States objected to terrorism as well as to other crimes being subjected to the jurisdiction of the ICC, primarily on the grounds that insufficient protection would be afforded to the rights of the accused and that the subsequent trial would not be fair. Based on the events of September 11 and in light of the Patriot Act[336] and the Executive Order concerning military tribunals,[337] these arguments are no longer available to the United States. The ICC will safeguard the rights of the accused much more stringently than the military tribunals established by the United States:

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

In contrast, in the ICC, a person will be deemed to be innocent unless his guilt is proven.[339] A person has a right to representation and protection against double jeopardy. However, it is inconceivable that a person will be tried both by his own state and by the ICC. The hearing will be public and there is a right of appeal against factual and legal errors as well as against the lack of proportionality between the crime and the punishment. Appeals will be heard before seven judges. There is no death penalty; [340] there is a privilege against self-incrimination and the right to silence.[341] The trial may only be conducted in the presence of the accused[342] and any admission as to the commission of the offense by him must be corroborated.[343] "And so, in many ways, this Statute offers much more protection for defendants than is offered most defendants in the United States."[344]

336. *See* U.S.A. Patriot Act, *supra* note 2, at 115.
337. *See* Military Order, *supra* note 3.
338. Berke, *supra* note 121.
339. *See* The Rome Statute, *supra* note 311, art. 66, para. 1.
340. *See id.* art. 77, paras. 1-2.
341. *See id.* art. 55, paras. 1(a) & 1(b).
342. *See id.* art. 63, para. 1.
343. *See id.* art. 65, para 1.
344. *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 240 (1999). Note that these comments were made prior to the terrorist attack of September 11, 2001. In the aftermath of that attack the degree of protection given to the rights of the accused deteriorated even further.

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

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

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

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

345. Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27, 38 (1996).
346. Neely v. Henkel, 180 U.S. 109, 123 (1901).
347. *See* Steven W. Krohne, *Comment, The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT'L & COMP. L. REV. 159, 166 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

> [O]ther serious violations of the laws and customs applicable in armed conflicts *not of an international character*, within the established framework of international law, namely, any of the following acts:
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.[355]

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

354. *See* The Rome Statute, *supra* note 311, art. 8(2)(b)(i). This article provides:

> For the purpose of this Statute, 'war crimes' means:
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the establish framework of international law, namely, any of the following acts:
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Id.

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

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

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

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

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

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

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

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

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

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

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

360. *See supra* Part 1.

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

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

their extradition to pass on information regarding the crimes, as well as freeze the assets used by the terrorists to finance their activities. International cooperation of this type will assist in exposing the movements of the terrorists, thwart their plans and bring them to justice. This is only the first aspect of cooperation. If cooperation is precluded by reason of the individual interests of a particular state, which is not interested in the extradition of suspects. For example, in the United States, an effort to uncover the truth by establishing tribunals to try terrorists, the constitutional safeguards of the defendant are not preserved and the defendant's guilt is not determined in a neutral environment[363] – then the second aspect of cooperation will come to the forefront through the operation of the Rome Statute. The trial of the terrorists before the ICC will be the outcome of the complementary principle, whereby if a state fails to bring the offender to trial, the ICC will step in and complete the task. As we have seen, the ICC safeguards the constitutional and due process rights of the defendants in criminal cases. There is no fear that states will refuse to cooperate to extradite terrorists to stand trial before an international tribunal that is much more neutral than a country such as the United States,[364] who lost thousands of citizens in one terrorist action and who will find it difficult to put aside the desire for revenge common to the entire population – including the jury members, the judges, and certainly the military judges who will be appointed to try the terrorists.

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

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

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

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

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

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

It should be noted that following the attack of September 11, 2001, many people asked themselves what would happen if Bin Laden were to be captured alive. The answer was to bring him to trial before the ICC[366] (disregarding for the moment the fact that it is not possible to try a suspect for offenses committed prior to the Statute taking effect) for crimes against humanity,[367] notwithstanding that terror is not within the jurisdiction of the ICC, since as already noted terrorism falls within the rubric of war crimes or crimes against humanity. These people agree, "even before the ICC gets off the ground, we already find that we need it. Just as we have already rethought other politics in the wake of September 11, the time has come for Washington to rethink its opposition to the ICC."[368]

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

365. *Id.* (emphasis added).

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

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

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

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

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

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

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

> Pan Am Flight 103 is a good example. We have not been able to bring the perpetrators to justice in all these years. Libya does not trust the United States or the United Kingdom to try the alleged perpetrators and the U.S. and U.K. do not trust Libya to do so. If we have an International Criminal Court, leaving aside the retroactivity question, it should be able to try that kind of case.[374]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Inclusion of terrorism in the jurisdiction of the ICC will bring prosecution of this criminal activity into a neutral forum, which will encourage participation by countries that do not trust the judicial processes currently in place. The further effect will be to discourage resort to self-help measures and frontier justice that were the last resort of the desperate.[377]

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

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

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

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

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

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

377. Wright, *supra* note 348, at 149.
378. *Id.* at 139, 148.
379. Dickinson, *supra* note 364, at 66.
380. David R. Sands, *U.S Withdraws from Treaty on Court*, THE WASHINGTON TIMES, May 7, 2002, at A01 (quoting House International Relations Committee Chairman Henry J. Hyde, Illinois Republican).

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

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

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

CONCLUSION

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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