

The Law Governing the Right of Enemy Aliens' Access to Courts



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Abstract For centuries courts of a nation engaged in war prevented aliens residing in the enemy's territory from seeking redress from them. As the recognition in the fundamental right of access to courts grew over the centuries, judges carved more and more exceptions to this rule. The changing nature of warfare in the 21st century presented further challenges to this traditional rule. Nevertheless, courts across democratic jurisdictions have thus far refrained from defining an overall alternative rule. Rather, they have resorted to solving specific cases through narrowly tailored decisions. After surveying the developing jurisprudence in regard to access of enemy aliens to courts, this chapter suggests an alternative rule compliant with contemporary human rights law and relevant to 21st war realities. It goes on to consider why courts are hesitant to declare the traditional law void and what can be learned from this hesitance as to the interaction between war and legal institutions.

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1 Introduction

It was settled for centuries that as a matter of law, enemy aliens, when residing in enemy territory, cannot seek redress in courts of the country with whom their own country is engaged in warfare. This law was accepted across jurisdictions and practiced through many instances of military confrontations, at times prolonged ones (such as during WWII). However, when 21st-century democratic governments facing legal challenges by enemy aliens, asked courts to apply this law, the latter found themselves in an uneasy position. The traditional rule does not easily lend itself to practice in modern democracies who by definition see an individual's access to courts as a fundamental human right. Furthermore, the changing nature of warfare in the 21st century changes with it the concrete implications of this law. While courts across such democracies seem in agreement that the old rule cannot be patently implemented, they have refrained from defining an overall alternative rule. Rather, they have resorted to solving specific cases through narrowly tailored decisions, a path that in itself warrants analysis.

This article argues for a new law governing the right to access to courts by enemy aliens. Our view is that the old rule must be rested for a new one that reverses the default. 21st century standards require that any individual be given "her day in court". This democratic axiom is not concerned with the national identity of the individual. National security concerns as well as objection to abuse of legal proceedings justify some narrowly tailored exclusions to this general rule in relation to specific enemy aliens. The discussion proceeds as follows: Sect. 2 will present the conceptual framework in which the basic historical rule against enemy aliens' access to courts was crystallized and how it developed over the centuries across four different jurisdictions—England, France, the United States and International Law. This overview will show that little has changed in the formulation of the law, despite growing awareness of its problematic aspects, especially in international law. Section 3 will discuss relevant rulings by high courts of western democracies since the beginning of the 21st century. Few courts faced these matters in the context of the "global war on terror". When they did, they avoided overall review of the traditional rule. We will discuss in-depth a 2014 ruling by Israel's Supreme Court, which we believe is the most comprehensive judicial decision on the matter to date, despite several shortcomings. In the context of the modern rulings, we will also discuss possible reasons for the hesitation of courts to declare the traditional law null and void. Section 4 will present the current law as we believe can be extracted from these recent rulings. It will also outline those issues that remain unsettled and await further discussion. Our conclusion will suggest initial thoughts for those discussions.

2 Conceptual and Historical Perspective

It comes almost without saying that access to courts is a fundamental human right.¹ There may be moral, legal and interpretive disputes over questions such as the scope of the right, its procedural versus substantial nature and its content. However, it is undisputed among jurists in democratic countries that individuals suffering from a legal injury must have available for them reasonable procedures to approach an independent and impartial court and seek remedy through a fair trial. The multitude of justifications for this right includes inter-alia, its necessity for the protection of any civil right (Leubsdorf 1984), and hence its being a sine-qua-non for a democratic polity (Michelman 1974). However, democratic politics have for ages limited enemy alien's entitlement to this right. This part will follow the conceptual background to these limitations.

Like practically any other right, the right to access to courts is not absolute. Where its justifications are present in the strongest manner, one may expect its strongest applications. In other circumstances, said justifications may be weaker and call for balancing between access to courts and other rights.

