

# Where are Terrorists to be Tried--A Comparative Analysis of Rights Granted to Suspected Terrorists

Amos N. Guiora

Case Research Paper Series in Legal Studies  
Working Paper 07-13  
March 2007

This paper can be downloaded without charge from the  
Social Science Research Network Electronic Paper Collection:  
<http://ssrn.com/abstract=977259>

# **Where are Terrorists to be Tried--A Comparative Analysis of Rights Granted to Suspected Terrorists**

**Amos N. Guiora**  
**Professor of Law**  
**Director, Institute for Global Security Law & Policy**  
**Case Western Reserve University School of Law**

*A draft of this article is currently undergoing cite checking and revision by the Catholic University Law Review and will be published in final format in Volume 56 Issue 2 of the Catholic University Law Review in the Spring of 2007*

## Abstract

Post 9/11, much disagreement and uncertainty remains about one of the seminal issues in counter-terrorism: *where* to try terrorists. While much discussed, this issue is not resolved. This article will analyze the issue from a comparative perspective by examining American, Israeli, Russian, Indian and Spanish approaches. Though the five nations' judicial and legal regimes differ, a comparative approach enables policy makers, academics and the public to develop a more global perspective on the issue and possibly to adopt other nations' models.

In the context of articulating the most appropriate forum for trying terrorists, the considerations and ramifications are numerous. The guiding principle must be the obligation of civil, democratic society to respect and uphold the rule of law. The analysis will include a discussion of how each of the nations define suspected terrorists, before what court of law are terrorists brought, what alternatives are considered and whether fundamental protections are guaranteed.

A critical issue in determining the appropriate forum is the terrorist-defendant's right to confront his accuser. In the American criminal and constitutional law context, the 6<sup>th</sup> Amendment guarantees a defendant the right to "be confronted with the witnesses against him." Should that right be granted to the terrorist-defendant? Bringing terrorists to trial would potentially require the exposing of intelligence sources. This is a major dilemma that will be addressed throughout this article.

Additional issues that must be addressed include: 1) representation—will the defendant be entitled to choose counsel or will counsel be assigned; 2) will the defendant be tried by jury or by a bench trial; 3) will the trial be conducted by an independent judiciary; 4) will the defendant be granted the right to appeal and if yes, 5) to what court.

Key words: trying terrorists, right to confront witnesses, right to counsel, US, Israel, Spain, Russia, India, independent judiciary, bench trial, right to appeal, rule of law, comparative judicial regimes, fundamental protections, suspects, 6<sup>th</sup> Amendment

# Where are Terrorists to be Tried--A Comparative Analysis of Rights Granted to Suspected Terrorists

By Amos N. Guiora\*

## Introduction

Post 9/11, much disagreement and uncertainty remains about one of the seminal issues in counter-terrorism: *where* to try terrorists. While much discussed, this issue is not resolved. This article will analyze the issue from a comparative perspective by examining American, Israeli, Russian, Indian and Spanish approaches. Though the five nations' judicial and legal regimes differ, a comparative approach enables policy makers, academics and the public to develop a more global perspective on the issue and possibly to adopt other nations' models.

In the context of articulating the most appropriate forum for trying terrorists, the considerations and ramifications are numerous. The guiding principle must be the obligation of civil, democratic society to respect and uphold the rule of law. The analysis will include a discussion of how each of the nations define suspected terrorists, before what court of law are terrorists brought, what alternatives are considered and whether fundamental protections are guaranteed.

A critical issue in determining the appropriate forum is the terrorist-defendant's right to confront his accuser. In the American criminal and constitutional law context, the 6<sup>th</sup> Amendment guarantees a defendant the right to "be confronted with the witnesses against him."<sup>1</sup> Should that right be granted to the terrorist-defendant? Bringing terrorists to trial would potentially require the exposing of intelligence sources. This is a major dilemma that will be addressed throughout this article.

---

\* Professor of Law and Director, Institute for Global Security, Law and Policy, Case Western Reserve University School of Law. Served for 19 years in the Israel Defense Forces, held senior command position in the Judge Advocate General's Corps including Legal Advisor to the Gaza Strip, Judge Advocate for the Navy and Home Front Commands and Commander IDF School of Military Law. In this last capacity had command responsibility for the development of an eleven point interactive video teaching IDF soldiers and commanders a code of conduct based on international law, Israeli law and the IDF ethical code. I would like to thank Erin M. Page, Senior Fellow in Terrorism and Homeland Security at the Institute for Global Security, Law and Policy, and 2006 Presidential Management Fellow, for her research, writing and editing contribution which significantly enhanced the quality of this article.

<sup>1</sup> U.S. Constitution, Amendment VI.

Additional issues that must be addressed include: 1) representation—will the defendant be entitled to choose counsel or will counsel be assigned;<sup>2</sup> 2) will the defendant be tried by jury or by a bench trial; 3) will the trial be conducted by an independent judiciary;<sup>3</sup> 4) will the defendant be granted the right to appeal and if yes, 5) to what court.

The primary purpose of any judicial regime is two-fold: provide the community with an opportunity to punish the wrongdoer<sup>4</sup> and enable the defendant to have his "day in court."<sup>5</sup> The issue before us and facing decision makers is how to most effectively implement these two goals in the counter-terrorism context. In providing a workable framework for this discussion, it is suggested that the present conflict with terrorism be defined as "armed conflict short of war." By so framing the conflict it is suggested that while civil, democratic states are not engaged in war as defined by international law, neither are they confronting the common criminal as defined by the traditional criminal law paradigm.

One of the critical issues facing scholars, policy-makers, and decision makers today is what rights, privileges, and obligations are owed to a suspected terrorist who has been captured. It should be added that resolution has not been reached regarding what term of art applies to the detained individual. Justice O'Connor in *Hamdi*<sup>6</sup> addressed the Administration's definition of enemy combatant:

---

<sup>2</sup> Presidential Order, Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sect. 4(c). <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>

<sup>3</sup> The Presidential Order establishing the military commissions did not provide for an independent judiciary as the court was comprised of senior military officers.

<sup>4</sup> The five commonly accepted punishment theories in the criminal law paradigm, all of which are relevant to the counter-terrorism paradigm: retribution, incapacitation, deterrence, denunciation, and rehabilitation.

<sup>5</sup> See i.e., Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 Tul. L. Rev. 299 (1990); Douglas N. Husak, *Retribution in Criminal Theory*, 37 San Diego L. Rev. 959 (2000); David Dolinko, *Three Mistakes of Retributivism*, 29 UCLA 1623 (1992).

<sup>6</sup> *Hamdi v Rumsfeld*, 542 U.S. 507 (2004); though *Hamdi* is an American citizen challenging the US Government's authority to classify him as an enemy combatant the case is of seminal importance as the Supreme Court addresses many of the issues discussed in this chapter. Unlike the hundreds of other detainees captured in Afghanistan, *Hamdi* was not held in Guantanamo Bay rather once it was determined that he is an American citizen he was transferred to the brig in South Carolina.

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there.<sup>7</sup>

The commensurate questions are significant: what judicial process is appropriate for terrorists; what are the limits of interrogation;<sup>8</sup> what are the limits of detention;<sup>9</sup> what standard of review are they to be granted;<sup>10</sup> for what crimes may they be tried? Resolution of these questions evades us until the primary issue is addressed—where are suspected terrorists to be tried.

## I. The United States

In November, 2001, President Bush issued a Presidential Order establishing military commissions for the express purpose of trying individuals suspected of involvement in terrorism. Shortly after the Presidential Order was issued, the U.S. Senate's Armed Services and Judiciary Committee's held a series of hearings.<sup>11</sup> Administration witnesses justified the establishment of the military commission by arguing that to effectively fight terrorism an alternate judicial regime was required. According to the Bush Administration, Article III courts were inappropriate for trying terrorists and those who provided them safe harbor.

---

<sup>7</sup> Justice O'Connor's opinion *Hamdi v Rumsfeld*, 542 U.S. 507 (2004).

<sup>8</sup> See Amos N. Guiora and Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427 (2006).

<sup>9</sup> *Hamdi v Rumsfeld*, 542 U.S. 507 (2004).

<sup>10</sup> *Hamdi v Rumsfeld*, 542 U.S. 507 (2004).

<sup>11</sup> U.S. Senate Committee on Armed Services, Dec. 12, 2001, To Receive Testimony on the Department of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-Citizens in the War on Terrorism, <http://armed-services.senate.gov/hearings/2001/c011212.htm>. U.S. Senate Committee on the Judiciary, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, 2001, available at <http://judiciary.senate.gov/hearing.cfm?id=126> (last visited Oct. 19, 2006), December 4, 2001, available at <http://judiciary.senate.gov/hearing.cfm?id=129> (last visited Oct. 19, 2006), Dec. 6, 2001, available at <http://judiciary.senate.gov/hearing.cfm?id=121> (last visited Oct. 19, 2006).

