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

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INTRODUCTION

The terrorist attack against the United States on September 11, 2001, breached the balance between human rights and national security. This breach has had a dual effect: It has led to the impairment of the constitutional rights of the citizens of the United States itself,[1] and also to the impairment of the basic rights of non-U.S. citizens, suspected or accused of terrorist offenses, who are to be tried before special military tribunals to be established in accordance with an executive order[2] issued by U.S. President George W. Bush.

The President of the United States, presiding over a power that is the symbol of democracy for many other Western nations, has explained in the executive order concerning the trial of terrorists: "[I] find consistent with section 836 of title 10, United States Code, that *it is not* practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[3]

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1. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see also* Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1 (2002).

2. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (2001).

3. *Id.* § 1(f) (emphasis added).

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

> It is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.[4]

U.S. society's acquiescence to according priority to considerations of efficiency and deterrence because of the needs of national security is understandable (if not justifiable) in view of the many fatalities caused by the attack of September 11. In the long term, however, the dangers posed by the creation of a special tribunal for a specific offense should act as a warning to society in America and other places, including Israel,[5] of the potential danger involved in creating a special tribunal for what is a *specific,* but not necessarily *special,* offense, and the reason for this is that terrorism is only a metaphor.

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

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

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

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

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

The violation of rights is not a violation of the rights of a terrorist on trial but rather an infringement of the rights of a person *suspected* or *charged* with terrorist offenses who is now on trial. Every person suspected of a crime is suspected of having breached a rule or certain law – the approach to every crime must therefore be identical.

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

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

The questions, which forum should try terrorists and which procedural rules should be applied by that forum, are not purely technical; on the contrary, these issues are substantive and the answers to them will have repercussions for the character and democratic strength of the society which operates such trial procedures.

Trying terrorists is nothing more than the trial of criminal offenders motivated or inspired by a certain ideology. There is no reason whatsoever for trying criminal offenders in a manner different to that which has been established over many years by the criminal system. Any attempt to deviate from ordinary judicial procedures requires a justification that does not exist here. Deviating from such procedures comprises nothing more then an attempt to exploit the criminal law to violate human rights for what is an

improper purpose and certainly in a manner that is neither compatible with democratic values nor proportional to the offense.

PART ONE

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

Terrorism is an international phenomenon. Terrorists are scattered throughout the entire world. Their desire to harm the citizens of a particular state does not necessitate their actual presence in that state. Is a democratic country, within the framework of its war against terrorism, entitled to try every terrorist who is a member of a terrorist organization and who operates against that country or against another democratic country? Does this right embrace terrorists who are not located within the territory of the trying country? The United States has apparently answered these questions in the affirmative: "[a]ccording to the executive order, the military tribunal can be used to try *any* suspect who is not an American citizen and has been identified by [George W.] Bush as a member of al Qaeda, participated in acts of terrorism against the U.S. or harbored terrorists."[6]

Today, the extraterritorial jurisdiction of a state to try terrorists is derived from a consequential test – the damage test. This is a test that was shaped by customary international law. It asserts that if the location of the damage or target to be harmed is in a certain state then that state has the power to place on trial the terrorists who were involved in the terrorist operation.[7]

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

The damage test is not the only test that justifies extraterritorial jurisdiction. Customary international law has acknowledged a number of additional principles (underlying a number of which is the principle of

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

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

damage) that deal with extraterritorial jurisdiction. It should be pointed out that international law sets limits on the right of a state to demand jurisdiction over offenses committed outside its borders. The extent of the limits depends on the nature and character of the crime.[8] As we shall see, the development of the phenomenon of international terrorism and its centrality in the lives of nations may lessen the scope of the restrictions placed by international law on the demand of a state for extraterritorial jurisdiction over terrorists.

It is customary to talk of five fundamental grounds for extraterritorial jurisdiction:[9]

1. *The territorial principle*: This principle has been universally identified by international law in respect of all types of crimes.[10] Under it a state has jurisdiction over crimes committed within its borders. The nationality of the victims or the perpetrators is immaterial to the right of adjudication.[11] In other words, the United States has jurisdiction over terrorists who are caught within its territory even if they are not American citizens.

