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# THE FUTURE OF GUANTANAMO BAY TRIALS: TOWARDS A DIFFERENTIATED AND SUI GENERIS MODEL

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## 1. THE NEED FOR A LEGAL-POLITICAL CHANGE AND REVIEW OF GUANTANAMO BAY PROCEEDINGS

The first Executive Order of the new US President Mr. Obama of 22 January 2009, titled “*Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities*”<sup>(1)</sup> enhanced the closure of Guantanamo Bay, the transfer of its detainees and the future of the legal proceedings before the Military Commissions within one year. The President of the United States deems it imperative that these types of

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proceedings comply with the rule of law, consistent with “*the national security and foreign policy interests of the United States and the interests of justice*”<sup>(2)</sup>

The question of perennial importance is how the Guantanamo Bay proceedings can be transformed into procedures which meet the international law standards of fair trial. Part and parcel of assessing the legal transformation of the Guantanamo Bay proceedings, is how to anticipate the necessity to detain and prosecute terrorist suspects. It is this question which is central to the Presidential Execution order and which merits the question whether a fusion between criminal procedural principles and State security (administrative) interests, while securing human rights protections, is a more preferable one than a unilateral solution, i.e. opting for one of the two models to be discussed in the following paragraph.

For such determination and in order to consciously dispose of the Military Commission proceedings vis-à-vis Guantanamo Bay detainees, consistent with the Rule of Law, it seems imperative to endorse:

- i. “A comprehensive interagency review”<sup>(3)</sup>, which also implies an interdisciplinary analysis of the legal options, and;
- ii. A differentiated procedural approach per category or type of terrorist suspect, which approach – until now – was absent within US policy.

Yet, without such a differentiation any legal disposition and transformation of the Guantanamo Bay proceedings will continue to encounter legal obstacles akin to those identified by the US Supreme Court in its judgment of 26 June 2006 of *Hamdan v. Rumsfeld*, whereby it was held that the Military Commission Act 2006 was incompatible with fundamental defence rights of Guantanamo Bay detainees.<sup>(4)</sup> Entertaining such a differentiated model is warranted now that the category of terrorism suspects encompasses different categories but is instead amorphous phenomenon. In particular three types of Guantanamo Bay detainees can be detected.<sup>(5)</sup>

- a. First, those against whom there exists a reasonable case and evidence to press (war crimes) charges;

b. Second, those suspects against whom no reasonable criminal case exists such that sufficient evidence can be brought against them to prosecute a (war crimes) case, but who still pose a considerable risk for society when released;

c. Third, suspects against whom no evidence can be brought and who have been cleared (no danger to society), but are subjected to potential human rights violations when repatriated.

Each of these types of terrorism suspects ought to activate a distinct legal model, the contours of which will be outlined in this paper. While doing so, this analysis revolves around two different legal models in order to suppress terrorism (*paragraph 2*). *Paragraph 3 and 4* of this paper arrive at the application of these two models on specific State powers vis-à-vis terrorism, thereby relying also on the legislative and judicial experiences in this regard within other legal systems of the world. The future of terrorism proceedings akin to the Guantanamo Bay cases will be addressed in *paragraph 5*, which examines the specific legal traits of criminal proceedings in terrorism cases, adhering to the case law of the Israeli Supreme Court and the European Court on Human Rights (ECHR).

## **2. DIFFERENTIATION OF LEGAL MODELS VIS-À-VIS TERRORISM SUSPECTS AND TERRORISM CASES**

### **2.1. LEGAL POLITICAL CHOICES AS TO APPLICATION OF THE LAW ENFORCEMENT OR LAW OF WAR MODEL**

The Executive Order of 22 January 2008 issued by President Obama, stipulating the closure of Guantanamo Bay, touches upon a preliminary issue; the scope of individuals against whom specific terrorism-procedures can be entertained and which type of legal model can be administered.

Section 1(c) of the mentioned Executive Order defines the individuals currently detained at Guantanamo Bay to be covered by this Order as those

individuals “currently detained by the Department of Defense in facilities at the Guantanamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.”

Noticeably, the Order avoids the adjective “unlawful combatant” which is still incorporated in the Military Commission Act 2006. Yet, as noticed, “enemy combatants” is a generic term which does not reflect the different categories of suspects, the categorization of which impacts upon the nature of (criminal) proceedings to be pursued.

When the international community is faced with international terrorism, the discussion as to what legal regime applies depends on choosing between the traditional Law Enforcement regime and that of the Law of War.<sup>(6)</sup> The consequences of such a legal-political choice is of ulterior importance for the procedural regime applicable to terrorist suspects. The last decade has shown a preference within the international community to transgress from the Law Enforcement regime towards the application of the system of the Law of War, particular when certain nations are subjected to actions of terrorist organizations.<sup>(7)</sup>

Accordingly, the disposition and transformation of the Guantanamo Bay cases is primarily contingent upon the legal-political choice of the US government for one of these two models. The nature of this predominantly legal-political choice can also be deduced from President Obama’s views as echoed by his Solicitor-General’s nominee, Ms. Elena Kagan, saying that because the United States is still at war with terrorist organizations, intelligence agencies could capture individuals around the world suspected of financing al-Qaida. Both Obama’s Attorney-General Eric H. Holder Jr. and Ms. Kagan ventilated the opinion that such individuals could be considered “part of the battlefield”.<sup>(8)</sup>

Clearly, this legal-political view is also reflected by the drafters of the Military Commission Act 2006 which comprises in article 948(b)(a) the view that the main purpose of the military commission proceedings was to “*try alien unlawful enemy combatants engaged in hostilities against the*

*United States for violations of the Law of War and other offenses triable by military commission.*"<sup>(9)</sup> The key question is whether the criterion "part of the battlefield" can amount to a indefinite concept, to be unilaterally determined by a State whose interest it is to have a "warlike situation" in place for purposes of suppressing terrorism.