When establishing the military tribunals, the Administration relied on the Supreme Court's holding in *Quirin*.<sup>12</sup> The Court used three different terms (illegal combatant, enemy belligerent, enemy combatant) in referring to captured German saboteurs.<sup>13</sup> Though the Court upheld President Roosevelt's decision to bring the German saboteurs<sup>14</sup> before a military tribunal, the Court did not resolve the larger, far more crucial issue of defining the saboteurs. The Court stated that "we have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war."<sup>15</sup> In attempting to determine the Court's "working definition" for any one of those interchangeably used terms, the assumption is that the Court was referring to an individual, engaged in combat with the U.S., who for whatever reason was not a soldier.

The appellants in *Quirin* were German soldiers who lost their status when they *purposefully* discarded their uniforms. Unlike terrorists, who do not belong to a regular army,<sup>16</sup> the 1942 Court seemingly applied this "working definition" to individuals who, by all accounts, had been soldiers. The loss of their status, resulting from their own actions, enabled the Court to correctly determine that they were not acting as soldiers at the time of their capture and thus not entitled to prisoner of war status.

In relying on *Quirin*, the Administration established a unique judicial regime for the express purpose of trying detainees. The judicial regime created by the Bush Administration was premised on two foundations: 1) that the detainees were not Prisoners of War and therefore could be brought to trial; and 2) that the detainees were not entitled to traditional Article III protections afforded to defendants in the criminal law paradigm.

---

<sup>12</sup> Ex Parte Quirin, 317 U.S. 1 (1942)

<sup>13</sup> Ex Parte Quirin, 317 U.S. 1, 30-31 (1942)("enemy combatant," "illegal combatant" and "unlawful combatant" are used in the same paragraph).

<sup>14</sup> LOUIS FISHER, NAZI SABOTEURS ON TRIAL 136-137 (University Press of Kansas 2005) (2003).

<sup>15</sup> Ex Parte Quirin, 317 U.S. 1, 46, 63, S.Ct. 2, 19-20 (1942).

<sup>16</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135.

According to Administration officials who testified before the Congress,<sup>17</sup> the fundamental purpose of the Presidential Order was to bring “justice to persons charged with offenses under the laws of armed conflict”<sup>18</sup> and to “target a narrow class of individuals – terrorists.”<sup>19</sup> In response to widespread criticism<sup>20</sup> that the Order insufficiently guaranteed detainee’s rights, the Department of Defense issued ten instructions intended to facilitate the Order's implementation. The ten instructions addressed a wide variety of issues:

- Instruction 1: Military Commission Instructions;
- Instruction 2: Crimes and Elements for Trial by Military Commission;
- Instruction 3: Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors;
- Instruction 4: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel;
- Instruction 5: Qualification of Civilian Defense Counsel;
- Instruction 6: Reporting Relationships for military Commission Personnel;
- Instruction 7: Sentencing;
- Instruction 8: Administrative Procedures;
- Instruction 9: Review of Military Commission Proceedings;
- Instruction 10: Certain Evidentiary Determinations.<sup>21</sup>

Criticism, which was fast in coming, centered on the following issues: the lack of an independent judiciary, the lack of an appeals process, the lack of a sentencing regime known to the detainee, the process by which counsel is assigned, the broad rules of evidence and the ability of the prosecutor to submit classified evidence to the court that the defendant would not be entitled to review.

---

<sup>17</sup> See Fn 26

<sup>18</sup> Testimony of The Honorable Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice, Nov. 28, 2001, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, available at [http://judiciary.senate.gov/testimony.cfm?id=126&wit\\_id=66](http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=66) (last visited Oct. 19, 2006).

<sup>19</sup> Testimony of The Honorable John Ashcroft, Attorney General, U.S. Dept. of Justice, U.S. Senate Committee on the Judiciary, Dec. 6, 2001, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, available at [http://judiciary.senate.gov/testimony.cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42) (last visited Oct. 19, 2006).

<sup>20</sup> William Safire, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A17. Robin Toner, *A Nation Challenged: The Terrorism Fight*, N.Y. TIMES, Nov. 18, 2001 at 1A. Statement of The Honorable Patrick Leahy, U.S. Senator (Vermont), Nov. 28, 2001, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, available at [http://judiciary.senate.gov/testimony.cfm?id=126&wit\\_id=66](http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=66) (last visited Oct. 19, 2006).

<sup>21</sup> U.S. Department of Defense, Military Commissions, Military Commission Instructions, available at [http://www.defenselink.mil/news/Aug2004/commissions\\_instructions.html](http://www.defenselink.mil/news/Aug2004/commissions_instructions.html) (last visited Oct. 19, 2006).

Determining the appropriate forum for trying suspected terrorists requires addressing two related questions: what is the correct or appropriate term to be used for those engaged in terrorism and what rights are they to be granted.

Have the attacks of September 11 resulted in a shift from metaphorical war/actual crime control to actual armed conflict? The suggestion that international terrorists pose a criminal threat is met with impatience in some quarters, as if it somehow diminishes the magnitude of the events of September 11. Terrorist crimes arguably differ from other transnational crimes, in that they are politically motivated and pose a threat to national security. However, in democratic societies, crimes against national security--espionage, for example--are not generally handled by military commissions. The Military Order of November 13 appears to rest on a perception that the current terrorist emergency is legally of a warlike character, and not simply a danger to national security or suitable grounds for military involvement in law enforcement.<sup>22</sup>

The criminal law process which guarantees the accused, and subsequently the defendant, the following protections: 1) a presumption of innocence until proven guilty; 2) evidence is submitted to an open court of law; 3) the right to confront witnesses;<sup>23</sup> 4) the right to remain silent;<sup>24</sup> 5) right to appeal to an independent judiciary;<sup>25</sup> and the 6) right to trial by a jury of peers.<sup>26</sup> Perhaps, the fundamental right granted by the criminal law process is the defendant's right to confront his accusers, thereby enabling cross-examination in open court. However, as counter-terrorism is based on intelligence information,<sup>27</sup> the prosecution would be obligated to make intelligence sources available for cross-examination. As has been documented, the risk is extraordinarily significant-- if not life-threatening-- for sources who testify.<sup>28</sup>

---

<sup>22</sup> Joan Fitzpatrick, *Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 A.J.I.L. 345, April, 2002

<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> U.S. CONST. amend. V.

<sup>25</sup> U.S. CONST. art. III (creating an independent judiciary).

<sup>26</sup> U.S. CONST. amend. VI.

<sup>27</sup> Intelligence gathering largely emanates from two sources; HUMINET which is human intelligence and SIGNET which is signal intelligence. HUMINET depends on individuals willing to act as sources for a variety of reasons. For a fuller description of this, see Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

<sup>28</sup> See Thomas C. Homburger, Vice Chair of the Anti-Defamation League's National Commission, Statement of Anti-Defamation League and American Jewish Congress B'nai B'rith International, Hadassah, and The Jewish

Adopting a paradigm that does not guarantee the defendant the right to confront witnesses enables the prosecution to base a case, either in whole or in part, on intelligence information. As an example—albeit one that was criticized by the Supreme Court in *Hamdi v Rumsfeld*<sup>29</sup>—the U.S. attempted to introduce intelligence information via the Mobbs Declaration.<sup>30</sup>

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter "Mobbs Declaration"), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." He expressed his "familiar[ity]" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[biased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U. S. military forces."

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." According to the declaration, a series of "U. S. military screening team[s]" determined that Hamdi met "the criteria for

---

Council for Public Affairs to the House Committee on the Judiciary (May 23, 2000), <http://www.fas.org/sgp/congress/2000/homburger.html>.

<sup>29</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) and as to be more fully discussed in this chapter

<sup>30</sup> The Mobbs Declaration is a statement supplied by a DOD official, summarizing the intelligence information known to the authorities regarding the activities of a particular defendant. The material is used in detention hearings. In Israel, the classified information presented to the Judge regarding a defendant was previously referred to as "negative security material" and reflected the known intelligence based on HUMINET and SIGNET alike. The material was used for a variety of criminal law and administrative sanctions. The primary issue is the reliability of the source(s) and whether the material is corroborated.

enemy combatants," and "a subsequent interview of Hamdi has confirmed that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant."

In a series of memos, the Bush Administration clearly articulated a position that those detained in the "war on terrorism" were not guaranteed Geneva Convention rights.<sup>31</sup> Though the memos were subsequently "corrected,"<sup>32</sup> the Administration's initial (and instinctive) response is instructive in analyzing how the Administration initially defined the terrorists' status. In arguing that the individuals were not subject to Geneva Convention protections, the Administration determined that they were not soldiers. Thus, the Administration held that the detainees were to be denied basic international law rights with the exception of receiving food, water, shelter and basic medical care. What rights were they denied? According to the Administration, the detainees could be subject to torture,<sup>33</sup> indefinite detention<sup>34</sup> and denied independent judicial review.<sup>35</sup>

According to the Geneva Convention,<sup>36</sup> captured soldiers must be returned to their home state upon the cessation of hostilities. Unlike war, whose culmination is marked by an agreement between the warring states, the present situation has no universally agreed upon beginning point and an agreement culminating its conclusion is difficult to foresee. The lack of a foreseeable, agreed upon "end to the conflict" directly affects the detainees' present and future status. As those detained will not be released in the foreseeable future, the question of their status directly impacts the rights granted to them.

