

TRYING TERRORISTS – JUSTIFICATION FOR DIFFERING TRIAL RULES: THE BALANCE BETWEEN SECURITY CONSIDERATIONS AND HUMAN RIGHTS

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INTRODUCTION

Sometimes life really does imitate art, and in surprising ways.

Take for example, President Bush's recent executive order to have military commissions try terrorists. Ever since it was announced, that order has been the center of great controversy, as we debate the extent to which liberty must be sacrificed to homeland security. This is not a simple, black and white issue.¹

The terrorist attack against the United States on September 11, 2001, breached the balance between human rights and national security. This breach has had a dual effect: It has led to the impairment of the constitutional rights of the citizens of the United States itself,² and also to the impairment of the basic rights of non-U.S. citizens, suspected or accused of terrorist offenses, who are to be tried before special military tribunals to be established in accordance with an executive order³ issued by U.S. President George W. Bush.

The President of the United States, presiding over a power that is the symbol of democracy for many other Western nations, has explained in the executive order concerning the trial of terrorists: “[I] find consistent with section 836 of title 10, United States Code, that *it is not* practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”⁴

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1. Daniel J. Kornstein, *Life Imitates Art on Secret Tribunals*, N.Y.L.J., Nov. 28, 2001, at 2.

2. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter U.S.A. Patriot Act]; see also Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, N.C. INT'L L. & COM. REG. (forthcoming).

3. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57, 833 (2001) [hereinafter Military Order].

4. *Id.* § 1(f) (emphasis added).

One may ask why it was found necessary not only to establish special tribunals to try terrorists, but also to desist from observing the constitutional safeguards granted to accused persons facing trial? The answer apparently lies in concern for the efficiency of the hearing, achieving deterrence at the expense of the pursuit of justice, and refraining from convicting innocent persons. In so doing, absolute priority is given to national security. Is this an appropriate course of action for a democratic nation contending with terrorism? One should recall the comments of Israeli Supreme Court President, Professor Aharon Barak:

It is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.⁵

U.S. society's acquiescence to according priority to considerations of efficiency and deterrence because of the needs of national security is understandable (if not justifiable) in view of the many fatalities caused by the attack of September 11. In the long term, however, the dangers posed by the creation of a special tribunal for a specific offense should act as a warning to society in America and other places, including Israel,⁶ of the potential danger involved in creating a special tribunal for what is a *specific*, but not necessarily *special*, offense, and the reason for this is that terrorism is only a metaphor.

A society that distinguishes between classes of offenders, with the deliberate objective of increasing the efficiency of the hearing and deterring others from participating in the commission of similar offenses, broadcasts moral weakness. There is a danger that by showing a negative attitude towards persons accused of terrorism, society will avoid a conscientious application of trial procedures. In taking this path society demonstrates moral weakness. The danger of the "slippery slope" arises when society adjusts to this weakness. Today, the justification given for the new measures is that because of the extraordinary terrorist attacks, procedural constitutional rights must be sacrificed in the just war against terrorism even at the price of harm to the innocent. Tomorrow, attacks by atypical sex offenders will be regarded as justifying the establishment of special tribunals and the modification of the

5. High Court of Justice [H.C.] 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) P.D. 817, 840 (Heb.).

6. For an extensive discussion of special tribunals for terrorists in Israel, see *infra* Part Two.

constitutional safeguards set out in the rules of procedure and evidence that have been arduously put together over hundreds of years, all in order to promote the efficiency of the hearing and deterrence. Where will this downhill slide end? Will we eventually agree to put political opponents on trial for treason, applying special criminal procedures? Changes to the nature of the trial forum, its composition and procedures may indicate that the stability of society, its basic values, and the rules which society shaped are in danger. A regime cannot possess a genuine democratic character and adhere to Due Process of Law if its principles are applied on a discriminatory basis.

Perhaps what is at issue here is not discrimination but rather simple Aristotelian equality – equal treatment for the equal and different treatment for the different. The terrorists breach every possible rule and law; therefore, why should they enjoy the privilege of being protected by rules which they refuse to acknowledge?

This article will try to explain the error in this approach: the violation of rights is not a violation of the rights of a terrorist on trial but rather an infringement of the rights of a person *suspected* or *charged* with terrorist offenses who is now on trial. Every person suspected of a crime is suspected of having breached a rule or certain law – the approach to every crime must therefore be identical.

I do not seek to argue that one cannot violate the constitutional safeguards of a person suspected of a terrorist offense who has been put on trial, but rather that the violation must be proportional, for a proper purpose and compatible with the basic values of society. Accordingly, this article shall demonstrate that even if there is justification for a separate tribunal for terrorists, such justification cannot provide grounds for allowing different rules of procedure more efficient than the ordinary rules. The outcome would be to completely negate the concept of due process in criminal law, and from there the path to the conviction of innocent persons is extremely short.

Such an outcome would be contrary to the balancing formula which I regard as proper – the prohibition on disproportionate or excessive injury to a suspect, an injury which even if intended for a proper purpose, namely, to safeguard national security, is completely contrary to the basic values of a democratic society.

Thus, this article will focus primarily on the proper forum for trying terrorists and will ask whether it is appropriate to establish a special forum for a specific offense, namely, terrorist offenses. The questions which forum should try terrorists and which procedural rules should be applied by that forum are not purely technical; on the contrary, these issues are substantive and the answers to them will have repercussions for the character and democratic strength of the society which operates such trial procedures.

The first part of this article will commence by considering the jurisdiction of the United States over terrorists when the United States conducts a war outside its own borders, and within the territory of another state, such as recently occurred in Afghanistan and earlier in the Gulf War.

The second part will discuss the legal rationale for establishing a single court, possessing general power to try all types of offenses and all classes of offenders. This part will further examine why countries such as the United States, England, and Israel deviate from this rationale. The third part will examine the nexus between the adjudicating forum – its character and composition – and its influence on the procedural rights of a defendant, as well as whether this nexus is essential. This part will examine the justification for creating a special forum for a particular type of offense and whether this justification makes it necessary to establish divergent rules of procedure. The fourth part will deal with the manner of establishing a judicial forum for trying terrorists in occupied territory according to the rules of international law. This part will examine the example of the State of Israel, which operates military courts in the territories administered by it, for the trial of terrorists. We shall also consider the establishment of a special military court within Israel for the trial of persons suspected of terrorism. The fifth part will present the legal position in the United States and in Britain in respect of the trial of terrorists, following September 11, and the criticisms thereof. The sixth part will examine the Rome Statute, which established the International Criminal Court, and the idea of including terror offenses within the scope of its jurisdiction.

The final concluding part of this article will seek to support the thesis presented by this research that trying terrorists is nothing more than the trial of criminal offenders motivated or inspired by a certain ideology. There is no reason whatsoever for trying criminal offenders in a manner different to that which has been established over many years by the criminal system. Any attempt to deviate from ordinary judicial procedures requires a justification that does not exist here. Deviating from such procedures comprises nothing more than an attempt to exploit the criminal law to violate human rights for what is an improper purpose and certainly in a manner that is neither compatible with democratic values nor proportional to the offense.

PART ONE

The scope of jurisdiction of the United States to try its enemies at a time when it is conducting a war outside its own borders

Terrorism is an international phenomenon. Terrorists are scattered throughout the entire world. Their desire to harm the citizens of a particular state does not necessitate their actual presence in that state. Is a democratic country, within the framework of its war against terrorism, entitled to try every terrorist who is a member of a terrorist organization and who operates against that country or against another democratic country? Does this right embrace terrorists who are not located within the territory of the trying country? The United States has apparently answered these questions in the affirmative: “[a]ccording to the executive order, the military tribunal can be used to try *any* suspect who is not an American citizen and has been identified

by [George W.] Bush as a member of al Qaeda, participated in acts of terrorism against the U.S. or harbored terrorists.”⁷

The primary problem that shall be examined in this part concerns the issue of the extraterritorial jurisdiction of a state over persons whose sole connection to that state is their intention to harm it or its citizens.

Prior to describing the various approaches taken by international law to this issue, we must emphasize the distinction between territorial jurisdiction and extraterritorial jurisdiction. The rule is that the criminal law of the various countries has territorial application: each country applies its laws to the area over which it is sovereign. Extraterritorial application is the exception to the rule: the state decides to apply its laws even outside its own borders. This exception is accepted when special circumstances exist. Thus, for example, the State of Israel has decided to apply its penal laws to offenses committed outside its jurisdiction where such offenses are perpetrated against the Jewish people.⁸ The reason for this is clear: the historical attempt during the Second World War to destroy the Jewish people as a people requires the State of Israel to protect Jews in general and its citizens in particular. The criminal code of the United States also grants extraterritorial jurisdiction over persons accused of injuring or killing others in the United States.⁹

Legislation is a unilateral measure taken by a state that establishes extraterritorial application of its jurisdiction. Extraterritorial application may take the form of a multilateral reciprocal measure taken by a number of states party to an international convention that confers extraterritorial jurisdiction over offenses dealt with by that convention.¹⁰ Indeed, in the past, this was one of the three justifications raised by the United States to validate its extraterritorial jurisdiction:

1. Congress extended the application of the laws of the United States even beyond U.S. borders in order to enable the punishment of offenders.¹¹

7. Vanessa Blum, *When the Pentagon Controls the Courtroom*, THE RECORDER, Nov. 27, 2001, at 3 (emphasis added).

8. See generally Penal Law of 1977 (Aryeh Greenfield, trans. 1999), sec.13(b)(2) [hereinafter Penal Law].

9. See 18 U.S.C. §§ 2331-2339B (2000). Section 2332b(a) of Title 18 forbids killing or injuring persons in the United States under special circumstances and “involving conduct transcending national boundaries.” *Id.* § 2332b(a)(i). This conduct required under the statute refers to “conduct occurring outside of the United States in addition to the conduct occurring in the United States.” *Id.* § 2332b(g)(1).

10. See Penal Law, *supra* note 8, sec. 16. For example, the State of Israel possesses extraterritorial jurisdiction in relation to foreign offenses to which it has acquiesced in multilateral international conventions over persons who are not Israeli citizens; the place of commission of the offense is immaterial to its jurisdiction. See *id.*

11. See U.S. CONST. art. I, § 8, cl. 10. The Offense Clause of the U.S. Constitution states that Congress shall have the power “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” *Id.*

2. Customary international law permits the United States to exercise extraterritorial jurisdiction in cases where harm has been caused to it.¹²
3. Conventional international law: in cases where there is a convention that vests the United States with jurisdiction.¹³

In this regard it should be pointed out that in the case of Pan Am Flight 103 in 1990, the Security Council of the United Nations supported the demand of the United States and Britain that one of them should be vested with jurisdiction on the ground that the terrorists were not entitled to conduct negotiations in respect to the place where they would be tried.¹⁴

Today, the extraterritorial jurisdiction of a state to try terrorists is derived from a consequential test – the damage test. This is a test that was shaped by customary international law. It asserts that if the location of the damage or target to be harmed is in a certain state then that state has the power to place on trial the terrorists who were involved in the terrorist operation.¹⁵ This is one of the justifications voiced by the United States for obtaining extraterritorial jurisdiction over the Libyans suspected of having committed the terrorist atrocity on Pan Am Flight 103:

[T]he territoriality principle of customary international law, the most commonly used basis for the exercise of jurisdiction, allows the United States to have jurisdiction over individuals who engage in conduct outside of U.S. territory that has a substantial effect within the United States. This principle would allow the United States to regulate activities aboard U.S. aircraft because any conduct occurring

12. See Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222, 236 (1993) (discussing international law grounds for allowing the United States to assert jurisdiction over suspects).

13. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 568. Article 5 (2) of the Convention states that "each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses that are mentioned in Article 1." *Id.* at 570. For example, the United States claimed jurisdiction on the basis of the Montreal Convention in the case of Pan Am Flight 103.

14. Daniel Cohen & Susan Cohen, *A Trial at Risk*, N.Y. TIMES, July 27, 1998, at A5.

15. See generally Caryn L. Daum, *The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Pan am Flight 103 Bombing Over Lockerbie, Scotland*, 23 SUFFOLK TRANSNAT'L L. REV. 131, 135 (1999).

on board these vessels would result in harm to U.S. citizens who would likely be on board.¹⁶

In this manner and in the light of the fact that the terrorist attack of September 11 took place within the territory of the United States, it is possible to justify the demand of the United States for extraterritorial jurisdiction over every terrorist connected to the attack. As these persons are no longer alive, merely acknowledging jurisdiction over those actually perpetrating the attack, cannot be seen as exhausting jurisdiction. Their deaths were an integral part of the terrorist action in which they participated. The entire force of the extraterritorial jurisdiction lies in the trial of those people who are located outside the borders of the United States and who assisted in the planning and execution of the operation, the purpose of which was to cause harm to the United States and serious injury to its citizens.

The damage test is not the only test that justifies extraterritorial jurisdiction. Customary international law has acknowledged a number of additional principles (underlying a number of which is the principle of damage) that deal with extraterritorial jurisdiction. It should be pointed out that international law sets limits on the right of a state to demand jurisdiction over offenses committed outside its borders. The extent of the limits depends on the nature and character of the crime.¹⁷ As we shall see, the development of the phenomenon of international terrorism and its centrality in the lives of nations may lessen the scope of the restrictions placed by international law on the demand of a state for extraterritorial jurisdiction over terrorists.

It is customary to talk of five fundamental grounds for extraterritorial jurisdiction:¹⁸

1. *The territorial principle*: this principle has been universally identified by international law in respect of all types of crimes.¹⁹ Under it a state has jurisdiction over crimes committed within its borders. The nationality of the victims or the perpetrators is

16. *Id.* at 147. See also RESTATEMENT OF FOREIGN RELATIONS § 402 cmt. h (1987). Section 402 states that “a state has jurisdiction to prescribe law with respect to . . . (c) conduct outside its territory that has or is intended to have substantial effect within its territory.” *Id.*

17. See Zephyr Rain Teachout, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1310 (1999).

18. See *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 443, 445 (Supp. 1935). These grounds were first identified collectively in research conducted in Harvard in 1935. See *id.*

19. See Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT’L & COMP. L. REV. 177, 177 (1997).

immaterial to the right of adjudication.²⁰ In other words, the United States has jurisdiction over terrorists who are caught within its territory even if they are not American citizens.

2. *The protective principle*: a state has the right to claim extraterritorial jurisdiction when a national interest is threatened by any act, irrespective of the place of occurrence of that act.²¹ A threat to the security of the nation is a recognized interest.²² The multifaceted network of terrorism that spreads over the entire world sees causing harm to the United States as its primary goal.²³ Accordingly, the United States can argue in its favor that it has extraterritorial jurisdiction over terrorists located outside its territory by virtue of their membership in a terrorist organization. That membership causes them to pose a threat to a crucial national interest – national security.
3. *The universality principle*: this confers extraterritorial jurisdiction over certain crimes, such as genocide, that are universally defined as punishable crimes by virtue of the degree of abhorrence to which they give rise.²⁴ Since these crimes threaten humanity as a whole, every nation has the right and even the duty to try the perpetrators of these crimes.²⁵ War crimes are recognized as crimes to which the universality basis applies.²⁶ As we shall see below, it is possible to identify terrorist acts as war crimes.²⁷ Accordingly, the

20. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (5th ed. 1998).

21. See *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir 1979); IAIN CAMERON, *THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION* 2 (1994).

22. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 33 n. 7 (D.D.C. 1998) (stating that American “victims of foreign state sponsored terrorism” may invoke protective jurisdiction in civil actions against those governments based on the “national security interests” involved).

23. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L. L. 236, 239 (2002) (citing the declarations of Osama Bin Laden: “[T]errorizing the American occupiers [of Islamic Holy Places] is a religious and logical obligation.”).

24. See Beverly Izes, Note, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J. L. & SOC. PROBS. 1, 11 (1997).

25. See *id.*

26. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir 1985) (stating in the context of war crimes allegedly committed by a former Nazi concentration camp guard that “some crimes are so universally condemned that the perpetrators are the enemies of all people” and concluding that “any nation which has custody of the perpetrators may punish them according to its law”).

27. For an extensive discussion see *infra* Part Six.

United States may claim extraterritorial jurisdiction over terrorists whom it has captured outside its borders within the context of its war against terror, by virtue of the universal principle.

4. *The passive personality principle*: jurisdiction will extend in accordance with the nationality of the victim. The state has power to punish all those who have caused harm to its citizens and breached its laws, irrespective of the place where the harm occurred.²⁸ To some extent this principle covers the same ground as the damage test. Both tests permit a state to exercise extraterritorial jurisdiction over terrorists because they have caused harm and damage to its citizens, except that the damage test ascribes importance to the place of occurrence of the damage and grants jurisdiction in cases where the damage occurred within the territory of the state.
5. *The nationality principle*: under this principle a state has jurisdiction over its citizens who committed crimes, irrespective of the place of commission of the offense.²⁹ This principle is not central to the issue of extraterritorial jurisdiction over terrorists and indeed is not clearly identified by the international community;³⁰ accordingly, no further elaboration will be given to it here.

In the light of the various principles it may be said that customary international law establishes the right of the United States to exercise jurisdiction over terrorists who caused it harm or who are interested in causing it harm and therefore endanger its security. As noted, even before September 11, the United States claimed extraterritorial jurisdiction, except that today this claim to jurisdiction refers to dangers that did not exist in the past.

This may be explained by noting that in the past, when the United States claimed extraterritorial jurisdiction, it intended to try terrorist suspects who had actually injured its citizens or who had been involved in attacks, before the “ordinary” courts and in accordance with existing procedure.³¹ In other words, its purpose was to obtain extraterritorial jurisdiction and exercise it in

28. John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 *FORDHAM INT’L L. J.* 298, 299-300 (1989-1990).

29. See CAMERON, *supra* note 21, at 17.

30. See generally Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 *YALE J. INT’L L.* 41 (1992).

31. See *infra* Part Five, which deals with the trial of terrorists by the United States in the text accompanying notes 204 and 205.

a manner identical to the territorial jurisdiction exercised over other criminal offenses that had been committed within the territory. The United States demanded that the suspects be brought to justice in accordance with the due process of law at the end of which the guilt or innocence of the defendant would be determined. This is the place to emphasize: there is no doubt cast on the existence of the extraterritorial jurisdiction of the federal courts to try terrorists who caused harm or intended to cause harm to the United States. Rather, this article shall examine whether the extraterritorial jurisdiction to try terrorist suspects who acted outside the borders of the United States also allows the conferral of jurisdiction on special tribunals, such as those which President Bush established following the attacks of September 11.

Beyond general principles of customary international law we shall examine whether it is possible to base the extraterritorial jurisdiction of the United States, within the framework of the war against terror, on the international laws of war that deal with jurisdiction. The rules of international law that deal with jurisdiction and with demands in relation to the manner of implementation were shaped in the context of wars conducted between two states³² and where in that situation one state conquered the territory of another. Accordingly, the rules of international law deal with the proper criminal proceedings to apply within territory subject to belligerent occupation.³³

When the United States declared war on terror, the first front was opened in Afghanistan.³⁴ Within the framework of this operation, the United States has probably captured numerous suspected terrorists. Its claim to extraterritorial jurisdiction over these people raises the question whether it should conduct these proceedings in accordance with the rules of international law as shaped in relation to cases of war waged between states even though it is fighting the phenomenon of terrorism and not another state.

The problem is simple: we need only examine whether the activities of the United States in Afghanistan are in the nature of belligerent occupation or whether it has merely conducted an invasion in the nature of "hit and run." Only if its operations are in the nature of belligerent occupation will the United States be bound by the rules of international law when it tries terrorist suspects. The distinction between the two situations depends on effective control of the territory – such control provides a legal basis for belligerent

32. See Emanuel Gross, *The Laws of War Between Democratic States and Terrorist Organizations*, MANITOBA LAW JOURNAL (forthcoming).

33. See Convention with Respect to the Laws and Customs of War on Land (Hague II) 1899, (No. IV) 1907 [hereinafter Hague Regulations]; The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 973, 287 [hereinafter Fourth Geneva Convention]. See details of the regulations in Part Four.

34. See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) [hereinafter Response Address].

occupation.³⁵ Article 42 of the Hague Rules emphasizes that occupation only applies to cases of actual control of enemy territory and refers only to that territory in which the occupier is able to exercise its authority.³⁶ It is difficult to say that the United States does not have effective control of Afghanistan. Indeed, the purpose of its war there is to fight against Al Qaeda, but that is not its sole purpose.³⁷ The United States was interested in overthrowing the Taliban regime on the assumption that this regime was providing support for terrorism.³⁸

On the other hand, we should recall that the United States had never recognized the Taliban regime as the official government of Afghanistan.³⁹ It may certainly be argued that the United States did not launch a war in Afghanistan with the intention of conquering Afghan territory and substituting its control for that of the Taliban. Its war was, and is, a war against terror that is an international phenomenon with multiple branches around the world, including Afghanistan. Because the prevailing regime provided support for terrorism and the regime that sought to replace it (the fighters of the Northern Alliance) was weak and incapable on its own of fighting the Taliban and the terrorist organizations hosted by it, the United States initiated action against the terrorism in Afghanistan by providing assistance to the regime that would ultimately replace the existing regime, i.e., an independent regime in which the United States plays no part.⁴⁰

The power granted by Congress to President George W. Bush to use U.S. military forces was aimed at preventing additional terrorist attacks and

35. See Meir Shamgar, *Law in the Territories Occupied by the IDF*, 23 HAPRAKLIT, 540 (1967) (Heb.).

36. See Hague Regulations, *supra* note 33, art. 42.

37. See John F. Harris & Mike Allen, *President Details Global War on Terrorists and Supporters; Bush Tells Nations to Take Sides As N.Y. Toll Climbs Past 6,000*, WASH. POST, Sept. 21, 2001, at A1 (discussing the demands put by the United States to the Taliban regime prior to launching the attack against Afghanistan).

38. See Response Address, *supra* note 34, at 1348. In addressing his demands to the Taliban, the President of the United States declared:

The United States of America makes the following demands on the Taliban: deliver to United States authorities all the leaders of Al Qaeda who hide in your land . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities . . . The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.

Id.

39. See Murphy, *supra* note 23, at 243.

40. See Steven Erlanger, *After Arm-Twisting, Afghan Factions Pick Interim Government and Leader*, N.Y. TIMES, Dec. 6, 2001, at B1. During November 2001, the fighters of the Northern Alliance succeeded in taking control of central Afghanistan and ultimately, with the help of the United Nations, took over the government of Afghanistan for six months prior to establishing a new government with a two-year mandate. See *id.* Following this, a permanent government was to be elected under a new constitution. See *id.*

not at conquering Afghanistan.⁴¹ Prior to launching the war, President Bush explained to the nation that his objective was to eradicate the network of terror: “[b]y destroying camps and disrupting communications, we will make it more difficult for the *terror network* to train new recruits and coordinate their evil plans.”⁴²

According to this position, occupation as such is not relevant to the operations of the United States in Afghanistan; therefore, the trial of terrorists who are captured in the territory of Afghanistan by the United States does not amount to the trial of combatants in occupied territory and is not subject to the rules of international law under the Fourth Geneva Convention.

As noted, the Geneva Conventions were formulated in a period when war was conducted between identifiable states having clearly defined geographical boundaries and an organized army. The modern war against terror is not a war between states — terror is an enemy without an address. This war is not a war that has the objective of conquering territory; the objective is eradicating terrorism, *inter alia*, by capturing terrorists and bringing them to justice. The *lacuna* that is found today in the Geneva Conventions do not provide judicial rules for wars of this type is not necessarily a negative arrangement.⁴³ The war against terror is a war between democratic states, states of the free world headed by the United States, and organizations which see freedom as their enemy. Is it conceivable that democratic states that fight terrorism with the aim of catching terrorists and placing them on trial will act in accordance with rules that are incompatible with their democratic values? Below we shall explain why in our view this is not possible.

At the beginning of this part, principles of international law were presented that may justify the extraterritorial jurisdiction of the United States over terrorists. An additional argument that may justify the jurisdiction claimed by the United States in its war against terror is that the terrorists that it has seized are none other than the principals of the perpetrators of the terrorist attacks of September 11, or those who plan to execute future terrorist attacks within U.S. borders, who have thereby committed the offense of terrorism within the borders of the United States. It follows therefore that the jurisdiction that the United States demands is not concerned with offenses committed outside its territory but rather with domestic offenses that have

41. See Authorization for Use of Military Force, Pub. L. No. 107-40, Pmb1., 115 Stat. 224 (2001).

42. Address to the nation announcing strikes against Al Qaeda training camps and Taliban military installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432 (Oct. 7, 2001) (emphasis added) [hereinafter Strike Address].

43. See the extensive discussion *infra* Part Six. An indication of this may be found in the Rome Statute of the International Criminal Court, 37 I.L.M. 999, which establishes the International Criminal Court and proposes the inclusion of terror offenses within its jurisdiction. The rules of procedures and evidence in this court were formulated with a keen eye towards ensuring a fair criminal process.

been planned abroad but which are designed to be committed exclusively within its territory.⁴⁴

In other words, the extraterritorial jurisdiction asserted by the United States may be well founded; the shakier basis is that which concerns its right to try terrorists before military tribunals. The establishment of military tribunals is only permissible under international law when they are set up by an occupier and for the purpose of trying local offenders within the occupied territory.

In the light of the fact that the United States did not launch a war of occupation against Afghanistan, it does not have power to establish military tribunals. First of all, the situation does not involve an occupying state, and secondly, the terrorist offenders whom the United States is interested in placing on trial are not local but rather international offenders.