## **2.2. THE CLASSIFICATION OF GUANTANAMO BAY DETAINEES FROM THE PERSPECTIVE OF THE LAW ENFORCEMENT AND LAW OF WAR MODEL**

Similar to the United States in its fight against al-Qaida, Israel defined its conflict with the Palestinians during the Second Intifada, including the Gaza Intervention of December 2008, as an armed conflict during which the Law of War is applicable.<sup>(10)</sup>

It has been held that States are empowered to opt for the Law of War model when confronted with extreme types of international terrorism, which affect the very essence and survival of a State and its population.<sup>(11)</sup> In the 1986 *Nicaragua* case, the International Court of Justice handed down a judgment to the extent that States are allowed to invoke military action on the basis of self-defence, against other States, preconditioned upon the existence of an armed attack resulting in severe consequences. The Security Council of the United Nations in its Resolutions 1368 and 1373 of 2001 has extended this criterion of "armed attack" also to non-State actors, i.e. terrorist organizations which mount an attack akin to the 9/11 events.

The only legal threshold seems therefore to be the existence of a certain level of violence within the (non)international armed conflict should be is considerably high in terms of the nature and severity of the terrorist operations, the number of victims and the length of the conflict.<sup>(12)</sup> Only in the absence of such extreme level of violence, one can say that the Law Enforcement model should be adhered to in order to investigate and prosecute terrorism suspects.<sup>(13)</sup>

Yet, the Law of War model inheres the handicap that it aims at the

traditional categories of civilians and combatants and not as much as at “unlawful combatants”. This flaw in the Law of War is also apparent from an analysis of the judgment of the US Supreme Court in the *Hamdi* case.<sup>(14)</sup>

### **2.3. TRANSPOSITION OF TWO MODELS ON GUANTANAMO BAY CASES**

Hence, the disposition and transformation of the Guantanamo Bay cases primarily revolves around a fundamental choice for either two models or a combination thereof.

The current categorization of the Guantanamo Bay detainees into the mentioned three types, is premised upon the application of the Law of War model and not on the Law Enforcement model as such. The US Supreme Court endorsed this legal-political approach, confirming the position of the US Administration in this regard, holding that unlawful combatants may be detained throughout the entire conflict. The Supreme Court Justices arrived at the following findings:

-“It is a clearly established principle of the Law of War that detention may last no longer than active hostilities, thereby referring to Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955]”

- Secondly, the Supreme Court agreed that “indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long-standing law-of-war principles.”

- “If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the Law of War”, the assumption to detain for the duration of the relevant conflict, may unravel. In the instant case, the Supreme Court held that this situation did not occur since at that time (2004) active combat operations against Taliban fighters were still ongoing in Afghanistan.

- Therefore, it is implicit in the judgment of the Supreme Court that at the moment active combat operations have ceased to exist, one can no longer presume an armed conflict.<sup>(15)</sup>

Hence, the US government, when facing a reform of the Guantanamo Bay proceedings, should first assess whether an active combat situation has continued to exist against al-Qaida. When answered in the negative, the Law of War model seems not applicable and resort should be had to the traditional Law Enforcement model. But even in the event of an affirmative answer, the disposition of Guantanamo Bay calls for a new set of laws in that the category of “unlawful combatants” should be specifically addressed. After all, the *Hamdi* judgment does not address the situation that a civilian is arrested for terrorism activities during the armed conflict. For these type of individuals, one cannot argue that “the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”<sup>(16)</sup> When accepting this proposition, the conclusion should be that those civilians, who are technically non-combatants but do engage in terrorist activities during the conflict, can only be subjected to the Law Enforcement model.

From this perspective, the two mentioned models may coincide even during an ongoing armed conflict. For instance, this concurrence of classification could emerge with several of the Guantanamo Bay suspects in so far as they are charged with the 9/11 attacks, i.e. deliberately attacking civilians in so far if one accepts that the attacks amounted to the start of a war.<sup>(17)</sup> Those type of suspects can therefore be subjected to criminal proceedings for breach of domestic criminal laws or Laws of International Armed Conflicts (LOIAC). If however the US would arrest a civilian in 2009 in Afghanistan on the basis of suspected terrorist intentions, while not taking part in the hostilities as such, such individuals ought to be subjected to the traditional Law Enforcement model, i.e. given a criminal trial.

### 3. STATE'S POWERS UNDER THE LAW OF WAR MODEL VIS-À-VIS TERRORISM

The ulterior solution as to how to dissolve the Guantanamo Bay system is premised upon the (non)acceptance of the proposition that fighting international terrorism equates an armed (military) conflict, which proposition in its turn presupposes terrorists attacks akin to an attack by hostile forces.<sup>(18)</sup> As noticed, international law does not prohibit that States resort to the Law of War model in the event of extreme, transnational types of terrorism which endanger the very existence of a State and its citizens. The option for the Law of War model may result in more extensive powers to battle terrorism compared to the Law Enforcement mode, such as:

- i. Qualifying terrorist suspects as military targets which may be killed at any time during the armed conflict.<sup>(19)</sup>
- ii. Prolonged detention of 'terrorists' (unlawful combatants) for the duration of the armed conflict without trial proceedings.<sup>(20)</sup>
- iii. Extended military operations against terrorist suspects conducted in third States.<sup>(21)</sup>

At the same time, these three types of military operations and measures are still controversial under international law.

