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

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

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

144. *See id.* art. 72.
145. *See id.* art. 73.
146. Protocol I to the Geneva Conventions of the 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 23.
147. *See generally* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y. B. HUM. RTS., 262 –263, (1971).
148. *See* Fourth Geneva Convention, *supra* note 33, art. 2.
149. *See* Shamgar, *supra* note 147, at 266.
150. *See* Ruth Lapidoth, *International Law in Israeli Law*, 19 MISHPATIM 807, 826 (1990) (Heb.).
151. H.C. 390/79, Dawikat et al v. Government of Israel et al, 34(1) P.D. 1, 29 (Heb.).

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

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

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

Within the framework of the legislative powers, each of the Supreme Commanders published an Order Concerning Security Provisions, 5730-1970[153] ("OCSP") for their respective regions, in which they set up first instance military courts in the region. Later, a military appeals court was established.

The Powers of the Military Courts

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

152. Ayal Gross, *The Military Court System in Judea, Samaria and the Gaza Strip*, MONTHLY REVIEW: MONTHLY FOR IDF OFFICERS, 36(5), 12, 13 (1989) (Heb.).
153. This order replaced a previous order issued in 1967, during the initial days of IDF government in these regions.

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

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

Panels of the Courts

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

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

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

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

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

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

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

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

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

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

Legal and Evidentiary Procedures

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

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

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

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

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

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

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

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

165. *See id.* cl. 35.

166. *See id.* cl. 12.

167. *See id.* cl. 8.

Right of Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

173. *See id.* cl. 140.

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

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

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

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

An additional discrepancy between the rules of procedure applicable in Israel and those under the OCSP relates to the right of a detainee to meet with an attorney. The law applicable in the courts in Israel enables a meeting between a person suspected of security offenses and his attorney to be delayed for up to ten days with the authorization of the officer in charge[180] and up to twenty-one days with the authorization of the President of the District Court, subject to a right of appeal to the Supreme Court.[181] In contrast, under the OCSP, the person in charge of the investigation may delay a meeting between the detainee and his attorney for up to fifteen days on grounds of the security needs of the region or the needs of the investigation. Furthermore, the confirming authority is entitled to extend this period by fifteen days. Therefore, it is possible to delay a meeting for up to thirty days.[182]

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

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

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

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

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

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

181. *See id.* § 35(d).

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

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

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

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

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

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

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

184. *Id.*

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

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

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

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

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

186. *Id.*

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

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

To complete the picture of the system of adjudicating security offenses established by the State of Israel, it should be noted that concurrently with the trial of persons suspected of security offenses in the military courts in the administered territories, the courts of the State of Israel, too possess jurisdiction to try persons charged with security offenses, including terrorists, under Israeli law.[188] In these cases, the domestic law of the State of Israel applies and not international law. However, it is important to emphasize that notwithstanding that the State of Israel is subject to large numbers of frequent and horrific terrorist attacks, it has not seen fit to set up special tribunals having exclusive jurisdiction to try terrorists. Jurisdiction is conferred on the ordinary courts that try all other criminal offenses and alongside this a special military court – the military court in Lod - has *concurrent* jurisdiction. The military court in Lod was set up and operates under the Defense (Emergency) Regulations, 1945.[189]

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

187. *Id.*

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

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

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

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

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

PART FIVE

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

The United States

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

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

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

191. Woolner, *supra* note 96.

As mentioned *supra*, the dangers of terrorism facing the United States led the President to decide that the legal rules of procedure and evidence applicable in ordinary criminal proceedings are not suitable in trials conducted by the military tribunals,[192] namely for a person who is not a citizen of the United States[193] and who is charged with terrorist offenses will be tried by a military tribunal without the protection and guarantees conferred on defendants in criminal proceedings in the courts of the United States:

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

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

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

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

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

194. Blum, *supra* note 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics —including torture and threats to their families — that are illegal in the United States . . . .[205]

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

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

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

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

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

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

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

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

207. *Id.* at 1239.

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

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

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

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

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

210. White, *supra* note 201, at 20.
211. *See* United States v. Yunis, 924 F.2d at 1086, 1089 (D.C. Cir. 1991).

Jawary to trial. Al-Jawary was accused of carrying out three attacks in New York in 1973.[212]

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

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

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

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

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

212. *See* United States v. El-Jassem, 819 F. Supp. 166, 170 (E.D.N.Y. 1993) (Al-Jawary and El-Jassem were the same person).
213. James S. Reynolds, *Domestic And International Terrorism: Expansion Of Territorial Jurisdiction: A Response To the Rise In Terrorism*, 1 J. NAT'L SECURITY L. 105, 109 (1997).
214. AntiTerrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. § 1214 (1996).
215. Illegal Immigrant Response Act of 1996, Pub. L. No. 104-208, 110 Stat. § 3009-546 (1996).
216. Bradly T. Winter, *Invidious Prosecution: The History of Seditious Conspiracy — Foreshadowing the Recent Convictions of Sheik Omar Abdel-Rahman and His Immigrant Followers*, 10 GEO. IMMIGR. L. J. 185, 212-13 (1996).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

241. Crona & Richardson, *supra* note 47, at 385.
242. Crona & Richardson, *supra* note 47, at 396, 405.

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

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

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

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

243. Judith Resnik, *Invading the Courts We Don't Need Military "Tribunals" to Sort Out the Guilty*, LEGAL TIMES, Jan. 14, 2002, at 34. (emphasis added).
244. Koh, *supra* note 54, at A39.
245. Oliphant, *supra* note 223, at 3 (quoting Randy Moss who headed the Justice Department's Office of Legal Counsel during the Clinton administration).
246. Blumenthal, *supra* note 202 (quoting U.S. Solicitor General Theodore B. Olson, whose wife died in the September 11 terror attack).