Under these ages-old givens, legal systems have developed their jurisprudence on the question of whether they should allow enemy aliens access to their courts. Most systems have rejected two alternative extreme notions—one, that enemy aliens enjoy unlimited access to courts; the other, that enemy aliens are categorically denied access to courts. In reality, most countries take a middle path—they provide enemy aliens with limited procedural access to courts.²

2.1 *The Conceptual Framework Limiting Enemy Aliens' Access to Courts*

Several significant justifications compete in addressing this issue. Some support enemy aliens' right to access to courts. These include: 1. *The rule of law*—war is not

¹See: ARTICLE 8 OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS, 1948 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”); ARTICLE 14 OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 UNTS 171, 1966 (“everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...”); ARTICLE 6(I) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

²This article deals mainly with *enemy aliens* and *unlawful enemy combatants*. These categories are governed by the FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1949). There is no detailed discussion regarding enemy combatants or prisoners of war, which are governed by the THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949).

conducted in a legal vacuum and should not be used to limit courts' capacities.³ 2. *Deterrence*—closing the courts' doors is likely to signal to governments of combating countries and their security agencies that their actions can go unsupervised and that wrongdoing is not likely to bear costs of different sorts. 3. *Policy considerations*—legal proceedings generate trust in the legal systems, and if successful in court, also in the government's own actions. 4. *Human rights' considerations*—Lack of access to courts means a lack of justice. It is often the only route of litigants to enforce their rights.

It may be argued that other considerations point at the same time towards the need to limit (or deny altogether) enemy aliens' access to courts. These include 1. *Preventing advantages from the enemy* as if it wins a legal battle against the country it may enjoy several benefits, some concrete such as the release of enemy captives or pay of compensations and legal fees, and other less material but no less important such as a morale boost or points gained in international public opinion. 2. *Economic considerations* work against the allocation of state funds, especially as constrained as in times of war, to serve the needs of the enemy. 3. *Practical and evidentiary difficulties*, which in extreme conditions may be tough to overcome. 4. *Policy considerations*—the fear that legal proceedings themselves will adversely affect the country's soldiers in combat and at the same time aid the enemy in the collection of valuable information that is disclosed in the courts of a court case.

As mentioned above, faced with these competing considerations, most legal systems have chosen a middle path. Common law initially took the radical view that “enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws” (Blackstone 1765). As we shall now describe, this notion was early relaxed.

Common law from its foundation and some three centuries later, viewed enemy aliens as not entitled to sue in its courts (McNair 1915). This was progress from an even harsher rule according to which they were *ex-lex*, and thus legal recourse was prevented from them altogether (McNair 1915). An individual who was born as a loyal to a king in enmity with the King of England, could not seek recourse in his majesty's courts even if he resided in England, as explained in a 1552 case, “for the Court will not suffer that any enemy shall take advantage of our law.” (McNair 1915). This general rule was reiterated unequivocally as late as the end of the 18th century. Justice Scott in *the Hoop* case (1799) ruled that “In the law of almost every country, the character of an enemy alien carries with it a disability to sue,” that common law “applies this principle with great rigor.” (McNair 1915). In short, an enemy alien was considered “totally *ex-lex*!” (Roxburgh 1920).

At the time there was one main deviation from the rule mentioned above. Enemy aliens by birth were not considered such if they have “come into the realm by the king's safe conduct.” This exception is both geographical and substantial. It is geography-based as the alien needs to be based in England at the time of suit. However, it is, more importantly, substantial because it is assumed that if the king

³On the role of courts in national emergencies see in this volume: Barak, Human Rights in Times of Terror, and Tassopoulos, Political Emergencies as Challenges to the Impartiality of Public Law.

offered the alien “safe conduct,” this was for a reason such as his coming into the realm “with flag of truce.” In any case for purposes of legal protection, the enemy alien’s coming into England had to be “an act of public authority” (Roxburgh 1920), and thus assumingly, in the interest of the king.

The rather rigid common-law rule has gone through major modifications in the period stretching from before the *Hoop* case to the end of the 20th century. We will see that it has been significantly relaxed. However, for purposes of our conceptual framework, it is fit to discuss here why the principle embodied in this rule, even as later modified, is incompatible with 21st-century law or warfare.

2.2 *England and the Common Law*

As mentioned above, the common law initially viewed an enemy alien as “ex-lex.” It carved out of this general rule those alien enemies who entered the realm under the king’s protection. However, it was quite early on that common law courts’ found this rule often leads to unjust results. They then began creating more and more exceptions to it. The following will succinctly present the development of the general rule as designed by those exceptions over the centuries. The conclusion will be that the general rule weakened gradually up to World War II, but at the same time, the courts refrained from overturning it.