#### SUB (I)

Even under the Law of War model, targeting of suspected terrorists (preventative killings) is only permitted when principles of proportionality are met. The controversy of this type of military operations was described by the Israeli Supreme Court with the following words:

*“The examination of the ‘targeted killing’ – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex (...). The result of that examination is*

*not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of The First Protocol). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not."*<sup>(22)</sup>

## **SUB(II)**

Under the Law of War, a detention system which deviates from traditional criminal proceedings is not unequivocally permissible. The mentioned *Hamdi* judgment of 28 June 2004<sup>(23)</sup> of the US Supreme Court inheres three main restrictions as to the legality of prolonged detentions:

a. First, the US may detain for the duration of the hostilities, individuals determined to be unlawful combatants "who engage in an armed conflict against the US";

b. Yet, for such detention, the evidence should reflect that United States forces are still involved in the "active combat in Afghanistan"; only then such detention is part of the exercise of "necessary and appropriate force."<sup>(24)</sup>

c. When the arrest concerns merely a civilian, who did not (in)directly assist the fighting forces, but would though be suspected of terrorist

activities, the Fourth Geneva Convention obliges the State to detain the suspect (civilian) only by way of criminal or administrative detentions.<sup>(25)</sup>

### **SUB(III)**

Despite the International Court of Justice having ruled that inter-state self-defence pursuant to article 51 of the UN Charter can not legitimize use of force in third States where the terrorist organization is vested<sup>(26)</sup>, international law does not rule out military extra-territorial operations being undertaken when terrorist operations are conducted on a continuous basis akin to combat-operations and the host State is failing to intervene.<sup>(27)</sup> It is questionable though whether the legal and military powers of a State differ considerably in the event the Law Enforcement model applies. Next paragraph will address this question.

## **4. STATE'S POWERS UNDER THE LAW ENFORCEMENT MODEL VIS-À-VIS TERRORISM**

### **4.1 EMERGENCY (TERRORISM) SITUATIONS AND HUMAN RIGHTS DEROGATION**

During the last decade, several States, faced with high level organized types of terrorism, introduced extended criminal law mechanisms in order to endorse:

- expanded detention regimes, including preventative arrests;
- expansion of evidentiary requirement, such as admission of intelligence sources and intelligence officers as witnesses;
- limitations on the defence having access to prosecution materials.<sup>(28)</sup>

When endorsing such deviation from traditional criminal law procedures in order to effectively suppress terrorism, two parameters should be of guidance. *First*, article 4 of the ICCPR, empowering States to, in extreme situations of emergency, depart from the obligation to comply with human

rights; terrorist operations to undermine a society fall within the ambit of this exception.<sup>(29)</sup> Yet, these derogations must be proportionate, i.e. not excessive measured against the State interests sought to protect. *Second*, certain human rights have an absolute nature and thus can not be departed from. An example is article 2(2) of the UN Anti-Torture Convention, providing that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

States have incorporated these two parameters by more flexible investigative, prosecutorial and detention powers vis-à-vis terrorism suspects on the one hand, while endorsing human rights protection for the suspect on the other hand. The following major legal systems of the world – which could be of guidance for the transformation of the Guantanamo Bay system within the Law Enforcement model – are instructive.

#### **AUSTRALIA**

The Australian Security Intelligence Organisation Act 1979 (ASIO) endows this organization with the power to seek a warrant to question, and in limited circumstances detain, a person who may have information relating to a terrorism offence. Further, ASIO may question a person for up to a total of 24 hours (48 hours if an interpreter is used) and, if permitted by the warrant, the person may be detained for up to 168 hours. Warrants are issued by a federal judge or a Federal Magistrate. A person with judicial experience supervises questioning. Legal protection is ensured by securing a person's right to have a lawyer present, the right to make a complaint to the Inspector General of Intelligence and Security and to seek a remedy in a federal court at any time.<sup>(30)</sup>

#### **CANADA**

The Canadian Anti-Terrorism Act 2001 (ATA) accords those accused of terrorism-related offences with the same substantive and procedural rights as

any other criminal accused in Canada, including the presumption of innocence, equality before the law and trial by an independent and impartial tribunal. The burden of proof rests upon the State such that it should prove its case beyond a reasonable doubt. At an investigative hearing a person is required to answer questions submitted by the Attorney General even if the answers would incriminate them. However the information or evidence derived from it, may not be used against the person in a criminal proceeding. Persons have the right to have a lawyer available at any stage of the proceedings.<sup>(31)</sup>

In the *Charkaoui* case of 2007, the Canadian Supreme Court banned prolonged detention of terrorist suspects in the event such detention is merely based upon confidential materials absent to judicial review. For the Canadian system, detention of terrorist suspects was initially allowed on the basis of evidence that was never disclosed to the named person without providing adequate measures to compensate for this non-disclosure and the constitutional problems it causes. The Supreme Court balanced the security needs of the government against the rights of the Accused, finding that legal solutions in this regard should be devised such that the protection of confidential security information should at the same time be less intrusive on the person's rights.<sup>(32)</sup>