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

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

In theory, the new provisions in the order seek to achieve a fair legal process;[249] however, the existence of multiple basket provisions[250] may pose an obstacle to obtaining a fair trial in practice. It must be recalled that the concern here is with terror offenses that fall within the category of criminal offenses against national security. In such a class of cases, the prosecution will frequently demand to make use of provisions authorizing secret evidence or hearings *in camera* on grounds of national security. Accordingly, it is not clear whether the order issued by the Department of Defense will indeed lead to changes that are substantively different from those ensuing from the executive order; particularly in light of the provision that in every case of incompatibility between the two orders, the executive order shall govern.[251]

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

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

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

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

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

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

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

252. *See id.* art. 3(A).
253. *See id.* art. 4(A)2.
254. *See id.* art. 4(A)3.
255. *See* Military Commission Order, *supra* note 247, art. 4(A)4.
256. *See id.* art. 4(B)2.
257. *See id.* art. 4(C)4.
258. *See id.* art. 4(C)3(b).
259. *See id.* art. 4(C)2.
260. *See id.* art. 5(O).
261. *See* Military Commission Order, *supra* note 247, art. 6(D)5(c).
262. *See id.* art. 6(B)3.
263. *See id.* art. 5(K).
264. *See id.* art. 5(A).
265. *See id.* art. 5(B).
266. *See id.* art. 5(C).

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

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

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

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

267. *See* Military Commission Order, *supra* note 247, art. 5(F)(G).
268. *See id.* art. 5(I).
269. *See id.* art. 5(E).
270. *See id.* art. 6(D)(1).
271. *See id.* art. 6(D)(3). This provision states that "[s]ubject to the Requirements of Section 6(D)(1) concerning admissibility, The Commission may consider *any other evidence including, but not limited* to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." *Id.* (emphasis added).
272. Associated Press, *Military Tribunals to Resemble Courts-Martial*, DOW JONES INT'L NEWS, Mar. 20, 2002 (emphasis added).
273. David E. Rovella, *Tribunals Tribulations. Debate focuses on Fairness, Secret Evidence and Appeals Process*, PALM BEACH DAILY BUSINESS REVIEW, Mar. 26, 2002, at A7.
274. *See* Military Commission Order, *supra* note 247, art. 6(D)5(a).
275. *See id.* art. 6(D)5(b).

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

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

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

276. *See id.* art. 6(F).
277. *See id.* art. 6(H)(4).
278. *See id.* art. 6(H)(5) – (6).

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

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

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

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

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

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

Great Britain

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

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

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

The possibility of obtaining an impression from the opinion of a police officer combined with the situation where increased use is made of secret evidence — on the ground that disclosing the evidence would be contrary to the public interest[283] (because it would reveal the police officer's source of information thereby endangering the life of the informant) — is likely to seriously violate the right of the accused to due process and his ability to refute the evidence against him or cast doubt on the impression created by the police officer in his testimony against him.

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

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

282. *See id.* §1(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Following the terrorist attack of September 11, 2001, on the United States, Britain declared a state of emergency based on the ground that the attack on September 11 amounted to a threat to the life of the nation as a whole. Accordingly, under Article 15 of the European Convention on Human Rights,[307] which during times of emergency or war permits violation of rights entrenched in the Convention. Britain saw fit to renew its counter-terrorism legislation in a new statute, the Anti-Terrorism, Crime and Security Act, 2001.[308] This Act permits the use of measures that are more injurious to the rights of the person suspected or accused of terrorist acts. Critics of the Act have expressed themselves unable to understand why British Prime Minister Tony Blair and Home Secretary David Blunkett were not satisfied with the existing legislation but instead wished to deal more harshly with persons already subject to severe treatment:

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

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

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

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

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

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

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

PART SIX

The International Criminal Court as an appropriate tribunal for trying terrorists

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

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

Background

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

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

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

The ICC has three primary objectives:

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

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

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

312. *See id.* art. 126.

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

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

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

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

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

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

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

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

The principal crimes within the jurisdiction of the court:

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

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

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

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

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

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

321. *Id.* art. 6.

322. *Id.* art. 7.

323. *Id.* art. 5.

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

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

326. *See id.* art. 24.

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

In terms of "unwillingness," the court must examine whether the state attempted to investigate or capture the wanted suspect and if there is justification for the fact that to that point the state had not done so.[330] In terms of "inability," the court must examine whether complete disregard has been shown for the matter or "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[331]

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

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

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

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

329. *Id.*

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

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

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

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

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

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

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

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

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

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

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