The exception made for those enemy aliens who entered the realm under the king’s “safe conduct” soon widened to include those enemy nationals present in England lawfully, even if they did not enter in such a manner. In *Wells v. Williams* (1697) the court found that a French national can sue in an English court, despite the war between the two kings, and although he entered England in a time of war “sine salvo conduct” (without safe conduct) Williams (1697).⁴ This because he remained in kingdom “by the King’s leave and protection”. Part of such protection is the ability to sue in courts. It was later ruled that such protection need not be express but can be implied by registration or even internment *E. D. D.* (1919).

Thus emerged what may be titled “a territorial model” of the general rule. Under this model, enemy aliens were denied access to courts not because of nationality, but by domicile. Those legally residing in England enjoyed such access regardless of their nationality. Often those residing in allied or neutral countries were granted access even if they themselves were enemy nationals (1915). Those residing in enemy territory were denied such access, even if they were nationals of allied nations. Thus, although non-enemy subjects, Dutch nationals were perceived enemies during WWII since their territory was occupied and governed by Nazi Germany. Even a British national in enemy territory could be denied access to his majesty’s courts (1943).⁵

⁴The authors feel compelled to quote another striking statement in this case: “A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity” (pp. 282–83).

⁵The House of Lords ruled that undoubtedly non-enemy subjects, the Dutch citizens were to be treated as enemy aliens since they were domiciled in occupied enemy territory (“an alien enemy...

More exceptions to the general rule and its territorial model were introduced in the 20th century. *First*, the court held that a person involuntarily staying in enemy territory would not be considered an enemy alien, notwithstanding his presence in such territory (1917). *Second*, access to courts exists in the case of dual plaintiffs, that is, when one plaintiff is an enemy alien and the other is not. Thus, a firm registered in England, with all but one of shareholders being enemy aliens, is entitled to sue in English courts (1919).⁶ *Third*, an enemy alien can sue if the respondent does not object to the action during the preliminary hearing.⁷

An interesting deviation from the territorial model has to do with cases of habeas corpus petitions filed by detainees held for violations of the laws of war or by prisoners of war. In these cases, the courts adopted the citizenship model according to which the Great Writ is denied from enemy nationals (1779).⁸ At the same time, enemy nationals detained for non-war related offenses did enjoy access to courts (1916).

The territorial model was adopted by other common law countries such as Ireland Trotter (1919), Scotland (1916), Canada (1914) and Australia (1916).

2.3 France and Civil Law

The legal systems of Continental Europe initially shared the Common law's harsh approach to enemy aliens' right of access to justice. However, many of the civil law jurisdictions were earlier to criticize this approach and adopt other, more flexible rules. This is true de jure, though as we will show, at times of war civil law countries did not always live up to their progressive theories.

In *France*,⁹ access to courts was originally denied to all subjects residing in enemy territory—a territorial test—as per a 1704 decision received in the parliament of Douai (Flandres) and an “act of government” from 1803, confirmed in 1806 by the Court of Cassation. This principle was also prevalent during WWI in light of a decree

does not mean a subject of a state at war with this country, but a person, of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country... Even a British subject, if voluntarily resident in enemy territory, would be treated at common law as unable to sue, for the denial of *persona standi in judicio* does not turn on allegiance, but on locality...it is not a question of nationality or of patriotic sentiment.”)

⁶However, the law regarding access to courts of enemy corporations is inconsistent. In *Sovfracht*, 1 All ER 76 (1943) the court treated a firm, incorporated in the Netherlands, as an enemy alien lacking access to courts in the UK. For a study summarizing the right of access to courts of enemy corporations in Britain, the US, France and Germany, see Paul Weidenbaum, *Corporate Nationality and the Neutrality Law*, 36(6) MICH. L. REV. 881 (1938).

⁷The common-law rule prohibiting access to courts is a preliminary plea. Accordingly, this rule should be raised at the first opportunity in the defense plea.

⁸The Court (Gould, Blackstone and Nares JJ) denied a habeas petition of Spanish sailors held as prisoners of war on British territory. It should be noted that their allegation was that they are wrongfully held as prisoners of war. *See also*: *Ex Parte Weber*, 1 KB 280 (1916); *R v. Supt of Vine Street Police Station, Ex Parte Liebmann*, 1 KB 268 (1916).

⁹Garner, *supra* note 5 at pp. 47–56.

of September 27, 1914, and legislation from April 4, 1915, that forbade trade with the enemy. The legislation stipulated that every contract signed with an enemy, even if on French soil, was null and void as being contrary to the public policy; and hence, it is impossible to ask for its enforcement.