## FRANCE

From the perspective of transformation of the MCA proceedings in the United States into new terrorism laws, it is instructive to note that in 1986 the French legal system introduced within the District Court of Paris, a specific section of prosecutors and examining magistrates, specialized in terrorism cases. Within this system, a specific prosecutor is empowered to determine whether a crime qualifies as a terrorism crime and accordingly can refer this case to the mentioned special section. The particular examining magistrate subsequently initiates an investigation in order to analyze whether the case can be submitted to the Trial Chamber. Apart from having a wide

range of investigative powers, the examining magistrate can delegate certain actions to the police authorities. The defence position is honoured in that, apart from prosecution and civil parties, the examining magistrate can entertain particular investigative requests on behalf of the defence, the decisions of which are appealable. At the end of the investigation, it is the examining magistrate who decided whether there is a *prima facie* case for a trial. Also this decision is appealable.

As a result of this specific anti-terrorism section within the French legal system (Paris), a specialized and expert section of counter-terrorism magistrates arose.<sup>(33)</sup>

Procedurally, the French Criminal Code of Procedure includes the principle that the procedural rules applicable to ordinary criminal cases, also apply to terrorism suspects. Hence, the time limit for pre-trial detention for terrorist suspects may lead up to two years pre-trial detention for crimes punishable by 10 years imprisonment or less; when it concerns crimes punishable beyond 10 years imprisonment, pre-trial detention may be allowed up to four years. Yet, certain procedural exceptions are admitted under the French system when it concerns terrorist suspects.

On 23 January 2006, France accepted a new law<sup>(34)</sup> assuring that police custody of terrorist suspects is restricted to a maximum of 6 days if there is a serious risk of a terrorist-act in France or abroad, or based on essential and urgent regulations resulting from international cooperation. This is contrasted by the time limit of 4 days maximum for suspects of other offences than terrorist offences. Furthermore, terror suspects may be questioned for 6 days without a lawyer being present and are not informed of the right to remain silent. After 96 and 120 hours of detention respectively the suspect may ask to consult his lawyer. If a lawyer is involved, access to the case file can still be denied. This French law furthermore provides that the terrorist suspects can be preventatively detained for the duration of four days without others knowing of his arrest.<sup>(35)</sup>

## UNITED KINGDOM

The House of Lords in the UK handed down judgments in 2004 and 2006 in which it clearly held that indefinite detention of terrorist suspects (non-British nationals) without trial-prospect is contrary to proportionality and discriminatory.<sup>(36)</sup> Additionally, the House of Lords excluded the use of statements obtained from terrorist suspects by foreign security services while applying torturous interrogation methods.<sup>(37)</sup>

The 2004 ruling of the House of Lords was actually also endorsed by the US Supreme Court in *Boumediene et al v. Bush* of 12 June 2008. In 2005, US Congress passed the Detainee Treatment Act (DTA), which provided that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo,” In the *Boumediene* judgment, the US Supreme Court Justices ruled that the Detainee Treatment Act was not an adequate and effective substitute for habeas corpus relief for terrorist suspects.<sup>(38)</sup>

## ISRAEL

Similarly, the Supreme Court of the State of Israel has stipulated several limitations on the application of the Law Enforcement model vis-à-vis terrorist suspects.

First, the Israeli High Court Justices handed down a judgment outlawing various torturous interrogation methods to be used against terrorist suspects, such as sleep deprivation and excessive tightening of handcuffs, even in the context of a “ticking bomb scenario” In particular, the judgment held that:

*“According to the existing state of the law, neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty-infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator—like any*

*police officer—does not possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.”*

Accordingly, the Supreme Court proclaimed that the General Security Service (GSS) of Israel lacked the authority to employ any interrogation methods that inflict physical or mental harm.<sup>(39)</sup>

Secondly, in the *Marab* judgment of 5 February 2003, the Israeli Supreme Court ruled upon the legality of detaining terrorist suspects in time of warfare. Initially, such detentions were carried out under regular criminal detention laws. However, on 5 May 2002, the Commander of the IDF forces promulgated a special order “detention in time of warfare”, which provided that during the first 18-day period of detention, detainees have no option to be heard by a judge, while the detention order can be authorized by military officers. After the 18-day period judicial review is required. The Israeli Supreme Court held that the 18-day detention period without judicial review was *null and void*, since:

- Detention without the establishment of criminal responsibility should only occur in exceptional cases.<sup>(40)</sup>

- No authority exist to carry out detentions without “cause for detention”.<sup>(41)</sup>

- Detentions not based upon the suspicion that the detainee endangers, or may be a danger to public peace or security, are arbitrary, while the military commander does not have the authority to order such detentions.<sup>(42)</sup>

As to the standard of judicial review, the *Marab* judgment endorses that there must “be reasonable suspicion that the detainee committed a security crime and reasonable reason to presume that his release will disturb security or the investigation.”<sup>(43)</sup> Therefore, the main aim of this judicial review is the ensure that a judge “thoroughly examines the material and ensure that every piece of evidence connected to the matter at hand be submitted to him.”<sup>(44)</sup>

The extent of judicial review is therefore to be based on quality of the material instead of quantity.<sup>(45)</sup>

#### **4.2. COMMON DENOMINATORS WITH THE LAW OF WAR MODEL**

The Law Enforcement model seems to have transgressed into a *sui generis* system of criminal law norms when it concerns terrorism suspects. Domestic courts have promulgated fundamental norms – akin to Common Article 3 of the Geneva Conventions – in order to protect the individual. Transforming Guantanamo Bay proceedings into a Law Enforcement model should thus be pursued in conformity with this case law. Hence, the Law Enforcement model acquires or has acquired traits of the Law of War model. Maybe that virtually the two models have a synchronized outcome.