International law provides two alternative options for trying terrorists that may be compatible with the circumstances in which the United States is acting. The first enables the establishment of an ad hoc tribunal that is not a military tribunal, and the second authorizes the establishment of a military tribunal in a particular place:

1. Many would certainly agree that by their actions the terrorists fighting in the various nations of the free world are in breach of the laws of war and in particular the rules forbidding injury to innocent civilians⁴⁵ and conducting war from the midst of civilian populations.⁴⁶ Accordingly, it seems that terrorists are war criminals: "Terrorism is a form of warfare in which, by design, innocent civilians are indiscriminately killed and civilian property devastated. Terrorists acts, therefore, are properly regarded as war crimes or crimes against humanity."⁴⁷ By virtue of the scope of their activities on the international plane it is necessary to act in accordance with the provisions of the U.N. Charter regarding the

44. See, e.g., the definition of a domestic offense in the Israeli Penal Law, sec. 7(A)(2) of the Penal Law of 1977. A domestic offense is generally defined not only as an offense committed within the territory of the state but also as an act preparatory to the commission of an offense outside the territory, provided that the offense in whole or in part, was due to be committed within the territory. See *id.*

45. See Protocol Additional to the Geneva Conventions of 12 August, 1949, And Relating to the Protection of the Victims of International Armed Conflicts (Protocol 1), art. 48 (1979).

46. See *id.* art. 58

47. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 354 (1996).

power to establish special ad hoc tribunals for the trial of war criminals.⁴⁸

2. The status of terrorists has not yet been regulated as a matter of international law.⁴⁹ At the same time there is a broad consensus that they should not be seen as lawful combatants as defined in the Geneva Conventions.⁵⁰ As only legal combatants are entitled to the status of prisoners of war, i.e., enjoy the advantage of immunity from trial following capture by the enemy,⁵¹ terrorists are not entitled to this protection. It is customary to regard terrorists as illegal combatants in view of the fact that they operate outside the framework of lawful combat. Illegal combatants may be tried before military tribunals in the location where they have been caught and may be punished as strictly as the law allows, albeit they may not be executed without trial.⁵²

Neither of these alternatives expressly permit the United States to remove the terrorists from the places in which they were found and captured and bring them to United States territory to try them before a tribunal specially set up for them. It should be emphasized that the concern is not with the capture of terrorists who were once located within the United States, planned terrorist attacks against it and against its citizens, and escaped to other countries in which they found refuge. Rather, the concern is with the capture of terrorists, illegal combatants such as the combatants who belong to the Al Qaeda organization, who have never visited the United States and who have not committed actual terrorist acts against it but who possess the status of terrorists by reason of the fact that they chose to belong to an organization

48. See U.N. CHARTER art. 39-51. See generally Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233 (1997).

49. See Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have A Right To Hold Terrorists As Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L., 721 (2001) (comprehensive discussion on the status of terrorists).

50. See the Geneva Convention Relative to the Treatment of Prisoners of War (No. III) (1949). Article 4 of the Geneva Convention defines the term legal combatants. See *id.* Protocol I to the Convention of 1977, expands the protection granted by the Geneva Conventions to combatants. See Protocol I to the Geneva Convention 1977, art. 43. It also affords protection to freedom fighters, i.e., combatants who are not part of the official armed forces of the state, but are regarded as lawful combatants. Israel and the United States refused to sign Protocol I for fear that members of terrorist organizations would exploit Article 43 to obtain the status of prisoners of war. See *id.*

51. See YORAM DINSTEIN, *THE LAWS OF WAR* 96 (Tel Aviv University Press 1983) (Heb.).

52. See *id.*

whose sole purpose is to fight against the United States as the symbol of their war against the principles of freedom and democracy.

More precisely, it must be recalled that the fact that these persons have never visited the United States says nothing about their criminal activity. It is possible, and perhaps easier, to conspire against the United States from outside its borders. It has been explained that such a conspiracy is sufficient to confer jurisdiction upon the United States. However, such jurisdiction is extraterritorial jurisdiction before a civilian court system and not before a military tribunal in the United States.⁵³

Indeed, these terrorists hold diverse nationalities and the place of their capture is not necessarily their country of nationality. Each one of these suspects could be extradited to his home country in order to stand trial there. However, the United States has chosen to reserve to itself the task of trying them. This demand may be justified on the ground that the terrorists that the U.S. has captured, by virtue of their affiliation to a terrorist organization the sole purpose of which is to wage war against the countries of the free world and at the head of the list, the United States, thereby conspired against the United States. The argument continues, this nexus suffices to vest the United States with jurisdiction over the terrorists in accordance with the damage principle or the protection principle referred to in the beginning of Part One.

True, the damage has not yet occurred; however, had this issue depended solely upon the terrorists, they would have been interested in causing damage of an effective and enormous magnitude immediately. It is difficult to agree with the contention that the United States cannot obtain extraterritorial jurisdiction over terrorists “only” because they are located outside its territory and “only” because they planned or were accomplices in a crime or party to an objective held by the terrorists who actually committed the terrorist attack against the United States.

The intent to harm the United States and active membership in an organization that is the leading player in realizing this objective may certainly be sufficient to vest the United States with jurisdiction. More precisely, this consent to the conferral of jurisdiction upon the United States is not consent to trial before a special military tribunal. Thus, many of the critics of the executive order do not doubt the power of the United States to try terrorists within the framework of its war against terror, but they reject the solution proposed by international law to establish an ad hoc tribunal and prefer that trials be conducted in accordance with existing legal procedures:

If we should capture Osama bin Laden or his accomplices in the days ahead, where should we try them? Two unsound

53. See 18 U.S.C. § 2332b(g)(1) (2000). We should note that the Criminal Code in the United States indeed provides for extraterritorial jurisdiction in respect of acts performed outside the United States but these acts must be connected to offenses committed within the borders of the United States. See *id.*

proposals have recently emerged. The first, and by far most dangerous, is already law: the president's misguided and much criticized order authorizing secret trials before an American military commission. The second, more benign approach, offered by prominent international lawyers, is to try terrorists before an as yet uncreated international tribunal. Both options are wrong because both rest on the same faulty assumption: that our own federal courts cannot give full, fair and swift justice in such a case. If we want to show the world our commitment to the very rule of law that the terrorists sought to undermine, why not try mass murders who kill American citizens on American soil in American courts.⁵⁴

To conclude this point, it should be clarified that the position held is not that the United States' war in Afghanistan is in the nature of occupation. Its activities indeed comprise a single, though not the only, front in its war against terrorism, but this fact should not be seen as "freeing it from the fetters" of the rules of international law. The fact that the Geneva Conventions fail to provide a solution to modern circumstances in the war against terrorism and the mode of trial of illegal combatants who have been captured by a non-occupying power is also insufficient reason to authorize a departure from the right to a fair trial. Moreover, even if the United States is entitled to claim jurisdiction over the terrorists, either because they are illegal combatants who belong to enemy forces against whom the United States is fighting or by virtue of the latter's extraterritorial jurisdiction under its own laws to try members of terrorist organizations, by placing them on trial it must apply its domestic law.

The United States is not entitled to violate the rights of defendants in such a manner as to leave them without almost any protection against improper trial procedures. There are a number of substantive elements that are intended to guarantee the existence of due process and a genuine effort to seek out the truth and bring about a just result. Infringement of these safeguards is prohibited independently of the question whether the accused is a citizen of an occupied state or acted and was caught in the territory of a foreign country and is placed on trial there, in accordance with the laws of the seizing state. In both cases the safeguards of Due Process of Law must be maintained. This approach benefits the accused; more importantly it benefits

54. Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001. The author explains why the establishment of a tribunal under the U.N. Charter must be rejected as a solution. The reasons are the cost of establishing an ad hoc tribunal and the fact that such a tribunal can only be established in the absence of an existing legal system operating in a fair and efficient manner, as was the case in Yugoslavia and Rwanda. As noted, this is not the position in the United States.

society by ensuring that the truly guilty (and not those who are deemed to be guilty because the state has set up a special process for them which inevitably leads the public to regard them as guilty) will cease moving freely in society and instead will find themselves behind bars. In order to clarify this position and the rationale behind it, the following part presents the legal system operating in a democratic country and the ideology inspiring this system – an ideology which places the decision to establish a special tribunal for a single offense – terrorism – in open conflict with legal principles which apply in a democratic state and the perception of substantive procedural justice operating therein.

PART TWO

Perception of the legal system and procedural justice in a democratic state

It is a government that detains people for the slightest violation and for indeterminate periods . . . and tries suspects in secret military proceedings, potentially far offshore and out of reach of its courts or constitution. It is the government of the United States, standing on what it calls a 'war footing.' The common question asked in the wake of the Sept. 11 attacks was what 'justice' meant as a response to the murder of thousands of innocents. Now, it seems that question has been answered. Last week's executive order signed by President George W. Bush establishing a military tribunal to try terrorist suspects touched off a firestorm of criticism from Congress and civil libertarians. But what it was, more than anything, was the final building block in what can be described as a 'shadow' criminal justice system, created specifically as a means to deal with the special problem of terrorism.⁵⁵

Much criticism has indeed been directed against the establishment of a special tribunal for an apparently special offense – terrorism. Why are many shocked by the notion of a special tribunal to try a certain group linked to a certain offense? It is conceivable that the courts may operate on the basis of classifying people by their relationship to a particular type of offense, thereby allowing us to single out offenses (together with population groups). This would enable us to create special courts for immigrants, special courts for minorities, as well as special courts for terrorists. It is highly likely that the system would operate very efficiently – so why reject it?

55. Jim Oliphant, *Justice During Wartime, Order on Military Trials Final Piece of Sept. 11 Response*, LEGAL TIMES, Nov. 19, 2001, at 1.

The answer to this question lies in the ideology underlying the legal system in a democratic state. The object is not the establishment of a legal system per se. A legal system is only a means through which to realize democratic values.⁵⁶ In its absence one would have a governmental mechanism likely to endanger democracy and its values, as would be the case were it to decide upon a legal system structured on the basis of classes of offenses. The objective is democracy itself, and this must be the subject matter of government. The courts are the "watchdogs" of democracy and the values underlying it.

Equality is one of the basic values in every democratic regime. It follows that the principle of equality is a fundamental value in every enlightened legal system: "Equality is a basic value for every democratic society to which the law of every democratic country aspires for reasons of justice and fairness to realize."⁵⁷ Its primary purpose is to guarantee equal application of the law: equality before the law. "Every person will achieve justice within the framework of law. We do not discriminate between one person and another; all are equal before us. We protect all persons; all minorities; all majorities."⁵⁸

Thus, for example, the U.S. Constitution guarantees equal protection of the law to all persons within the jurisdiction.⁵⁹ Moreover, international constitutional documents which deal with human rights such as the Universal Declaration of Human Rights which was adopted by the U.N. General Assembly in 1948, emphasize the principle of equality as a central aspect of human rights.⁶⁰ after all, what is a democratic nation if not the expression of the values of liberty, freedom and the preservation of human rights? These international declarations on human rights seek to preserve the principle of equality before the law followed immediately by protection of the right to due legal process.⁶¹

The combination of the two rights leads us to the conclusion that the existence of a uniform legal system for the matters within the jurisdiction of

56. See Aharon Barak, *They gave the State of Israel all that they had*, THE COURT—FIFTY YEARS OF ADJUDICATION IN ISRAEL 13 (MOD, 1999).

57. H.C. 6698/95, Adel Qa'adan and others v. Israel Land Authority, 54(1) P.D. 258, 275 (Heb.).

58. Barak, *supra* note 56, at 14.

59. See U.S. CONST. amend. XIV which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*

60. See UNIVERSAL DECL. OF HUMAN RTS. art. 2. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

61. See *id.* art. 7. "All are equal before the law and are entitled without any discrimination to equal protection . . . against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* "Everyone is entitled in full equality to a fair trial, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." See *id.* art. 10.

the state is the true expression and reflection of the concept of equality before the law: no distinction is made from the point of view of the law between different types of offenders. All those who breach the law are equal before it and are subject to the same treatment by the judiciary: the award of due legal process. Put differently, a democratic state derives its court structure from the principle of equality, namely, a single body and not separate bodies adjusted to different types of offenders/offenses.

The establishment of special tribunals for certain classes of offenses breaches another central principle that informs all democratic states: the principle of the separation of powers,⁶² and in particular the importance of the independence of the judiciary in a democratic state. Accordingly, the ordinary courts fear the establishment of special tribunals:

The standing and constitutional roles of the court as the ‘third and independent arm’ of government are in the process of being diminished. The creation by the Executive through Parliament of these new specialist tribunals can impair judicial independence in the widest sense, that is to say, as distinct from the independence of judges as such, inasmuch as it serves to prevent the operation of the judicial process according to law in the widest sense for the administration of justice.⁶³

It is possible to appreciate the danger which creating a special tribunal poses to basic principles of a proper democratic regime, through the example of a special military tribunal:⁶⁴ not all of the judges sitting on the panel are professional judges; some are army officers. The prosecutors are not private attorneys but service personnel, as are the judges. The separation between the judicial branch and the executive branch is infringed: the absence of dependence of the judicial branch upon the executive branch and its agencies is undermined, and in consequence the independence of the judiciary is impaired. More is at stake: separation within the judicial authority itself between judges and prosecutors, to be found in every proper legal system so as to preclude bias and conflicts of interest, does not exist in special military tribunals.

As noted, the principle of equality before the law, which necessitates the establishment of a uniform court system for everyone, requires that equal treatment be accorded to equal persons. Absent equal particulars, different

62. See H.C. 3267/97, Amnon Rubinstein v. Minister of Defence, 52(5) P.D. 481, 515 (Heb.).

63. *Victorian Supreme Court's concern over development of specialist tribunals*, THE AUSTRALIAN LAW JOURNAL, vol. 64, 385-386. July, 1990.

64. See *infra* Part Four for an extensive discussion.

treatment does not mean improper discrimination. In other words, improper discrimination is the result of the unequal treatment of equals.⁶⁵

Thus, it may be argued that the establishment of a separate judicial system for a certain type of offense does not comprise improper discrimination. A certain class of offense is in the nature of a different particular that therefore enables divergent treatment. This treatment is a permissible distinction between different classes of offenses. A permissible distinction does not contradict democratic values.

An argument of this type might have been justified had divergent treatment for different classes of offenses indeed been a permissible distinction. It is inconceivable that a distinction between offenders ensuing from the fact of their affiliation to a particular class of offense will make them different, so as to justify trying them before a tribunal different to the tribunal which tries "the general population." Every offense is different. This is the reason why different offenses are listed in the criminal law of every country (offenses of robbery, fraud, offenses against national security, etc.). Is it sufficient that there be a difference between offenses in order to justify trial before different tribunals?

The question is not whether a distinction can be found between offenses but whether the distinction justifies divergent treatment. If the distinction is not relevant to the purpose of the regulation being considered, reliance on it for the purpose of applying different law infringes the principle of equality and leads to improper discrimination; only a relevant distinction justifies divergent treatment and will comprise a permissible distinction.⁶⁶

The principle of equality, which is no more than the other side of the coin of discrimination and which the law of every democratic state aspires, for reasons of justice and fairness, to realize, means that one must consider for the purposes of the said goal, equal treatment of men, among whom there are no real differences, which are relevant to that goal⁶⁷

Different classes of criminal offenses do not justify divergent treatment, i.e., the establishment of separate judicial tribunals. Why? First, as we have explained there are no classes of criminal offenses, there are different criminal offenses and all are concentrated within a single criminal code. Second, and more important the search for a relevant distinction that justifies divergent treatment depends on the system of values accepted by enlightened societies. An expression of this system of values in democratic countries in particular,

65. See BARUCH BRACHA, EQUALITY OF ALL BEFORE THE LAW, RESEARCH IN CIVIL LIBERTIES IN ISRAEL 3 (1988).

66. See *id.* at 4.

67. Further Hearing [FH] 10/69, Boronovsky v. Chief Rabbis of Israel et al, 25(1) P.D. 7, 35 (Heb.).

may be found in the constitutions adopted by each of those countries and specifically, in the universal declarations of human rights that are the outcome of the encouragement offered by democratic countries. Indeed, these declarations do not expressly prohibit discrimination on the basis of different offenses. However, the cumulative effect of these provisions and their emphasis on due process of law, in particular the criminal law process, create the impression that in democratic societies application of the class criteria towards criminal offenses, in order to provide the basis for divergent approaches towards the trial of offenders, may be regarded as improper discrimination.

Thus, for example, regarding to the criminal process, Article 14 of the International Covenant on Civil and Political Rights stresses:

- (1) All persons shall be equal before the courts and tribunals. In the determination of any *criminal charge* against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law
- (2) Everyone charged with a *criminal offense* shall have the right to be presumed innocent until proved guilty according to law.
- (3) In the determination of *any criminal charge* against him, everyone shall be entitled to the following minimum guarantees, in full equality⁶⁸

Article 14 specifies basic procedural rights to be made available to every defendant in criminal proceedings, such as the right to be informed of the charges brought against him, in a language that he can understand, the right to consult with an attorney of his choice, the right to be present during the trial and the right to cross-examine witnesses.⁶⁹ These are safeguards that are the necessary minimum for every criminal proceeding, whatever the offense. Therefore, when the objective is to place a person on trial and conduct criminal proceedings, no relevant distinction exists between offenders – all are charged with having breached specific provisions of the criminal law and the law will treat all of them equally, i.e., it will place them before the same court/tribunal irrespective of the type of offense.

The combination of principles underlying the democratic state: separation of powers, the rule of law and protection of human rights, leads to the conclusion that the governing rule is trial for all offenders and for all offenses before a single central forum. Every rule has an exception; however,

68. International Covenant on Civil and Political Rights, art. 14 (1976) (emphasis added).

69. See *id.* art. 14(3).

anyone wishing to deviate from the rule, who is interested in reserving a particular type of offense to a particular judicial tribunal, must explain the grounds justifying the exception. Can it not be said that today, when we are living under the very real threat of destructive terrorist attacks, state security considerations are sufficient grounds to justify the creation of a special judicial forum for the particular crime of terrorism? Grounds that justify deviating from the rule and the principle underlying the legal system of democratic states – equality before the law?

It should not be forgotten that security is not just the army. Democracy is also security. Our might is in our moral strength and our adherence to the principles of democracy precisely when the danger in our midst is great. Indeed, security is not an objective which stands alone. Security is a means. The objective is a democratic regime, which is the regime of the people which emphasizes individual liberties.⁷⁰

Later in this article it will be shown that the offense of terrorism is no different than any other criminal offense. Assigning a special judicial forum to it is improper and it is not possible to show any direct linkage between such a forum and the objective for which it has been set up, namely, promoting national security. The influence that a special forum for trying terrorists may have on national and individual security will at the most be found as an improvement in the sense of security felt by the citizens of the state. It will not result in the genuine strengthening of security on the ground. In order to prove this proposition, we shall now turn to an examination of the influence exerted on procedural rights available to the accused by deviations from the fundamental concepts guiding the implementation of the legal process in a democratic state and the perception of procedural justice appropriate to it.

PART THREE

The character of a judicial forum and its ramifications for procedural rights available to an accused

It is difficult to understand the sharp criticism voiced throughout the United States at the Executive Order establishing special military tribunals to try terrorists, without examining the answer to the question: does the nature of a judicial forum influence the procedural rights of the accused? The answer is in the affirmative. In order to illustrate this, the military courts responsible for trying soldiers in Israel will be considered and how isolationist ideology, separating the military and civilian systems, led to the creation of a

70. H.C. 680/88, Shnitzer et al v. the Military Censor et al, 42(4) P.D. 623 (Heb.).

separate military legal system. Later, it will also be seen how the separate system sought to justify the use of legal procedures that diverged from those applied in the ordinary criminal legal system will be examined. These divergent procedures almost inevitably led to the infringement of the procedural rights of the soldiers, primarily including their constitutional rights to a fair trial.

The nature of a military judicial forum

The relationship between a military judicial forum and a civilian judicial system takes one of three forms:

1. A system that is embedded within the civilian system, which includes *inter alia* judges and soldiers.
2. A system that is integrated in the civilian system but preserves a certain degree of uniqueness for military trials.
3. A separate system without any organizational connection to the civilian system, although it generally allows appeal proceedings from the highest military instance to the supreme civilian court in the state.⁷¹

The discussion will focus on the military justice system in Israel, in which the military legal system is separate from the civilian legal system.⁷² The military legal system has dual jurisdiction: (a) exclusive jurisdiction for military offenses,⁷³ and (b) concurrent jurisdiction with the civilian legal system in relation to other criminal offenses.⁷⁴ The military legal system differs from the civilian legal system in two main areas. The first concerns the differing procedures expressly established by the Military Justice Law.⁷⁵ It should be noted that the laws of evidence and defenses in military law were drawn from the general criminal law and in general were applied by way of reference to the general law.⁷⁶ The second difference relates to the composition of the judicial panel. Whereas the judges in the civilian legal system are purely professional judges, in the military legal system, one sees judges who are not professional jurists sit in judgment.

While it would be desirable in terms of the democratic theory for a soldier, like every civilian, to bear civic duties and be entitled to protection for

71. See Oded Mudrik, *Military Trials in Israel from the 'Command Perspective' to the 'Court'*, 1 PLILIM 83, 84 (1990) (Heb.).

72. See Military Justice Law of 1955 (Heb.) [hereinafter Military Justice Law].

73. See *id.* sec. 1.

74. See *id.* sec. 14.

75. See *id.* sec. 461.

76. See *id.* sec. 476.

all his civil rights, the fact that a soldier is part of a mechanism responsible for national security makes him different than any civilian. He is subject to potentially lethal dangers and is required to tacitly waive the fundamental right of every person, the right to life.⁷⁷ A soldier, in contrast to a civilian, is required to carry out his tasks in almost every condition, whereas a civilian is entitled to abandon his job at will. In the army, one may find mutual dependence and mutual trust – each individual relies on the other and each individual is dependent on the other. Without such trust, the military system cannot function. In order to preserve the sense of trust and mutual dependence, and the ability to demand certain behavioral standards, it is necessary to have a judicial system that is separate from the civilian system.

The principle reasons justifying a separate legal system for soldiers are practicality and efficiency – the fact that a military system must be capable of meeting its own needs unconditionally, remain completely independent, flexible, and take into account timetables of training programs, specific tasks and the like. Beyond this, a separate military legal system allows exploitation of the potential manpower, as a soldier who is punished by a military court remains within the army, and the army may continue to make use of that soldier in accordance with its requirements.⁷⁸

The most important justification for a separate judicial system is the need to regulate the conduct of the soldiers in a manner particular to the army as an essential precondition to achieving military goals. It is necessary that soldiers be tried by their commanders, who are military men, and not purely professional judges, as military men are capable of properly assessing the nature of the soldier's conduct. Further, these commanders possess the overall responsibility for the army's activities, including the maintenance of discipline therein. Likewise, on occasion, a military interest may have priority over the soldier's individual interests; accordingly, whereas the civilian judicial system acts diligently to protect the rights of the individual in the criminal process, the military legal system restricts the soldier's interests in so far as a preferred military interest exists that dictates the actions of the army.⁷⁹

One of the possible justifications for a separate military legal system is that the army is a comprehensive structure in which the scope of conduct unique to it relates to a large number of highly diverse matters. To this, one may add the special military experience. These features justify a separate specific judicial system. Nonetheless, it is necessary to examine whether the existence of a separate legal system also inevitably entails the institution of divergent legal procedures and divergent evidentiary rules that may violate the procedural rights of the accused.

77. See Basic Law: Human Dignity and Liberty of 1992, sec. 9 [hereinafter Basic Law].

78. See Mudrik, *supra* note 71, at 87-90.

79. See Westmoreland & Prough, *Military Justice*, 3 HARV. J. L. & PUB. POL'Y 1, 50 (1970).

In Israel, “the overall view is that the balance tilts significantly towards substantive closeness (of the military legal system)” to a court, which is part of the judiciary.⁸⁰ “The legal procedures and rules of evidence are similar,⁸¹ as are the functions fulfilled by the military prosecution and defense and most important[ly] the fact that there is a review by the civilian legal system by way of appeal to the Supreme Court.”⁸²

Still, it is not possible to ignore the ‘lack’ in the military legal system and the difference ensuing from the composition and nature of the military court, which may have an influence on the procedural rights of the accused, and the consequential test also has an impact on his substantive rights: the dignity and liberty of the soldier are violated notwithstanding that none would dispute that human rights also mean the rights of the soldier as a man.⁸³

For example, notwithstanding that the Military Justice Law establishes the principle that a trial before a military court is to be conducted in public and provides a power to hold hearings *in camera* on the grounds set out in the law, as is the situation in the civilian courts,⁸⁴ the law is not satisfied with this arrangement and also grants powers to the convening authority to close the proceedings where he believes such a course is necessary to prevent infringement of national security.⁸⁵ There is no doubt that this supplementary power may have an unnecessarily harmful impact on the rights of the accused to a public trial, as the authority need not give reasons for its decision and the military court hearing the matter will not review it. Judicial review is a privilege reserved to the High Court of Justice that usually does not intervene in the discretion exercised by the command level in the army.⁸⁶

In my opinion, such an infringement is not necessary. It is possible and appropriate to confine the exceptions of a public trial to those set out the Military Justice Law, which are subject to the discretion of the court, without conferring separate power upon the convening authority. The danger of the misuse of power by the convening authority and the ancillary fear of the violation of the constitutional safeguards of the accused to a fair trial, require

80. Mudrik, *supra* note 71, at 116.

81. See Military Justice Law, *supra* note 72, at sec. 476. This section provides: “[s]ave as otherwise provided in this Law, the rules of evidence binding in criminal matters in the law courts of the State are binding also in a court martial and before an examining judge.” *Id.*

82. See Military Justice Law of 1986, Amendment No. 17, sec. 440.

83. ODED MUDRIK, *MILITARY JUSTICE* 56 (1993).

84. See Military Justice Law, *supra* note 72, at sec. 325.

85. See *id.* sec. 324.

86. See, e.g., H.C. 2888/99, Hollander v. Attorney General, Tak-Al 99(2) 1407 (Heb.).

that the rule of public trials in the military court be identical to the rule and exceptions concerning public trials, applicable in the civilian legal system.