---

<sup>31</sup> Memorandum from Jay Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), in MARK DANNER, *TORTURE AND TRUTH* (New York Review of Books, 2004) and see Amos N. Guiora and Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427 (2006).

<sup>32</sup> See, Memorandum from Jerald Phifer, to Commander, Department of Defense Joint Task Force 170, in MARK DANNER, *TORTURE AND TRUTH* 168 (New York Review of Books 2004); Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander USSOUTHCOM (Jan. 15, 2003), in MARK DANNER, *TORTURE AND TRUTH* 183 (New York Review of Books 2004).

<sup>33</sup> See Amos N. Guiora and Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427 (2006).

<sup>34</sup> Brief for the Respondents, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

<sup>35</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 4 (Nov. 16, 2001).

Unlike criminals, whose date of release is determined either by judge or jury in the presence of their presence, enemy combatants as defined by the Bush Administration are to be held literally in a “black hole.” Indefinite detention, then, is a linchpin in defining the rights—or more accurately lack of rights—of an enemy combatant.

### **The Presidential Order**

The November 2001 Presidential Order,<sup>37</sup> establishing military commissions in Guantanamo Bay, does not properly define the term “enemy combatant.”<sup>38</sup> According to Section 2 of the Presidential Order,<sup>39</sup> the following individuals will be brought before the military commissions:

(a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known as al Qaida;
  - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.<sup>40</sup>

According to the above, an enemy combatant may be defined as any individual, who *in any way, shape or form* came in contact with any member of al-Qaeda during any period of time with the intent of causing harm *in the broadest definition of harm* to the United States. Enemy combatant, as defined in the Presidential Order, is an individual who need not necessarily have been involved in an act of terrorism in the present; according to the above definition it is sufficient to

---

<sup>36</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135.

<sup>37</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 2 (Nov. 16, 2001). *See also* Chapter 6.

<sup>38</sup> In fact, the Military Order of Nov. 13, 2001 does not even use the term “enemy combatant” at all. Rather, it describes in general terms “individual subject to this order.”

<sup>39</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 2 (Nov. 16, 2001).

<sup>40</sup> *Id.*

have provided assistance, even if minimal. Furthermore, the minimal degree required is not defined thereby leaving significant grounds for “liberal” interpretation on the part of the executive in determining whether an individual is an enemy combatant.

When the Bush Administration established the military commissions, the intention was to provide a forum whereby “enemy combatants” suspected of violating the Presidential Order would be detained, interrogated and tried. Since 2001, more than 660 individuals<sup>41</sup> captured in Afghanistan were transferred to Guantanamo Bay. These individuals, accused of being enemy combatants were considered by the U.S. government to be the “enemy.” The numbers speak for themselves; of the 598 individuals initially detained,<sup>42</sup> 267 have been released.<sup>43</sup>

Justice O'Connor's troubling words in *Hamdi* that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided,”<sup>44</sup> reflect a perspective that may suggest a “slippery slope” regarding rights denied to the defendant. A critical issue in the detention of enemy combatants is determining the threat they pose to the nation's security. One of the disturbing conclusions emanating from Guantanamo Bay is that some individuals were detained without cause. Furthermore, individuals were transported to Guantanamo though neither intelligence nor evidence was available regarding their involvement in terrorism, as required by the Presidential Order.<sup>45</sup>

---

<sup>41</sup> Guantanamo Bay Detainees, [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_detainees.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm) (this is the highest number of detainees held at one time at Guantanamo Bay but the numbers fluctuate as more people are detained and some detainees are released).

<sup>42</sup> Guantanamo Bay Detainees, [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_detainees.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm) (this is the number of original detainees from August 5, 2002 but since then, there have been additional transfers to Guantanamo Bay. By November 24, 2003 the number of detainees was approximately 660, but has declined since then.)

<sup>43</sup> Press Release, U.S. Dept. of Defense, Detainee Release Announced (February 9, 2006) <http://www.defenselink.mil/releases/2006/nr20060209-12461.html>

<sup>44</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004).

<sup>45</sup> See Carol D. Leonnig, *Panel Ignored Evidence on Detainee*, Washington Post, March 27, 2005, at A01.

The criminal law paradigm as analyzed in a wide range of U.S. Supreme Court cases,<sup>46</sup> addresses the question of when may an individual be detained.

What must be established is when can an individual be designated an enemy combatant, detained and potentially remanded. Justice Stevens dissent in *Padilla*<sup>47</sup> addresses this issue:

Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention.

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.<sup>48</sup>

Accordingly, the need to develop standards in determining *when and why* an individual may be detained is ultimately more significant than *how*. For a nation to determine that an individual is an enemy combatant and therefore deprived of rights fundamental to the criminal law process, places a heavy burden on the state. In such cases, the state must have either intelligence

---

<sup>46</sup> See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942).

<sup>47</sup> *Rumsfeld v Padilla*, 542 U.S. 426 (2004) (Stevens, J., dissenting).

<sup>48</sup> *Rumsfeld v Padilla*, 542 U.S. 426 (2004) (Stevens, J., dissenting).

information<sup>49</sup> or criminal evidence **strongly** indicating that the individual is actively engaged in an organization either known to be a terrorist organization or suspected of being one.

The Supreme Court most recently addressed the issue of the military commissions and enemy combatants in *Hamdan*. The Court stated that:

The commission's procedures...provide...that an accused and his civilian counsel may be excluded from, and precluded from, ever learning what evidence was presented during any part of the proceeding...the presiding officer decides to 'close.' Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and 'other national security interests.' Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other 'protected information,' so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial.<sup>50</sup>

In further analyzing the procedures for the military commissions, the Court held that: "Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."<sup>51</sup>

Actively engaged is to be defined as follows: participating in the planning of an attack, providing harbor to those committing the attack, ensuring the availability of financial resources, providing significant logistical support or actually performing the act. These four parts form the essence of terrorism. In rejecting the Government's argument regarding *Hamdi's* right to challenge his detention, the Supreme Court held as follows:

---

<sup>49</sup> For a discussion of intelligence information, see Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004).

<sup>50</sup> *Hamdan* 2786-2787

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.<sup>52</sup>

Five years after 9/11 the appropriate forum for trying suspected terrorists has not been clearly identified by the U.S. If viewed as a "journey," then the trail navigated by the Bush Administration is murky. From the initial decision to establish military commissions premised on troubled case law, the path has been less than clear. In determining that the suspected terrorists were not to enjoy Article III protections, the Administration denied the detainees basic constitutional protections. Nevertheless, in at least one case, the Administration decided to try a suspected terrorist in an Article III court. The proceedings in the Moussaoui trial—result notwithstanding—resembled a circus more than a process. Whatever the cause, an unruly defendant or a timid court, begs the issue. The manner in which the trial was conducted reflects enormous weaknesses in the traditional Article III judicial paradigm's ability to try "untraditional" defendants. However, five years after the establishment of the military tribunals in Guantanamo Bay not one individual has been tried in the military commissions. The Bush

---

<sup>51</sup> *Hamdan* at 2798.

Administration's initial efforts to establish a new judicial paradigm was met with significant criticism from all quarters.

This article suggests that the failure to clearly, coherently and consistently articulate a response as to where suspected terrorists are to be tried is problematic from many perspectives—the legal, judicial, policy, and practical. Rather than "define the issue," both the Executive and Judicial branches (perhaps with Congressional acquiescence) continued the tradition of not defining the non-soldier combatant. As long as the status is not defined, it is all but impossible to establish a judicial regime that meets constitutional muster. *Hamdan* represents but the Court's initial foray into this matter; how the issues of articulating the status and rights of detainees are resolved will determine the appropriate forum for trying suspected terrorists. Ambiguity reflected by "fits and starts" guarantees that these fundamental issues remain unresolved in the U.S. despite the recently enacted Military Commissions Act.

If an analogy from the sports world were to be applied, it would be said with a reasonable degree of confidence—albeit regrettably—that five years post 9/11, the U.S. is 0-2 in determining the appropriate forum for trying terrorists.

## II. ISRAEL

Israel applies a two-track approach to Palestinians suspected of having committed acts of terrorism.<sup>53</sup> Following the June 1967 Six Day War, the Israel Defence Forces established military courts in the West Bank and the Gaza Strip<sup>54</sup> for the purpose of trying Palestinians

---

<sup>52</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

<sup>53</sup> The focus of this section will be Palestinian residents of the West Bank and the Gaza Strip with two caveats; 1) there are a number of outstanding legal questions concerning the status of residents of the Gaza Strip post-disengagement; 2) Israeli citizens suspected of having committed acts of terrorism will be brought before civil courts only and, for policy reasons, are not subject to the jurisdiction of the military courts. However, they may be placed in administrative detention (similar to residents of the West Bank and the Gaza Strip) though the procedure is different than that in place for Palestinians. It should be noted that Jewish and Arab citizens of Israel alike have been placed in administrative detention over the years. For purposes of clarity, Palestinians residing in the West Bank and the Gaza Strip will be referred to as Palestinians.