#### **5. TOWARDS A SUI GENERIS SYSTEM OF CRIMINAL PROCEEDINGS IN TERRORISM CASES.**

##### **5.1 INTRODUCTION: A BALANCED MIXTURE OF MODELS**

The ulterior solution for the disposition of the Guantanamo Bay proceedings may be a system which inhibits a cross-fertilization of both the Law of War and the Law Enforcement systems. All three Guantanamo Bay categories would fit within the fusion of these two models. An exponent of such a *sui generis* system is the “Detention of Unlawful Combatants Law”, passed by the Israeli Knesset in 2002. This law - defining unlawful combatants as individuals taking part, either directly or indirectly, in hostilities against Israel but do not fall within the ambit of a prisoner of war status under the Geneva Conventions – allows the Chief of General Staff of the Israeli Defence Forces to order detention for reasons of State security. However, judicial review is required by a District Court, both initially and every six months thereafter. Detention under this regime can serve either to bring an

individual to (criminal) trial or to detain him as long as hostilities have not been terminated.<sup>(46)</sup>

The Israeli legislator thus dictates a mixture of procedural elements of both models, which fusion of systems could also accommodate the US policy on the “war on terror”.

*First* of all, the criterion for this type of detention is that of “reasonable cause to believe that a

person being held by the State authorities is an unlawful combatant and that his release will harm State security<sup>(47)</sup>”. Importantly, such an incarceration order – despite this order to be granted in the absence of the particular person – must be brought to the attention of the prisoner at the earliest possible date in order to provide him with the opportunity to challenge that order and its underlying submissions. Within the Israeli system, such a challenge can be brought before an officer of at least the rank of lieutenant-colonel. Yet, within a prospective US system on Guantanamo Bay detainees, this role could be substituted by a judicial authority.

In the *second* place, and as a derivative of the *habeas corpus* right, the particular prisoner should be brought before a judge of the district court as soon as possible. Within the Israeli Detention Law, this should be done no later than fourteen days after the issuance of the incarceration order. Absent to compliance with such a fundamental time limit for judicial review, the incarceration order should be quashed.<sup>(48)</sup> The type of judicial review in this regard should be substantive, whereby the (military) Court of Appeals should be empowered to examine the question of the reliability of the evidence. This type of review should therefore go beyond the question whether a reasonable authority would have made the decision on the basis of said material.<sup>(49)</sup> Furthermore, judicial review within the context of detaining terrorist suspects should take into account “the severe infringement of the human rights of the administrative detainees, and grants it great weight when examining both the evidential basis which motivated the security forces to use the means of administrative detainment and the discretion of the military

courts themselves.”<sup>(50)</sup>

In the *third* place, such a system should include a regular type of judicial review in order to supervise compliance with the initial “reasonable cause” and the criterion that release would harm the State security.<sup>(51)</sup> In the Israeli system such review takes place once every six months.

In the *fourth* place, fundamental to the fairness of such a review system forms the procedural requirement that a decision of the district court on incarceration is appealable to a higher court.<sup>(52)</sup>

In the *fifth* place, only under exceptional circumstances the Court should be empowered to depart from the common evidentiary rules in criminal proceedings.<sup>(53)</sup> The Israeli system holds that it is permissible to depart from such traditional rules.

The Israeli Supreme Court is empowered to entertain claims by terrorist suspects - sitting as a High Court of Justice (HCJ) - against the detention imposed by the IDF. Such suspects may even acquire standing without having a nexus with Israel as such. Chief Justice Barak expounded on this notion as follows:

“Our Supreme Court – which in Israel serves as the court for First instance for complaints against the executive branch – opens its doors to anyone with a complaint about the activities of a public authority. Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue. We have not used the Act of State doctrine or non-justiciability under these circumstances. We consider these issues on their merits. Nor do we require injury in fact as a standing requirement; we recognize the standing of anyone to challenge the act. In the context of terrorism, the Israeli Supreme Court has ruled on petitions concerning the power of the state to arrest suspected terrorists and the conditions of their confinement, It has ruled on petitions concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated. These hearings sometimes take place just hours after the alleged incident about which the suspected

terrorists complains. When necessary, the Court issues a preliminary injunction preventing the state from continuing the interrogation until the Court can determine that it is being conducted legally.”<sup>(54)</sup>

## 5.2 PRACTICAL FUNCTIONING OF A SUI GENERIS APPROACH

The practical implications of the functioning of such a *sui generis* system is evidenced by a judgment of the Israeli Supreme Court. On 6 December 2005, the HCJ vindicated that:

First of all, the State cannot exercise its authority to detain a terrorist suspect unless there is “a reasonable basis to assume that reasons of security of the area or security of the public require that the person be held in detention”<sup>(55)</sup>

*Secondly*, and cumulatively, there should be “decisive security reasons for that detention”.<sup>(56)</sup>

In the *third* place, the detention of a terrorist suspect should be proportional, i.e. the authority who is empowered to impose this type of detention should act proportionately by balancing the right to personal liberty against security considerations. Although under the Israeli Detention Law, the primary authority to issue an administrative detention order is the military commander, attributed with discretionary powers, this proportionality principle is equally applicable to other authorities who are to be vested with these type of powers.