I have explained the discrepancy that exists between the laws of arrest in the army and the laws of arrest in the general criminal law system.⁸⁷ Thus, for example, at a time when considerations of deterrence and efficiency have been excluded from the civilian laws of arrest and have been declared to be unlawful,⁸⁸ the substance of military service and its nature apparently continue to justify per se the arrest of a soldier solely on grounds of deterrence or the efficiency of the legal system.⁸⁹ The justifications that are identified for the establishment of a separate legal system are now used to justify remand until the conclusion of legal proceedings of persons charged with offenses for which they would not have been remanded in the civilian courts.⁹⁰ The justifications for a separate military legal system do not also justify the discrepancies between the laws of arrest and procedures applicable respectively in the civilian legal system and the military legal system.

The procedural right of every defendant not to be remanded until the conclusion of the proceedings simply because he has been accused of a serious offense or in order to deter others, also applies in respect of the military legal system. Arrest for reasons of deterrence contradicts the fundamental perception of innocence that applies to all citizens of the state – detention prior to a verdict is only justified on a preventative basis. The rationale whereby remand until the conclusion of the legal proceedings is a way of expressing the dissatisfaction of the army with offenses that breach discipline and is an essential tool to the proper functioning of the army, is outrageous and sends a message that the criminal process in the army has failed. It means that despite the extensive powers, which the criminal process places in the hands of the judicial authorities, that process is not effective by itself in sending a message of deterrence, and that the soldiers are incapable of understanding the significance of standing trial and deterrence embodied in the very existence of a penal provision in the law.⁹¹

Accordingly, the remand of a soldier merely because he has committed a serious offense, notwithstanding the fact that personally he is not dangerous, comprises a serious infringement of the freedom of a person who may be found innocent at the conclusion of the legal proceeding. It is not asserted that one must examine the restrictions on the freedom of a soldier on the basis of the expectations of military commanders in relation to the measures that will

87. See generally Emanuel Gross, *Constitutional Aspects of the Laws of Arrest in the Army*, LAW & GOV'T 5(2), 437, (Heb.).

88. See Criminal Appeal [Cr.A.] 537/95, *Ghanimat v. State of Israel*, 49(3) 353 (Heb.); Cr.A. 8087/95, *Zada v. State of Israel*, 50(2) P.D. 133 (Heb.).

89. See Gross, *supra* note 87, at 450.

90. See Arrest Appeal [A.A.] 15/97, *Private Ya'akov Damri v. Chief Military Prosecutor* (unpublished) (Heb.).

91. See Gross, *supra* note 87, at 437.

assist them to promote discipline and deterrence in the army. The correct test should be whether the proposed restriction on liberty is necessary and whether it is compatible with the fundamental perceptions of society – the answer would be in the negative. Another noteworthy difference relates to the right of an accused to come before a judge following his or her initial arrest. In the civilian system, the period of arrest prior to bringing a suspect before a judge may not exceed twenty-four hours.⁹² In contrast, in the military system the period was shortened by eight days⁹³ to ninety-six hours,⁹⁴ and subsequently, following a judgment of the Supreme Court, to forty-eight hours.⁹⁵ There does not seem to be any substantive reason connected to the nature of military service that justifies the discrepancy between the two judicial systems. The difference only exists because it is intended to serve the needs of one side, namely, the convenience of the system, but this convenience cannot justify the refusal to bring a soldier before a judge within twenty-four hours and not forty-eight hours.

The inescapable conclusion is that the nature of the judicial forum can indeed have an impact on the constitutional safeguards of the defendants before it.

Special judicial forum for terrorist offenses

It has been found that society justifies swift trials when it seeks to achieve a different goal not less worthy than securing the rights of the accused, such as, ensuring the security of the state and its citizens. It does this by seeking to achieve maximum trial efficiency and deterrence. Thus, in the same way as it is important that the military establishment react swiftly to try a soldier who is suspected of having betrayed his friends in war time, even if such efficiency in the conduct of the trial will erode the constitutional safeguards of the accused, so too President George W. Bush believed that the swift trial of terrorists would be an appropriately rapid and efficient response in the war against terrorism.⁹⁶ Such a trial, which is a type of field court martial, a quick trial, so it is believed, will achieve the goal of deterring those dealing in terrorism by causing them to fear the consequences of being suspected of terrorist acts. Does the infringement of the right to due process combined with the pursuit of a speedy trial achieve this aim? In my opinion, speed per se cannot be regarded as the ultimate goal:

92. Criminal Procedure Law, Powers of Enforcement – Arrest, § 29(a) (1996) [hereinafter Criminal Procedure].

93. See Military Justice Law, Amendment No. 32, *Sefer Hachukkim* 366, § 440 (1996).

94. See *id.* at 278.

95. See H.C. 6055/95, *Zemach v. Minister of Defence*, Tal-AI 99(3) 1400 (Heb.).

96. Ann Woolner, *Model Trial? 1942 Tribunal Hid More Than State Secrets*, FULTON COUNTY DAILY REPORT, Dec. 5, 2001.

Legal proceedings serve a primary purpose and that is doing justice while ensuring the appearance of justice. All the rest is generally the outcome of this: the imposition of the law and the instilling of the consciousness of its power, accepting the authority of the law, its might as an instrument for rooting out crime generally and terrorism in particular, deterrence ensues from this and other ancillary significances, all these are consequences derived from doing justice and not its alternatives. Of course, legal proceedings must, generally, commence and conclude within a reasonable period of time... however the efficiency, force and influence of legal proceedings are not measured solely by their duration. In every judicial proceeding there are, conventionally, substantive elements, which cannot be waived in any circumstances, even if in practice their existence tends to lengthen the proceedings somewhat.⁹⁷

The desire of the establishment to bring about efficiency and deterrence is understandable particularly in times of emergency; however, this understanding is likely to cause society to permit a critical deviation from the constitutional safeguards that, in practice, comprise the bill of rights of the accused, and waive them. The result is that society uses the person as an instrument. It sacrifices him or her in order to realize a more important social interest – security!

One of the constitutional principles common to the policies of democratic societies, when placing persons on trial and deciding upon the legal procedures in court, is the well-known categorical imperative of the philosopher Immanuel Kant: "*Never use a man merely as a means but always at the same time as an end.*"⁹⁸

The creation of a special judicial forum with special legal procedures that do not permit the accused to exercise the right of cross-examination, but enable a conviction on the basis of evidence kept secret for reasons of national security, severely violates the procedural rights of the accused. This violation falls outside the scope of the balance between human rights and social interests (including national security), as expressed in the ordinary rules of

97. H.C. 87/85, *Argov v. Commander of IDF Forces in Judea and Samaria et al*, 42(1) 353, 378 (Heb.).

98. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 101(H.J. Paton trans. 1964). "Act always so as to treat humanity whether in your own person or in that of another, never merely as a means but always as at the same time as an end." *Id.* See also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977).

procedure applicable in the civil legal system.⁹⁹ This deviation is a blatant breach of the prohibition upon using a man as a means; he is being turned into a tool in the hands of society in the hope of deterring others who may plan a future attack. The most serious risk is that of convicting innocent persons. Is this a price that a democratic society is prepared to pay? Is it at all right to demand from a democratic society that it pay this type of price? The answer is no. A democratic society in which individual liberties are acknowledged as basic rights is required to pay a social price that entails waiving part of the protection usually accorded to public security,¹⁰⁰ as

[n]o security reason, even the most weighty, is heavier, in the relative balance of a given criminal proceeding, than the weight of the conviction of an innocent person. In this connection, the type of offense with which the person has been accused and the punishment which he may expect are not important. The conviction of an innocent man is so profound and painful a violation in the regulation of the criminal procedure, as not to be permitted under any circumstances.¹⁰¹

Nonetheless, is not the offense of terrorism sufficiently unique so as to justify the separate trial of terrorists, even if this would violate the rights of the terrorist suspect facing trial?

Many of the writers on terrorism describe it as so exceptional a phenomenon that the usual treatment offered by the legal system and the law are unsuitable:

Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them. In the face of terrorism, extraordinary law, it seems, is required. Terrorism literature emphasizes, through its choice of metaphors, that the situation is one of “us” or “them.” To

99. See, e.g., Evidence Ordinance [Consolidated Version] (Aryeh Greenfield, Trans. 2000), sec. 44(a) & 45. (1971) [hereinafter Evidence Ordinance]. These sections establish the proper balance between an important public interest (national security) and the right to a fair trial and justice. See *id.* See also Cr.A. 889/96, Mazrib Muhammed v. State of Israel, 51(1) P.D. 433, 443-445 (Heb.).

100. See Criminal Further Hearing [Cr.F.H.] 5/89, State of Israel v. Ghanimat, 49(4) P.D. 589, 645 (Heb.) (“A basic right by its nature carries a social price . . .”).

101. Miscellaneous Applications [M.A.] 838/84, Menachem Livni et al v. State of Israel, 38(3) P.D. 729, 738 (Heb.). This case concerned the need to reveal privileged evidence in order to achieve justice and conduct fair criminal proceedings that might uncover the truth versus security needs, which argued against disclosing the evidence. See *id.*

survive, we must destroy them. To fail to destroy them is to destroy ourselves.¹⁰²

The threat terrorism poses to civilization passes through violence. A recurring problem for authors on terrorism is the need to distinguish terrorist violence from other kinds of violence. The terrorist should not be said to be using run-of-the-mill kinds of violence, the everyday kind of violence that affects the citizen of our democracies in a matter of fact way the violence that we have come to live with. If the violence of terrorism is not distinguishable, then the average terrorist may not seem much worse (if not any better) than the average rapist, murderer, robber, or vandal.¹⁰³

Others explain the distinction between offenses of terrorism and other offenses by referencing the fact that the victims of terrorism are innocent from a dual point of view compared to their status in other criminal offenses:

They are inherently innocent (not to blame as victims), but they are also innocent because they are in some sense sacrificed and sacrificial victims. Sacrificed by the terrorists because they stood for the things the terrorists despise. Sacrificial in that if our governments had taken strong action against terrorists, as they should have, these innocent people would not have been victims.¹⁰⁴

I reject these views – when it is said that the victim of a terrorist offense is an exceptionally innocent victim, a victim of an exceptional act of violence, then the position that “normal” violence exists, with victims who may be characterized as “normally” innocent is taken. Such an argument is unfounded.

True, terrorists do not respect laws and breach all rules of the game. However, every person suspected of a criminal offense is suspected of not having respected the law. There are those who believe that terrorists are different in this regard as, in contrast to other criminals, they do not respect any law – not the criminal law, not moral law, not the laws of peace and not the laws of war. They breach all forms of law simultaneously.¹⁰⁵ Does this justify a different mode of trial for a person suspected of breaking all the rules of the game? Does the fact that terrorists are always presented as “other,” and they chose to be “other” and behave as “others” means that the state must treat

102. Ileana M. Porras, *Symposium: On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119,121-22 (1994).

103. *Id.* at 129.

104. *Id.*

105. *See id.* at 139.

them in another manner and that the terrorists can only blame themselves for this outcome?

Terrorism is essentially no different from any other criminal offense. It substantively resembles every other criminal offense in the statute books. The only difference that can be found lies in the perpetrators' motives. The acts of violence or murder are motivated by the desire to instill terror. However, the existence of a distinct motive in terrorism offenses does not justify separate trials. The venue for trying terrorist offenses is the ordinary courts. Any desire to deviate from this structure in favor of another structure suggests a desire to tilt the balance between human rights and national security in one direction only – security interests.

Terrorism is an offense of violence, and it seems the state adopts the following tactic when dealing with it: it classifies the offense of violence under the name “terrorism” while repeatedly emphasizing¹⁰⁶ the images of terror as an enemy, whose goal is to kill, whose tools are violence and whose motives are the motives of a fanatic fundamentalist Islam.¹⁰⁷ From the moment the state classifies an offense of criminal violence as terrorism, it signals to the public, and the public that visualizes the fanatic Islamic fundamentalists, against whom the government warns, has little choice but to agree, that “it is something else” and from that moment everything must be “other.” As it has been previously explained, the offense of terrorism is like every other criminal offense, only the motive is different, and this difference does not justify “different” treatment.

It should be noted that in the past the United States was accustomed to classifying terror offenses as criminal offenses.¹⁰⁸ Even in the war against terror now being waged, the President declared he wanted to catch the

106. See, e.g., William J. Casey, *The International Linkages - What Do We Know?*, in HYDRA OF CARNAGE: INTERNATIONAL LINKAGES OF TERRORISM – THE WITNESSES SPEAK 5 (Uri Ra'anan et al. eds., 1986). The explanation given by the CIA is as follows:

In confronting the challenge of international terrorism, the first step is to call things by their proper names, to see clearly and say plainly who the terrorists are, what goals they seek, and which governments support them. What the terrorist does is kill, maim, kidnap and torture. His or her victims may be children in the schoolroom. Innocent travelers on airplanes, businessmen returning home from work, political leaders . . . They may be kidnapped and held for ransom, maimed or simply blown to bits.

Id.

107. See 10 *Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States*, 11 September 2001, ¶¶ 21-22 (Oct. 4, 2001), available at <http://www.number-10.gov.uk/news.asp?NewsId=2686> (last visited Oct. 22, 2002). An expression of the religious-Islamic component of the phenomenon of terrorism may be seen in the statements of Osama Bin Laden: “[t]he killing of Americans and their civilian and military allies is a religious duty for each and every Muslim to be carried out in whichever country they are until the Al Aqsa mosque has been liberated from their grasp and until their armies have left Muslim lands.” *Id.*

108. See 18 U.S.C. §§ 2331-2339B (2000) (defines and establishes punishments for terrorism).

terrorists and bring them “to justice.”¹⁰⁹ This objective is identical to the objective of the criminal legal system: the prevention of crime and damage by the capture and punishment of those guilty of causing them.¹¹⁰ It may be argued the character of the terrorist attack of September 11, 2001, and its outcome were different from any other terrorist attack previously suffered by the United States. This difference requires the offense of terror to be classified in a different manner and prevents it from continuing to be regarded as a purely criminal offense. Support for this proposition may be found in the fact that before September 11, the United States regarded terrorist attacks as crimes; whereas, in the aftermath of September 11, it regarded them as acts of war.¹¹¹

The primary difference between the terrorist attack of September 11, and previous terrorist attacks on the United States, lies in the tremendous scale of damage and injury caused to innocent persons. But from the point of view of the criminal law, the character of an offense, which forbids taking life as a criminal offense, does not depend and will not vary in consequence of the number of victims involved: “[t]he point is not that the September 11 attacks were no different from past terrorist attacks, but rather that they were not so different that the criminal law had not contemplated them.”¹¹²

Moreover, we are not dealing here with a separate field requiring exceptional expertise in order to try the terrorist offenses. The fact that terror offenses are criminal offenses that, like all criminal offenses, necessitates expertise in the field of criminal law as such¹¹³ (and not in the “area of terrorism”), contrary to the example of the adjudication of fiscal offenses – where it is possible to justify the existence of a special panel on the basis that special expertise and professionalism is required in relation to the subject-matter. More precisely, the existence of a special panel does not mean a special tribunal, and it certainly does not mean special procedural rules that differ from the ordinary rules of procedure.

Other issues can justify the establishment of a special tribunal. For example, the State of Israel created a special court system for labor law,¹¹⁴ but the entire rationale behind the creation of this separate legal system turns on the special expertise and professionalism required in the field of labor relations. The motive for creating this separate legal system was the desire to advance the cause of justice in that field of law, *i.e.*, to ensure that labor disputes would be heard by a body that would be devoted to dealing with these

109. Strike Address, *supra* note 42, at 1432.

110. See generally WAYNE R. LAFAYE, CRIMINAL PROCEDURE 1.2(c), 10 (2d ed. 1992).

111. See Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1225 (2002).

112. *Id.* at 1226.

113. See Wison Finnie, *Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation*, 1990 L.J. OF SCOT. U. JUD. REV. 1, 2-3 (1990).

114. See, e.g., Labour Court Law (1969) (Heb.).

matters and would specialize in them to a greater extent than the ordinary courts.¹¹⁵ Yet, the creation of a separate tribunal was not thought to justify the violation of the procedural rights of those being judged by the Labor Court!

When a state creates a separate legal system, which differs from the ordinary prevailing system, it bears the burden of showing the new structure has not been motivated by a desire to violate constitutional safeguards, but rather to preserve them. If one draws a comparison with the examples considered above, one sees that when the state creates special tribunals for terrorists, modifies the laws of procedures and evidence and violates the procedural rights of the accused, it is not motivated by the desire to advance the cause of justice by conducting a trial with the aid of experts in the “laws of terror.” On the contrary, the state has a concealed motive; it seeks to obtain results which cannot be obtained by holding a trial within the ordinary court system, as the constitutional safeguards of the accused would delay the ultimate outcome to which the state aspires, namely, a conviction that will have a deterrent effect: “[t]he primary American interest created by the September 11 attacks is the successful punishment of those responsible. This interest is not satisfied by mere apprehension of the perpetrators; prosecution resulting in acquittal would not satisfy the United States’ interests in punishment and safety.”¹¹⁶

Accordingly, it is difficult to find a special ideology that can provide a basis for, and justify the creation of, a separate system for trying terrorists. Searching for these justifications leads only to the state’s desire for retribution, deterrence and realization of the desired outcome under the cover of a legal process. However, a democratic state cannot be satisfied with what is merely a legal process, it must ensure that the legal process is *proper* and accords with its democratic values. It is the departure from these values as reflected in the executive order in the United States, which requires American society to act to abolish the military tribunals:

[w]e need to think long and hard when it’s time to try somebody in a tribunal. There are good reasons to use the criminal justice system. It sends a signal to the world of the unimpeachable integrity of the process We don’t want to become what we criticize.¹¹⁷

Like American society, Israeli society too must reexamine its special courts, such as the military court for terrorists in Lod.¹¹⁸ It should be emphasized that, in the light of the fact that trials are no longer held in the Lod

115. See H.C. 5168/93, Shmuel Mor v. National Labour Court et al, 50(4) P.D. 628, 638 (Heb.).

116. See Note, *supra* note 111, at 1235.

117. See Oliphant, *supra* note 55, at 1.

118. See *infra* Part 4 for an extensive discussion.

military court, it would seem Israeli society has understood that a special court for trying terrorists, even if established by statute, is not appropriate and measures should now be taken to abolish it even though it exists only on paper.

I wish to stress that I do not cast doubt on the fact that the security of the nation and its citizens is an important public interest standing at the center of the fundamental values of a democratic state, as without every citizen being guaranteed his personal safety and without public safety being secured, it is not possible to ensure the real implementation of human rights: "without order there is no liberty."¹¹⁹ Accordingly, had the President of the United States declared it proper to establish a separate legal system for terrorist suspects for the reason that the phenomenon of terrorism is spreading swiftly and dangerously and the dangers it poses are likely to prove calamitous, and had he declared it necessary to set up this separate system so as allow it to deal solely with persons suspected of this offense in order to avoid the routine delays in the ordinary federal system, which is burdened with many other issues, but had he nevertheless stated that the procedural and evidentiary rules and constitutional safeguards available to a defendant in this special tribunal would be identical to the "due process of law" that prevails in the federal legal system, then it would not be necessary to criticize the presidential decision.¹²⁰ The proper balance in a democratic state between human rights and national security is not breached when a special tribunal is set up in order to avoid the burdens on the existing system or even when it is designed to satisfy the public's demand for a system that will deal solely with terrorist suspects. This balance is maintained as long as the rules applicable within the existing system are coextensive with the rules that will apply in the new tribunal.

Regrettably, this is not the case. The situation that has been created in the United States has led many to the conclusion that: "The new administration powers, amassed during wartime, have made the normally

119. H.C. 14/86, *Leor v. Film and Play Censorship Council*, 41(1) P.D. 421, 433 (Heb.).

120. See ABA, *Task Force on Terrorism and the Law Report and Recommendations on Military Commissions* (Jan. 4, 2002). It should be noted that the American Bar Association (ABA) has declared its willingness to accept the special tribunal but seeks the maintenance of fair legal criminal procedures. See *id.* The ABA proposals require:

Compliance with Articles 14 and 15 of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of *ex post facto* application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

Id.

delicate balance between individual rights and collective security that much more precarious.”¹²¹

A real danger exists because there is much sharper focus on national security and threats of terror in times of emergency than in times of peace, and because we are dealing with the conduct of persons who threaten the security of the state and its citizens, society will agree to deal with them separately in a manner that differs from that applied in the ordinary courts. Achieving this distinction will only be possible if different rules of procedure are established that are based on the desire to achieve a goal that is adjusted in times of emergency, and which has a different weight to that ascribed to it in times of peace. For example, the need to protect sources of information leading to the detection of terrorists would be justified, although in a regular trial the testimony of these sources would result in their exposure. In a separate system, evidence would be allowed to be given in the absence of the accused and would even permit a conviction on the basis of police testimony to the effect that to the best of the police officer’s knowledge – the defendant is guilty of terrorist activity, all this without an examination of the police officer’s source of information.¹²²

In my opinion, a society, which sanctions a separate system that acts in accordance with special rules in the trial of terrorists, and does so out of a fear that conducting a trial in accordance with the prevailing rules will impair national security, makes a serious mistake.

It is agreed that in criminal legal procedures concerning terrorist offenses a real need may arise to protect the intelligence sources that helped to uncover the terrorist or to depart from the principle of public trials. However, this need can be met within the existing judicial system. If the state proves that, for worthy and well-founded security reasons, which will not lead to a miscarriage of justice for the accused, it is necessary to refrain from disclosing evidence or that the trial should be held *in camera*, the regular judicial system can meet this need. It must be recalled that the system operates in accordance with procedures based on the principle of openness — secrecy and privilege are the exceptions. Nonetheless, the exceptions exist and in cases of need, national security grounds will allow them to be implemented.¹²³ The emphasis lies on the fact that usually, secrecy is an exception; but, where special rules are created for the trial of terrorists, the

121. Richard L. Berke, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1.

122. See *infra* Part 5, concerning the trial of terrorist suspects in Britain.

123. See, e.g., Courts Law [Consolidated Version] (Aryeh Greenfield trans. 2000), sec. 68 (1984): (a) The Courts shall conduct their hearings in public. (b) A court may hear all or part of a certain matter behind closed doors, if it deems it necessary because of one of the following: (1) to protect the national security.” *Id.* See also Evidence Ordinance, *supra* note 99, sec. 44. “(a) A person does not have to deliver and a Court shall not admit any piece of evidence, if the Prime Minister or the Minister of Defense expressed his opinion in a certificate signed by him that delivering it is liable to injure national security. . . .” *Id.*

exception becomes the rule. For example, a trial *in camera* without the possibility of external supervision and review but has all the dangers accompanying this state of affairs.

It would seem that the grounds justifying the trial of terrorist before military tribunals, such as the need to safeguard intelligence sources in the continuing war against terrorism, the danger involved in disclosing information in a public trial and the desire to prevent terrorist suspects exploiting the proceedings should they be held in open court by turning the trial into a platform for proclaiming their views, are merely the openly declared motives for creating the military tribunal. The concealed, but genuine, motive is the use of the military tribunals as a United States policy measure in its war against terror; the aim of the United States is to achieve this objective and not to bring the suspect to trial and justice.¹²⁴

Consequently, it seems that the desire of the United States to see those guilty of the attacks of September 11 behind lock and key is so intense as to cause it to distrust its own existing legal system:

They [the military tribunals] help to guarantee those interests [retribution and incapacitation] and suggest that Americans have come to distrust their own criminal justice system's ability to safeguard them. By granting the President discretion to try Al Qaeda members without the procedural and evidentiary rules that favor defendants in our civilian justice system, the military tribunals promise to reduce the probability that a suspected terrorist will escape conviction.¹²⁵

A different danger is that of the "slippery slope:" a society that today allows the disparate treatment of persons suspected of terrorism may tomorrow allow the disparate treatment of persons suspected of other offenses: "But why stop there? If the theory behind the November bill is that a streamlined system should be set up to process thousands of claims with fundamental similarities, why not extend the system to suits against, say, managed health care companies? Or all doctors?"¹²⁶

Other critics of the power of the President of the United States to issue this executive order are also aware of this danger and explain:

President Bush has claimed the power to create and operate a system for adjudicating guilt and dispensing justice through military tribunals without explicit Congressional authorization —threatening to establish a precedent that

124. See Note, *supra* note 111, at 1236-37.

125. *Id.* at 1235-1237.

126. Evan P. Schultz, *Decisions Set Precedents Whether Justices Like it or Not*, FULTON COUNTY DAILY REPORT, Dec. 27, 2001, at 5.

future presidents may seek to invoke to circumvent the need for legislative involvement in other unilaterally defined emergencies.¹²⁷

The inescapable conclusion is that it is precisely in times of emergency in which the governmental authority desires to exploit the situation in order to obtain the public's understanding, encouragement, support and consequently authorization, in the name of national security, for an efficient war against terrorists by violating the rights of the enemy – that society must recognize that it should refrain from giving such authorization. Indeed, terrorism is an enemy, and therefore the tendency to agree to the erosion of the rights of the enemy may be legitimate and broad but it must be recalled that violation of the rights of the enemy defendant may end in injury to another enemy who is none other than one's political opponent.

PART FOUR

Rules of international law for trying terrorists in occupied territories and comparative law in relation to the State of Israel

Since its establishment, the State of Israel has been compelled to deal with the phenomenon of terrorism. Terror attacks in the territory of the State of Israel are frequent and since the events of October 2000 have become a matter of routine. The trial of terrorists or “wanted persons” who have been caught and are suspected of terrorist activity is an integral part of Israel's fight against terrorism. Most of the terrorist attacks against Israel are launched from the territory of the Palestinian Authority – territory that the State of Israel occupied in 1967. In this part, the rules of international law for trying terrorists in occupied territories outside the borders of the occupying power will be examined, and how the State of Israel has chosen to implement these rules will be described.