<sup>54</sup> As these lines are written, the courts' name has not been changed following disengagement.

residing in either area<sup>55</sup> suspected of having committed acts of terrorism. Military judges are appointed by military commanders who had command responsibility over the West Bank and the Gaza Strip; military prosecutors are similarly appointed.<sup>56</sup> Palestinians are represented before the Courts by civilian defense attorneys, Palestinians and Israelis alike.

Palestinians brought before the Court are interrogated initially by the General Security Services (in Hebrew: SHABAK)<sup>57</sup> and afterwards by the Israel Police.<sup>58</sup> The charge sheet, based either on the individual's confession or on the testimony of others, is submitted to the Court by the military prosecutor. The case is heard by a panel consisting either of one or three judges.<sup>59</sup> The trial is conducted according to Rules of Criminal Procedure and Evidence akin to those in Israeli civilian courts and would be very familiar to American trial lawyers. If convicted, the defendant may appeal to the Military Court of Appeals; the prosecution may appeal if the Court has acquitted the defendant. During the course of the interrogation, the Israel may deny the suspect the right to see an attorney for up to thirty one days.<sup>60</sup>

The second track that has been implemented by Israel over the course of the past 38 years is administrative detention. Administrative detentions, unlike the criminal process, are not punitive;

---

<sup>55</sup> According to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, articles 64-71 the occupying power may establish courts to try residents of the occupied area for offences committed against the public good/security; courts with jurisdiction over civil matters that were in existence prior to the occupation must be allowed to continue. 75 U.N.T.S. 287.

<sup>56</sup> As Israel has never annexed the West Bank and the Gaza Strip, the Commander of the IDF Forces in the West Bank is in essence the head of the Military Government in the West Bank and until disengagement, his counterpart in the Gaza Strip was the Officer in Command of the Gaza Strip. This author's appointment to be a Prosecutor in the West Bank Military Court was signed by then Major General Ehud Barak (OC—Central Command); an appointment to serve as a Military Judge in the Gaza Strip Military Court was signed by Major General (ret.) Matan Vilnay.

<sup>57</sup> A number of High Court of Justice opinions have been written regarding various interrogation measures. The seminal opinion is H.C. 5100/94, Public Comm. Against Torture in Israel v. State of Israel & General Sec. Serv.

<sup>58</sup> The Israel Police commander in the West Bank while serving under the Director General of the Israel Police, is under the command of the IDF Area Commander with the exception of disciplinary affairs

<sup>59</sup> The size of the panel will be determined by the severity of the charge sheet. Regarding the composition of the panels, until recently the Presiding Judge was a lawyer serving in the IDF JAG Corps and in those cases where the panel was composed of three judges the two additional judges were reserve officers who were not lawyers. Recently two significant changes have been made: 1) the judges (unlike the prosecutors) no longer serve in the JAG; rather they serve in the IDF Military Court Unit; 2) lawyers serving in the reserves have replaced non-lawyers as the two additional judges. The IDF School of Military Law (when this author was its commander) instituted a training program for these newly appointed judges.

rather, an individual is detained if available intelligence information indicates the individual is involved in the preparation of a future attack.<sup>61</sup> Administrative detentions are implemented if the intelligence information gathered regarding an individual cannot be made public for fear that harm will come to an informant.<sup>62</sup> In such instances, a senior IDF Commander<sup>63</sup> will sign an administrative detention order upon receipt of a recommendation from the General Security Services and a legal opinion from an IDF Legal Advisor. The legal opinion will analyze the intelligence information and attempted to gauge whether the High Court of Justice will deny a petition should the detainee file one.

Administrative detentions are codified in article 85 of the Defense Emergency Regulations Act (1945).<sup>64</sup> The maximum detention period is for renewable six month periods subject to judicial review;<sup>65</sup> there is no statutorily determined time period limiting the number of detentions. Renewability requires a showing that the detainee continues to present a viable security threat. In the overwhelming majority of cases, the basis for extension of the initial detention order is the *same* intelligence information that had served as the basis for the military commander's initial decision.

Administrative detention has been heavily criticized<sup>66</sup> for a number of reasons. Primarily, the criticism has concentrated on two critical issues: the detainee's inherent inability to confront his accuser and the resultant “fishing expedition” his lawyer is required to conduct. However, unlike

---

<sup>60</sup> U.S. Department of State Country Report on Human Rights Practices 2004 – Israel and the occupied territories – February 2005, Sect. 1(d), available at <http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.html?tbl=RSDCOI&id=4226d98a9>.

<sup>61</sup> Administrative sanctions are deterrent-driven rather than punitive determinant.

<sup>62</sup> See Amos N. Guiora and Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427 (2006).

<sup>63</sup> Generally, the Commander who signs the orders is a one star general and the Commander of the IDF in the West Bank; in extreme cases, the Commander of the IDF for the Central Command (a two star general) will sign during a large scale military operation, a regional commander (full colonel) will sign.

<sup>64</sup> When the IDF occupied the West Bank, these regulations were in place as they had been introduced by the British in the Mandate period (1917-1948). As international law does not allow the occupying power to erase existing laws, the IDF “inherited” the regulations from the Jordanians who ruled the West Bank from 1948-1967.

<sup>65</sup> The process repeats itself in its entirety.

<sup>66</sup> See, e.g., Orna Ben-Naftali & Sean S. Gleichevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 HARV. INT'L L.J. 185 (2000), Eitan Barak, *With the Cover of Darkness: Ten Years of Games with Human Beings as 'Bargaining Chips' and the Supreme Court*, 8 PLILIM 77, 80-81 (1999) (Heb.)

the Military Commission mechanism established by the Presidential Order,<sup>67</sup> the Military Commander's decision regarding the administrative detention of an individual is subject to independent judicial review by the High Court of Justice.<sup>68</sup>

### **1. Trials of Detainees**

The trials can take place in either of two different venues: civilian courts or Israel Defense Force (“IDF”) military courts. The IDF military courts are not courts martial which only try soldiers.

An overwhelming majority of Palestinians accused of terrorism acts are tried in the Military Court, even if the act was committed in Israel proper (the pre-1967 borders). The primary reason for this is substantive, if the act was planned in the West Bank, the participants reside in the West Bank and the cells’ activities primarily occur in the West Bank, the Military Courts are deemed to have proper jurisdiction over the matter.

The judicial trial process is similar to the American criminal system. The defendant is innocent until proven guilty; the State submits a charge sheet and the defendant may admit guilt. Similar to large American cities, approximately 90% of defendants plead out. The most notable difference is the lack of a jury trial in the Israeli system.

Similar to the constitutionally guaranteed right to confront the accuser, secret intelligence information cannot be submitted to the court for purpose of conviction. However, it can be the basis both for a suspect’s initial detention and the extension of remand. In Israel, a suspect who has been arrested must be brought before a judge within 24 hours. In the West Bank, as amended in 1997, a Palestinian can be held for up to eight days without seeing a judge.<sup>69</sup>

---

<sup>67</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order of Nov. 13, 2001, 66 Fed. Reg. 222 § 4 (Nov. 16, 2001).

<sup>68</sup> *Salama v IDF Commander in Judea and Samaria*, H CJ 5784/03, *Marab v IDF Commander in the West Bank*, H CJ 3239/02.

<sup>69</sup> Military Order 378. In Israel, according to section 9.3.3 of the penal code a detainee must be brought before a judge with 24 hours. <http://64.233.167.104/search?q=cache:HUTfhLzLL7sJ:www.heuni.fi/uploads/j6hs3o3ru64zn5.pdf+detention+in+israel+according+to+the+penal+code&hl=en>. The West Bank and the Gaza Strip have never been annexed to the State of Israel which is why the government is a military government; in addition, the laws of the State do not apply to the two Areas. The legislation of the Areas is drafted by the officers of the Judge Advocate General Corps and

## 2. Administrative Hearings for Detainees

Administrative sanctions include deportations, assigned residence, and administrative detention. The process is initiated when the GSS receives intelligence information from one or more informants regarding a particular individual. If the GSS determines that the information cannot be submitted to an open court of law then a recommendation will be made to the Military Commander that the individual be administratively detained.<sup>70</sup>

Should the military commander sign the detention order, the individual will be brought before a military judge. This is not a trial – neither the detainee nor his attorney has the right to examine the information on which the detention is based. During the course of the hearing, the judge fulfills a double-role; that of judge and defense attorney. The detention order, if approved by the judge, is then reviewed by a higher ranking judge. Petitions can then be filed against these decisions to the High Court of Justice.<sup>71</sup>

The detention for six months is indefinitely renewable; however, an extension order is subject to mandatory review by an independent judiciary. That is, the detention may be unlimited (the longest one was for a number of years), but each time the process is renewed in full.

