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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 order[3] 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]

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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 states[32] 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, Pmbl., 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 civilians[45] 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 1 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 goal . . . .[67]

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 equality . . . .[68]

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 days[93] 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-Al 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 DWORKIN, 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 emphasizing[106] 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 such[113] (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. LAFAVE, 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 satisfies 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 Regulations[128] 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 IUNEI MISHPAT, 934, 935-937 (1974) (Heb.).
132. *See* DINSTEIN, *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.