The rules of international law

When international law deals with issues of occupied territories, it uses the term “belligerent occupation.” Such occupation is primarily regulated by Articles 42-56 of the Hague Regulations¹²⁸ and the Fourth Geneva Convention.¹²⁹ This is a situation in which occupied territory remains in the hands of the enemy in time of war or thereafter. If the enemy has effective

127. Neal K. Katyal & Laurence H. Tribe, *Essay: Waging War, Declaring Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1308 (2002).

128. See Hague Regulations, *supra* note 33.

129. See Fourth Geneva Convention, *supra* note 33.

control over the occupied territory, then there exists a legal basis for belligerent occupation.¹³⁰

The government in occupied territory is military in character. Governing the occupied territory is a supreme military commander; however, this individual does not act in a vacuum. The commander receives orders from those who have authority over him within the framework of the military hierarchy, while responsibility for occupation is principally imposed not on the commander, but on the Occupying Power.¹³¹

The relationship between the occupier and the civilian population ensues from the special circumstances of belligerent occupation. As the occupier does not obtain property rights in the occupied territory, the residents of the territory do not lose their nationality. Accordingly, if they were citizens of the occupied area, they continue to hold that citizenship and owe a persisting duty of loyalty to the enemy.¹³² Alongside this principle, Article 5 of the Fourth Geneva Convention provides that where in occupied territory a person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited the rights of communication (with the outside world) under the present Convention; however, the Occupying Power must treat this detainee in a humane manner, *and in case of trial, he shall not be deprived of the rights of fair and regular proceedings.*¹³³

Article 43 of the Hague Regulations provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.¹³⁴

As a result, the occupier must respect the laws prevailing in the occupied territory, and he may repeal or amend existing laws and enact new laws only in exceptional circumstances where he is absolutely prevented from respecting the previous legal position. The construction that has been given to the exception talks of situations of "necessity" (and not being "absolute prevented" in the literal sense).¹³⁵ The necessity may ensue from legitimate

130. See Shamgar, *supra* note 35.

131. See Yoram Dinstein, *Judgment in relation to the development of Rafiah*, 3 IJUNEI MISHPAT, 934, 935-937 (1974) (Heb.).

132. See DINSTEN, *supra* note 51, at 214.

133. See Fourth Geneva Convention, *supra* note 33, art. 5

134. Hague Regulations, *supra* note 33, art. 43.

135. See H.C. 202/81, Tabib et al v. Minister of Defence et al, 36(2) P.D. 622, 629-631 (Heb.).

interests of the occupier, such as laws prohibiting acts of sabotage, hostile organizations, and so on. The article deals with legislation in both the civil and criminal spheres, although additional provision exists in relation to the criminal sphere in the Fourth Geneva Convention. Article 64 provides that the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Convention.¹³⁶ According to Article 64 the occupier is entitled to legislate its own penal laws in the occupied territory in so far as is necessary to fulfill its obligations under the Convention, maintain orderly government in the occupied territory and ensure the security of the occupier.¹³⁷ Article 65 adds that the new penal laws shall not come into force before they are published and brought to the knowledge of the inhabitants in their own language, they may not have retroactive effect.¹³⁸

With regard to all the offenses that are included in the penal laws, which the occupier leaves in effect in the occupied territory, Article 64 provides that the tribunals of the occupied territory shall continue to function.¹³⁹ Nonetheless, the indigenous courts are not the only courts functioning in the occupied territory, joining them are a system of military courts.¹⁴⁰ Whereas the indigenous courts handle all the civil and criminal matters in accordance with the local law, the military courts of the occupier apply in the occupied territory the criminal laws that it legislates for the local population in accordance with its own legitimate interests. The authority to establish a system of military courts is accorded by Article 66 of the Fourth Geneva Convention subject to the courts being properly constituted, non-political and sitting as first instance courts in the occupied territory.¹⁴¹

The subsequent articles of the Convention have a cumulative effect providing broad protection for the maintenance of fair criminal proceedings. For example, the military courts shall apply only those provisions of law applicable prior to the commission of the offense and which are in accordance with general principles of law. The penalty must be proportional to the offense and the court must take into consideration the fact that the accused is not a national of the Occupying Power.¹⁴² The trial must be regular and the defendants must be informed, in writing, in a language which they understand, of the particulars of the charges preferred against them.¹⁴³ An accused shall

136. See Fourth Geneva Convention, *supra* note 33, art. 64.

137. See *id.*

138. See *id.* art. 65.

139. See *id.* art. 64.

140. In contrast to military tribunals that have jurisdiction over soldiers serving in the army of the occupier, here we are concerned with jurisdiction over civilians, and accordingly we use the term "court" and not "tribunal."

141. See *id.* art. 66.

142. See *id.* art. 67.

143. See Fourth Geneva Convention, *supra* note 33, art. 71.

have the right to present evidence in his defense and obtain the assistance of an attorney and an interpreter.¹⁴⁴ A convicted person shall have the right of appeal or the right to petition a competent authority of the Occupying Power.¹⁴⁵ Additional provisions in respect of this matter appear in Article 6 of the Additional Protocol:¹⁴⁶ the presumption of innocence, whereby every person is deemed to be innocent until convicted; trial in the presence of the accused and privilege against self-incrimination whereby a person may not be compelled to testify against his own interest or admit guilt.

The trial system operated by the State of Israel in the occupied territories

The State of Israel is a Contracting Party to the Geneva Convention and accordingly the Convention applies to all the territory that Israel occupied during the Six Day War and has remained under its control. At the same time, it should be noted that the State of Israel has taken the position that it does not admit the application of these Conventions to these territories, as it has never recognized the rights of the Egyptians or Jordanians to any part of the Land of Israel.¹⁴⁷ This position is not compatible with the provisions of the Fourth Geneva Convention that does not make application of the Convention contingent upon recognition of property rights and declares that it is applicable to every case of full or partial occupation of the territory of a Contracting Party.¹⁴⁸ Nonetheless, in 1971, in an international symposium on human rights, the Attorney General formally declared that the State of Israel had decided (without withdrawing from its fundamental legal position) to act in practice in accordance with the humanitarian provisions of the Fourth Geneva Convention.¹⁴⁹ At the same time it should be recalled that as the majority of the provisions of the Fourth Geneva Convention are constitutive, so long as Israel does not adopt legislation incorporating the Convention into its domestic law, the constitutive provisions do not automatically apply on the national level.¹⁵⁰ Notwithstanding this, the Supreme Court has held "that it is a mistake to think . . . that the Geneva Convention does not apply to Judea and Samaria. It applies, notwithstanding . . . that it is not justiciable in the Israeli courts."¹⁵¹

144. *See id.* art. 72.

145. *See id.* art. 73.

146. Protocol I to the Geneva Conventions of the 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 23.

147. *See generally* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y. B. HUM. RTS., 262-263, (1971).

148. *See* Fourth Geneva Convention, *supra* note 33, art. 2.

149. *See* Shamgar, *supra* note 147, at 266.

150. *See* Ruth Lapidoth, *International Law in Israeli Law*, 19 MISHPATIM 807, 826 (1990) (Heb.).

151. H.C. 390/79, Dawikat et al v. Government of Israel et al, 34(1) P.D. 1, 29 (Heb.).

And indeed, after the State of Israel occupied the areas of Judea, Samaria and the Gaza Strip in 1967, it established in those regions a system of military courts that was compatible with the recognition accorded by international law to the need to ensure the rule of law, even in times of belligerent occupation.

The State of Israel sought to ensure the existence of a fair and proper legal and judicial system that would create an independent mechanism for applying the law. Security, public order and the welfare of the population were to be guaranteed by establishing a military judicial system in Judea, Samaria and the Gaza Strip, while at the same time preserving the indigenous courts in these areas.

In compliance with the principles of international law discussed above, following the entry of the IDF into the areas of Judea, Samaria and the Gaza Strip, the indigenous judicial system, including its jurisdictional powers, were preserved as the local law had applied them prior to the IDF occupation of the territory. Parallel with this system, a military court system was established in each and every area by the commander of the IDF forces in the region, namely, by the O.C. of the particular command, holding the rank of Major-General, who, under the rules of international law, comprised the supreme authority in the occupied area, and who held as such the powers of government, legislation and execution from the initial moment of the occupation. Thus, the Proclamation Concerning the Government and the Law, which was published in Judea, Samaria and the Gaza Strip by two Supreme Commanders at the time, stated: "Every power of government, legislation, appointment and administration in relation to the region or its inhabitants will from this point on be held by me only, and will be exercised by me or by someone appointed for that purpose by myself or who will act on my behalf."¹⁵²

Within the framework of the legislative powers, each of the Supreme Commanders published an Order Concerning Security Provisions, 5730-1970¹⁵³ ("OCSP") for their respective regions, in which they set up first instance military courts in the region. Later, a military appeals court was established.

The Powers of the Military Courts

The OCSP empowers the military courts to adjudicate every offense set out in the security legislation and every offense set out in the local law – the local criminal law applicable prior to the IDF's entry into the region – subject

152. Ayal Gross, *The Military Court System in Judea, Samaria and the Gaza Strip*, MONTHLY REVIEW: MONTHLY FOR IDF OFFICERS, 36(5), 12, 13 (1989) (Heb.).

153. This order replaced a previous order issued in 1967, during the initial days of IDF government in these regions.

to the provisions in the security legislation.¹⁵⁴ The military courts and the indigenous courts that continue to operate in the regions even after the IDF's entry, possess concurrent jurisdiction, in so far as concerns offenses against the local law.¹⁵⁵ The decision where to try a person suspected of having contravened a local law is made by the competent prosecutorial authorities.¹⁵⁶ Generally, in the past, when the offense was of a security nature, the charges would be brought before the military court. These were offenses, which by their nature, undermined the security of the area, breached public order, or harmed the security forces or various bodies cooperating with the security forces, Israeli citizens or any other important interest of the military government in the area.¹⁵⁷

It should be emphasized that in certain circumstances the jurisdiction of the military courts also extends beyond the confines of the territory, for example, a military court has jurisdiction in respect of an act that is performed outside the boundaries of the region and which would be an offense against the security legislation or the local law were it to be committed within the area, where that act harmed or was intended to harm the security of the area or the public order therein.

Panels of the Courts

Each court is headed by the President of the Court; additionally, there is a Duty President, who fills the functions of the President in the event of the latter's absence. These judges are appointed by the Commander of the IDF forces in the area in accordance with the recommendation of the Military Advocate General.¹⁵⁸ An IDF officer of the rank of Major and above, who has legal training, may be appointed as a jurist judge; the President of the Court must be a jurist judge of the rank of Lieutenant-Colonel and above. The Presidents of the Court and the Duty Presidents are judges in the regular army; whereas, the majority of the judicial force, in terms of numbers, consists of reserve army lawyers serving in the Military Advocate General's Unit.¹⁵⁹

The hearing of the indictments submitted to these courts is conducted by a panel of three judges, at least one of whom must be a jurist who acts as the presiding judge; the two other judges consist of IDF officers who need not

154. See Order Concerning Security Provisions, cl. 7 [hereinafter OCSP].

155. See M. Drori, *Concurrent Criminal Jurisdiction in the Occupied Territories*, 32 HAPRAKLIT 386 (1979) (Heb.).

156. See H.C. 412/71, *Nasirat v. Commander of IDF Forces in the Gaza Strip and North Sinai* (unpublished manuscript) (Heb.).

157. See Gross, *supra* note 152, at 14. See also H.C. 481/76, *Liptawi v. Minister of Defence et al*, 31(1) P.D. 266 (Heb.).

158. See OCSP, *supra* note 154, cl. 3.

159. See Gross, *supra* note 152, at 14.

have legal training.¹⁶⁰ Alternatively, the panel may consist of a single judge who is a jurist.¹⁶¹ From the point of view of substantive jurisdiction, there is no distinction between the two panels, in both cases the military court is empowered to hear every offense defined by security legislation or the local law subject to the security legislation. The distinction between the two panels lies in the sentences that may be passed. A court consisting of a one-judge panel is restricted in the sentences it may pass; for example, the judge may not sentence a person to death. Only a three-judge panel, containing two jurists, and voting unanimously, may pass such a sentence.

The decision before which panel (a single or three judge panel) an indictment will be heard is within the sole discretion of the military prosecution.¹⁶²

Legal and Evidentiary Procedures

The rules of procedure are as established by the OCSP or are in accordance with the procedures that seem to the court most suitable for the pursuit of justice.¹⁶³ Express provisions have been made in relation to the principle of open trials.¹⁶⁴ These provisions include: the right of an accused to be present throughout the proceedings,¹⁶⁵ the right to an interpreter if the accused does not understand Hebrew,¹⁶⁶ and the right of an accused to have assistance from an attorney of his choice.¹⁶⁷ Moreover, where the charge relates to a serious offense, and the accused has not chosen a defense attorney and no defense attorney has been appointed for him by the legal advisor of the region, the military court, with the consent of the accused (and the proposed defense attorney), will appoint a defense attorney for him.

160. It should be noted that this arrangement is similar to the arrangement applying in the military tribunals under the Military Justice Law of 1955, described in Part 1 *supra*.

161. See OCSP, *supra* note 154, cls. 3a and 4.

162. See H.C. 372/88, Fox v. Military Advocate General et al, 42(3) P.D. 154 (Heb.). Here the petitioner argued that the decision of the military prosecution to try him before a single judge was extremely unreasonable. The petition was dismissed on the ground that the choice of charges and the judicial panel, which would hear the matter was in the hands of the military prosecution. See *id*.

163. See OCSP, *supra* note 154, cls. 9 and 10.

164. See *id*. cl. 11. This clause provides:

A military court shall hold its hearings in open court, however, a military court is entitled to order that a hearing will be held, in whole or in part, *in camera*, if it is of the opinion that it would be appropriate to do so for the security of IDF forces, public safety, protection of morality or the safety of a minor, or if it believes that an open hearing would deter a witness from testifying freely or prevent him from testifying at all.

Id. It should be noted that as a rule in Israel trials are open to the public.

165. See *id*. cl. 35.

166. See *id*. cl. 12.

167. See *id*. cl. 8.

Right of Appeal

Until April 1, 1989, it was not possible to file an appeal against a judgment of the military court to any appeals court.¹⁶⁸ A convicted person could make various requests regarding the judgment to the Commander of the IDF forces in the region. The Area Commander could intervene in the judgment either by acquitting the accused or by canceling the judgment and ordering a new trial.

The establishment of an additional appeals process followed a hearing in the High Court of Justice in Israel on a petition filed by two persons who had been convicted by the military court in Ramallah.¹⁶⁹ In that case, the High Court dismissed the petition and did not see fit to intervene in view of the fact that the rules of international law did not mandate an appeals process. However, the High Court did express its support for the establishment of a military appeals court in the area of Judea, Samaria, and the Gaza Strip. The High Court's position was rooted in its conviction that the right of appeal would contribute to strengthening the elements of fairness and reasonableness in legal proceedings. In enlightened systems, the appeal is regarded as an essential and substantive factor in the fairness of the trial; its introduction into the military court system would raise the esteem in which it was held and emphasize its independence. Likewise, in the light of the "doctrine of long occupation" to the effect that the lengthier the occupation the more weight has to be given to the needs of the indigenous population by modifying existing laws and instituting new laws that will meet the changing needs of society over time, President Shamgar held:

The implementation of a right of appeal expresses the departure from extreme emergency measures, which are necessary in the initial period of a military government, but which are not justified in a military government, which has already existed for twenty years or more... One cannot find reason or logic why the military legal system, *i.e.*, the instrument by which the Israeli government does justice, has to be the one to bear, more than any other governmental system, the mark of the war, of transience, of the limitations which ensue from times of emergency, which are expressed by the absence of the characteristics which complement the

168. See Fourth Geneva Convention, *supra* note 33, art. 73. As we have explained international law as set out in Article 73 of the Fourth Geneva Convention does not establish an obligation to provide an appeals court. A convicted person has the right to petition the competent authority of the Occupying Power, but the latter is not a court of appeal.

169. See H.C. 87/85, Argov et al v. Commander of IDF Forces in Judea and Samaria et al, 42(1) 353 (Heb.).

substance and appearance of *the fair and complete legal system*.¹⁷⁰

As a consequence of this judgment, the OCSP was amended,¹⁷¹ and as of April 1, 1989 a military court of appeals has been instituted to serve both regions. For the purpose of an appeal, a distinction has to be drawn between a judgment given by a single judge and a judgment given by a panel of three judges. In the latter case, the appeal is a right; whereas, leave must be given to appeal against the judgment of a single judge.¹⁷² Both a convicted person and the prosecution may exercise the right of appeal or apply for leave to appeal. An automatic appeal lies in the event of a judgment imposing the death penalty, even if the accused has not chosen to submit such an appeal.¹⁷³

This institution is extremely important and, as noted, strengthens the element of fairness in the trial. It enables the consideration of legal decisions made by the court of first instance in a new setting, which ultimately will discard decisions that are flawed, while those decisions that have passed the additional review will emerge strengthened. This new instance strengthens the independence of the military legal system and its detachment from external influences. Many see the legal proceedings, which are conducted by the State of Israel in the administered territories, as part of a real effort to negate the well-known adage that "military justice resembles justice to the same extent as military music resembles music."¹⁷⁴

I believe that the State of Israel has indeed made a genuine effort to maintain a fair legal system in the administered territories. The fact that Israel established a special judicial system for security offenses, the military legal system,¹⁷⁵ does not prompt any real fears to the contrary, as the trial of security offenses by the indigenous courts in the occupied territories would be clearly tainted by prejudice and conflicts of interests. The indigenous courts could not really be expected to conduct objective hearings in respect to offenses against the security of the area. Moreover, the State of Israel has chosen to preserve the constitutional safeguards of the accused and constrict as much as possible the influence of the judicial forum upon his procedural rights.

Why did the State of Israel choose to take steps to minimize the influence of the judicial forum, but not to neutralize it completely? One

170. *Id.* at 375-376 (emphasis added).

171. *See* OCSP, *supra* note 154, cl. 4b.

172. *See id.* cls. 3 and 40b.

173. *See id.* cl. 140.

174. *See* Gross, *supra* note 152, at 21. This saying is attributed to the Frenchman Kalmanaso.

175. It has been explained that the jurisdiction of the military courts and the indigenous courts is concurrent, however, generally the military court obtains jurisdiction over security offenses.

cannot ignore the fact that some influence does exist, as the judges are not professional judges. The panel is comprised of a professional judge and military commanders who have no legal training.

The State of Israel chose to preserve the same constitutional safeguards in the military courts in the administered territories as are available to an accused in a military tribunal within the State of Israel; notwithstanding, that it could have conducted the criminal proceedings in the military court in accordance with rules of procedure and evidence applicable in the indigenous criminal courts in the territories. It should be noted that the State of Israel has decided that the rules of evidence to be applied in the military courts will be the same as the rules applied in courts in Israel.¹⁷⁶ In contrast, the right of a detainee to be brought before a judge under the OCSP differs from the right of an Israeli citizen within the territory of the State of Israel to be brought before a judge. Whereas in Israel a detainee must be brought before a judge within twenty-four hours of arrest,¹⁷⁷ under the OCSP, it is possible to detain a person and only obtain a warrant of arrest ninety-six hours later.¹⁷⁸ Under the OCSP, more serious harm is caused by the fact that a police officer is authorized to issue an arrest warrant within seven days.¹⁷⁹ Under Israeli law, only a judge may issue an arrest warrant.

An additional discrepancy between the rules of procedure applicable in Israel and those under the OCSP relates to the right of a detainee to meet with an attorney. The law applicable in the courts in Israel enables a meeting between a person suspected of security offenses and his attorney to be delayed for up to ten days with the authorization of the officer in charge¹⁸⁰ and up to twenty-one days with the authorization of the President of the District Court, subject to a right of appeal to the Supreme Court.¹⁸¹ In contrast, under the OCSP, the person in charge of the investigation may delay a meeting between the detainee and his attorney for up to fifteen days on grounds of the security needs of the region or the needs of the investigation. Furthermore, the confirming authority is entitled to extend this period by fifteen days. Therefore, it is possible to delay a meeting for up to thirty days.¹⁸²

These discrepancies and their ramifications certainly highlight the existence of a departure from the balance between security needs and the rights of the accused to a fair trial and to protection of the constitutional safeguards, which guarantee a fair trial. In 1989, the Betselem organization

176. See OCSP, *supra* note 154, cl. 9. This clause provides: "in relation to the laws of evidence, a military court will act in accordance with the rules applicable to criminal matters in the courts of the State of Israel." *Id.*

177. See Criminal Procedure, *supra* note 92, § 29(a).

178. See OCSP, *supra* note 154, cl. 78 (c).

179. See *id.* cl. 7d (d)(1).

180. See Criminal Procedure, *supra* note 92, § 35(c).

181. See *id.* § 35(d).

182. See OCSP, *supra* note 154, cl. 78(c).

presented a report based on observations made by attorneys for the organization concerning trials in the military courts.¹⁸³ The findings of the report reflect the dangers discussed here:

The serious situation, in which the majority of hearings are delayed for about a month because of the failure to bring up accused persons under arrest or because of the failure of witnesses for the prosecution to appear violates the basic right of a man not to be punished by lengthy detention prior to his guilt being established in a fair trial. The punishment therefore precedes the conviction and the court seems only to determine the date of conclusion of the punishment, and not act as the decision-maker on the question of guilt and innocence.¹⁸⁴

The comments of military judge Aryeh Cox (Res.) emphasize even more the dangers posed by a military court system:

It is clear that this court is not a natural and regular court, but some sort of solution which the military government found to enforce the government of occupation. The work performed there is not purely judicial: in practice, the whole situation in the military court in Gaza seems to be something from another world. Hundreds of family members outside, tens of prisoners inside, most of them very young, and the impression left is that they have lost faith in the system and do not even try to defend themselves. They admit everything. Their defense counsel who in many cases are pathetic figures, also accept the situation and in practice do the work of middlemen for purposes of punishment. I found a complete symbiosis there between the prosecution, the judges and the lawyers. The accused are on the sidelines and all is conducted with stoic acceptance. We found accused, we also found suitable offenses for them, and what has to be done now is to find even more suitable punishment for them.¹⁸⁵

There can be no more doubt; evidence in the field has shown that the primary influence exerted by the character of the judicial forum on the rights of an accused ensues from its composition. In a military court in which the judges are appointed by a military commander, it follows that the judges and

183. See *Report from the back yard*. SUBJUDICE: LEGAL MONTHLY FOR LAWYERS AND THEIR CLIENTS 1: 30, 1992.

184. *Id.*

185. Sarah Leibowitz, *Interview with a military judge*, HADASHOT, (Oct. 11, 1991) (Heb.).

prosecutors who serve in the Military Advocate's Unit are subordinate to one commander and are dependent on one authority for their advancement. Likewise, it follows that the whole system of the separation of powers between judges and prosecutors that exists in the regular civil courts disappears when it comes to a military court:

In military courts, for example, the ties between the judge and prosecutor are close ties, occasionally only a thin wall separates the room of the prosecutor from the room of the judge. They are really one on top of the other. As the separation of powers is a basic principle of every legal system, its absence comprises one of the main reasons for the fact that the element of adjudication in the territories is not pure.¹⁸⁶

From observations conducted by the Betsalem organization during the period it appears that the majority of trials are not based on witness testimony while convictions are based on admissions of guilt by the accused. This finding casts doubt on the conclusion that the process before a military court indeed leads to a just trial, notwithstanding the provisions we have already discussed that apply the rules of procedures and evidence prevailing in Israeli law to the military courts:

Contrary to the civil court system, the ability of a military judge in the territories to check whether he is indeed conducting a just trial and whether the accused committed all the offenses, is non-existent, because generally there is a total and comprehensive admission of all the offenses. Thus, the judge is deprived of the ability to examine whether the person before him committed the offenses, in whole or in part, or whether he is innocent. In other words, in practice, the judge cannot unearth the truth and conduct a just trial. In this area of offenses there is another factor, fundamental and no less complex than those that come after it. The investigators reach a large portion of the offenses from 'snitching.' There, people admit everything, and from confession to confession they incriminate others. It is very dangerous and uncertain to decide the fate of a person on the basis of 'snitching.' And on the basis of this information charges are brought. This is a chain reaction: 'information, indictment, confession, punishment. And if we mention punishment, the level of punishment too does not give rise to equal justice. When a

186. *Id.*

Jew kills an Arab he may be given a year's imprisonment. When an Arab throws a stone and causes no damage, he receives a similar punishment. This is not a just trial.¹⁸⁷

This is the practical result of a military trial that is different in composition to an ordinary civil trial, even when it purports to apply procedures that are similar to the procedures applicable in the ordinary civil courts. The outcome is deep erosion in the basic rights of each accused to a fair trial. Such an outcome contradicts the tenets of a democratic state. What will be the result in a situation where not only the panel trying the accused (terrorists) is different from the panel sitting in an ordinary civil court, but the law, too, allows the application of legal procedures and laws of evidence which are different and which seek the benefit of one party only, the prosecution, as ordered by the President of the United States? Such an arrangement will be completely incapable of meeting basic principles of a genuine democratic regime that seeks truth and justice; the outcome will be known in advance and the discrepancy between this outcome and the truth will be palpable.