In implementing the additional track—as problematic as it is—Israel recognizes that terrorists, while they possess certain rights, cannot be granted full criminal law rights in every instance. As previously discussed, granting all terrorists full criminal rights would foreclose the State the right to detain individuals when only classified information is available. The need of the State to protect itself requires the development of mechanisms whereby the State grants terrorists rights, though not the full panoply of criminal rights.

---

signed into being by the Commander of the Central Command or by the Commander of the Southern Command (both are Major Generals; the equivalent to two star generals).

<sup>70</sup> Article 85 of the Defence Emergency Regulation of 1945 as described in David A. Kirshbaum, *Israeli Emergency Regulations & The Defense (Emergency) Regulations of 1945*,

<http://www.geocities.com/savepalestinnow/emergencyregs/essays/emergencyregsessay.htm>.

<sup>71</sup> I have sat in on these hearings and decisions of mine have been appealed to the High Court of Justice.

## Application

On April 14, 2002, the Israel Defence Forces arrested Marwan Barghouti in Ramallah.<sup>72</sup>

Barghouti, who was the head of the Tanzim,<sup>73</sup> challenged the jurisdiction of the Court to try his case arguing five fundamental points:

1. The authority of the State of Israel to try Palestinians who attack Israelis was negated upon the signing of the Oslo Accords.
2. The rules of international law reject Israel's right to try the Defendant, since he is a freedom fighter opposing occupation. All forms of opposition have been defined as legitimate, including the use of

---

72

[http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/4/Information%20on%20Marwan%20and%20Ahmed%20Barghouti%20-%202015-Apr](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/4/Information%20on%20Marwan%20and%20Ahmed%20Barghouti%20-%202015-Apr), The Tel Aviv District Court described Barghouti as follows: "The Defendant, who is a resident of Ramallah, is the head of the Terrorist Organizations in the Judea and Samaria area. He is their leader and was a central partner in their decision making.

The Defendant was subordinate to Yasser Arafat, who is head of the Terrorist Organizations.

During the Relevant Period for the Indictment, the Terrorist Organizations engaged in intensive Acts of Terror against Israeli targets, in accordance with the policy established by the leadership of the organizations.

The Defendant led, managed and operated Acts of Terror against Israeli targets by conspiring with senior field operatives, who were responsible for the actual implementation of the Acts of Terror, according to the aforesaid established policy, which the Defendant was engaged in implementing.

Senior and key terror activists with whom the Defendant conspired to commit the Acts of Terror under his leadership were, among others: Nasser Aweis, Ahmed Barghouti, Nasser Abu Hamid, Ra'ad Karmi, Muhaned Diria (Abu Halawa), Muhammad Musalah (Abu Satha), Mansour Shrim and Mahmoud Titi (hereinafter: "the Field Commanders"). Ahmed Barghouti (hereinafter: Ahmed) also served as the Defendant's right hand man and his liaison in contacts with the other Field Commanders.

The field commanders committed the Acts of Terror by conspiring with the field activists who were subordinated to them, were under their command and operated according to their orders (hereinafter: "Terror Activists").

Each time a decision was made by the leadership of the Terrorist Organizations to halt the Acts of Terror due to various constraints, political and otherwise, the Defendant instructed the Field Commanders and their subordinated activists to halt the Acts of Terror.

The end result of this pattern of activity was that during the Relevant Period for the Indictment, since no explicit order was given by the Defendant to halt the Acts of Terror, the Commanders and their subordinate Terror Activists continued to carry out Acts of Terror in accordance with the policy of the leadership of the Terrorist Organizations throughout that entire period, as detailed above.

Within the conspiracy to commit Acts of Terror and with the intention of promoting this conspiracy, the Defendant and his subordinates carried out a series of actions that caused, promoted and enabled the implementation of the Acts of Terror."

[http://www.israel.org/MFA/MFAArchive/2000\\_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud](http://www.israel.org/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud)

<sup>73</sup> The "Tanzim" - an organizational framework through which the activity of the Fatah members was implemented in the Judea and Samaria region and in Gaza. In the Relevant Period for the Indictment, the organization has waged a violent and armed struggle while committing Acts of Terror against Israel, its civilians and its soldiers. The Tanzim is a terrorist organization as defined in the Prevention of Terrorism Ordinance (quoted from the Gurfinkel decision).

[http://www.israel.org/MFA/MFAArchive/2000\\_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud](http://www.israel.org/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud)

- violent force. If such a fighter is apprehended, he is to be defined as a prisoner of war and not as a criminal.
3. The Defendant was kidnapped from Ramallah by IDF soldiers contrary to the Oslo Accords and international law.
  4. The Defendant holds immunity negating the right of the State of Israel to put him on trial.
  5. The indictment is political and constitutes an indictment against the entire Palestinian people.<sup>74</sup>

Though Barghoutti was a resident of the West Bank, a politically based decision was made to bring him to trial in an Israeli civilian court rather than in the West Bank Military Court.<sup>75</sup> In the context of the two-track approach implemented by Israel, Barghoutti was to be tried before a court of law rather than subjected to the administrative detention process. In determining which track to apply, the criminal law process is legally preferable as the defendant's basic rights are guaranteed *though* operational and intelligence considerations may conceivably outweigh legal considerations. In addressing Barghoutti's status the Court (Judge Zvi Gurfinkel) examined the international law issue:

The Defendant claims that he is to be considered a prisoner of war, and, accordingly, the Occupying Power is forbidden to prosecute him under criminal law.

The Defendant is not to be considered a prisoner of war.

Terrorists who attack a civilian population do not fall within the framework of "lawful combatants" entitled to the status of "prisoners of war," since they do not meet the conditions, in accordance with international law, that a lawful combatant is required to meet. The heads of the Palestinian terror organizations, of whom the Defendant is one, systematically violate the rules of war.

---

<sup>74</sup>State of Israel vs Marwan Barghouti, Ruling by Judge Zvi Gurfinkel, Dec. 12, 2002, available at [http://www.israel.org/MFA/MFAArchive/2000\\_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud](http://www.israel.org/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud) (last visited Oct. 18, 2006).

<sup>75</sup> The overwhelming majority of Palestinians who commit acts of terrorism are brought to trial in the Military Courts even if they committed or were responsible for others having acts of terror in Israel. The decision regarding Barghoutti was based on political considerations—it was assumed that there would be overwhelming media interest in the trial given his pre-eminent position, his relationship with Arafat and that he counted among his friends members of the Israeli left. In light of this expected media interest it was felt that the civilian court system would be a more "appropriate" venue. According both to various media reports and information to which this writer is privy, there was opposition to this decision within the security apparatus as it was felt that military judges who had been sitting in terrorist cases for years would be more competent in handling the issues Barghoutti was expected to raise and that the process would be both more efficient and more effective if the case were not brought to the civilian court.

International law distinguishes between two groups of combatants who undertake hostile actions against the State of Israel.

The first group of elements that undertake hostile actions against the State comprises persons who are part of regular armies that engage in combative actions against the State of Israel in accordance with the rules of war.

Combatants who act within the framework of this group and are apprehended receive the status of prisoners of war. Prisoners of war are not prosecuted in accordance with criminal law for their participation in combative actions, provided that they acted in accordance with the rules of war. If, however, they acted contrary to the rules of war, they may be prosecuted on account of war crimes.<sup>76</sup>

The two track Israeli model enables the State to determine which judicial regime is applicable to a particular defendant depending on the nature of the information available. If the information is evidence based, enabling cross examination in open court of witnesses, then the defendant will be charged in a criminal trial. However, if the case is predicated on intelligence information, then the individual will be administratively detained. While administrative detentions deny the individual the right to confront his accuser, independent judicial review guarantees both procedural and substantive oversight. In direct contrast to the Presidential Order establishing the military commissions or the recently enacted Military Commissions Act, independent judicial review is institutionalized in Israel. The two-tier process described above is predicated on clear definition of the terrorists, their status and the rights to be granted them.

### **III. Russia**

In 2003, 561 acts of terrorism were registered in Russia, an increase of 55.8 percent compared to 2002, Rosbalt news agency reported on 20 January, citing figures provided by Russian Interior Ministry Yurii Demidov. Four hundred of the attacks that took place in Russia in 2003 took place in the Southern Federal District, including 386 in the Chechen Republic, Demidov said. “This is due to the ongoing subversive and terrorist activity of rebel groups, who gave up the struggle for an

---

<sup>76</sup> State of Israel vs Marwan Barghouti, Ruling by Judge Zvi Gurfinkel, Dec. 12, 2002, available at [http://www.israel.org/MFA/MFAArchive/2000\\_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud](http://www.israel.org/MFA/MFAArchive/2000_2009/2002/12/State%20of%20Israel%20vs%20Marwan%20Barghouti-%20Ruling%20by%20Jud) (last visited Oct. 18, 2006).

independent Chechnya a long time ago,” he claimed. “Now they are just carrying out the plans of international terrorists.”<sup>77</sup>

In analyzing what paradigm Russia implements, it is important to address two important questions: how do the Russians define the conflict and how does the conflict impact public debate and legislation. While the Constitutional Court in the Constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the Situation in Chechnya case,<sup>78</sup> never expressly used the term “non-international armed conflict,” it did state that Geneva Convention Additional Protocol II should have been applied by the parties.<sup>79</sup>

According to a 2003 State Department report,

Russia passed several new antiterrorism laws, began implementing previously passed legislation, and facilitated effective interdiction of terrorist finance flows by becoming a full member of the Financial Action Task Force (FATF). In February, the Russian Supreme Court issued an official government list of 15 terrorist organizations, the first of its kind in Russia and an important step toward implementation of counterterrorism statutes. Following the promulgation of the list, the 15 organizations were prohibited from engaging in any financial activities.<sup>80</sup>

Nevertheless, according to the Russian penal code terrorists are considered criminals, subject to a specific category within the criminal justice system.