Such a rigorous prohibition attracted criticism from French jurists who saw the concept behind it, one of war as a total conflict between nations and their citizens, as outdated. These jurists called for a distinction between official enemy agents—to which the law can deny access to courts—and civilians, who should be entitled access to courts. The crucial factor being the features of an individual litigant rather than his place of residence.¹⁰

The criticism led to a revision of the French law. The courts relaxed the strict rule and allowed access to courts to subjects of an enemy state dwelling in enemy territory. However, their right to relief was suspended until the end of the war. Importantly, the courts framed the right of access to courts as a “natural right”, which could be infringed only through explicit legislation. The leading decision, handed down on April 20, 1916, instigated enormous criticism from French patriotic circles. This ruling stated that the prohibition on trade with the enemy did not deny all other private rights of access to courts even if the litigant dwelt in enemy territory.

Austria, too, adopted a liberal policy. Subjects and corporations in enemy territory were allowed to sue and be sued in the Austrian courts if a special surveillant consented to the proceedings. For instance, the courts sanctioned a suit presented by a French haberdasher from Vienna, who, with the outbreak of WWI, had returned to France and attempted to sue Viennese clients for the payment of debts accumulated before the war.¹¹ The court suspended the relief until the end of the war.

Germany, in contrast, took a position more extreme than did France and adopted the territorial criterion applied in the common law. German legislation denied access to court, first and foremost, to any enemy alien dwelling outside Germany and to any corporation located beyond German borders, irrespective of whether in enemy or neutral territory (However, like England, the exercise of the right to defend oneself as a respondent was retained).¹² Germany's Chancellor received broad authority to set individual exceptions. Due to the territorial test, French or English subjects residing in Germany during the war, and French or English corporations operating primarily from German soil, or having branches in Germany, were awarded the option of access to court.¹³

Although the civil law rule is in general more liberal than the common law rule, in practice differences are not significant. Most of the civil law states enacted during WWI special legislation banned any governmental or private trade with the enemy. Enemy aliens were not allowed to sue, even if the contract or the commercial relation

¹⁰*Ibid.*, at 51–52.

¹¹Garner, *supra* note 5 at pp. 58–59.

¹²This deviation from the civil law rule may be explained by the outburst of militarism and nationalism that characterized old Germany, especially after its unification in 1871 under the leadership of Otto von Bismarck, up to and later during World War II.

¹³Garner, *supra* note 5 at pp. 56–58.

were signed before the outbreak of the war. This approach was maintained during WWII.¹⁴ An absolute prohibition was in tort law. Most of the civil law states, similarly to the UK and the US, enacted legislation providing strict immunity for the state from enemy aliens' war damages claims (Hogg and Monahan 2000; Frulli 2003; Engle 2005; Hofmann and Riemann 2004).¹⁵ In public claims regarding the war's conduct, the rule was even stricter (McNair 1915).

2.4 *United States Law*

American law was influenced by the English rule but took its own course of development. Three marked periods show the changing attitude towards the question of enemy aliens and their right of access to courts: the Civil War, World War II and the still-evolving period following the terror attacks on September 11, 2001 (the latter of which will be discussed in part three of this paper).

Federal courts adopted the English rule according to which persons dwellings in enemy territory are not allowed to conduct any intercourse—trade or otherwise—with the US as a whole.¹⁶ The literature and rulings tended sought to deny their access to the court, including preventing writs of habeas corpus presented by enemy aliens.

Several cases during the Civil War, deal with the right of access to civilian courts of “enemy” aliens who were tried by military commissions (1866, 1869). The question of whether they are entitled to “the great writ” (i.e., habeas corpus) went all the way up to the Supreme Court of the United States. These are not typical cases to the question of “enemy aliens” as they pertain to American Citizens. They did, however, give the Supreme Court an opportunity to make it clear that the court would not allow an absolute denial of its power to examine the legality of any petitioners incarceration and that the great writ is an “immemorial right” for centuries, even before the Constitution was established. In one case, Chief Justice Chase ruled that the justices “regard as established, upon principle and authority that the appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.” It should be noted again, that the case was about “enemy” citizens' access to court, but not to foreigners' enemy.

¹⁴McNair, *supra* note 5; Roxburgh, *supra* note 5; Garner, *supra* note 5.