To complete the picture of the system of adjudicating security offenses established by the State of Israel, it should be noted that concurrently with the trial of persons suspected of security offenses in the military courts in the administered territories, the courts of the State of Israel, too possess jurisdiction to try persons charged with security offenses, including terrorists, under Israeli law.¹⁸⁸ In these cases, the domestic law of the State of Israel applies and not international law. However, it is important to emphasize that notwithstanding that the State of Israel is subject to large numbers of frequent and horrific terrorist attacks, it has not seen fit to set up special tribunals having exclusive jurisdiction to try terrorists. Jurisdiction is conferred on the ordinary courts that try all other criminal offenses and alongside this a special military court – the military court in Lod - has *concurrent* jurisdiction. The military court in Lod was set up and operates under the Defense (Emergency) Regulations, 1945.¹⁸⁹

Most defendants coming within the doors of the military court in Lod court are Arab citizens and residents of Israel who breached the Defense (Emergency) Regulations, or Arab residents of the territories who committed such offenses within the territory of the State of Israel.¹⁹⁰ The fact that this court has concurrent and not exclusive jurisdiction to try terrorists (by virtue

187. *Id.*

188. See e.g. Penal Law, *supra* note 8, Ch 7, B & D; Penal Law, *supra* note 8, sects 146-147; Defence (Emergency) Regulations, 58, 59, 62, 64, 66, 67, 84 and 85 (1945) [hereinafter Regulations]; Prevention of Terrorism Ordinance, secs. 2-4 (1948).

189. See Regulations, *supra* note 188, §§ 12-15.

190. See A. Ben-Haim, *Death Penalty in the Case Law of the Military Courts in Israel and the Administered Territories*, 10 LAW AND ARMY 35, 42 (1989) (Heb.).

of the breach of the Defense (Emergency) Regulations) to some extent lessens the fear that would have ensued had this court possessed exclusive jurisdiction. Yet, the fear does not leave altogether. Why was it not possible to be satisfied with the jurisdiction of the regular civil system?

I have explained that there is no justification for the existence of a separate tribunal save where the subject-matter requires particular expertise that is not possessed by all the judges of the regular courts or where the motive for establishing a separate tribunal is to advance the cause of justice. It seems that neither of these justifications formed the basis for the establishment of the military court in Lod, and this explains the lack of activity there and the fact that no indictments are filed there. In practice, it is the regular courts that conduct the trial of terrorists within the territory of the State of Israel, and they do so in accordance with the criminal law. Consequently, the path to amending the law so as to abolish the military court in Lod altogether is short.

PART FIVE

A comparative glance – the manner in which the United States and Britain cope with the trial of terrorists

The United States

In November 2001, President of the United States, George W. Bush, issued an executive order requiring that the trial of persons charged with terrorist offenses, whom are not citizens of the United States, to be conducted in special tribunals – military tribunals. The stated cause for this executive order was the terrorist attack of September 11, 2001. The reasoning behind the order includes:

The speed of such tribunals, their portability, the availability of the death penalty, and their looser rules make them a good option, in Bush's view. But looser rules also mean a greater likelihood that the innocent would be convicted and the system manipulated by officials. Secrecy would mean no public scrutiny.¹⁹¹

The very dangers that were discussed previously in connection with the ramifications for due process resulting from the establishment of a special tribunal for a particular type of offense and the introduction of specially composed judicial forums, are likely to be seen in all their gravity as a result of the new legal situation created in the United States.

191. Woolner, *supra* note 96.

As mentioned *supra*, the dangers of terrorism facing the United States led the President to decide that the legal rules of procedure and evidence applicable in ordinary criminal proceedings are not suitable in trials conducted by the military tribunals,¹⁹² namely for a person who is not a citizen of the United States¹⁹³ and who is charged with terrorist offenses will be tried by a military tribunal without the protection and guarantees conferred on defendants in criminal proceedings in the courts of the United States:

Instead, suspects will be tried by a panel of commissioned military officers; prosecutors will be permitted to introduce evidence not ordinarily admitted in court, such as hearsay and evidence obtained through illegal searches; and suspects will have no right to judicial review. Little if any of the proceeding are expected to be open to the public Defendants will be represented by counsel, but potential defense attorneys are likely to be selected or scrutinized by the government because much of the evidence against their client will be classified information And unlike U.S. jury trials, which require unanimous verdicts, a military commission will require only a two-thirds vote to determine guilt. A two-thirds vote of the commission is also required for sentencing, even for imposing sentences of life imprisonment or death. Decisions reached by a military commission, according to the executive order, will not be reviewable by any court or international tribunal. Only the [P]resident [sic] or [S]ecretary [sic] of [D]efense [sic] can review or overturn a tribunal's decision.¹⁹⁴

“The statute that established the tribunal provides the accused with the presumption of innocence and the rights to a public hearing, counsel of his own choosing, cross-examination of witnesses and to appeal any conviction to a judicial body. Bush’s commission denies all of these rights to the accused.”¹⁹⁵

First, it should be noted that the distinction made in the executive order between a terrorist suspect who is a U.S. citizen and one who is not a citizen and is subject to the jurisdiction of the military tribunal is problematic from a constitutional point of view, in the light of the injury caused to the principle

192. See generally Military Order, *supra* note 3.

193. See U.S. CONST. amend. V, VI. The Constitution of the United States does not enable citizens of the United States to be tried before special tribunals. See *id.*

194. Blum, *supra* note 7.

195. Marjorie Cohn, *Let U.N. try terrorists*, NAT’L L. J., Dec. 10, 2001, at A21.

of equality.¹⁹⁶ The injury to the principle of equality before the law has a dual nature. The first concerns the distinction between a U.S. citizen and a foreign national located within the territory of the United States:

Why should a hacker from Montana who launches a computer virus that infects terminals in hospitals and government facilities be subject to trial in a military tribunal if he is a green-card holder, but accorded a civilian trial if he is a citizen, when the relevant provisions of the Bill of Rights, and the separation of powers, apply without regard to citizenship?¹⁹⁷

The second distinction is between a U.S. citizen and a non-U.S. citizen who is not located within U.S. territory, but was captured outside its borders and is tried before the military tribunal. From a constitutional point of view, this distinction is less grave, as it is customary to regard the principle of equality before the law as a principle confined to the territory of the United States.¹⁹⁸ As explained below, when a state decides to impose its laws and try a defendant before a tribunal of its own creation, it must conduct the legal proceedings in accordance with the central tenet of its system of law, the principle of "due process."

There are those who believe that the distinction between one who is a U.S. citizen and one who is not may carry practical dangers; as this distinction nourishes and strengthens the hatred felt by the Muslims against the United States and its citizens: "[t]he inherent distinction based on nationality unwittingly feeds the mind-set of non American Muslims as being victimized and unworthy of treatment according to higher standards reserved for Americans. This, of course, does nothing to ameliorate the hatred simmering below the surface."¹⁹⁹

Beyond this, it is difficult not to obtain the sense that the establishment of the military tribunals with their special panels and special rules of procedures was designed to make it easier for the prosecutors to achieve a high rate of conviction that would not be achievable in the regular courts, where "due process" is diligently pursued.

196. See the text accompanying notes 203 and 204. An explanation of the scope of protection afforded by the United States Constitution is provided *infra*.

197. Katyal & Tribe, *supra* note 127, at 1298.

198. See 42 U.S.C. § 1981(a) (1994) (the words are confined to "the jurisdiction of the United States" and to "states" and "territories"). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the provisions of the Equal Protection Clause "are universal in their application, to all persons within the territorial jurisdiction . . .").

199. Michael J. Kelly, *Essay: Understanding September 11th - - An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV., 283, 292 (2002).

In other words, the efficiency of the hearing takes preference to the search for justice, which on occasion requires somewhat more time. Is this order of preference constitutional in a democratic state? There are those who think not: “We should not retreat from our constitutional system of justice, which has served us well for more than 200 years. The constitution guarantees all ‘persons’, not just citizens, basic fairness before depriving them of their liberty or their life.”²⁰⁰ Attorney Mary Jo White, U.S. Attorney for the Southern District of New York, explains:

In the United States, we have all of the safeguards of the Constitution, the rules of criminal procedure, and the rules of evidence, which are fully applicable to defendants accused of terrorists crimes who are tried in American courtrooms. I believe that the United States’ judicial system is a model of how terrorist crimes should be prosecuted. We should not lower the bar of our criminal justice system when it is invoked to deal with the very serious crimes of terrorism. If we did lower the bar, we should be bowing to that particular type of crime and diluting our own fundamental principles of fairness and due process.²⁰¹

Therefore, the question is: are human rights and constitutional protections relevant to terrorist suspects and defendants? In my opinion, the answer to this is in the affirmative. The purpose of constitutional safeguards is not solely to protect defendants, but also to allow a fair trial, to protect a defendant against the unjustified abridgement of his rights, and to protect society in general. Doing justice is also relevant when dealing with terrorist suspects: “[T]o bring these terrorists to justice with justice.”²⁰²

Moreover, there are those who believe the performance of the enforcement authorities of the United States are subject to constitutional rules, such as prohibitions on unreasonable searches and arrest,²⁰³ even when they fulfill their functions outside the borders of the United States:

[A]ny action under authority of the United States is subject to the Constitution. If U.S. law enforcement officers act in a foreign state, they must of course observe the laws of the foreign state. But neither the high seas nor foreign soil can

200. Cohn, *supra* note 195, at A21.

201. Mary Jo White, *Symposium: Panel I: Secrecy and the Criminal Justice System*, 9 J.L. & POL’Y 15, 16-17 (2000).

202. Jeff Blumenthal, *Set Up Rights for Al-Qaeda Captives*, *ABA Urges Bush*, FULTON COUNTRY DAILY REPORT, Feb. 6, 2002 (V113, N25) (quoting Evan Davis, New York Bar President).

203. *See* U.S. CONST. amend. IV.

free a U.S. law enforcement officer from the restraints on official behavior imposed by the United States Constitution.²⁰⁴

How, then, shall we allow measures to be taken within the borders of the United States that are not compatible with constitutional principles applicable even outside the borders of the United States?

It will become apparent that the investigatory and governmental authorities are also of the opinion that the Constitution of the United States binds them in their activities on U.S. territory. This is the reason why the practice developed whereby the government of the United States secretly transports countless persons suspected of involvement in terrorist activities to other countries where investigative techniques may be used that would be unlawful in U.S. territory:

Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to their families—that are illegal in the United States²⁰⁵

There is no room for the distinction between the prohibition on implementing unconstitutional investigative tactics on U.S. land and the similar prohibition against operating legal procedures in an unconstitutional manner so as to put a spoke in the wheels of justice. There are those who may argue that the U.S. Constitution only applies to U.S. citizens: “[S]ome measure of allegiance to the United States, as evidenced by citizenship or residency, is the *quid pro quo* for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials.”²⁰⁶

This stance touches on the constitutional rights entrenched in the First, Second, Fourth, Ninth and Tenth Amendments of the Constitution, but not the constitutional rights entrenched in the Fifth and Sixth Amendments.

204. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 451 (1990).

205. Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at 1.

206. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1990) (Wallace, J., dissenting) (emphasis added).

Accordingly, those who advocate that the Constitution only applies to the citizens of the United States believe that “aliens” are still entitled to due process — that is to the protection of the Fifth and Sixth Amendments to the Constitution — which give the right to counsel, cross-examination, and to a trial in the presence of the defendant. The explanation for this position may be found in the language of the Constitution. Whereas the First, Second, Fourth, Ninth and Tenth Amendments refer to “people,” the Fifth, Sixth and Fourteenth Amendments refer to “any person” and “no person.”²⁰⁷ The use of the term “person” and not “citizen” displays the deliberate intention to protect aliens.²⁰⁸

In other words, even those who argue that the Constitution of the United States only applies to U.S. citizens cannot justify the negation of constitutional safeguards that are accorded to a defendant by the United States. The conduct of fair proceedings and due process are not dependent on time and place. The question is not whether everyone in the world, including terrorists, have the right to enjoy the constitutional protections afforded by the U.S. Constitution, but rather whether everyone in the world has some expectation of being tried in the United States when they are actually located outside its borders. The answer is no. However, as noted in cases of terrorist activities that harm the citizens of the United States, the latter has jurisdiction, and in such cases it would be reasonable to expect that it would operate its judicial system in a constitutional manner in so far as concerns the due process of law.

Indeed, the same U.S. Constitution that provides the basis for the entire legal system in the United States and affords constitutional protection to the defendant, deals in the First and Sixth Amendments with the basic guarantees of a fair trial: the right to a trial in open court, a trial by jury, and public review by way of freedom of expression concerning the process.²⁰⁹ These rights may be justifiably violated (as opposed to being abridged in advance) when dealing with the trial of terrorist suspects. Secrecy is a necessary measure for preserving the integrity of investigations concerning continuing terrorist offenses in order to protect the safety of: persons transmitting information to the Grand Jury and to the government, witnesses, defendants and their families. Consequently, there is a clash between the right to an open trial and the public interest in open legal proceedings on one hand and the

207. *Id.* at 1239.

208. *Yick Wo*, 118 U.S. at 369 (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens”). See also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was deliberately formulated in order to extend certain rights to aliens).

209. See U.S. CONST. amend I. (“Congress shall make no law... abridging the freedom... of the press”). See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12 (1986) (observing that “public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system”).

public interest in holding proceedings *in camera* and incorporating other elements of secrecy where the offenses charged are terror offenses. Which interest is overriding in this clash? Attorney Mary Jo White answers this question as follows:

Prosecutors and judges must be sensitive to the media and the public's right of access to the judiciary in international terrorism cases.... At the same time, however, what we would ask is that the media and the public recognize, and even try to accept, that the law protects and needs to protect the compelling countervailing interests that are so frequently present in international terrorism cases: national security; public safety; ongoing investigation; often involving ongoing terrorist plots; and witness safety. Very often, in terrorism cases, the law will strike a balance in favor of greater closure, sealing and secrecy. This may at times frustrate the media. But that, in my view, is a necessary and lawful price to pay.²¹⁰

It is not disputed that there is a need for secrecy in appropriate cases in which there is a real fear that openness will endanger essential public interests. At the same time, these are exceptional cases. The rule will continue to be openness and in a regular legal proceeding the need to take secret measures will be examined in accordance with the rules of procedure applied by the existing legal system. The legal position that has been created today in the United States following the issue of the executive order, reflects a complete shift in the rules of the game not only the rule of public trials, but also additional rules that guarantee the existence of fair criminal proceedings. The cumulative effect of these changes is not and cannot be a necessary and lawful price to pay. First, there is the fact that the framework for the conduct of the trial has changed – the existing federal framework is no longer suitable. This change carries a fundamental flaw that will have an influence on the entire proceedings and ultimately, on the substantive rights of the defendant. The defendant's life and liberty may be taken away from him unnecessarily and unjustifiably. This flaw cannot be accepted or justified: history has proven that the United States is able to contend with international terrorists who have injured U.S. citizens by placing them on trial *within the existing legal framework*. Thus, for example, in the case of Fawaz Yunis, who was involved in the hijacking of a Jordanian airplane in 1985, Yunis was tried in a federal court in the United States (among the passengers there were U.S. citizens).²¹¹ Another example concerned the American success in bringing Al-

210. White, *supra* note 201, at 20.

211. See *United States v. Yunis*, 924 F.2d at 1086, 1089 (D.C. Cir. 1991).

Jawary to trial. Al-Jawary was accused of carrying out three attacks in New York in 1973.²¹²

Conducting the trial of terrorists within the existing system will achieve the goal of deterrence much more ably than conducting a trial in “secret” tribunals: “The pursuit of terrorists overseas, as illustrated by the Al-Jawary case, demonstrates the commitment of the United States in bringing international criminals to justice. It also should serve as a deterrent to others.”²¹³

The executive order and the additional statutory and constitutional changes that followed the events of September 11, 2001, may be seen as a dangerous expansion of the United States’ attitude towards terrorism as a special phenomenon that requires exceptional proceedings shrouded in secrecy.

In 1996, when the United States enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)²¹⁴ and the Illegal Immigration Responsibility Act of 1996 (IIRIRA),²¹⁵ it created a special court that is entitled to make use of secret testimony and secret evidence to deport aliens charged with terror offenses. The consequences of operating this system were harsh:

[C]onspiracy prosecutions operate invidiously in inviting the jury to assess the defendant’s identity as an American . . . [asking] the jury to decide whether the defendant is one of ‘us’ engaging in protected speech, or one of ‘them’ conspiring . . . against our government. Xenophobia operates to make those defendants who are ethnic minorities seem more threatening and thus more likely to be guilty of seditious conspiracy. When the defendants are actually foreigners, such as the immigrants in the New York City terrorism trial, their identities cast even a longer shadow.²¹⁶

The use of secret evidence inspired by fear of potential harm to national security led to many cases of unjustifiable deportations. When evidence is

212. See *United States v. El-Jassem*, 819 F. Supp. 166, 170 (E.D.N.Y. 1993) (Al-Jawary and El-Jassem were the same person).

213. James S. Reynolds, *Domestic And International Terrorism: Expansion Of Territorial Jurisdiction: A Response To the Rise In Terrorism*, 1 J. NAT’L SECURITY L. 105, 109 (1997).

214. AntiTerrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. § 1214 (1996).

215. Illegal Immigrant Response Act of 1996, Pub. L. No. 104-208, 110 Stat. § 3009-546 (1996).

216. Bradley T. Winter, *Invidious Prosecution: The History of Seditious Conspiracy — Foreshadowing the Recent Convictions of Sheik Omar Abdel-Rahman and His Immigrant Followers*, 10 GEO. IMMIGR. L. J. 185, 212-13 (1996).

secret, it is difficult to imagine how the defendant may counter it, as a court has said:

Rafeedie— like Joseph K. in *The Trial* - can prevail . . . only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.²¹⁷

Another court explained the great danger to the principle of due process entailed by a rule that routinely permits secret evidence and described it as a violation, which is unconstitutional:

Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggest that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process.²¹⁸

These remarks, made by courts in the United States in connection with the special structures set up for deporting aliens, identified the fact that the government's measures undermined the adversarial system and the purpose underlying the legal system, namely, the discovery of the truth.

It is noteworthy to mention that when the courts ordered the disclosure of the secret evidence and allowed the defendants to provide evidence in rebuttal, no connection was found between the evidence and the defendants.²¹⁹ This was the state of affairs in a special system that allowed the use of secret evidence, yet enabled representation by an attorney and public and judicial review. What will be the outcome if a special system operates to try persons accused of terror offenses on the basis of evidence that is concealed for reasons of national security, does not allow the accused to choose his attorney, and does not permit review of any type which, on the contrary, merely allows secret proceedings behind closed doors?

The principal argument for the trial of terrorists by military tribunals is that terrorists are war criminals; accordingly, they should be tried in military tribunals for that exact reason and not because terror offenses are substantively different from other criminal offenses.

217. *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989).

218. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995).

219. See generally Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists'*, 8 *ASIAN L. J.* 1, 19-24 (2001).

Even before September 11, 2001, it was customary to hear leaders of democratic countries comment to the effect that the struggle against the phenomenon of terrorism amounted to a war against terrorism: "This is a case involving a war."²²⁰ If this is indeed a war, and after September 11, 2001, it is difficult to question this proposition:

[A]nd it involved a battle plan, by enemy 'soldiers' of the Sheik, to target innocent civilian commuters for death in contravention of all international law of armed conflicts, then why was the venue for the war criminals a civilian court instead of a military tribunal?²²¹

Trying acts of terrorism is trying acts of war. The court system, rules and judges were not intended to try these types of activities. This was also the explanation Justice Mishael Cheshin of the Supreme Court of Israel gave for the problems that, in his opinion, arose from the trial of acts of terror and the reaction thereto:

The act of the murderer was in substance — even if not in its framework and formal definition — an act of war and to an act which is in essence an act of war, one responds with an act which too is in essence an act of war and in the manner of war. From this the great difficulty follows, we find it difficult to apply to an act of war standards which are required of everyday law: and I as a judge have not become accustomed to dealing with war and have not learned the ways of soldiers. *And here I am required to apply everyday law and standards of law to an act which is in substance an act of war. How shall I do this?*²²²

Following the declaration of war against terror and the issue of the executive order, senior sources in the United States explained that the reason for establishing a military tribunal was none other than that the United States was involved in a military conflict: "The traditional processes of criminal

220. Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. TIMES, Jan. 31, 1995, at A1.

221. See Crona & Richardson, *supra* note 47, at 351.

222. H.C. 1730/96, Sabiach v. General Biran et al, 50(1) P.D. 342, 369-370 (Heb.) (emphasis added) (The judgment deals with the decision of a military commander to demolish the houses of terrorists who had committed suicide attacks against Israeli citizens and had caused the death of innocent persons).

justice were inappropriate and ineffective . . . This is a war situation . . . This is all about dispensing military justice attendant to a military conflict."²²³

In view of the expansion of the phenomenon of terrorism, its development and strengthening, as reflected in the events of September 11, that lead to the deaths of thousands of innocent civilians, and that no society could have conceived so runs the argument of those advocating trial by military tribunals; submitting the perpetrators of these acts and their principals to the same jurisdiction as the perpetrators of other crimes. To the contrary: "The legitimacy of using military commissions in this country for trying 'unlawful combatants,' such as members of Al-Qaeda charged with violating the laws of war, is not open to serious question."²²⁴

Military tribunals are not a new phenomenon. During the Civil War and later during the Second World War, Germans who had committed war crimes on U.S. territory were tried by military tribunals.²²⁵ Thus, supporters of trying terrorists before military tribunals find justification for their position in U.S. Supreme Court judgments that examined the constitutionality of these tribunals and held that the federal government had power to order the establishment of military tribunals to try unlawful combatants who had breached the laws of war on U.S. territory.²²⁶ At the time, Congress expressly authorized this measure there was certainly no constitutional problem.

The inescapable conclusion is that: "The definition and punishment of war crimes and crimes of universal jurisdiction are constitutionally the direct responsibility of Congress, not of the judiciary, and the historically and legally approved mechanism for discharging this duty is the military commission, not the federal district court."²²⁷

The court also rejected the contention that military tribunals breach the Sixth Amendment of the Constitution regarding the right to trial by jury, for the reason that the Amendment did not intend to have an impact on the existence of a preceding right – the right of nations to make use of military tribunals to try unlawful combatants:²²⁸ "The Court's decisions in *Milligan* and *Quirin* establish that persons, be they citizens or otherwise, who as unlawful combatants commit acts that violate the law of war can be subjected to the jurisdiction of military tribunals when such are authorized by Congressional legislation."²²⁹

223. Jim Oliphant, *War on Terror Is Reshaping Legal Landscape*, THE RECORDER, Nov. 19, 2001, at 3.

224. Hugh Latimer, *A legitimate tool*, NAT'L L.J., April 15, 2001, at A21. See also Crona & Richardson, *supra* note 47, at 356.

225. See generally *Yamashita v. Styer*, 327 U.S. 1 (1946).

226. See generally *Quirin v. Cox*, 317 U.S. 1 (1942).

227. Crona & Richardson, *supra* note 47, at 375.

228. See *Quirin*, 317 U.S. at 38-45.

229. Christopher Dunn, *Reviewing the Constitutionality of Military Tribunals*, N.Y.L.J., Jan. 11, 2002, at 1.

It should be noted, the judgment of the court dealt with the existence of express authorization by Congress for the establishment of the tribunals.²³⁰ No such express authorization was given in relation to the order issued by President Bush.²³¹

Congress authorized the use of force in relation to all those involved in any way with the events of September 11. In its resolution, Congress refrained from using the term “war.”²³² Only in emergency situations, where waiting for Congressional authorization is likely to pose a danger to the security of the nation and its citizens, is the President entitled to act without the authorization of Congress.²³³ When the executive order was issued one month after the terrorist attack, this was not the case.

Beyond this, it is not clear if the order is confined solely to unlawful combatants who have breached the rules of war on U.S. territory (as noted, Congress authorized the use of force only in respect of those involved in the attack of September 11). It seems that the President intended a much broader application that would efficiently fight international terrorism. A hint of this may be found in Spain’s refusal to extradite terrorist suspects to the United States for fear that they would be tried before military tribunals that failed to meet basic and essential standards of due process. “Authorities in Spain this week expressed reluctance to hand over eight alleged terrorists they have arrested if it meant the men would be put before a U.S. tribunal.”²³⁴

To the contrary, it may be argued that trying terrorists before a civilian court and not before a military tribunal that follows special procedures may

230. See *Quirin*, 317 U.S. at 1 (In *Quirin*, Congress authorized the use of military tribunals. This authorization was the result of several legislative decisions stitched together. First, Congress had declared war and had understood the government’s total commitment to the war effort). See Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796. Second, there was a pair of statutes explicitly authorizing trial by military commission for spying and providing aid to the enemy. See also Brief of the Respondent app. III, at 78-79, *Quirin* (Orig. Nos. 1-7), reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 397, 479 (Philip B. Kurland & Gerhard Casper eds., 1975).

231. See Katyal & Tribe, *supra* note 127, at 1284-93. For the distinction between the cases in the past when Congress authorized trial by military tribunals and the circumstances in which the executive order was issued following the events of September 11, 2001. See *id.*

232. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. (2001) The Resolution states:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determinate planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

233. See EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 4 (1947).

234. T.R. Reid, *Europeans Reluctant to Send Terror Suspect to U.S.*, WASH. POST, Nov. 29, 2001, at A23. See also Berke, *supra* note 121.

serve the interests of the terrorists. A public trial open to the press may provide them with a platform to disseminate their ideas, persuade people of the justice of their actions, and most seriously, continue to sow fear among the general public.²³⁵ These phenomena must be prevented and a military tribunal, operating on the basis of special criminal procedures, has the power to do so before they take place. In the United States, for example, the President decided to try Zacarias Moussaoui before a federal court, even though he is a French citizen. According to the United States, Moussaoui was involved in the planning and execution of the attack of the September 11. He was supposed to be one of the airplane hijackers; however, his arrest on immigration charges in August of 2001 prevented him from taking part in the actual attack.²³⁶ During his trial, the fear that the public process would be misused bore fruit. Moussaoui waived his right to representation by counsel and instead of concentrating on conducting his defence chose to make political speeches with the aim of broadcasting his views, even though these views tended to incriminate him:

For one thing, his 50-minute speech before Judge Leonie M. Brinkema supported the prosecution's portrait of him as a hate-filled terrorist. He told the Court that he prayed to Allah for 'the destruction of the United States of America' and for the 'destruction of the Jewish people and state.'²³⁷

Is the fear and panic that speeches of this type seek, a price that society wishes to pay? If defendants charged with terrorism ignore their rights, including their right to due criminal process, and instead focus on using the process for their own contemptible purposes, one must be justified in strengthening the legal position of tribunals, such as the military tribunals for terrorists, in order to enable their legal procedures to operate to prevent the terrorists from using the process as a device for achieving their objectives.