The Russian Criminal Code categorizes the following offenses as criminal: terrorism, hostage-taking, hijacking of an aircraft, sea vessel, or train, organization of an illegal armed unit, attempts on the life of a State or public figure, and attacks on person or agencies enjoying international protection.

The Code provides that serious criminal offences are pre-meditated actions for which the maximum punishment does not exceed 10 years imprisonment. Particularly serious pre-meditated actions carry a maximum punishment of ten years’ imprisonment or more. The Russian Criminal Code states that the punishment for “terrorism” is imprisonment

---

<sup>77</sup> Roman Kupchinsky, *Russia: The Losing Battle Against Terrorism and Insurgency*, Radio Free Europe-Radio Liberty, Analytical Report, Vol. 4, No. 17, Sept. 16, 2004, available at [http://www.terrorisme.net/p/article\\_122.shtml](http://www.terrorisme.net/p/article_122.shtml) (last visited Oct. 18, 2006).

<sup>78</sup> Judgment of the Constitutional Court of the Russian Federation of July 31, 1995 on the Constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the Situation in Chechnya.

<sup>79</sup> Sobraniye Zakonodatelstva Rossiyskoy Federatsii # 33, Art.3424, 14 August 1995; Bakhtiyar Tuzmukhamedov, *Chechnya and the Laws of War*, Crimes of War, Oct. 1999, <http://www.crimesofwar.org/expert/chech-tuzmuk.html> (last visited Oct. 18, 2006).

<sup>80</sup> *Id.*

for a period of from 5 to 10 years, for a period of from 8 to 15 years in cases with aggravating circumstances and for a period of from 10 to 20 years in cases with especially aggravating circumstances.

Russian legislation establishes increased liability for recruiting and training of terrorists and the financing of terrorist activities and organizations. Pursuant to the Criminal Code of the Russian Federation, persons who recruit, train or finance terrorists may be considered accessories to a criminal offence and prosecuted. Inducing a person to commit a terrorist offence (by recruiting the person) constitutes incitement and the perpetrator is held liable under the Criminal Code. If a person has facilitated the commission of a terrorist offence by means of advice, directions, the provision of information, that person may be considered an accomplice to the offence. The liability of such a person is stipulated in the relevant article of the special section of the Criminal Code.<sup>81</sup>

...

There was only one unsuccessful attempt to change the punishment system after Beslan: In January 2005 the State Duma has rejected amendments providing punishments of terrorists relatives.

There are not significant changes in this area during the year after Beslan tragedy. Last changes have been made in June 2004, then Federation Council approved amendments to the Criminal code that established the maximum sentence for terrorism crimes would be life imprisonment.<sup>82</sup>

A Chechen, Islan Mukaev, was sentenced in a Daghestan Court to a 25 year prison term for allegedly participating in the execution of six captured Russian soldiers.<sup>83</sup> In May 2005, one of the participants in the Beslan school massacre<sup>84</sup> was prosecuted in Vladikavkaz, the North Ossetian capital. The defendant, Nur-Pashi Kulayev, was charged with nine crimes, including

---

<sup>81</sup> National Laws and Measures for Counter-Terrorism and Regulation of Biology, Depaul University, College of Law, available at [http://www.law.depaul.edu/institutes\\_centers/ihrli/downloads/publications/Russia.pdf](http://www.law.depaul.edu/institutes_centers/ihrli/downloads/publications/Russia.pdf) (last visited Oct. 18, 2006).

<sup>82</sup> <http://www.borrull.org/e/noticia.php?id=52615>

<sup>83</sup> <http://www.rferl.org/featuresarticle/2005/09/428A771F-B158-489A-ADE9-D9562F9F4C1B.html>

<sup>84</sup> For a full description see Chapter 2

terrorism, murder and banditry.<sup>85</sup> According to press accounts, one of his two attorneys had only been practicing law for two weeks prior to being appointed by the State.<sup>86</sup>

Prosecutors Gnl Nikolai Shepel and Maria Semisynova sought life imprisonment on behalf of 1343 plaintiffs. The trial judge is Tamerlan Aguzarov, and Kulayev is defended by Umar Sikoyev and Albert Pliyev, the latter of which had only practised law for 2 weeks prior to being appointed by the state. His defence lies in the claim that he was one of the recruited Chechnyans who were told they would be attacking a military checkpoint, and had no foreknowledge their target was the Beslan school; he was reportedly among several of the militants who argued in favour of capturing the local Beslan police station instead. While no witnesses have claimed he shot any of the victims, several have testified that he ran around the gymnasium shouting curses and threatening to shoot various hostages with his assault rifle - though Kulayev testifies that he was only given the firearm to carry because his leaders didn't want any of their weapons left lying around where hostages could seize them.

He has testified that Polkovnik smashed his cellphone in rage, stating that Russian forces were unwilling to negotiate, and that the bloodbath started when Russian snipers killed two hostage-takers that were carrying detonators for the explosives strung around the gymnasium. Polkovnik then shot three of the militants including the two female suicide bombers who had objected to the scholastic target, detonating their bombs. Nur-Pashi was supposed to be shot himself, by his brother Khan on orders from Polkovnik, but Khan refused.<sup>87</sup>

The Russian approach –in spite of a series of particularly violent terrorist attacks—has been to consistently categorize the terrorists as criminals rather than as “enemy combatants.”

Nevertheless, as documented elsewhere,<sup>88</sup> Russian forces have consistently *not* treated Chechen

---

<sup>85</sup> Beslan Siege Suspect Trial Begins, BBC News, May 17, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4553757.stm>

<sup>86</sup> Douglas Birch, *Admitted Militant Goes on Trial in Russian School Hostage Case*, The Baltimore Sun, at 10A (May 18, 2005)

<sup>87</sup> [http://en.wikipedia.org/wiki/Nur-Pashi\\_Kulayev](http://en.wikipedia.org/wiki/Nur-Pashi_Kulayev)

<sup>88</sup> *Russia Condemned for ‘Disappearance’ of Chechen*, July 27, 2006, Human Rights News, available at <http://hrw.org/english/docs/2006/07/27/russia13864.htm> (last visited Oct. 18, 2006) (It is estimated that 3,000 to 5,000 people have disappeared in Chechnya since 2000.); *Worse Than a War*, Human Rights Watch Backgrounders, March 2005, available at <http://hrw.org/backgrounder/eca/chechnya0305/> (last visited Oct. 18, 2006); *Russia*, Human Rights Watch, Human Rights Overview, Jan. 2006, available at <http://hrw.org/wr2k6/pdf/russia.pdf> (last visited Oct. 18, 2006); Report 2006, Amnesty International, available at <http://web.amnesty.org/report2006/rus-summary-eng#2> (last visited Oct. 18, 2006); *Briefing – Torture, “Disappearances” and Alleged Unfair Trials in Russia’s North Caucasus*, Amnesty International, Sept. 30, 2005, available at <http://web.amnesty.org/library/index/engneur460392005> (last visited Oct. 18, 2006);

terrorists as criminals. Criminals are not subjected to State actions similar to those faced by Chechen terrorists. Accordingly, the question of whether Russia considers Chechen's engaged in combat with Russian forces as criminals, enemy combatants or terrorists requires a multiple response.

Once caught, the Chechen fighter is brought to trial similar to a criminal. In those circumstances the detainee is subject to the relevant sections of the Russian penal code. As described above, the criminal law process includes a prosecutor, defense attorney, judge and the right to confront the accuser.

However, unlike criminal defendant's suspected of having committed a serious crime, Chechen terrorists are subjected to human rights violations **in combat**. This approach is reminiscent of the Israeli approach— operationally engaging terrorists in the zone of combat and bringing them to justice in the criminal law paradigm or an alternative such as administrative detention.. The Russian approach is similar to the American and Israeli approach of engaging terrorism in the zone of combat; however dissimilar from the American approach in that the captured terrorist is provided a full criminal process.

#### **IV. India**

India faces a myriad of threats external and internal alike. In analyzing whether terrorists are to be considered criminals or enemy combatants it is incumbent to recall the three threats India faces: 1) external in the form of Pakistan; 2) Kashmirian based terrorism supported by Pakistan; 3) Hindu-Moslem and Sikh-Moslem domestic based tension and violence which has resulted in acts of terrorism against the State. In spite of these multiple threats, India has consistently adopted the criminal law paradigm rather than developing or implementing an enemy combatant paradigm. The long-simmering conflict with Pakistan will not be addressed.