2. *The protective principle*: A state has the right to claim extraterritorial jurisdiction when a national interest is threatened by any act, irrespective of the place of occurrence of that act.[12] A threat to the security of the nation is a recognized interest.[13] The multifaceted network of terrorism that spreads over the entire world sees causing harm to the United States as its primary goal.[14] Accordingly, the United States can argue in its favor that it has extraterritorial jurisdiction over terrorists located outside its territory by virtue of their membership in a terrorist organization.

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

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

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

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

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

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

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

That membership causes them to pose a threat to a crucial national interest – national security.

3. *The universality principle*: This confers extraterritorial jurisdiction over certain crimes, such as genocide, that are universally defined as punishable crimes by virtue of the degree of abhorrence to which they give rise.[15] Since these crimes threaten humanity as a whole, every nation has the right and even the duty to try the perpetrators of these crimes.[16] War crimes are recognized as crimes to which the universality basis applies.[17] As we shall see below, it is possible to identify terrorist acts as war crimes. Accordingly, the United States may claim extraterritorial jurisdiction over terrorists whom it has captured outside its borders within the context of its war against terror, by virtue of the universal principle.

4. *The passive personality principle*: Jurisdiction will extend in accordance with the nationality of the victim. The state has power to punish all those who have caused harm to its citizens and breached its laws, irrespective of the place where the harm occurred.[18] To some extent this principle covers the same ground as the damage test. Both tests permit a state to exercise extraterritorial jurisdiction over terrorists because they have caused harm and damage to its citizens, except that the damage test ascribes importance to the place of occurrence of the damage and grants jurisdiction in cases where the damage occurred within the territory of the state.

5. *The nationality principle*: Under this principle a state has jurisdiction over its citizens who committed crimes, irrespective of the place of commission of the offense.[19] This principle is not central to the issue of extraterritorial jurisdiction over terrorists and indeed is not clearly identified by the international community;[20] accordingly, no further elaboration will be given to it here.

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

16. *See id.*

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

18. John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 FORDHAM INT'L L.J. 298, 299-00 (1989-1990).

19. *See* CAMERON, *supra* note 12.

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

In the light of the various principles it may be said that customary international law establishes the right of the United States to exercise jurisdiction over terrorists who caused it harm or who are interested in causing it harm and therefore endanger its security.

PART TWO

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

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

The answer to this question lies in the ideology underlying the legal system in a democratic state. The object is not the establishment of a legal system per se. A legal system is only a means through which to realize democratic values.[21] In its absence, one would have a governmental mechanism likely to endanger democracy and its values, as would be the case were it to decide upon a legal system structured on the basis of classes of offenses. The objective is democracy itself, and this must be the subject matter of government. The courts are the "watchdogs" of democracy and the values underlying it.

Equality is one of the basic values in every democratic regime. It follows that the principle of equality is a fundamental value in every enlightened legal system: "Equality is a basic value for every democratic society to which the law of every democratic country aspires for reasons of justice and fairness to realize."[22] Its primary purpose is to guarantee equal application of the law: equality before the law. "Every person will achieve justice within the framework of law. We do not discriminate between one person and another; all are equal before us. We protect all persons; all minorities; all majorities."[23]

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21. *See* Aharon Barak, *They gave the State of Israel all that they had, in* THE COURT – FIFTY YEARS OF ADJUDICATION IN ISRAEL 13 (Min. of Def., 1999).

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

23. Barak, *supra* note 21, at 14.

CONCLUSION

Indeed, terrorists must pay for their acts. 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. 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.[24] Another provision in Israel enables notification of the fact of the arrest to be delayed for a relatively long period.[25] 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,[26] including the fact that certain evidence has been classified as privileged.[27] 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.[28]

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

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24. *See* Criminal Procedure Law, sec. 35 (1996) (Heb.). 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.*

25. *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.*

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

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

28. *See* Evidence Ordinance [Consolidated Version] (Aryeh Greenfield, trans. 2000), secs. 44(a) & 45 (1971).

evidence in the hands of the prosecution.[29] 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.[30] 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.

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. 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 the pressure of work within the civilian legal system.

More precisely, my 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. Moreover, the outcome of the proceedings is not a legal

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

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

> 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.[31]

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.[32]

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

32. Michael J. Kelly, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 291-92 (2002).