There is no doubt that court room "shows" of the type staged by Moussaoui must be prevented. However, the tools for preventing these displays are not necessarily found in closed hearings before a military tribunal. It is possible to conduct the trial in a civilian court, in which the

235. See, e.g., Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 § 20 (Eng.) [hereinafter Prevention of Terrorism Act]. "Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Id.* The desire to cause fear is one of the prominent components of all the various definitions of terrorism.

236. See Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks; Action Formally Links Man to Al Qaeda, States Evidence Against Bin Laden*, WASH. POST, Dec. 12, 2001, at A1. Robert O'Harrow, Jr., *Moussaoui Ordered to Stand Trial In Alexandria*, WASH. POST, Dec. 14, 2001, at A15.

237. Neil A. Lewis, *Mideast Turmoil: The Terror Suspect; Moussaoui's Defense Plan Complicates Terror Trial*, N.Y. TIMES, April 26, 2002, at A12.

judge may choose to exercise his inherent power to caution the defendant against improper use of the process. In cases where the defendant disregards these cautions, the judge may immediately terminate his “speech” and find him guilty of contempt of court.

It should be recalled that the support for the trial of terrorists before the civilian court system in accordance with existing legal procedures is not intended to provide the terrorists with a “platform” for spreading their ideas, but rather to prevent the conviction of innocent persons. As we have explained, the danger of convicting innocent persons increases when the process is conducted in a military tribunal, in accordance with special procedures that violate the rights of the accused. Indeed, military tribunals like the civilian courts are interested in the truth and are capable of unearthing it. However, contrary to the position in the civilian legal system, exposing the truth as it emerges from the evidentiary materials before it is the central consideration guiding the military tribunals and not the real fear which informs the civilian legal system that innocent people may be convicted.

There are those who contend that because we are concerned with the trial of terrorists, it would be correct not to focus too intensely on the fear of convicting the innocent:

The civilian criminal justice system, which entails a trial to a jury of twelve persons who must unanimously agree that a particular defendant is guilty beyond a reasonable doubt, is designed to err on the side of letting the guilty go free rather than convicting the innocent. However, when this nation is faced with terrorist attacks that inflict mass murder or hundreds of millions of dollars damage in a single instance, we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims becomes paramount.²³⁸

More precisely, it would seem that even those who support terrorists being tried by military tribunals are not willing to go to the extreme of allowing rules of procedure and evidence as stated by the executive order: “I think even those of us supportive of the concept of a military tribunal think it makes sense to confine its jurisdiction to the leaders of terrorist organizations.”²³⁹ “These are extreme circumstances, and I think the [P]resident’s action is not unreasonable On the other hand, it is a little surprising they would settle on less than a unanimous vote to impose the death penalty.”²⁴⁰

238. Crona & Richardson, *supra* note 47, at 379.

239. Blum, *supra* note 7 (quoting former Deputy Solicitor General, Philip Lacovara, now a partner in the Washington, D.C. office of Chicago’s Mayer, Brown & Platt).

240. *Id.* (quoting former Secretary of the Army Togo West, Jr., a lawyer at D.C.’s Covington & Burling).

In their article, Spencer J. Crona and Neal A. Richardson, who support military tribunals, propose a model that would better ensure the exposure of the truth than would be the case under the procedures for operating the military tribunals outlined in the executive order. For example, they would allow a deviation from the rules of evidence prevailing in the "regular" legal system, but would prohibit the admission of evidence elicited in an unlawful manner, such as an unlawful search, in contravention of the right against self-incrimination, or in a statement given without the customary Miranda warning.²⁴¹ And yet, the authors contend that the deviation from the rules of procedure and evidence, the erosion of constitutional safeguards available to a defendant facing a military tribunal, and the violation of the due process of law, are all legitimate measures in the war against terror.

[T]he pre-eminent question with due process always is; given the circumstances, what process is due? We assert that the military commission approach provides the process due to those accused of committing terrorist war crimes . . . It is legally and intellectually disingenuous to provide terrorists the same rights as persons accused of ordinary crimes against society. Our Bill of Rights was designed to protect individuals in society against the arbitrary exercise of government power. It is not meant to protect commando groups warring on society through arbitrary acts of mass violence.²⁴²

I consider the argument, that those who breach the laws of war are not entitled to enjoy any of the constitutional protections conferred by the U.S. Constitution, irrelevant. The desire to try persons within the "regular" legal system is motivated by the wish that society enjoy the benefits of doing justice, which includes convicting the guilty and acquitting the innocent. This is the primary characteristic of every court and tribunal. It is a forum of justice. The enjoyment obtained by an accused from constitutional safeguards is an enjoyment that is ancillary to the primary purpose of due process, which will ultimately end with the revelation of the truth and the performance of justice.

Indeed, why not show the world that the United States is able to "perform justice?" Why is it necessary to be enveloped in this cloak of secrecy?

Why are we afraid of using our own processes? Trials are emblematic of both the possibility of knowledge and the risk

241. Crona & Richardson, *supra* note 47, at 385.

242. Crona & Richardson, *supra* note 47, at 396, 405.

that information could come affecting judgment of those accused. The profoundly emotional response to the tragedy and horror of Sept. 11, 2001, has created an environment afraid of deliberation. The effort to preclude that process represents a desire to ensure punishment. Despite the terrorists attack on the United States, the presidency has continued to function. And although disrupted by anthrax, Congress still works. *Why should we accept the order's premise that the federal judiciary cannot similarly do its job of sorting the guilty from the innocent? Now is not the time for a radical form of alternate dispute resolution. Rather, it is a time to display our courts and our constitution as proudly as our flag.*²⁴³

If any legal system in the world can cope in a fair, efficient, and open manner it is the American legal system: "No country with a well functioning judicial system should hide its justice behind military commissions or allow adjudication of the killing of nearly 4,000 residents by an external tribunal. Why not show the world that American courts can give universal justice?"²⁴⁴

Moreover, it should be remembered that terrorism is not a new phenomenon. During the Clinton period, a number of terrorist attacks took place against the United States. At that time, no one proposed trying terrorists before military tribunals. To the contrary, Attorney General Janet Reno treated terrorists like other criminals: "There are good reasons to use the criminal justice system. It sends a signal to the world of the unimpeachable integrity of the process."²⁴⁵

The victims of the acts of terror of September 11 justify the executive order. In their view: "Al-Qaeda and its supporters . . . despise the freedoms Americans cherish and have not only declared war on this country but also declared hatred against it."²⁴⁶ This argument supports the position that the executive order is likely to be understood and accepted on an emotional basis because of the many fatalities and injuries caused by the terrorist attack. However, this argument does not justify the order; it misses the essence of the problem, the likelihood of an improper process leading to a discrepancy between the factual truth and the conclusions ultimately reached by the panel of the military tribunal.

243. Judith Resnik, *Invading the Courts We Don't Need Military "Tribunals" to Sort Out the Guilty*, LEGAL TIMES, Jan. 14, 2002, at 34. (emphasis added).

244. Koh, *supra* note 54, at A39.

245. Oliphant, *supra* note 223, at 3 (quoting Randy Moss who headed the Justice Department's Office of Legal Counsel during the Clinton administration).

246. Blumenthal, *supra* note 202 (quoting U.S. Solicitor General Theodore B. Olson, whose wife died in the September 11 terror attack).

We should emphasize that we are not arguing that terrorists are entitled to move freely is not being set forth. The argument is that the state and society must support a process that identify those who are the real terrorists and those who are merely people wrongly suspected of terrorist offenses.

Because of the many criticisms directed at the executive order as originally formulated, along with the serious ramifications it had for a fair criminal process, on March 21, 2002, Secretary of Defense Donald H. Rumsfeld published an order specifying new guidelines for the operation of the military commissions for trying terrorists.²⁴⁷ He stressed: "Let there be no doubt that these commissions will conduct trials that are honest, fair and impartial . . . While ensuring just outcomes, they will also give us the flexibility we need to ensure the safety and security of the American people in th[e] midst of a difficult and dangerous war."²⁴⁸

In theory, the new provisions in the order seek to achieve a fair legal process;²⁴⁹ however, the existence of multiple basket provisions²⁵⁰ may pose an obstacle to obtaining a fair trial in practice. It must be recalled that the concern here is with terror offenses that fall within the category of criminal offenses against national security. In such a class of cases, the prosecution will frequently demand to make use of provisions authorizing secret evidence or hearings *in camera* on grounds of national security. Accordingly, it is not clear whether the order issued by the Department of Defense will indeed lead to changes that are substantively different from those ensuing from the executive order; particularly in light of the provision that in every case of incompatibility between the two orders, the executive order shall govern.²⁵¹

This is the place to note the principal changes effected by the Department of Defense's order:

247. See Department of Defense Military Commission Order No. 1, available at <http://www.defenselink.mil/news.Mar2002/d20020321ord.pdf> (last visited Mar. 23, 2002) [hereinafter Military Commission Order].

248. DoD News: *Secretary Rumsfeld Announces Military Commission Rules*, available at http://www.defenselink.mil/news/Mar2002/b03212002_bt140-02.html (last visited Mar. 23, 2002) [hereinafter DoD News].

249. See Military Commission Order, *supra* note 247, art. 1. The purpose of this article is as follows: "[t]hese procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order." *Id.*

250. See, e.g., *id.* art. 9 (provisions that place national security at the head of the list of priorities and prohibit contrary activities). Article 9 provides for the protection of state secrets that "[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." *Id.* For a provision that enables hearings *in camera* on various grounds of state security, see Article 6(B)(3): "Grounds for closure include . . . intelligence and law enforcement sources, methods, or activities; and *other national security interests.*" See *id.* art. 6 (emphasis added).

251. See *id.* art. 7(B).

- **Application:** Article 3 provides for application of the order in accordance with the executive order.²⁵² The distinction between a terrorist suspect who is not an American citizen and one who is a U.S. citizen is preserved. Only the former may be tried before the military tribunal.
- **Panel of judges:** Every panel will be composed of between three to seven judges.²⁵³ The judges will be military officers in the U.S. army, and not professional judges.²⁵⁴ Presiding over every tribunal will be a president who is required to be a military lawyer by profession.²⁵⁵
- **Prosecution:** All the prosecutors will be military officers who act as military advocates.²⁵⁶
- **Representation:** The accused has the right to be represented by counsel throughout the proceedings.²⁵⁷ The accused has the right to choose a civilian attorney (to be paid for by the accused) on condition that the attorney meet a number of criteria, including security clearance at the level of “secret” and above.²⁵⁸ Whether or not the defendant has chosen his own attorney, the judicial panel will appoint a military advocate.²⁵⁹
- **Trial format:** The rule is open trials and a press presence.²⁶⁰ However, in cases where the prosecution wishes to present classified information, the hearing will be closed to the public.²⁶¹ This will also occur in cases where various security interests require hearings to be held *in camera*.²⁶²
- The rule is that the accused will be present during the hearings subject to certain exceptions relating to security interests.²⁶³
- The accused has the right to obtain the indictment in a language he understands in order to prepare his defense.²⁶⁴
- The accused will enjoy the presumption of innocence and will be deemed innocent until his guilt is proved.²⁶⁵
- The standard of proof needed for a conviction is beyond a reasonable doubt.²⁶⁶

252. *See id.* art. 3(A).

253. *See id.* art. 4(A)2.

254. *See id.* art. 4(A)3.

255. *See* Military Commission Order, *supra* note 247, art. 4(A)4.

256. *See id.* art. 4(B)2.

257. *See id.* art. 4(C)4.

258. *See id.* art. 4(C)3(b).

259. *See id.* art. 4(C)2.

260. *See id.* art. 5(O).

261. *See* Military Commission Order, *supra* note 247, art. 6(D)5(c).

262. *See id.* art. 6(B)3.

263. *See id.* art. 5(K).

264. *See id.* art. 5(A).

265. *See id.* art. 5(B).

266. *See id.* art. 5(C).

- The accused will obtain the benefit of the privilege against self-incrimination — he cannot be forced to testify against himself, and his refusal to testify cannot be used against him.²⁶⁷
- The accused will have the right to conduct cross-examinations of prosecution witnesses.²⁶⁸
- The accused shall have the right of access to the evidence against him.²⁶⁹ At the same time, the rules of evidence will differ from the rules of evidence in the civilian legal system.²⁷⁰ It will be possible to use types of evidence that are inadmissible in the civilian legal system such as hearsay or opinion evidence.²⁷¹

The military will allow prosecutors to use evidence that has a '*probative value to a reasonable person*,' which could include hearsay statements or documents and other evidence that came into prosecutors' hands through unorthodox means.²⁷²

The evidence standard opens the door to hearsay and physical evidence obtained by military forces in Afghanistan . . . preventing any chain-of-custody challenges.²⁷³

- The prosecution has the right to use secret evidence and not to disclose the source of the evidence.²⁷⁴ It should be noted that the order does not allow use against the accused of evidence that has been concealed from the military defense advocate who has been appointed for him.²⁷⁵ It would be expected to find a similar provision in relation to the failure to disclose information to the civilian lawyer, as the latter is required to possess security clearance at least at the "secret" level; however, the order is silent about this situation. Its silence is likely to be interpreted as permission to use evidence against an accused even though that evidence has not been disclosed to the civilian lawyer who has been appointed by the accused to conduct his defense. In contrast, in a trial in the civilian court system, the prosecution is obliged to disclose secret

267. See Military Commission Order, *supra* note 247, art. 5(F)(G).

268. See *id.* art. 5(I).

269. See *id.* art. 5(E).

270. See *id.* art. 6(D)(1).

271. See *id.* art. 6(D)(3). This provision states that "[s]ubject to the Requirements of Section 6(D)(1) concerning admissibility, The Commission may consider *any other evidence including, but not limited to*, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." *Id.* (emphasis added).

272. Associated Press, *Military Tribunals to Resemble Courts-Martial*, DOW JONES INT'L NEWS, Mar. 20, 2002 (emphasis added).

273. David E. Rovella, *Tribunals Tribulations. Debate focuses on Fairness, Secret Evidence and Appeals Process*, PALM BEACH DAILY BUSINESS REVIEW, Mar. 26, 2002, at A7.

274. See Military Commission Order, *supra* note 247, art. 6(D)5(a).

275. See *id.* art. 6(D)5(b).

information and its sources or lose a conviction. Such a situation is likely to complicate the defense of the accused.

- A two-thirds majority is needed for a conviction. However, in cases where the death penalty is imposed, there must be a unanimous verdict.²⁷⁶
- In the event of a conviction, the accused may apply for a review by a special panel composed of three military officers, at least one of whom has experience as a judge.²⁷⁷ In suitable cases, the case will be transferred to the Secretary of Defense and from him returned to the judicial panel or transferred to the President for a final decision.²⁷⁸

There should be no mistake: these modifications draw us closer to the goal sought by the judicial system in a democratic country — the pursuit of justice. However, the fact that the legal procedures and laws of evidence are not identical to the legal procedures applicable in the federal legal system leaves the danger that the nature of the special judicial forum will have an impact on the procedural rights of the accused and ultimately on the latter's basic human rights. Allowing hearings to be conducted *in camera* and the use of secret evidence, as well as the use of various types of evidence that are not admissible in the civilian legal system are likely to result in serious violations to the procedural rights of the accused. Moreover, there is no guarantee that these violations will be proportional and for a proper purpose. This is because the judges are not professional judges, but rather military officers who identify very strongly with the national security interests. The prosecutors are military advocates as well. The resulting absence of the separation of powers between the judges and prosecutors continues to undermine the fairness of the criminal process as it is meant to be conducted under the order. There is a real likelihood of consensus between the judges and prosecutors as to the use of provisions that will violate the rights of the accused. No balancing factor will be available that will point to the error in making unnecessary use of "secret" measures. Moreover, the right of appeal provided for by the order is not a right of appeal to a civilian court or to the Supreme Court. It refers to a panel that is similar in its composition to the original judicial panel, and the final decision rests with the President. It follows that the entire process remains within a special military system; whereas, the offense itself is no different from any other criminal offense tried within the civilian framework. The existence of a right of appeal strengthens the elements of fairness and reasonableness in the legal process. The absence of a right of appeal to the civilian legal system will necessarily have an impact on the nature of the adjudication in the military tribunal, as:

276. *See id.* art. 6(F).

277. *See id.* art. 6(H)(4).

278. *See id.* art. 6(H)(5) – (6).

the existence of an appeals instance which has the function of bringing the actions of the lower court under review directly affects the functioning of the lower court, channels issues to their proper course and promotes, by virtue of acting in these areas, the standing and prestige of the judicial institution and the confidence felt in it.²⁷⁹

A close reading of the provisions of the order leads to the conclusion that the changes that the President decided to authorize were proper but insufficient. One may understand that within the framework of the war against terror, the President of the United States thought he was under a duty to establish separate tribunals to try terrorists in order to focus the task of adjudication on this subject-matter and draw the population's attention to the steps taken by the government to promote their security. The Secretary of Defense explained it as follows:

Make no mistake, we are dealing with a dangerous and determined adversary, for whom Sept. 11 was just the opening salvo in a long war against our nation, our people and our way of life. We have no greater purpose, no greater responsibility as a nation, than to stop these terrorists, to find them, root them out, and get them off the streets, so that they cannot murder more of our citizens. The President has a number of tools at his disposal to meet that difficulties challenge, including the use of military commissions to try captured Taliban and Al Qaeda terrorist.²⁸⁰

It is difficult, perhaps even impossible, to understand what connection exists between the need for intensive and focused judicial treatment of terror offenses designed to capture terrorists and distance them from society, and the modification of the laws of procedure and evidence applicable in the trial of every other criminal offense. Special judicial treatment should not deviate from just forms of treatment. The amendments to the order have not yet internalized this principle. So long as the tribunals act otherwise than in accordance with the rules of procedure applicable in all other criminal processes, the chances of capturing the real terrorists are not great.

279. H.C. 87/85, *Argov v. Commander of IDF Forces in Judea and Samaria et al*, 42(1) 353, 373 (Heb.).

280. See DoD News, *supra* note 248.

Great Britain

The path that Britain chose to pursue in dealing with terrorism is primarily that of counter-terrorism legislation. This legislation clearly leads to the different treatment of terrorist suspects as well as to divergent legal procedures and rules of evidence applied in connection with persons accused of terrorist offenses.

Statutes such as the Prevention of Terrorism (Temporary Provisions) Act of 1989 (PTA) and the Northern Ireland (Emergency Provisions) Act of 1996 (EPA) confer upon the police and the security forces broad powers of search, arrest, and detention that can be carried out without a warrant and without need for reasonable suspicion.

The legislation having the greatest ramifications for the conduct of a fair trial is the Criminal Justice (Terrorism and Conspiracy) Act of 1998 (CJTCA). This Act significantly modified the type of evidence admissible in a legal proceeding on the basis of which suspects may be convicted of involvement in terrorist organizations. In order to convict a person of membership of an organization listed under the Act, the CJTCA allows a police officer to testify that: “[I]n his opinion, the accused belongs to an organization [sic] which is specified, or belonged at a particular time to an organisation [sic] which was then specified.”²⁸¹ This testimony is admissible and evidence of the contents of the statement, although a person cannot be convicted merely on the basis of a police officer’s testimony.²⁸² As a result of this Act, the police officer is transformed into an expert witness, who is not only entitled to testify as to the facts, but may also give interpretations and opinions.

The possibility of obtaining an impression from the opinion of a police officer combined with the situation where increased use is made of secret evidence — on the ground that disclosing the evidence would be contrary to the public interest²⁸³ (because it would reveal the police officer’s source of information thereby endangering the life of the informant) — is likely to seriously violate the right of the accused to due process and his ability to refute the evidence against him or cast doubt on the impression created by the police officer in his testimony against him.

The issue of using secret evidence arises in two separate situations. In the first situation the prosecution may keep the evidence secret and still make use of it, in other words, the secrecy is specifically directed towards a certain defendant and his defense attorney. The secrecy does not apply in relation to the court and the prosecution is entitled to present the evidence to the judges. This evidence is likely to have significant influence on the judgment of the court, notwithstanding that the accused has not been given any opportunity to

281. Criminal Justice (Terrorism and Conspiracy) Act, 1998, ch. 40, §1(2) (Eng.) [hereinafter CJTCA].

282. See *id.* §1(3).

283. See *R. v. Hennessey*, 68 Cr. App. R. 419, 425 (1978).

cast doubt on the reliability and relevance of the evidence against him. The second situation is where the prosecution seeks to keep evidence secret, but in so doing forfeits any opportunity to make use of the evidence against the defendant or bringing it before the court.²⁸⁴ The privilege is directed at the accused and his defense attorney as well as the court. In a case where the interests of justice require the disclosure of the evidence and the prosecution persists in its refusal to disclose it, the defendant will most likely be acquitted.²⁸⁵ The CJTCA is concerned with the first situation. This is the more serious scenario from the point of view of the ramifications for the basic right of the accused to a fair trial.

At the same time, the court held in 1994 that there was no impropriety in the use of secret evidence where the intention was to protect the identity of an informant used by the police, except in cases where the exposure of the informant would enable the defendant to prove his innocence or prevent a miscarriage of justice.²⁸⁶

In terror type offenses, the clash between the public interest in using secret evidence and the right to a fair trial, and the danger of causing a miscarriage of justice to an accused is severe. The likelihood that the defendant will succeed in proving that his interest in disclosing the evidence overrides the interest in defending public security is non-existent:

[I]n many of these situations it is likely that the balance may favor non-disclosure. This is due to the nature of prosecutions for terrorist offenses. They often involve information flowing from highly confidential intelligence sources Also, there will be a great need to keep the identities of

284. *See, e.g.*, Evidence Ordinance, *supra* note 99, at sec. 45. This section states that A person does not have to deliver *and the court shall not admit*, a piece of evidence, if a Minister expressed the opinion by a certificate signed by him that delivering it is liable to injure an important public interest, unless the Court hears that the matter of the petition of the party who asks that the evidence be revealed decides that the need to reveal it in order to do justice outweighs the interest not to reveal it.

Id. (emphasis added).

285. *See* M.A. 838/84, Livni et al v. State of Israel, 38(3) P.D. 729, 736-737 (Heb.). This case states that:

Where the court has held that the evidence must be disclosed, the prosecution faces a dilemma, whether to continue the criminal proceedings or end them. If it continues, it will have to disclose the evidence. If it believes that disclosure of the evidence will harm national security, it will have to bring about the termination of the criminal proceedings and on occasion even the acquittal of the accused.

Id. This is the law applicable in Israel.

286. *See* R. v. Keane, 2 All E.R. 478, 99 Cr. App. R. 1 (1994). Likewise, the laws of evidence in Israel permit the disclosure of privileged information where the need to disclose it in order to prevent a miscarriage of justice supercedes the interest in non-disclosure. *See* Evidence Ordinance, *supra* note 99, at secs. 44(a) and 45.

informers confidential due to the reputation of certain paramilitary and terrorist organizations of exacting revenge on informers.²⁸⁷

The Act also undercuts the defenses available to a defendant and his right to a fair trial by permitting the violation of his right to silence. The Act permits a jury to draw conclusions from the silence of the defendant during the investigation and hold that silence against him in two situations.²⁸⁸ First, when the suspect was interrogated prior to being charged and was permitted to meet an attorney prior to the interrogation. Second, after he was charged or a police officer informed him that he would probably be charged and he was interrogated after he was permitted to meet an attorney. In addition, it should be noted that in these cases it is not possible to obtain a conviction solely on the basis of the defendant's silence.²⁸⁹ Nonetheless, the Act is quiet as to the situation where the defendant's silence is joined with a police officer's opinion that the accused is a member of a terrorist organization.

Further erosion of a terrorist suspect's right to a fair trial may occur at an earlier stage when he is still only a suspect; as the Act permits a suspect to be held for up to seven days before being brought before a judge.²⁹⁰ During the first forty-eight hours there is no obligation to provide the suspect with an attorney or allow him to make a telephone call. This leaves the door open for the application of enormous psychological pressure upon the suspect to answer the questions of the interrogation team and undermines his right to silence to an extent that may lead to an unsound conviction.

In the United States, as in Britain, it would seem the purpose of the measures that violate the right to due process is to deter terrorists and give preference to public and state security interests at the expense of human rights. This is achieved in a manner that is not proportional:

The CJTCA is also unlikely to aid the apprehension of terrorists or to deter potential terrorists from committing offenses In the long run, all that the CJTCA may accomplish is an increase [in] the number of terrorist convictions and, given the evidentiary burdens that face these suspects, a corresponding increase in the number of innocent people falsely convicted.²⁹¹

287. Kevin Dooley Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act of 1998 Be Reconciled with its Human Rights Act?*, 33 VAND. J. TRANSNAT'L L. 221, 243 (2000).