---

*Violations Continue, No Justice in Sight*, Amnesty International, July 1, 2005, available at <http://web.amnesty.org/library/index/engneur460292005> (last visited Oct. 18, 2006).

On March 26, 2002 the Indian parliament passed the Prevention of Terrorism Act (POTA); on September 17, 2004, it was announced that the Act would be subsequently repealed.<sup>89</sup> POTA, which replaced the Terrorist and Disruptive Activities Prevention Act (TADA), articulated the Indian approach regarding which paradigm is applicable to terrorists.

The developments after the enactment of the POTA, including the responses received by the POTA review committee show that the POTA is worse than TADA. POTA provides for criminal liability for mere association or communication with suspected terrorists without the possession of criminal intent (Section 3(5) of the POTA). Section 4 of POTA is similar to Section 5 of TADA in laying out a legal presumption that if a person is found in unauthorized possession of arms in a notified area, he/she is automatically linked with terrorist activity. Section 48(2) provides for the option of pre-trial police detention for up to 180 days. As under the TADA, where 98% of the cases never reached the trial stage, this Section 48(2) could also be misused by the police by keeping an accused for long periods of detention without charge or trial. Special courts for trials are established under POTA which are given the discretion to hold trials in non-public places, like prisons, and to withhold trial records from public scrutiny, thus preventing the independent monitoring of special court sessions. Section 32 provides that confessions made to police officers are to be admissible in trial, which has increased the possibility of coercion and torture in securing confessions.<sup>90</sup>

In addition, fault was found with POTA for discarding “the fundamental right of [the] accused to due process and [a] presumption of innocence. Persons arrested under POTA could be held for 30 days before authorities had to produce them in a special court of law.”<sup>91</sup> POTA also allowed for the admission of evidence that would otherwise not be allowed in a criminal trial.

Unlike Spain, which expanded the criminal law paradigm to include incommunicado detention, India has reverted to a traditional criminal law approach in attempting to combat terrorism. Furthermore, the present Indian approach is dissimilar from the Israeli model which enables

---

<sup>89</sup> Human Rights Watch: Human Rights News, *India: POTA Repeal a Step Forward for Human Rights: Government Should Dismiss All POTA Cases* (Sept. 22, 2004), available at <http://hrw.org/english/docs/2004/09/22/india9370.htm> (last visited Oct. 18, 2006).

<sup>90</sup> Sachin Mehta, *Repeal of POTA – Justified*, available at <http://www.legalservicesindia.com/articles/pota.htm> (last visited Oct. 18, 2006).

<sup>91</sup> Kranti Kumara, *Repeal of India’s Draconian Anti-Terrorism Law*, Nov. 27, 2004, available at <http://www.wsws.org/articles/2004/nov2004/ind-n27.shtml> (last visited Oct. 18, 2006).

bringing individuals suspected of committing terrorist acts either before a court of law and charging them in open court or ordering the administrative detention of an alleged terrorist. The Russian approach perhaps most closely resembles the Indian approach—the terrorist is defined as a criminal and once detained, is guaranteed full rights according to the criminal law paradigm devoid of a second track (Israel) or an alternative approach such as the military commissions.

India has decided to repeal a controversial piece of anti-terrorism legislation, the Prevention of Terrorism Act (POTA). The move, while welcomed by those who believe the legislation is draconian and were criticizing its misuse, has raised concern over how the government now proposes to tackle the problem of terrorism in the country.<sup>92</sup>

POTA's repeal suggests that the Indian government responded to international criticism of what had been considered "draconian powers" granted to the authorities. Both TADA and POTA had been the recipients of significant criticism for human rights abuses committed by Indian law enforcement officials. These powers enabled the State to implement measures that extended beyond the traditional criminal law paradigm. The measures were reflective of a hybrid that included aspects of the criminal law paradigm but incorporated "special measures" directly affecting the rights of the individual detainee. The hybrid paradigm which was implemented by India for a short period of time has been, in essence, replaced by the traditional criminal law paradigm.

Following POTA's repeal, terrorists in India are brought to trial before regular criminal courts. In determining that the criminal law is the most appropriate for trying suspected terrorists, India has adopted the paradigm akin to Russia. Rather than attempting to implement a twin-track approach similar to Israel, the Indian model reflects the application of the traditional criminal law process. However, should the Indian security forces aggressively, operationally engage suspected terrorists and simultaneously apply the criminal law paradigm to detained, suspected terrorists then India's twin-track approach would be more reflective of Russia's twin-track approach as compared to Israel's twin track judicial paradigm approach.

---

<sup>92</sup> Sudha Ramachandran, Filling India's anti-terrorism void, available at [http://www.atimes.com/atimes/South\\_Asia/FI23Df03.html](http://www.atimes.com/atimes/South_Asia/FI23Df03.html) (last visited Oct. 18, 2006).

## V. SPAIN

“Under Spanish law, terrorism is classified as a crime that can be prosecuted even if it is alleged to have been committed in another country.”<sup>93</sup> Señor Garzon, Spain’s top anti-terrorism magistrate, “also argues he can go after al-Qaeda because the September 11 plot was partly set up in Spain.”<sup>94</sup> Spain views terrorism as a criminal matter whereby terrorists are to be tried in courts of law established in accordance with the Spanish penal code. This article addresses whether terrorists are to be categorized in a different paradigm than criminals.

Crimes of terrorism are outlined in the second section of the Spanish Penal Code, (Chapter V, Title XII, Book II). Title XII explicitly refers to crimes against the “public order,” however a clear definition of this concept of “public order” is not included in the Code itself. “Public order” is generally understood as the normal working of public and private institutions, and thought to be about maintaining the internal peace and free development of the fundamental rights and freedoms of citizens. In fact, “public order” consists of maintaining the conditions essential for social coexistence in a peaceful environment, while remaining within the democratic framework established by the Spanish Constitution.

Articles 571 of the Penal Code defines the objective elements of the crimes of terrorism, including arson and destruction. These actions appear separately in another part of the Penal Code; they are considered as crimes of terrorism only when other elements are present. Those additional elements are that the author of the crime must belong to, act in the name of, or collaborate with armed bands, organizations or groups whose goal is to disturb the constitutional order or the public peace.

Art. 572 of the Spanish Penal Code penalizes any individual who acts against the life, health or freedom of any person when the author of the crime is linked with an armed or terrorist organization. This requirement is essential as well in the regulation accompanying art. 574 - a residue regulation that penalizes any crime that is not described expressly in the Penal Code but which has the same conditions and the same goals as the rest of the crimes of terrorism.

It is important to realize that when speaking about belonging to, acting in the name of, or collaborating with an armed or terrorist group it is

---

<sup>93</sup> Chris Johnston, *9/11 Terror Suspects on Trial in Spain*, TIMES ONLINE, April 22, 2005, available at <http://www.timesonline.co.uk/article/0,,3-1580871,00.html> (last visited Oct. 18, 2006).

<sup>94</sup> Chris Johnston, *9/11 Terror Suspects on Trial in Spain*, TIMES ONLINE, April 22, 2005, available at <http://www.timesonline.co.uk/article/0,,3-1580871,00.html> (last visited Oct. 18, 2006).

understood that a direct relationship has to exist between the author of the crime and the armed group or terrorist organization. The Spanish Supreme Court recognizes an “armed group” as an association concentrating on armed action from which permanent links are born. Hierarchy and discipline are important to armed groups, whose actions are usually numerous and unpredictable, and who attack with suitable instruments of violence provided by their criminal organization (STS, 2nd hall, 25-1 and 27-5-1988).<sup>95</sup>

Similar to the other surveyed nations, the question is whether the existing criminal law paradigm is applicable to terrorism. In the aftermath of the train station bombings, the Spanish authorities have arrested, interrogated and brought to trial a number of individuals involved in the attack.<sup>96</sup> 116 people were arrested in connection with the Madrid train bombings<sup>97</sup> and as of April 7, 2005, twenty-five remained in jail.<sup>98</sup> Though *incommunicado* detention is at odds with the “commonly accepted” criminal law process, the Spanish approach considers terrorists to be criminals. The two-track approach, implemented by Israel, has not been introduced in Spain, though the curtailment of terrorist's rights has been codified.<sup>99</sup> Though *incommunicado* detention indicates a modification of the criminal law process, an alternative paradigm has not yet been developed.

Terrorism does not constitute a form of war in the strictest sense, but rather a form of crime, whilst possessing specific characteristics which set it apart from ordinary crime. As political insurrections or coups d'états, it is a threat to society: its intention is to change the existing political situation through violence. It is the terrorists who present their crimes as methods of war, whilst directing their attacks against civilian victims. It is the role of democratic governments, in their fight against terrorism, to decide whether they can accept this claim or whether they prefer to treat terrorists as perpetrators of a specific kind of crime.