In the *fourth* place, as to the assessment of proportionality, this type of detention should be “forward-looking”, i.e. toward future danger, while its nature is not punitive, rather preventative.<sup>(57)</sup>

In the *fifth* place, as to the assessment of the nature and gravity of the level of danger presented by the detainee; “The continuation of the detention is a function of the danger. This danger is examined according to the circumstances. It depends upon the level of danger presented by the administrative detainee according to the evidence. It depends upon the extent to which the evidence itself is reliable and updated. The longer the

administrative detention is, the heavier becomes the burden upon the military commander to show the danger from the administrative detainee.”<sup>(58)</sup>

### **5.3 THE FUTURE OF GUANTANAMO BAY *SUI GENERIS* PROCEEDINGS: STRIKING BALANCES**

The future legal framework of Guantanamo Bay cases is depending on the political willingness to accept that terrorisms can best be adjudicated through a *sui generis* system.

The necessity for such a balanced and *sui generis* model can aptly be illustrated by the reasoning of the HCJ, led by the Chief Justice A. Barak as set forth by said judgment of 6 December 2005. This case concerned a petitioner who was on his way to commit a suicide bombing. This individual, on the basis of classified information, was at the time of the HCJ hearing already detained for the past four years. Yet, each time the administrative detention was extended before it was brought before the HCJ.

Initially, the administrative detention order was brought for approval before a military judge and subsequently reviewed including scrutinizing the classified material which raised real and tangible suspicion of petitioners intent to commit a suicide bombing. The military judge shortened the period of detention on the basis of, *inter alia*, the outdated nature of the classified material. The Military Court of Appeals to which the military prosecutor appealed, while granting the appeal, reinstated the military detention order in full. It ascertained the nature of the classified material such that: “*Indeed, the most severe intelligence was gathered in 2001, and it indicates [petitioner’s] intention to commit a suicide bombing, the seriousness of his intention (which he did not keep to himself), and his connections to the infrastructure of Hamas’ military activity. In additional, there is intelligence relating to 2002... which also supports the evidence of [petitioner’s] murderous intentions, and his link to the military infrastructure. Additional intelligence was collected later, but it is not so substantial.*”<sup>(59)</sup>

Subsequently, the HCJ was called upon to examine the lawfulness of the

reinstating of the administrative detention order. It arrived at a negative answer on the basis of a comprehensive analysis of all relevant factors which (should) underlie such an order. Paragraph 9 of the mentioned judgment reflects this analysis as follows:

*“The question placed before us is whether the four year custody of petitioner in administrative detention is legal. In our opinion, the answer is affirmative. From the intelligence material regarding petitioner – which we viewed with petitioner’s consent and whose reliability is of the highest order – it appears that petitioner intended to commit a suicide bombing at the time of his arrest. More updated intelligence information – from different periods during petitioner’s detention – shows that this intention of petitioner has not changed. This reliable material also reinforces the previous material regarding the intention which petitioner formed in the past. This intention, although formed in the past, is forward-looking, as are the administrative detention and the danger which it is intended to prevent. In the circumstances before us, the entirety of the classified material, both that gathered before his detention and that which was gathered during his detention, indicates a most concrete danger from petitioner. The danger he poses is clear. His release from administrative detention in these times of bloody struggle between the terrorist organizations and the State of Israel would be like the release of a “ticking bomb” waiting to explode. In this situation, in which the danger is so great, respondents’ decision is reasonable even though petitioner has been in administrative detention for four years. On the basis of the material before us, we cannot assume that the long custody in administrative detention lessened petitioner’s dangerousness. The material which was placed before us forms a sufficient evidentiary basis for the continued custody of petitioner in administrative detention, for the present time. Indeed, the circumstances before*

*us, in which petitioner's dangerousness is so great, might change in the future. The danger posed by petitioner might decrease if there is a change in his intentions and plans, or if there is a change in the present security situation, in which the terrorist organizations frequently use suicide bombers against civilians of the State. However, at the present time, and in the framework of the petition before us, we find that the military commander has lifted his burden and shown that his decision is reasonable, and that there is no cause for our intervention in the conclusions of the military instances.*"<sup>(60)</sup>

Clearly, this approach reflects elements of both legal policies that underpin a Law of War model and that of a Law Enforcement model. It is actually the same *sui generis* model as envisioned by the ECHR. In its judgment in the case of *O'Hara v. U.K.*, the ECHR held that:

*(...) terrorist crime poses particular problems, as the police may be called upon, in the interest of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardizing the informant. However, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5(1)(C) is impaired. Even in those circumstances, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.*<sup>(61)</sup>

Thus, the ECHR endeavors to balance the two models, integrating it into one

*sui generis* approach.