288. See CJTCA, *supra* note 281, § 1(4).

289. See *id.* § 1(6)(b).

290. See Prevention of Terrorism Act, *supra* note 235, §§ 14(4) and 14(5).

291. Kent, *supra* note 287, at 271.

Special attention should be given to the manner in which it was decided to try terrorist suspects in Northern Ireland. In view of the frequency of terrorist attacks in Northern Ireland, a non-jury judicial process was established for these types of offenses. This decision formed a clear exception to the customary mode of trial: "There is no more potent symbol of the common law tradition than the jury trial."²⁹²

The system of trial without a jury in Northern Ireland, known as the "Diplock Trials,"²⁹³ enables a suspect to be immediately arrested and held for up to four weeks before being brought before a judge. On the other hand, if the offense for which a person is being detained is not classified as a terrorist offense, but is an "ordinary" crime of violence, a preliminary inquiry has to be held before a magistrate who will determine if there is probable cause evidencing guilt.²⁹⁴ When the prosecution is of the opinion that the offense is a terror offense, he will transfer the case to the Director of Public Prosecutions for Northern Ireland who will decide whether the offense may indeed be classified as a terrorist offense that justifies trial without a jury.²⁹⁵ A judge does not have power to release the defendant on bail.²⁹⁶ Generally, the Director of Public Prosecutions will require clear and solid evidence of the fact that the offense relates to terrorism.²⁹⁷ Within twenty-four hours of receiving the case file, the Director of Public Prosecutions must decide whether the case will be tried before a "Diplock court." The Act creates a special judicial system for terror offenses: "The system is designed to filter out of the Diplock process trials which are not terrorist-related, which the statute defines as involving the use of violence for political means."²⁹⁸

This method of trying terrorists deviates from accepted rules of evidence and procedure, which results in the violation of the rights of the accused. Such rights include the right to remain silent. As previously seen, later legislation allows the violation of the right of silence and permits conclusions to be drawn from the silence of the accused or his refusal to testify in cases where the accused has been charged with terror offenses.²⁹⁹ Accordingly, this violation is not unique to the Diplock trials system, but to terror offenses as a whole. This was also the explanation given for the provisions of the

292. John Jackson & Sean Doran, *JUDGE WITHOUT JURY: THE DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* 48 (1995).

293. See Diplock Report 1970, promulgated into status in 1973, now the Northern Ireland (Emergency Provisions) Act 1991 (EPA). Named for Lord Diplock, Chairman of the Parliamentary Commission that studied the problems emanating from the violence and ultimately recommended the measure.

294. See Carol Daugherty Rasnic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239, 244 (1999).

295. Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 65 (N. Ir.).

296. See generally Criminal Evidence Order, 1988, No. 1987 (N. Ir.).

297. See Jackson & Doran, *supra* note 292, at 21.

298. Rasnic, *supra* note 294, at 246.

299. Criminal Evidence Order, *supra* note 296, § 3(5).

Evidence Order that enable the silence of a defendant to be used against him: “Defending the legislation in the House of Commons, prior to its passage, Secretary of State for Northern Ireland, Mr. Thomas King, stated that the Evidence Order resulted from the continued abuse of the judicial system in Northern Ireland and the *difficulties many prosecutors were experiencing in litigating terrorist trials.*”³⁰⁰

In other words, convenience – easing the task of prosecutors in dealing with the evidentiary burden in terrorist offenses – was offered as the justification for violating the basic right of *every* defendant to a fair trial.

The Diplock system causes particular harm to the right to silence and the privilege against self-incrimination when it permits an admission to be obtained from a suspect or accused by means of a “moderate degree of physical maltreatment.”³⁰¹ However, a judge has discretion whether or not to accept an admission gained in this way and may reject it in order to prevent a miscarriage of justice to the defendant or for other reasons of justice.³⁰²

The appeal process in relation to Diplock trials is automatic. Therefore, alleviating to some extent the injury to a defendant who has been deprived of the right to a jury trial in the customary manner.³⁰³ However, freeing oneself from the grim impression created by the special rules for terrorist offenses is difficult because the presumption of innocence has been pushed into a corner. Furthermore, the entire process is based on the assumption that a person charged with terror offenses must indeed be guilty even though their guilt has not been proven.

Britain, like Northern Ireland, has also made an effort to give “special treatment” to terror offenses. Britain employs a special judicial forum that is different from the forum used for other criminal offenses, based on the deliberate and clear knowledge that the alternative treatment will influence the protection given to an accused to prevent an unfair trial. The justifications offered for this treatment are efficiency, that is, use of a person as an expeditious instrument to achieve objectives in the fight against terrorism, and convenience aimed at the benefit of one party only, the state. However, “[t]here is no discernable consensus among bench and bar in Northern Ireland as to whether the Diplock trial functions as a means toward the laudable goal of dealing with violence in the most effective and expeditious manner.”³⁰⁴

To the contrary, in order to succeed in the fight against terrorism in Northern Ireland and elsewhere, it would be better not to have a special system of rules and a separate judicial forum for terrorist defendants:

300. Thomas P. Quinn, Jr., Note, *Judicial Interpretation of Silence: The Criminal Evidence Order of 1988*, 26 CASE W. RES. J. INT’L L. 365, 374 (1994) (emphasis added).

301. Rasic, *supra* note 294, at 249 (Quoting *R v. McCormick and Others* (1977) 105, 111 (McGonigal, J)).

302. See Northern Ireland (Emergency Provisions) Act, *supra* note 295, § 11(3).

303. See Jackson & Doran, *supra* note 292, at 26.

304. Rasic, *supra* note 294, at 255.

Long-heralded as the birthplace of individual rights and liberties, the home of the Magna Carta, and the Bill of Rights of the Glorious Revolution, Great Britain has reverted to tyrannical measures to deal with the crisis in Ireland. The sides to the crisis in Northern Ireland are currently seeking a peaceful settlement.

*Respect for the rule of law is crucial to the success of this process, and depriving suspected terrorists of fundamental legal rights has no constructive role. For 'without the higher moral ground of legality and fairness, any democratic society is left weaker against its enemies.'*³⁰⁵

It should be noted that the Diplock trials have been abolished as well as the interrogation process which permitted the use of violence in Britain.³⁰⁶

Following the terrorist attack of September 11, 2001, on the United States, Britain declared a state of emergency based on the ground that the attack on September 11 amounted to a threat to the life of the nation as a whole. Accordingly, under Article 15 of the European Convention on Human Rights,³⁰⁷ which during times of emergency or war permits violation of rights entrenched in the Convention. Britain saw fit to renew its counter-terrorism legislation in a new statute, the Anti-Terrorism, Crime and Security Act, 2001.³⁰⁸ This Act permits the use of measures that are more injurious to the rights of the person suspected or accused of terrorist acts. Critics of the Act have expressed themselves unable to understand why British Prime Minister Tony Blair and Home Secretary David Blunkett were not satisfied with the existing legislation but instead wished to deal more harshly with persons already subject to severe treatment:

Last year's act extended police powers to investigate, arrest and detain. It created new offenses, which permit the courts to deal with terrorist acts and their planning, wherever in the world they are carried out. All that it required is a charge and evidence, leading to that old-fashioned legal commodity:

305. Quinn, *supra* note 300, at 399 (emphasis added).

306. Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 131 (2001).

307. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 22. Britain adopted this Convention into its domestic law in 1998 and since then the Convention has been regarded as the British Charter of Human Rights. See also Kent, *supra* note 287, at 225.

308. Anti-Terrorism, Crime and Security Act. (2001), available at <http://www.the-stationery-office.co.uk> (last visited Mar. 19, 2002).

proof beyond a reasonable doubt. No presumption of innocence. That is now considered too demanding. With an eye to new-style ‘foreign’ terrorism, Blunkett’s bill says that foreign nationals suspected of terrorism can be detained indefinitely without charge or trial, simply on the basis of a certificate signed by him that they are a threat to national security and suspected of being international terrorists. That is all. The presumption of innocence, fundamental to justice in both our great countries, will not apply. The Star Chamber lives again. The [H]ome [S]ecretary can act on suspicion and belief based merely on information provided by the security services and antiterrorist police. The quality of that information will not be challenged or tested by the alleged terrorist because he will not be told what it is -nor will his attorney. Suspects, thus found guilty by certificate and not by the verdict of a jury, will be held for six months in a high-security jail after which their case will be reviewed by a special immigration commission, with further reviews every six months. But there will be no right to appeal to the normal courts save on a question of law. *Habeas corpus* will not be available.³⁰⁹

Furthermore, as we saw John Ashcroft, the U.S. Attorney General, explain the executive order and its violation of the right to due process by the statement: “Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protection of the American Constitution.”³¹⁰ So too, his equivalent in Britain, David Blunkett, explained that he would do everything necessary in order to protect British nationals. Moreover, this article has already considered the flaws in this approach.

PART SIX

The International Criminal Court as an appropriate tribunal for trying terrorists

309. Fenton Bresler, *Certified Criminals*, NAT’L L. J., Dec. 10, 2001, at A21 (emphasis added).

310. See DoD News, *supra* note 248.

Background

On July 17, 1998, the Rome Statute was signed.³¹¹ One Hundred and twenty states voted for the establishment of an international criminal court (ICC). Seven states objected, including Libya, China, Iraq, Israel, and the United States. Twenty-one others abstained. The Rome Statute entered into force after sixty states ratified it.³¹²

The ICC purports to be an international forum available to all, designed to conduct legal proceedings in an objective manner, with neutral judges. Excluded from the panel will be judges from states that have been injured, which have caused the injury, or are allies of judges from such states.³¹³

The main reason for the establishment of the ICC was the strong desire of the UN to set up a permanent international tribunal to replace the *ad hoc* tribunals,³¹⁴ which the UN and the international community as a whole had concluded possess more disadvantages than advantages. First, the jurisdiction of an *ad hoc* tribunal is limited to the states represented on the tribunal; second, it is extremely expensive to establish new *ad hoc* tribunals each time a conflict occurs in which it is claimed that human rights have been violated.³¹⁵ The pressure exerted by the international community and in particular the NGOs and human rights organizations should also not be disregarded. In retrospect, the activities of the latter in particular had great influence on the manner of establishment of the ICC.³¹⁶

The ICC has three primary objectives:

Deterrence:³¹⁷ The ICC will cause people, from the simplest soldier to the most senior officers and political leaders, to be aware that they are responsible for their actions and may be answerable for them in the future.

Complementary:³¹⁸ The ICC will complement the criminal legal system in every country. If a state has failed to exercise its judicial mechanisms for

311. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10 (1998); Rome Statute on the International Criminal Court, 37 I.L.M. 999 (1998) [hereinafter *The Rome Statute*].

312. See *id.* art. 126.

313. See *id.* arts. 34-38 (regarding the composition of the panel of judges).

314. See Blakesley, *supra* note 48, at 240.

315. LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION* 6 (1997).

316. See generally Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

317. See Carroll Bogert, *Pol Pot's Enduring Lesson*, FIN. TIMES, Mar. 16, 1998 at 16.

318. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 710 (1996) (discussing the importance of an international tribunal's ability to take over a matter when a national criminal justice system proves inadequate).

trying atrocities, the ICC will enter the fray and rectify the failure. In particular, the tribunal is intended to be used in relation to weak nations which are unable to bring suspected criminals to justice.

Permanence:³¹⁹ The ICC will be a permanent fixture that will document the atrocities and the stories of the survivors.

The principal crimes within the jurisdiction of the court:

Article Five of the Statute provides that jurisdiction will lie over: “[T]he most serious crimes of concern to the international community as a whole.”³²⁰ These crimes include Genocide, crimes against humanity, war crimes, and crimes of aggression. For the purposes of the Statute, ‘genocide’ includes: “commit[ing] [acts] with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . .”³²¹; ‘crimes against humanity’ includes “[crimes] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . .”³²²; and ‘war crimes’ mean “[crimes] committed as part of a plan or policy or . . . as a large-scale commission of such crimes.”³²³

The provision relating to acts of aggression is one of the most problematic, because the Statute does not define what is meant by the term. The Article will only enter into force seven years after the entry of the Statute into force, at which time a definition of the offense will be established. In the meantime, a definition has been adopted from a draft code concerning crimes against international peace and security, which defines aggression as follows: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.”³²⁴

On the last day before the final ratification of the Statute a provision was added enabling the international community, at some time in the future, to add offenses relating to acts of terror and international trade in drugs to the jurisdiction of the ICC.³²⁵ It should be emphasized that the jurisdiction of the ICC is prospective, so that it relates to offenses that may be committed after the Statute comes into force.³²⁶

Prior to considering the issue of the trial of terrorists before the ICC, an explanation is required as to the principle underlying the exercise of ICC

319. *See id.* at 714-15.

320. The Rome Statute, *supra* note 311, art. 5

321. *Id.* art. 6.

322. *Id.* art. 7.

323. *Id.* art. 5.

324. G.A. Res. 3314 (1974), art. I.

325. *See* The Rome Statute, *supra* note 311.

326. *See id.* art. 24.

jurisdiction, namely, the principle of complementary jurisdiction.³²⁷ According to this principle, a case will not be justiciable if it has been investigated or is already the subject of proceedings in a state that has jurisdiction over it. This is also the position in relation to a case where a state has jurisdiction, has investigated the matter, and has chosen not to prosecute.³²⁸ In practice, the principle is limited to cases where the state having jurisdiction is: "unwilling or unable genuinely to carry out the investigation or prosecution."³²⁹ In such a case, the ICC may obtain jurisdiction over the matter.

In terms of "unwillingness," the court must examine whether the state attempted to investigate or capture the wanted suspect and if there is justification for the fact that to that point the state had not done so.³³⁰ In terms of "inability," the court must examine whether complete disregard has been shown for the matter or "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."³³¹

The primary anxiety arising in connection with the jurisdiction of the ICC concerns the misuse of the powers of the ICC and the fear of politicization of trials before the ICC. Political fears ensue principally from the ways in which the Statute permits complaints to be submitted and investigations launched; ways that may lead to fraudulent and arbitrary claims. Article Thirteen provides for three ways of filing claims. First, a state that is a party to the Statute may complain before the prosecutor. Second, the Security Council of the United Nations may file a complaint with the prosecutor. In such a case there is almost no fear of politicization. To the contrary, this Article is the product of U.S. demands. For all the states, the Security Council represents a much more neutral and objective body in relation to specific states that submit complaints and demands for investigations. Third, the prosecutor may decide to launch an investigation.

There is no doubt that political considerations may be brought to bear even at the initial stage of the submission of a complaint to the ICC prosecutor.³³² To obviate this, it was decided that a trial would only be commenced after the complainant supplied proof of the existence of a case. Upon the provision of such proof, the prosecutor may launch an investigation

327. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY 464 (1993). Attention should be paid to the dictionary meaning of this term: "The interrelationship or the completion of perfection brought about by the interrelationship of one or more units supplementing, being dependent upon, or standing in polar position to another unit or units." *Id.*

328. See The Rome Statute, *supra* note 311, art. 17(1)(a).

329. *Id.*

330. See *id.* art. 17(2)(a)-(c).

331. *Id.* art. 17(3).

332. See generally SUNGA, *supra* note 315.

and file charges. The charges are to be presented for consideration by members of the presidency of the court, which consists of judges from the various countries that will act as a *quasi* jury to decide whether there is a case. The presidency may also instruct the prosecutor not to launch an examination, not to bring charges, or reconsider the charges. Article Fifteen of the Statute requires a reasonable basis for the information in order to launch the investigation. This information will be considered in a preliminary hearing and the members of the Pre-Trial Chamber, which consists of three judges, must confirm that the court indeed has jurisdiction and that the information provides a reasonable basis for launching and pursuing an investigation. Article Eighteen adds that a decision of the Pre-Trial Chamber may be appealed to an Appeals Chamber.

In examining the question of the jurisdiction of the ICC over terrorists, the fear of the misuse of power and the introduction of political considerations lessens. An examination of the phenomenon of terrorism in the international arena reveals the abhorrence felt by many countries towards it. Indeed, it is customary to regard the criminal trial as a domestic interest of a particular society, which determines the social values that it believes should be protected — a form of criminal relativism. However, in the fight against terror, there is no relativism. The threat is relevant to the entire world. Therefore, it may be argued that jurisdiction must be held by a global or international body, the ICC, which will provide an additional international front in the war against terror. In practice, many scholars believe that: “Global terrorism must be combated through concerted international action. In fact terrorism can be best combated through the use of a permanent international criminal court.”³³³

The United States was of the opinion in the past that terrorism had to be dealt with on an international level, with a permanent international court. Pennsylvania Senator Arlen Specter declared: “The fight against terrorism could be tremendously aided by an international court to try these international criminals.”³³⁴

The call for the establishment of an international tribunal to try terrorists was first raised in 1937 in the Convention Against Terrorism,³³⁵ which proposed creating such a body. However, India was the only country to ratify the convention. Yet, in 1998 an agreement was reached to create an international court.

The discussion concerning the trial of terrorists by the ICC highlights the fact that the majority of problems identified with the institution do not justify the absence of jurisdiction in relation to terrorism. First, the United

333. Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 233 (1992).

334. Arlen Specter, *A World Court for Terrorists*, N.Y. TIMES, July 9, 1989, at 27.

335. The League of Nations Convention Against Terrorism of 1937. See also Rupa Bhattacharyya, *Establishing a Rule of Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 58-9 (1996). Rule 1.2 encourages parenthetical explanation.

States objected to terrorism as well as to other crimes being subjected to the jurisdiction of the ICC, primarily on the grounds that insufficient protection would be afforded to the rights of the accused and that the subsequent trial would not be fair. Based on the events of September 11 and in light of the Patriot Act³³⁶ and the Executive Order concerning military tribunals,³³⁷ these arguments are no longer available to the United States. The ICC will safeguard the rights of the accused much more stringently than the military tribunals established by the United States:

Suspected terrorists will be tried not before a jury but rather a commission made up primarily — though not necessarily exclusively — of military officers. The suspects and their lawyers, who may also be military officers appointed to represent them, will be tried without the same access to the evidence against them that defendants in civilian trials have. The evidence of their guilt does not have to meet the familiar standard 'beyond reasonable doubt' but must simply 'have probative value to a reasonable person.' There will be no appeals.³³⁸

In contrast, in the ICC, a person will be deemed to be innocent unless his guilt is proven.³³⁹ A person has a right to representation and protection against double jeopardy. However, it is inconceivable that a person will be tried both by his own state and by the ICC. The hearing will be public and there is a right of appeal against factual and legal errors as well as against the lack of proportionality between the crime and the punishment. Appeals will be heard before seven judges. There is no death penalty;³⁴⁰ there is a privilege against self-incrimination and the right to silence.³⁴¹ The trial may only be conducted in the presence of the accused³⁴² and any admission as to the commission of the offense by him must be corroborated.³⁴³ "And so, in many ways, this Statute offers much more protection for defendants than is offered most defendants in the United States."³⁴⁴

336. See U.S.A. Patriot Act, *supra* note 2, at 115.

337. See Military Order, *supra* note 3.

338. Berke, *supra* note 121.

339. See The Rome Statute, *supra* note 311, art. 66, para. 1.

340. See *id.* art. 77, paras. 1-2.

341. See *id.* art. 55, paras. 1(a) & 1(b).

342. See *id.* art. 63, para. 1.

343. See *id.* art. 65, para 1.

344. Panel Discussion: Association of American Law Schools Panel on the International Criminal Court, 36 AM. CRIM. L. REV. 223, 240 (1999). Note that these comments were made prior to the terrorist attack of September 11, 2001. In the aftermath of that attack the degree of protection given to the rights of the accused deteriorated even further.

The fact that the trial is not before a jury fortifies the fairness of the trial of the terrorists. The trials will be conducted by professional judges who will be much more neutral than juries as far as terrorism is concerned. This is particularly so in the aftermath of the attacks of September 11, which affected almost every citizen. In other words, in the United States, jury members come from the very population which had suffered injury. U.S. Judge John Parker has explained that judges “[would be] better qualified than a jury could possibly be to pass upon the issues which would be presented to a court trying the complicated sort of cases which would be presented to an international criminal court.”³⁴⁵

One should also recall the judgment of the U.S. Supreme Court to the effect that the Bill of Rights does not prohibit the trial of U.S. citizens by foreign tribunals outside the territory of the United States:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.³⁴⁶

The United States’ objections to making international terrorism subject to the jurisdiction of the ICC hamper the united front and international cooperation shown by the nations of the world in the fight against international crime. The United States, in principle, cooperates in this endeavor to the point where terrorism is involved. When terrorism, an issue which is one of the priorities of the United States, is involved, the United States is not willing to allow an external body to take over its powers; rather it relies solely upon itself and seeks to ensure that the handling of the terrorism will conform to its own interests. However, states weaker than the United States are interested in including terrorism within the court’s jurisdiction. These states generally lack the ability to capture terrorists and place them on trial themselves. Such states include Egypt, Argentina, India, Algeria, and Russia.³⁴⁷ “Jurisdictional restraints excluding terrorism from the ICC strongly favor resource-rich countries that can afford to carry out long

345. Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT’L L. REV. 27, 38 (1996).

346. *Neely v. Henkel*, 180 U.S. 109, 123 (1901).

347. See Steven W. Krohne, *Comment, The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT’L & COMP. L. REV. 159, 166 (1997).

distance operations to capture and extradite suspects, but this also places a heavy prosecutorial burden on countries that cannot."³⁴⁸

The question which should be put to the United States is: why take this position? The "complementary" principle underlying the ICC means the ICC will not have exclusive jurisdiction over the terrorists. If the United States succeeds in coping with the phenomenon, capturing the terrorists by itself, and placing them on trial, the ICC will be left outside the picture.

Notwithstanding the declared opposition of the United States, it should be noted that the population in general and scholars in particular are of the opinion that the jurisdiction of the ICC should be expanded to include acts of terrorism.³⁴⁹ This is also the opinion of various NGOs, including human rights organizations.³⁵⁰ Nonetheless, from our point of view, it is the government's decision which prevails and United States' opposition is likely to have an impact on the entire world. The United States should not use its influence to cause suffering to the innocent. To the contrary, as former Secretary of State Warren Christopher has said, the United States must "use our influence to stop the suffering of innocent civilians."³⁵¹

In our opinion, the ICC has the ability to help countries cope with terrorism. Even if the United States is of the opinion that it is an expert in handling terrorism, and that this phenomenon entails such complex problems which requires the commitment of the best minds, money and resources to deal with the issues efficiently - while any extrinsic involvement would only detract from the outcome - the United States should not be allowed to exclude terrorism from the jurisdiction of the ICC. The complementary principle enables the United States to make use of its powers to place terrorists on trial; and only if the United States should fail in this endeavor will the ICC enter the picture and complete the task. The United States should not be allowed to ignore other weaker countries which cannot bring the terrorists to trial by themselves and need the ICC: "The United States . . . should support granting the proposed court jurisdiction over the crimes proscribed by the Terrorism Conventions even if it does not intend to avail itself of that jurisdiction; such support would aid less powerful nations that are unable to effectively prosecute terrorist themselves."³⁵²

348. William F. Wright, *Symposium Issue: The International Criminal Court: Limitations on the Prosecution of International Terrorists by the International Criminal Court*, 8 J. INT'L L. & PRAC. 139, 140 (1999).

349. See Robert E. Griffin, *Editorial, Court Would Deter Terror*, HARRISBURG PATRIOT, Aug. 2, 1996, at A10.

350. See Bonnie Santosus, *An International Criminal Court: "Where Global Harmony Begins,"* 5 TOURO INT'L L. REV. 25, 28-29 (1994).

351. Secretary of State Warren Christopher, *Speech at the Soref Symposium*, Washington Institute for the Near East Policy (May 20, 1996), available at <http://www.washingtoninstitute.org/pubs/soref/chris.htm> (last visited Oct. 21, 2002).

352. Krohne, *supra* note 347, at 177.

The emphasis on the support for trying terrorists before the ICC is confined to those cases in which the state seeking to capture them is not required to pay an unconscionable price. If the capture of the terrorists entails the loss of many soldiers and innocent civilians, then the principle of reasonableness that guides us in the exercise of discretion will tilt the balance towards taking measures other than capturing the suspects and placing them on trial, such as targeted killings or other actions falling within the framework of a state's right to self-defense.³⁵³

In practice, even today, it is possible to interpret the Rome Statute in such a manner as to vest the court with jurisdiction over terrorist offenses. Despite the provision, which was added to the effect that only in another seven years will it be decided whether to make terrorism a justiciable offense, in the aftermath of September 11, 2001, the Statute must be interpreted so as to incorporate terrorism within its jurisdiction, in the light of the fact that acts of terror are war crimes. The Rome Statute, in defining war crimes, refers to the Geneva Conventions of August 12th, 1949 and lists acts that comprise a breach of the Conventions and consequently are also acts of war under the Rome Statute. Among these provisions, Article 8(2)(b)(i) states expressly that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities is an act of war.³⁵⁴

Indeed, in the definition of war crimes in the Rome Statute, Article 8(e)(i) expressly provides that war crimes also include:

[O]ther serious violations of the laws and customs applicable in armed conflicts *not of an international character*, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.³⁵⁵

353. See generally Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L. & COMP. L. J. 195 (2001).

354. See The Rome Statute, *supra* note 311, art. 8(2)(b)(i). This article provides: For the purpose of this Statute, 'war crimes' means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Id.

355. The Rome Statute, *supra* note 311, art. 8(2)(e)(i) (emphasis added).

The addition of terrorism to the jurisdiction of the ICC will require states to reach an agreement regarding the definition of terrorism. This is not an easy task because the definition of terrorism is subject to serious dispute.³⁵⁶ Nonetheless, one of the elements common to the various definitions of terrorism is that terrorism uses violence and instills fear among civilians in order to achieve a particular purpose, which is generally the collapse of or an uprising against an existing regime.³⁵⁷ This element, which is common to the definitions regarding the use of violence against civilians by a terrorist body, which is not a state, is recognized by the Statute. Therefore, there is no need for a seven year wait; acts of terror should be regarded as war crimes and perpetrators of such acts should be placed on trial before the ICC through the channel provided by Section 8(e).