---

<sup>95</sup> Dr. María Teresa Fernández Sánchez, Facultad de Derecho, Universidad de Salamanca, February 15, 2001, available at <http://jurist.law.pitt.edu/world/spaincor3.htm> (last visited Oct. 18, 2006).

<sup>96</sup> Spain's political response is addressed in Chapter 6.

<sup>97</sup> *Madrid Train Bombing Suspects to be Tried in Spain*, Xinhua General News Service, Feb. 5, 2006 (Many of the people held are “nearing the end of the two-year period” that the law permits for preventative jail without charge).

<sup>98</sup> Al Goodman, *Serbia Hands over Madrid Suspect*, CNN, September 25, 2005, available at <http://www.cnn.com/2005/WORLD/europe/09/25/madrid.extradite/index.html> (last visited Oct. 18, 2006).

<sup>99</sup> Article 55(2) of the Spanish Constitution allows for the suspension of the rights of suspected terrorists “with respect to the length of detention, privacy of the home, and secrecy of communications ‘as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.’” Article 571 of the Criminal Code defines terrorists. HRW, *Setting an Example? Counter-Terrorism Measures in Spain*, available at <http://hrw.org/reports/2005/spain0105/index.htm> (last visited Oct. 18, 2006).

In Spain, the fight against terrorism is not undertaken in a bellicose way, but as a specific chapter in the fight against crime, independent of the political problems it poses and which cannot be left to one side. This is why criminal law and the courts are essential instruments in the fight against terrorism.

2. In our country, an indictment on terrorist offences comes under the jurisdiction of the Assize Court, called the Audiencia Nacional, a specialised body of jurisdiction, based in Madrid, whose jurisdiction covers all offences committed throughout the whole of the national territory. It is an ordinary court, a civil tribunal made up of professional judges, members of the judiciary, appointed by the Judicial Service Commission in compliance with predetermined legal criteria, who are irremovable and answerable only to the law. The tribunal is independent from the executive and, hence, the government exerts no influence upon it whatsoever. In no circumstances are such prosecutions left to ordinary juries, given the risks involved.<sup>100</sup>

Cándido Conde-Pumpido Tourón, Justice of the Supreme Court of Spain clearly articulates the Spanish approach. Terrorists are criminals and the Spanish criminal justice system is the appropriate regime for bringing terrorists to justice. In the context of addressing what paradigm is most effective in the context of counter-terrorism, the Spanish model is a criminal law one with additional powers granted to the executive branch at the expense of the suspect. Nevertheless, the suspect is to be treated as a criminal suspect, with the full rights granted to all criminal suspects with the exception referred to.

## CONCLUSION

The United States, post 9/11, clearly represents the extreme end of the spectrum—terrorists are enemy combatants to be detained in Guantanamo Bay, Abu Ghraib or so-called “black sites.” The Presidential Order established a judicial regime by which the terrorists are to be brought to justice. Nevertheless, as discussed previously the military commissions have been significantly challenged in the Courts and court of public opinion alike. The “jury is still out” as at the time these lines are written, no defendant has been brought to trial before the commission.

---

<sup>100</sup> Cándido Conde-Pumpido Tourón, *Judicial Response to Terrorism: National Venues, The Spanish Model*, 10th International Judicial Conference in Strasbourg from 23 to 24 May, available at

Unlike Israel, Russia, India and Spain which regularly try terrorists, the Bush Administration's initial handling of the fundamental issue this article seeks to analyze has resulted in a clear policy failure. By over-reaching, by establishing a judicial paradigm inconsistent both with Article III requirements and international law guarantees, the Administration opened the door to wide-spread criticism, which was not long in coming. While the U.S. continues to hold hundreds of detainees for trial, terrorist defendants held by the other nation's surveyed in this article have been brought to trial in accordance with the traditional criminal law paradigm or detained in accordance with an administrative law process subject to independent judicial review.

While the *Padilla*<sup>101</sup> case suggests "a crack in the wall," the overall approach of the U.S. has been steadfastly consistent both with respect to which judicial paradigm to apply to terrorists and what measures can be subsequently implemented. The enemy combatant paradigm as defined by the U.S. allows for basic violations of the Geneva Convention that have not been adopted—and if adopted then subsequently altered—by the other surveyed nations.

That is not to suggest that the operational counter-terrorism measures implemented by Russia and India are free of human rights violations. They are not. However, in determining what judicial regime to apply to terrorists both countries ultimately have chosen to view terrorists as criminals. That application does not apply to operational considerations. Israel's approach with respect to what judicial regime to apply to terrorists has been to adopt a two-tier approach. While Russia, India and Spain have not adopted a similar regime, the three countries are more closely aligned with Israel than with the U.S. Israel, Spain, India and Russia have consistently defined terrorism as a criminal act and terrorists as criminals. The only exception with respect to how Spain implements the criminal law paradigm is implementation of the incommunicado detention.

Implementation of methods extending beyond the criminal law paradigm suggests recognition

---

[http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2002-judicial/Panel1\\_C%C3%A1ndidoCondePumpidoTour%C3%B3n.asp](http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2002-judicial/Panel1_C%C3%A1ndidoCondePumpidoTour%C3%B3n.asp), (last visited Oct. 18, 2006).

<sup>101</sup> The Court of Appeals in *Padilla* stated that the President did not have the authority to designate someone within the U.S. as an enemy combatant unless the President was given that authority by Congress. *Padilla v. Rumsfeld*, 352 F.3d 695, 712-714 (C.A.2 N.Y., 2003). This was eventually overturned by the Supreme Court which held that

that the traditional approach is ineffective. Furthermore, careful analysis of *how* the paradigm has been implemented suggests over-reach and tweaking rather than a consistent legal policy. In determining where to try terrorists the five surveyed nations' seemingly articulate a realization that terrorists are somehow *different* than common criminals. However, how different and how to articulate the difference is an issue that jurists and decision makers alike are struggling with. That struggle results in policy inconsistency, ambiguity and violations of human rights.

How should we go forward? It is suggested that in the American setting, amending the FISA court legislation, whereby suspected terrorists would be brought to trial before the court, would resolve the policy and legal ambiguity of the past five years. Such Congressional initiative would enable the trying of suspected terrorists before a civilian court skilled and competent in issues inherently specific to terrorist trials. As the *Moussaoui* trial clearly exhibited, traditional Article III courts are ill-equipped for such trials. It is recommended that trials of individuals suspected of involvement in terrorism would be heard before a bench trial, without a jury, to allow the introduction of intelligence information that would not be made available to the defendant nor counsel. While violative of the 6<sup>th</sup> amendment right to confront the accuser, a court specifically trained in reading and analyzing the reliability of intelligence information would satisfy a balancing test whereby the State could introduce such information subject to strict judicial scrutiny by an independent court.

The separate judicial and operational approaches adopted by India and Russia suggest the adoption and application of the criminal law paradigm to a terrorist brought before a regular civilian court in conjunction with aggressive operational counter-terrorism in contrast to traditional law enforcement. India and Russia treat terrorists as criminals once the terrorists are caught but not in an operational sense. Both countries have come under severe criticism for widespread allegations of human rights violations. Spain's approach is similar to that of Russia and India with two significant differences---the Spanish government has implemented a policy of incommunicado detention while maintaining a traditional law enforcement rather than

---

the proper respondent was the commander of the naval brig where the Padilla was being held and that the Court did not have jurisdiction. 124 S.Ct. 2711 (2004).

operational counter-terrorism approach. Unlike India and Russia, Spain treats terrorists as criminals in both the operational and judicial regimes. Nevertheless, the three countries have largely resisted the adoption of a second judicial tier, unlike the United States and Israel.

Israel has the most fully developed two track judicial approach to terrorism in that defendants may be brought either to court for a full criminal trial or detained administratively subject to independent judicial review. A terrorist defendant brought to trial in a military court is provided full criminal rights and protections akin to the judicial process before a civilian court; in administrative detention the detainee is not entitled to confront his accuser.

In developing judicial policy with respect to where to try suspected terrorists the five countries analyzed in this article suggest different approaches to a similar dilemma. In determining how to most effectively proceed it is recommended to establish a policy that most effectively balances the rights of the individual with the rights of the State. In the American context, it is recommended—as discussed above—to amend the FISA court to enable the holding of criminal trials before that court. In the Russian and Indian contexts, the holding of criminal trials has been determined to be the preferred route though violations of human rights in the operational context remain a constant. Similarly, Spain’s incommunicado detention policy has been the subject of criticism though the Spanish model most consistently adapts the criminal law paradigm from both a judicial policy and law enforcement perspective. It remains to be seen whether Spain’s model will become increasingly Russian-like from an enforcement perspective or adopt an Israeli two track approach.

Civil, democratic society must constantly engage in introspection with respect to various measures adopted and implemented. This article has sought to shed light on the question of where suspected terrorists are to be tried. It is suggested that the paradigms presently adopted may not be the paradigms of tomorrow. The ultimate test is how do the five surveyed nations most effectively balance while providing terrorist defendants their day in court.