¹⁵Eric A. Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, Bremen University, 2005 (available: http://www.zerp.uni-bremen.de/english/pdf/dp1_2005.pdf); RAINER HOFMANN & FRANK RIEMANN, INTERNATIONAL LAW ASSOCIATION COMMITTEE ON COMPENSATION FOR VICTIMS OF WAR COMPENSATION FOR VICTIMS OF WAR—BACKGROUND REPORT (ILA 2004) (available at: <http://www.ila-hq.org>).

¹⁶The Prize Cases, 67 U.S. 635 (1862). In these cases the US Supreme Court have delved into, among others, the questions of who is an “enemy” and what is a “state of war”. See also the references in Johnson v. Eisentrager, 339 U.S. 763, at footnote 52 [1950].

An important precedent was set in the *Milligan* case. The background of this petition was a presidential order issued by Abraham Lincoln during the Civil War, which suspended a detainee's privilege to request a writ of habeas corpus. Milligan, an American citizen and a resident of Indiana, had arrested and tried before a military commission, found guilty and sentenced to death by hanging. Milligan challenged the authority of the military commission to try him as well as his incarceration. The court decided that his access to civil court could not be suspended and that he was entitled to a jury trial. However, under the common law rule, Milligan was at any rate entitled to access to court, based on his American citizenship as well as a place of residence (Indiana State). The court, well aware of the historical moment ("No graver question was ever considered by this court"), also determined an important rule: in lieu of statute, "Martial rule can never exist where the courts are open." This rule seemingly applies only to US citizens, not to foreign enemy aliens.

Similarly to the English law, the American Law has adopted the philosophical conception to which war is a total conflict between two nations.¹⁷ The US jurist, James Kent, argued that following this rationale leads to the obvious conclusion regarding "the inability of an alien enemy to sue, or to sustain... a persona standi in judicio..." (Kent 1826).

This approach also prevailed during WWI. Article 7(b) of the *Trading with the Enemy Act*, 1917, stipulates that during hostilities, the courts are not to hear any civil suits presented by enemy aliens or allies of an enemy. Enemy subjects were entitled to defend themselves as respondents during the war (although they did not have the right to cross-action) (1870); however, as plaintiffs, they had access to court only at the war's conclusion or, as in common law, if they held a work permit or resided in the United States. Moreover, some state courts ruled that a suit based on causes of action arising before war's outbreak would be suspended until after the war's conclusion, whereas suits based on causes of action arising after war's initiation would be rejected.¹⁸ In some exceptions to the general rule state-court, judges voiced their discomfort with it. Such was the case when the New York Supreme court was asked to dismiss a plaintiff's suit by her being an enemy alien (1918). The court emphasized that it could deny the motion because the plaintiff, a temporary resident of New York, should not be seen as an enemy alien, but it chooses to deny it

¹⁷See for instance: Article 21 to the INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, PREPARED BY FRANCIS LIEBER, PROMULGATED AS GENERAL ORDER NO. 100 BY THE PRESIDENT LINCOLN, 24 APRIL 1863. See also Articles 20, 24. For the Lieber Code see Elihu Root, *Francis Lieber*, 7(3) AMER. J. INT'L L. 453 (1913); George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in Field*, 1(1) AMER. J. INT'L L. 12 (1907). For a similar approach see *Prize cases*, 67 U.S. 635.

¹⁸For the approach taken by the courts during this period see E. M. Borchard, *The Right of Alien Enemies to Sue in Our Courts*, 27 YALE L. J. 104 (1917); Gordon, *The Right of Alien Enemies to Sue in American Courts*, 36 ILL. L. REV. 809 (19XX); Battle, *Enemy Litigants in Our Courts*, 28 VIRGINIA. L. REV. 429 (1942); Rylee, *Enemy Aliens as Litigants*, 12 GEO. WASH. L. REV. 55 (1944); *Habeas Corpus Protection Against illegal Extraterritorial detention*, 51(3) COLUMBIA L. R. 368 (1951); Willis B. Shell, *Habeas Corpus: Jurisdiction of Federal Courts to Review Jurisdiction of Military Tribunals When the Prisoner is Physically Confined Outside the United States*, 49(6) MICHIGAN L. R. 870 (1951).

on the broad ground that the resident subjects of an enemy nation are entitled to invoke the process of our courts so long as they are guilty of no act inconsistent with the temporary allegiance which they hold for this government.