## **6. CONCLUSIONS AND RECOMMENDATIONS: REFINING POLICIES, DEFINITIONS, CATEGORIZATION OF GUANTANAMO BAY DETAINEES AND JUDICIAL REVIEW**

The consequence of the foregoing observations is actually that the three detected categories of Guantanamo bay detainees (see Paragraph 1) should be further analyzed from the perspective of the application of the Law Enforcement model and that of the Law of War model. In other words, within the category 1 (existence of a reasonable case to prosecute), the suspect could be a civilian who had no dealings with the hostilities as such but was merely captured because he or she was involved in terrorist activities which fall outside the definition of article 948a(1) of the MCA 2006. This provision reads that: *“The term ‘unlawful enemy combatant’ means— “(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”*

Presupposed the population of Guantanamo Bay includes civilians which do not (longer) fulfil this definition, the Law Enforcement model applied to the three mentioned categories of Guantanamo Bay detainees produces the following scheme:

- The first category is to be subjected to a set of procedural criminal laws congruent with ordinary domestic criminal proceedings or criminal proceedings which are in compliance with the LOIAC; as to the trial model to be applied for these type of proceedings, one could – a parallel to the French system – opt for setting up a specialized Chamber pertaining to one Federal Court in the United States that could be competent to try these cases, which court and its prosecutors could specialize in proceedings against this category of detainees. The advantage of this judicial model is uniformity, consistency and a quality of judicial review.

- With regard to the second category, i.e. detainees which are ultimately not subjected to judicial (criminal) proceedings, one could consider setting up a system of administrative or preventative detention, albeit it that such a system should comply with human rights law.

- With respect to the third category, criminal law nor LOIAC seems to have a function since the disposition of these type of detainees is a matter of immigration and/or asylum proceedings.

The future US policy on Guantanamo Bay enhances a revision of the category of “enemy combatant”. On 13 March 2009, the Obama Administration departed from the designation “enemy combatant” while promulgating a more limited definition of suspects to be detained at Guantanamo Bay. This policy sets forth that:

1. "The president has the authority to detain persons that the president determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks."

2. "The president also has the authority to detain persons who were part of, or substantially supported Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."<sup>(62)</sup>

This new policy clearly reflects that the US administration – adhering to the context of ‘engaged in hostilities against the US’ – continues to opt for the Law of War model as far as the disposition of Guantanamo Bay proceedings is concerned. The threshold of ‘substantial support’ will exclude numerous Guantanamo Bay detainees from prosecution. This threshold seems to be more burdensome than the criterion of “a direct part in hostilities” as enshrined by article 51(3) of Additional Protocol I to the Geneva Convention.

Yet, for future terrorism proceedings – other than covering Guantanamo Bay detainees – the Law of War model may accumulate legal obstacles for

the Obama administration. From its inception, the Law of War model was developed to deal with armed conflicts between regular armed forces of States, therefore not as much as to encompass conflicts with non-State actors. A war in material sense exists when armed force is actually used, which force “must be comprehensive on the part of at least one party to the conflict.”<sup>(63)</sup> Therefore, not every military action can be qualified as a ‘war’ since this depends on the scale of the use of force.<sup>(64)</sup> The interpretation of a certain military intervention or even armed conflict as a “warlike situation” and thus the triggering of the Law of War model, could lead to artificial legal implications. The assumption that a person is “part of the battlefield” when he is apprehended by US intelligence agencies in the Philippines, suspected of financing al-Qaida, is legally difficult to construe.<sup>(65)</sup> Hence, these interpretative problems could be avoided when opting for the Law Enforcement model when it concerns individuals who were involved in terrorist actions against a certain State.

As noticed in the previous paragraphs, the detainees akin to Guantanamo Bay prisoners may also include ‘civilians’, i.e. individuals not fulfilling the qualification of ‘combatant’ or not fulfilling the newly introduced criterion of ‘substantial support’. The US Supreme Court in the *Hamdi* judgment already touched upon this lacuna in the system. As observed, the *Hamdi* judgment does not address the situation that a civilian is arrested for terrorism activities during the armed conflict (see paragraph 2.3). Opting for a Law Enforcement model *sui generis* – disconnecting its applicability from both the artificial element of ‘engaged in hostilities’, i.e. an armed conflict vis-à-vis terror and the new criterion of ‘substantial support’ – while reinforcing it with certain legal-procedural traits of the Law of War model (see paragraphs 2.1 and 3 above), could more effectively address the category of terrorism suspects akin to al-Qaida and the Taliban.

The ultimate test for the international community, addressing how to pre-emptively prevent terrorist attacks, is whether such a preventative policy can at the same time secure that accused terrorists are subjected to fair

proceedings and not detained arbitrarily. This test has been repeatedly administered by the Israeli Supreme Court called upon to balance these two ends of the spectrum, and actually introducing such a *sui generis* application of elements of both the Law of War and the Law Enforcement model. This practical precedent can serve well to assist the Obama administration in its endeavour to dispose of the Guantanamo Bay proceedings and transform them into a coherent system *sui generis* which is in compliance with the international rule of law. ❖

## NOTES:

1. The White House, Office of the Press Secretary, *Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 22 January 2009
2. Ibid.
3. Ibid., at D
4. See for these legal deficiencies, G.J. Alexander Knoops, The Proliferation of the Law of International Criminal Tribunals Within Terrorism and “Unlawful” Combatancy Trials After Hamdan v. Rumsfeld, *Fordham International Law Journal* Volume 30, No. 3, February 2007.
5. See Robert Guest, Goodbye Guantanamo, *The Economist: The World in 2009*, December 2008, at 62.
6. Shany Yuval, The International Struggle Against Terrorism – the Law Enforcement Paradigm and the Armed Conflict Paradigm, The Israel Democratic Institute, September 2008.
7. Ibid.
8. David Savage, Solicitor general nominee says ‘enemy combatants’ can be held without trial, *Los Angeles Times* 11 February 2009.
9. See the Military Commissions Act 2006, at 2602.
10. Yuval, supra note 6
11. Ibid.
12. Ibid; See also the Trial Chamber Judgment in *Prosecutor v. Haradinaj*, ICTY Case No. IT-04-84-T, 3 April 2008.
13. Ibid.
14. See the Supreme Court Judgment in *Hamdi v. Rumsfeld*, Case No. 03-6696, 28 June 2004.
15. Ibid.
16. Ibid.
17. See article 8(2)(b)(i)(ii) of the ICC-Statute, qualifying this conduct as a war crime.