Beyond this, the existence of an international tribunal that will enable the capture and trial of terrorists is a necessary tool in the war being waged by the nations of the free world against the phenomenon of international terrorism. The explanation for this is found in the fact that there is a war underway; a war in the modern age is conducted only by way of self-defense.³⁵⁸ One of the conditions which a state must meet in order to be able to exercise its right of self-defense, is that it has first attempted to resolve the dispute by peaceful means. In circumstances of a war against a terrorist organization, the state is required to refrain from any hostilities if the possibility exists of capturing the terrorists, arresting them, and placing them on trial.³⁵⁹ This requirement is part of the theory which perceives war between a terrorist organization and a state as something other than conventional war, but a war nonetheless. Moreover, in every war a state must meet the basic demands of international law, *i.e.*, to refrain as far as possible from aggressive acts if the objectives may be achieved by alternative means. In this way, the ICC will supply an answer for those who believe that terror is war and that the attempt to resolve disputes other than by force, is consistent with modern laws of warfare. In addition, the ICC will serve as an answer for those who believe that it is not possible to speak of a war between a democratic state and a terrorist organization. In the opinion of the latter, a war takes place between two states, between combatants or freedom fighters. The terrorists who breach the laws of war do not fall within the definition of combatants or

356. See Gross, *supra* note 306, at 97-101.

357. See Boaz Ganor, *Terrorism: No Prohibition Without Definition*, available at <http://www.ict.org>. (last visited Dec. 20, 2001). "[T]errorism is the deliberate use of violence against civilians in order to attain political, ideological, and religious aims." *Id.* See also Prevention of Terrorism Act, *supra* note 235, at § 14(1): "terrorism . . . means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Id.*

358. U.N. CHARTER, ch. VII, art. 51.

359. See Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 686-87 (1999). See also Gross, *supra* note 353.

freedom fighters nor are they innocent civilians as they take an active part in the hostilities. Thus, their status is not regulated by international law and they are considered to be unlawful combatants.³⁶⁰ Therefore, not only should aggressive acts not be taken against them, but they should be stopped by being brought to trial. Indeed, the latter is the principal course of action available to a democratic nation in its struggle against terror.³⁶¹

The essence of the criticism is that a democratic state does not have to respond by way of war; rather it should use the democratic measures which are at its disposal by virtue of its very nature. For example, the capture, detention, and trial of terrorists, as the acts of the terrorists are crimes that are no different from any other crime. Terror offenses are ideologically based, and certainly of a more serious nature than ordinary crimes, but that is only because of their impact. This alone does not change the fact that the phenomenon is criminal in nature. The crimes are perpetrated against the state or against humanity; they are war crimes. A state must deal with these crimes, not by using the tools of war but by employing the measures familiar to it, available to it, and customarily used in the handling of crime, via the law enforcement authorities and the judicial system. These measures for handling crime do not include launching a war. An act of war that leads to the elimination of any particular terrorist will not cause the phenomenon of terrorism to vanish. "Terrorism is not analogous to war because it is essentially a crime, and crimes are best dealt with through law enforcement, even when supplemented by paramilitary or military personnel. The response to terrorism is the pursuit of justice, relentless and unyielding."³⁶²

A democratic state is entitled to fight against terrorism by engaging in military action. At the same time, in cases where it is possible to capture the terrorists and bring them to trial, a democratic state should choose that course of action. The United States, by its desire to capture the terrorists itself, in the framework of its war against terror, and place them on trial before special tribunals, not only creates the risk of an unfair trial, as explained in the earlier chapters, but also leaves itself a slim chance of succeeding at this task. In view of the unique character of international terrorism as an unidentified enemy and one that is present everywhere and threatens all the countries of the free world, the solution lies in cooperation between those targeted countries.

Cooperation should be directed not only at waging war against terror in the military sense, but also at joint efforts between the authorities responsible for law enforcement and the intelligence agencies in every country. Cooperation could appropriately be expressed through the transfer of intelligence regarding terrorists, thereby making it easier for states seeking

360. See *supra* Part 1.

361. See the response of Professor Jordan Paust following the terrorist attack of September 11, 2001, available at <http://www.asil.org/insights/insight77.htm> (last visited Dec. 20, 2001).

362. Cherif Bassiouni, *In the Aftermath; Seeking Revenge or Justice?; On the Dark Trail of New Criminals, U.S. Needs Help*, CHI. TRIB., Sept. 23, 2001, at 3.

their extradition to pass on information regarding the crimes, as well as freeze the assets used by the terrorists to finance their activities. International cooperation of this type will assist in exposing the movements of the terrorists, thwart their plans and bring them to justice. This is only the first aspect of cooperation. If cooperation is precluded by reason of the individual interests of a particular state, which is not interested in the extradition of suspects. For example, in the United States, an effort to uncover the truth by establishing tribunals to try terrorists, the constitutional safeguards of the defendant are not preserved and the defendant's guilt is not determined in a neutral environment³⁶³ – then the second aspect of cooperation will come to the forefront through the operation of the Rome Statute. The trial of the terrorists before the ICC will be the outcome of the complementary principle, whereby if a state fails to bring the offender to trial, the ICC will step in and complete the task. As we have seen, the ICC safeguards the constitutional and due process rights of the defendants in criminal cases. There is no fear that states will refuse to cooperate to extradite terrorists to stand trial before an international tribunal that is much more neutral than a country such as the United States,³⁶⁴ who lost thousands of citizens in one terrorist action and who will find it difficult to put aside the desire for revenge common to the entire population – including the jury members, the judges, and certainly the military judges who will be appointed to try the terrorists.

The horrendous consequences of the terrorist attack of September 11, 2001, caused the press to stress that United States citizens were waiting for a military response by their government. This response was not slow in coming. However, one must ask: what will be the outcome of this response? Will it lead to the eradication of international terror or will we later conclude that this response merely satisfied the desire for revenge felt by citizens of the U.S. without achieving a genuine eradication of the phenomenon? Genuine eradication of the phenomenon can only be obtained through the cooperation of democratic states in terms of law enforcement combined with other forms of action, non-war measures, such as economic sanctions.

The trial of terrorists by one country, such as the United States, will not put an end to the phenomenon of terrorism. Therefore, cooperation in placing suspects on trial should be regulated by an existing international convention, namely, the Rome Statute. The democratic states must respond to the terrorist

363. See *Pentagon Officials Begin Designing Military Tribunals for Suspected Terrorists*, N.Y. TIMES, Oct. 25, 2001, at A1. Spain refused to extradite to the United States suspected terrorists captured on Spanish soil during the course of October 2001 precisely because it feared that these suspects would not be given a fair trial, similar to that afforded to citizens: "Spanish officials told the United States last week that they would not extradite eight men suspected of involvement in the Sept. 11, 2001 attacks without assurances that their cases would be kept in civilian court." *Id.*

364. See Laura Dickinson, *Courts Can Avenge Sept. 11: International Justice - Not War - Will Honor Our Character While Securing Our Safety*, LEGAL TIMES, Sept. 24, 2001, at 66.

threat within the framework of the rule of law, by placing suspects on trial. Military responses against organizations throughout the world will merely transform the democratic states into collaborators with the objectives of the terrorists: undermining the stability of Western cultured society. The danger to democratic societies is great. Therefore, societies must be aware of this danger and take precautions against it. Thus:

An international terrorism tribunal with diverse representation would provide a vehicle for the world community to come together to witness, acknowledge, and condemn attacks such as those we have just suffered By working to create a court to try such terrorists, we send a message that *the proper response to terrorism is trial followed by appropriate punishment, not punishment without trial.*³⁶⁵

It should be noted that following the attack of September 11, 2001, many people asked themselves what would happen if Bin Laden were to be captured alive. The answer was to bring him to trial before the ICC³⁶⁶ (disregarding for the moment the fact that it is not possible to try a suspect for offenses committed prior to the Statute taking effect) for crimes against humanity,³⁶⁷ notwithstanding that terror is not within the jurisdiction of the ICC, since as already noted terrorism falls within the rubric of war crimes or crimes against humanity. These people agree, “even before the ICC gets off the ground, we already find that we need it. Just as we have already rethought other politics in the wake of September 11, the time has come for Washington to rethink its opposition to the ICC.”³⁶⁸

One of the reasons why the United States objects to the inclusion of terrorism as an offense within the jurisdiction of the ICC is the absence of an international code, a law that regulates terror offenses.³⁶⁹ As noted, to date no consensus has even been reached regarding the definition of the term. The difficulty is huge as the states of the free world may regard someone as a terrorist who would be considered a freedom fighter by the fundamentalist world.

365. *Id.* (emphasis added).

366. See Douglass W. Cassel, Jr., *Try Bin Laden - But Where?*, CHI. DAILY L. BULL., Oct. 11, 2001, at 6.

367. See The Rome Statute, *supra* note 311, art. 7(1)(a). As defined in this article “[f]or the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder” *Id.*

368. Cassel, *supra* note 366, at 6.

369. See Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 442-43 (1995).

Without a definition in a Convention Against Terror, it might be argued that there is no jurisdiction in the light of the doctrine of "no crime where there is no law" – "*nullum crimen sine lege*." This is undoubtedly a strong argument; however, it should not be given undue weight. Although there is no specific international code on the matter there are numerous international conventions which deal with terrorism even if they refrain from according a precise definition to the term.³⁷⁰ Following the attack of September 11, widespread interest has been shown in formulating a codex of these conventions. Moreover, the UN has been working towards this goal for a number of years.³⁷¹

There are those who argue that without the ICC obtaining jurisdiction over terror offenses, the court will not possess the teeth necessary to operate as an efficient tribunal: "jurisdiction over crimes such as terrorism is exactly what the court needs to help it build a positive reputation and save it from being useless."³⁷²

The legal situation today in the United States as described in Parts One and Five, where the United States claims that extensive jurisdiction is vested in military tribunals that do not abide by the constitutional safeguards of the defendant may lead to heightened enmity towards the United States. This enmity may be the outcome of the sense that the United States has turned itself into a paternalistic power responsible on behalf of the rest of the world for trying terrorists. Accordingly, in the interest of preserving relations with the rest of the world, the United States should favor the position supporting ICC jurisdiction over terror. We should recall that there are states which not only cannot fight against terrorism by themselves but also cannot extradite the terrorists to the United States due to political reasons or for fear that the trial will not be neutral. One such example is Columbia which has strained relations with the United States.³⁷³ One cannot ignore the fact that even the United States, however mighty a power, cannot cope with terrorism on its own. There are examples in U.S. history where it failed to try terrorist suspects. For instance, in the case of Mohamar Ghadaffi, terrorists, who wished to prevent his extradition to the United States in 1987, did so by kidnapping two German citizens:

Pan Am Flight 103 is a good example. We have not been able to bring the perpetrators to justice in all these years.

370. See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (New York Convention), Dec. 14 1973, 1035 U.N.T.S. 167; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 704 U.N.T.S. 219; International Convention Against Taking of Hostages, Dec. 17, 1979, G.A. Res. 146, U.N. GAOR, 34th Sess. (1979).

371. See Pickard, *supra* note 369, at 452.

372. Krohne, *supra* note 347, at 178-79.

373. See *id.* at 180-81.

Libya does not trust the United States or the United Kingdom to try the alleged perpetrators and the U.S. and U.K. do not trust Libya to do so. If we have an International Criminal Court, leaving aside the retroactivity question, it should be able to try that kind of case.³⁷⁴

Now, after September 11, there is a fear that the United States will attempt to bring to trial persons who in the usual course would not be tried. Thus, the ICC will provide a check on the United States; it will safeguard the rights of the defendant and will conduct a thorough investigation prior to trying the suspect. This will happen in cases where, the United States has failed to bring the person to trial.

To summarize this point, there are three main reasons which substantiate the argument that the inclusion of terror offenses within the jurisdiction of the ICC can only benefit the interests of the world in general, and the United States in particular, in the war against terror:

First, the court would provide a neutral international forum in which to prosecute terrorists which may increase the likelihood that countries holding suspected terrorists would turn them over to be tried. In the past, some countries have refused to extradite suspected terrorists to countries such as the United States for fear that the United States had prejudged the defendants. Therefore, providing a neutral forum for trial may persuade countries harboring terrorists to extradite them for trial. Second, persuading countries to turn over terrorists would also reduce the need for the United States to impose economic sanctions as a means of pressuring countries into extraditing terrorists. Generally, these sanctions have been ineffective and end up hurting the general population more than the government which refuses to turn over the suspect. The third way the Court could help the United States fight terrorism is by alleviating the burden and political embarrassment of the United States having to rely on self-help methods, such as forcible abductions, to deal with terrorists. As a party to the Rome Statute, the United States could work with other party states to bring terrorists to justice and use the Court Prosecutor to determine whether a *prima facie* case actually exists against the suspect, thus reducing the number of wrongful abductions.³⁷⁵

374. Cavicchia, *supra* note 333, at 264.

375. John Seguin, *Note, Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L. J. 85, 106-07 (2000).

A different question is whether the ICC will be capable of dealing with the terrorists. In other words, there are real difficulties arising from the fact that the ICC lacks the experience and the resources needed to investigate acts of terror. Such investigations are usually prolonged and complex and are conducted by law enforcement authorities and intelligence services.

This is a serious objective problem which may justify waiting an additional seven years, as required by the Statute, prior to including terrorism within the jurisdiction of the ICC. During these years the ICC will gather experience trying war crimes and crimes against humanity. As we have explained, acts of terror are no different in their outcome to war crimes or crimes against humanity.

Our conclusion is that terrorism is an international problem which feeds from the extraordinary cooperation that has evolved between those engaged in terrorism throughout the world. Accordingly, the solution to it must also be found in the international arena and it too must draw its life from unique cooperation between all the nations of the free world now facing the threat of terrorism. The struggle is complex. It is a hybrid, comprising both passive and active defense, including preventive measures against terrorist groups. The combination of these measures is likely to have the deterrent effect necessary to remove the terrorist threat from above the heads of the democratic nations.

The ICC is the product of a new convention that should properly be part of this combination of measures and express the cooperation on the international plane leading to the arrest and trial of the terrorists. More precisely, we do not seek to argue that a military response should not be used against acts of terror; rather, such responses should not to be seen as the ultimate answer. Those in the United States who claimed after September 11 that “[o]nly military victory - not judicial proceedings - ends a military threat”³⁷⁶ must be opposed.

Agreement to include terrorist offenses within the jurisdiction of the ICC is not a magical solution that will guarantee victory in the war against terror. It is only an additional measure that will join the arsenal of measures available to a democratic state in its struggle. Yet, it is an essential measure as it will provide a solution towards the success, which everyone will be ready to work:

Inclusion of terrorism in the jurisdiction of the ICC will bring prosecution of this criminal activity into a neutral forum, which will encourage participation by countries that do not trust the judicial processes currently in place. The further

376. George M. Kraw, *On Our Own Terms Do We Want Foreign Courts To Judge Our Reprisals To Terrorism?*, LEGAL TIMES, Sept. 24, 2001, at 67.

effect will be to discourage resort to self-help measures and frontier justice that were the last resort of the desperate.³⁷⁷

We must recall that terrorism is directed at democratic states and seeks to undermine their values; a basic value of every democratic state is the pursuit of justice. Leaving the trial of terrorists in the hands of the injured states themselves is to let the victim judge and punish the criminal. The fear of prejudice is strong. Therefore: “[t]he establishment of the ICC creates an independent, neutral venue that promises to address concerns that the accused will receive an unbiased trial . . . [and] if the world community is to effectively address the issue of international terrorism, it must establish a neutral forum for prosecution of these crimes.”³⁷⁸

A democratic state based on principles of justice, where the search for justice is obliged to locate the terrorists and place them on trial before international tribunals that employ fair and neutral processes would be the better solution compared to tribunals operating within the injured state, which may be exploited to satisfy the desire for revenge: “Indeed, one of the most important reasons to support a criminal process is to end the cycle of vengeance. Only justice can move us toward a safer society.”³⁷⁹

Notwithstanding the criticism voiced throughout the United States about the decision not to ratify the Rome Statute, the President of the United States decided that the United States could not be a party to the Statute. The main reason for this was the fear that U.S. soldiers would become subject to trial before the ICC for war crimes or crimes against humanity as a consequence of injuries to innocent civilians caused during the war against terror in general, and the fighting in Afghanistan in particular, in the aftermath of the attack of September 11: “The United States simply cannot accept an international institution that claims jurisdiction over American citizens, superior to that of our Constitution.”³⁸⁰

It would seem that the step which the United States seeks to take is precedent-making. The U.S. is not satisfied with refraining from ratifying the Rome Statute; rather it seeks to completely withdraw its signature from the Convention.

The rules of international law dealing with conventions prohibit a state from engaging in acts which would defeat the object and purposes of a treaty

377. Wright, *supra* note 348, at 149.

378. *Id.* at 139, 148.

379. Dickinson, *supra* note 364, at 66.

380. David R. Sands, *U.S Withdraws from Treaty on Court*, THE WASHINGTON TIMES, May 7, 2002, at A01 (quoting House International Relations Committee Chairman Henry J. Hyde, Illinois Republican).

pending its entry into force.³⁸¹ The decision by the United States to remove its signature will not necessarily defeat and undermine the purpose of the treaty. The treaty will continue to exist and the ICC will initiate operations even without the participation of the United States. It is precisely because of this that some people argue that by removing its signature in circumstances where the treaty is in effect and the court will begin work on the basis of the broad consent of one hundred and thirty-nine states, the U.S. is making an error from the point of view of its own interests as a democratic state:

[T]he U.S. is bucking the trend at the most critical moment. As a superpower, the U.S. cannot afford to turn away from such a consensus. With the ICC as a matter of fact and a reality of law, the U.S. will at some point be forced to deal with the Court. Before the 60th ratification, discussions about what form such dealings would take were academic. Now, they are very much real. State parties to the ICC, many of them U.S. allies, will start to implement laws and policy consistent with the ICC, whether such policies are favored by the U.S. or not. The U.S. may try to run away from the ICC through benign neglect or withdrawal from the entire process, but the issue is unavoidable.³⁸²

Beyond the dangers entailed in shaping the ICC without the active participation of the United States, we should note that when the U.S. decision is examined against the background of the legal and statutory developments ensuing from the war against terror, there are those who believe that: "there's a certain irony in the fact that the United States, which tends to extraterritorially apply its laws rather widely, is not willing to participate in a truly international consensus"³⁸³ for the ICC.

CONCLUSION

True justice implies a balancing of the scales; and there is no action or force or thing on Earth that can balance the loss of a husband, a daughter, son, parent, or wife. But we can and

381. Vienna Convention on the Law of Treaties (1969), art. 18. This article provides: [a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . .

Id.

382. See <http://www.isc-icc.org/mythreal.html> (last visited May 9, 2002) (responses to the U.S. decision to remove its signature from the Rome Statute).

383. Sands, *supra* note 380, at A01 (quoting Canadian Foreign Minister Bill Graham).

*do demand accountability. One way or another, terrorists must answer for their crimes.*³⁸⁴

Indeed, terrorists must pay for their acts. In this article we set out the jurisdiction possessed by the United States to try those who have caused it injury by acts of terror. We have explained that the offense of terror is no different than any other criminal offense. Therefore, there is no justification for trying terrorists separately in separate courts, operating special rules of procedures and evidence that differ from those applicable in the civilian legal system. An agreement to try terrorists before the regular courts is not a sufficient guarantee of due process or achievement of justice. The emphasis must be on prohibiting the establishment of special rules of procedure and evidence for terrorists. We saw that in Israel, a special provision exists that permits violation of the right of a person suspected of offenses against the security of the state, which is to meet with an attorney.³⁸⁵ Another provision in Israel, enables notification of the fact of the arrest to be delayed for a relatively long period.³⁸⁶ These provisions are specific to a particular type of offense, albeit the hearings in relation to the provisions are conducted before the ordinary courts. Because the hearings are likely conducted within the existing court system and not before a special tribunal, the exception to the procedures prevailing in relation to persons suspected of non-security offenses is balanced from the moment the indictments are filed. From that point, the greater safeguards are available to the defendant. For example, the prosecution is required to disclose all the investigative materials to the defendant,³⁸⁷ including the fact that certain evidence has been classified as privileged.³⁸⁸ The significance of the privilege (imposed because of the fear of harm to national security or another important public interest) lies in the fact that the prosecution cannot use the evidence. However, the defendant has the right to attempt to persuade the court that his defense will be harmed if the privilege is not removed and that uncovering the truth outweighs national security.³⁸⁹

384. See Daum, *supra* note 15, at 131 (quoting Madeleine K. Albright, Statement on venue for trial of Pan Am # 103 Bombing Suspects, Aug. 24, 1999) (emphasis added).

385. See Criminal Procedure Act, *supra* note 92, sec. 35. This section permits delaying a meeting between a person suspected of national security offenses and his attorney for up to twenty-one days, in contrast to Section 34 of the same Law that permits delaying a meeting between a person suspected of other offenses and his attorney for up to forty-eight hours at the most. See *id.*

386. See *id.* sec. 36. This section permits the delay of notification for up to fifteen days compared to Section 33 of the same Law that requires notification without delay of the arrest of persons suspected of offenses which are not security offenses. See *id.*

387. See Criminal Law Procedure (Consolidated Version) Law, 1982, sec. 74 (Eng.).

388. See Cr.A. 1152/91, Siksik v. State of Israel, 46(5) P.D. 8, 20 (Heb.).

389. See Evidence Ordinance, *supra* note 99, at secs. 44(a) and 45.

As terror offenses are criminal offenses, offenses which touch upon issues of life and death, it is a core principle in this field of law that defendants are given a full opportunity to defend themselves against any evidence in the hands of the prosecution.³⁹⁰ This right is derived from the essence of a democratic regime. Indeed, a democratic state cannot exist without security. It is possible to erode the rights of the defendant in the name of the security of the state and its citizens. However, a democratic state will only permit such an erosion of rights where the accused is guaranteed a just and fair trial. Accordingly, where there is privileged evidence, some of which is of critical and substantive importance to the determination of the guilt or innocence of the accused, it would be proper to disclose this evidence.³⁹¹ The fact that the defendant has been accused of terror offenses does not impair the need to disclose this evidence; such disclosure is compatible with the interests of the individual and the entire democratic society in ensuring due process.

We conclude that in judging terrorists it is more important to preserve rules of procedure which are identical to the rules applicable in every other criminal proceeding than to proclaim that the terrorists should be tried before the ordinary civil courts; yet concurrently permit the proceedings to be conducted in accordance with special rules of procedure. We have explained that in view of the growth of the phenomenon of terrorism we believe that it is possible to justify the existence of a special tribunal that will deal exclusively with the trial of terrorists. However, the motive for the establishment of such a tribunal should be to deal with terrorism in a focused manner with the purpose of promoting a just trial. This also meets the needs of public and national security which require concerted action to be taken against terrorism before the latter strikes again, without placing society at risk by reason of delays ensuing from pressure of work within the civilian legal system.

More precisely, our support for the establishment of a separate tribunal is not support for the application of different legal procedures and rules of evidence. To the contrary, we have shown how the character of a judicial forum, its composition, and the nature of its activities influence the procedural rights of the defendant. When we deal with the criminal process, with issues of liberty, this influence may have an additional far reaching effect:

Often the line separating a procedural defect from a defect which may have an influence on the outcome of the trial is not too clear. Indeed, it is difficult to deny that in many cases the existence of a serious procedural defect creates a presumption of influence on the outcome of the proceedings.

390. See H.C. 428/86, *Barzilai v. Government of Israel and 521 others*, 40(3) P.D. 505, 569 (Heb.).

391. See M.A. 8383/84, *Livny et al v. State of Israel*, 38(3) P.D. 729, 738 (Heb.).

Moreover, the outcome of the proceedings is not a legal determination which exists in the air. It also entails a determination regarding the proper manner of conducting the proceedings and preserving the rights of the persons litigating before the court. Thus, a serious procedural defect is to a large extent a serious substantive defect.³⁹²

The United States understood the grave impact of the provisions of the executive order on the actual fairness of the criminal process. Accordingly, the order issued by the Department of Defense attempted to make the proceedings before the military tribunal correspond more closely to the criminal proceedings conducted in the civilian legal system. Although this attempt has not been completed, it should be applauded. The fact that the rules of evidence differ substantively in civilian and military tribunals and the fact that there is no separation of powers inside the court – the judges, prosecutors and even defense attorneys come from the same military system are obstacles to the existence of fair criminal proceedings. The order issued by the Department of Defense has not succeeded in overcoming these obstacles.

The phenomenon of international terrorism puts democratic society to a test with the most difficult aspect being which of the following two interests will prevail: the interest in national security or the interest in pursuing a fair trial. This question sets a trap; it hints that the answer requires one interest to be chosen, thereby completely negating the other. A democratic state cannot fall into this trap. It is the state's responsibility to find the proper balance between these two interests in a manner that guarantees the safety of the public by placing terrorist suspects on trial and only convicting a person on the basis of rules of procedure which mandate a conviction based on the disclosure of the truth. The truth, the acquittal of the innocent and the conviction of the guilty, is what will guarantee public safety.

In order for a democratic state to achieve victory in its war against terror, it does not need to alter the balances it has created between these competing interests:

What message does it send to the world when we act to change the rules of the game in order to win? If we are acting justly, with faith in our cause and truth on our side, then we will prevail. We don't need to change the rules. They are sufficient for our purpose and fairly crafted to ensure a legitimate outcome.³⁹³

392. M/H 7929/96, Kozli et al v. State of Israel, 99(1) Tak-El 1265 (Heb.).

393. Kelly, *supra* note 199, at 291-92.