For the length of WWII and thereafter, the US Supreme Court set down some precedents that impinged on enemy subject's access to the US civil courts. These precedents allowed citizens access to court, and likewise to enemy aliens present in US territory, but forbade it from foreign enemy outside US soil, albeit less strictly than the UK rule.

The constitutional right of an enemy alien's access to court was discussed on *Johnson v. Eisentrager* case (1950). This case involved the constitutionality of detaining 21 German citizens, detained and tried by the U.S. on Chinese soil during World War II. Justice Jackson, denying them the right to access to court, repeated the conception of war as entire combat between two nations.¹⁹ It was material to his argument that at no point were the men tried or held within the U.S.

Access to civil courts was, likewise, denied from "unlawful combatants" (1942)²⁰; this category can be US citizens who "associated themselves with the enemy." This term is equivalent to the common term of 'unprivileged belligerents.'

The *Eisentrager* case has influenced U.S. practice on actions presented by enemy aliens until recently.²¹ The court has denied constitutional access to an enemy alien but has not deliberated access as emanating from particular federal acts or international law. These issues have arisen only of late, after the September 11, 2001, terrorist attacks, as we will show in part three.

2.5 International Law

Access to court is a recognized international law right. It is mentioned in Article 8 of the Universal Declaration of Human Rights (1948) and anchored in Article 14 of the International Covenant on Civil and Political Rights (1966).²² These instruments do not necessarily provide access to a court to enemy aliens. The convention's Article 4 permits a member state to derogate from its obligations in "time of public emergency

¹⁹From the case: "In war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such... it is one validated by the actualities of modern total warfare... in war every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country". For a similar approach see also *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

²⁰In this case, the courts denied access to civil courts (the plaintiffs were tried by a military commission) in a writ of habeas corpus requested by German citizens, based on the contention that they were "unlawful combatants" and, thus, were ineligible to civil judicial proceedings. See also *In re Yamashita*, 327 U.S. 1 [1946].

²¹For the prohibition rule of enemy aliens' access to US courts and civil suits see *Ex parte Colonna*, 314 U.S. 510 (1942); *Ex parte Kumezo Kawato*, 317 U.S. 69 (1942).

²²INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 UNTS 171 (1966).

which threatens the life of the nation.”²³ Also, according to Article 2(1) the parties to the convention undertake to ensure rights enumerated in it, only to those individuals within their territory. The covenant, therefore, does not, in general, confer rights on an enemy alien found outside its territory.

The law governing the enemy subject's (or hostile parties) right of procedural access to the court during warfare is anchored in two primary sources. The first source and a controversial one is Article 23(h) of the Hague Regulations (1907).²⁴ Section 23(h) prohibits a party to hostilities to abolish or suspend rights and actions of an enemy subject, defined as a national of the hostile party (that is, a personal-status test of citizenship):

23. It is especially forbidden [...]:

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.²⁵

According to the prevailing interpretation in civil law countries, Article 23(h) annulled the common law rule regarding an enemy alien's access to courts. It is, therefore, impossible to forbid an enemy subject's suit as per the common law rule.²⁶

However, According to the Anglo-American interpretation, Article 23(h) is directed exclusively at military personnel. Its purpose is to prevent military commanders from issuing orders that might deter an enemy alien from exercising access to the court within occupied enemy territory, that is, in his state. Article 23(h) does not impinge on the options local civil authorities—such as legislatures—can employ to limit an enemy alien's access to his own state's courts.²⁷ More specifically, the article targets the behavior of soldiers on the battlefield but does not obligate their governments to avoid similar acts. This approach has been the subject of criticism

²³Article 4 likewise states that during states of emergency, there are rights that do not suffer infringement but no mention is made in this regard to access to court during war.

²⁴HAGUE REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND (1907).

²⁵The relevant articles with respect to the right of access to courts of enemy subjects in occupied territories are Articles 42–56, especially Articles 43–48.

²⁶This interpretation is based on the covenant's authors' original intent and the textual interpretation of the article. For this and the article's development history see Thomas E. Holland, *Article 23(h)*, 28 *L.Q.R.* 94 (1912) 94; Thomas E. Holland, *THE LAWS OF WAR ON LAND* (1908) 44; Lassa F. L. Oppenheim, *THE LEAGUE OF NATIONS* () 45–55; K. Strupp, *Die Bedeutung des Artikels 23 h der Haager Landkriegsordnung und die anglo-amerikanische Auffassung vom Einfluß des Krieges auf die schuldverhältnise Privater*, 23 *ZETSCHRIFT FÜR INTERNATIONALES RECHT*, Abt. II, 118–121 (1913).