18. See Yuval, *supra* note 6.

19. *Ibid.*, See also the Judgment of the Israeli Supreme Court in *The Public Committee against Torture in Israel v. The Government of Israel*, HCJ 769/02, 11 December 2005.

20. *Ibid.*, see also the Hamdi case, *supra* note 14

21. *Ibid.*

22. See Israeli Supreme Court judgment, *supra* note 19, para. 60; see also G.J.A. Knoops, Military criminal responsibilities for targeting suspected terrorists within (international) armed conflicts: towards a uniform framework, *International Criminal Law Review* 8-1 (2008), at 151–170

23. *Hamdi* case, *supra* note 14.

24. *Ibid.*

25. See Yuval, *supra* note 6.

26. See International Court of Justice Judgment in the case of *Democratic Republic of Congo v. Uganda*, Case No. 116, 19 December 2005.

27. See Yuval, *supra* note 6

28. *Ibid.*: see the systems of the UK, France, Spain, the Netherlands, Israel, Australia and the US.

29. *Ibid.*

30. Secretary of State for Foreign and Commonwealth Affairs, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries*, October 2005, at 7.

31. *Ibid.*, at 16

32. See the Canadian Supreme Court judgment in the case of *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, at 139.

33. *Ibid.*, at 27.

34. Loi n°2006-64 du 23 janvier 2006.

35. Rudie Neve, Lisette Vervoorn, Frans Leeuw, Stefan Bogaerts, First inventory of policy on counterterrorism: Germany, France, Italy, Spain, the United Kingdom and the United States, 2006, at 74, 75.

36. See for instance *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, 16 December 2004.

37. See House of Lords: Opinions of the lords of appeal for judgment in the cause *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004) A and other (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2005] UKHL 71*

38. See the US Supreme Court judgment in the case of *Boumediene et al v. Bush et al.* , Case No. 06-1195, 12 June 2008.

39. See Supreme Court of Israel, H.C. Nos. 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97 en 1043/99, at 40, available at <http://62.90.71.124/eng/verdict/framesetSrch.html>; See also G.J.A. Knoops: International Criminal Law Liability for Interrogation Methods by Military Personnel under Customary International Law and the ICC Statute, *International Criminal Law Review*, 4, 2004.

40. See Israeli Supreme Court Judgment in the case of *Marab v. The Commander of the IDF Forces in the West Bank*, Case No. HCJ 3239/02, 28 July 2008, at 20.

41. *Ibid.*, 22

42. *Ibid.*, at 22.

43. *Ibid.*, at 33.

44. *Ibid.*, at 33.

45. *Ibid.*

46. See the *Detention of Unlawful Combatants Law*, in *Sefer Hahukim* 192, 2002, at 948

47. *Ibid.*, article 3(a)

48. *Ibid.*, article 5(a)

49. See the Israeli Supreme Court judgment in the case of *A. v. The Commander of IDF Forces in the Judea and Samaria Areas*, Case No. HCJ 11026/05, 5 December 2005, at 8

50. *Ibid.*

51. See article 5(c) of the *Detention Law*, *supra* note 46.

52. *Ibid.*, article 5(d)

53. *Ibid.*, article 5(e)

54. Foreword by President Barak of the Israeli Supreme Court in the Volume: *Judgments of the Israeli Supreme Court: Fighting Terrorism within the Law*, at 15; from Foreword: A Judge on Judging – The Role of a Supreme Court in a Democracy, by Aharon Barak – President of the Israeli Supreme Court; originally printed in *Harvard Law Review*, November 2002.

55. See the Israeli SC Judgment, *supra* note 49, at 5.

56. *Ibid.*

57. *Ibid.*, at 7.

58. *Ibid.*

59. *Ibid.*, at 3

60. *Ibid.*, at 9

61. *O'Hara v. U.K.*, ECHR, October 16, 2001, para. 35. The applicant, a prominent

member of Sinn Fein, complained about violation of Article 5 ECHR and argued that in his case no reasonable suspicion existed and that he had not obtained exact information regarding the origins of the accusations. The Court emphasised that the “reasonableness” of the suspicion on which an arrest is based forms an essential part of the safeguards against an arbitrary arrest and detention pursuant to Article 5(1)(c) ECHR. The reasonableness of the suspicion must be based on facts and circumstances. What may be deemed as reasonable depends on the circumstances of the case. The Court considered that when it involves terrorist crimes, not all information may be revealed in order to protect informants or for public safety. However, even in case terrorist crimes are suspected the safeguards of Article 5(1)(c) ECHR apply.

62. Terry Frieden, U.S. Reverses policy, drops ‘enemy combatant’ term, article from CNN Politics.com, <http://edition.cnn.com/2009/POLITICS/03/13/enemy.combatant/index.html>, 13 March 2009.

63. Yoram Dinstein, *War, Aggression and Self-Defence*, Fourth Edition, Cambridge University Press, 2005, at 15

64. *Ibid.*, at 11

65. See the LA Times article, *supra* note 9.