²⁷This interpretation is based on the context of the article within the document. The article is placed in the chapter on the “means of injury the enemy” during “hostilities”. See George B. Davis, *The Amelioration of the Rules of War on Land*, *AMER. J. INT'L. L.* 63, 70 (1908); PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCE AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES* (1909) 235; G. VON GLAHN, *LAW AMONG NATIONS* (4th ed., 1981) 61; G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* (1957) 108; C.M. Picciotto, *Alien Enemy Persons, Firms and Corporations in English Law*, 27 *YALE L. J.* (1917–1918) 167; Stone, *supra* note __ at 441–443; Trotter, *supra* note 14 at 20; Holland, *supra* note 124 at 98. It should be noted that Profs. Holland, Stone and Von-Glahn suggested canceling Article 23(h) due to its ambiguity.

delivered by international scholars.²⁸ The British government and courts, however, based on the interpretation mentioned above, continued to apply their traditional rule well after 1907 and during the two world wars as well as afterward. The court has unyieldingly declared this position:

Article 23(h)... relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home... It is to be read, in our judgment, as forbidding any declaration by the military commander of a hostile force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their Courts of law to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in the military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the Courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article.

In the U.S. (1942) and Israel (1988), the matter remains moot. Thus, the conundrum raised by Section 23(h)'s interpretation is not, yet, resolved. There is no authoritative decision issued by any international tribunal on this topic. Still, the practice of most of the countries after Article 23(h) was adopted indicates that they have implemented Article 23(h) given the British interpretation, even the civil law countries which saw the British interpretation as a "barbaric approach against the culture." The controversy revived in the nineties, while Article 23(h) was adopted, as it is, into Rome Statute of The International Criminal Court.²⁹

Another source which deals with enemy aliens' access to court is Article 5 of the Fourth Geneva Convention (1949),³⁰ which likewise points to the possibility of infringing an enemy alien's access to the court during the war. An "enemy alien" is defined as a person found in the territory of an enemy state that is a party to violence (the territorial test). According to the convention, such a person "shall not be entitled to claim such rights and privileges under the present convention" if, "an individual protected person is suspected of or engaged in activities hostile to the security of the State." Nor can he enjoy the rights granted by the convention if the relief to which he may be entitled may be prejudicial to the state's security. Obstruction of such an action also applies in private law cases, such as tort or contract. Also, an enemy alien can be sued, within which framework he is entitled to a fair and regular trial.³¹

The approach of the European Court of Justice in the aftermath of the 9/11 terrorist attacks, was however very different than that of what was considered to be the law on access of enemy aliens to courts in the 20th century. After a court of first instance

²⁸Holland, *supra* note 54 at 94–96; Holland, *supra* note 54 at 5; Garner, *supra* note 18 at 29; Oppenheim, *supra* note 44 at 309–313. In his letter to the British Foreign Office, Prof. Oppenheim wrote that Article 23(h) annuls the prohibition on an enemy alien's access to court, and that the British interpretation currently contradicts the international law rule.

²⁹Article 8(2)(b)(XIV) to the ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2002).

³⁰GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1949).

³¹According to the Commentary to the Geneva Convention, Article 5 is not a general provision regarding access to court of enemy aliens but, rather, a specific provision regarding enemy aliens' protection only in criminal charges against him by state-party.

declared in 2005 that states can limit access to court in the name of the war on terror,³² The Grand Chamber overturned its decision as not respecting the rights to “defense, especially the right to be heard, and of the principle of effective judicial protection” (2008).

It is also the only case dealing with this issue since WWII. It is, therefore, difficult to outlay any ongoing approach of international law to this matter.

3 The Law Against Access to Courts by Enemy Aliens Meets the 21st Century

As above described, most any legal system had at first limited the ability of enemy aliens to access its courts but had later subjected these limitations to a series of exclusions and amendments. Courts in the various jurisdictions have struggled to properly balance national interest, but also, one may argue, national and nationalistic sentiment, with basic principles of justice and fairness. The outcome of such balancing exercises did not significantly change across centuries and jurisdictions. As discussed in part 1(c), the 20th century brought with it radical changes in the status of individual rights. Individuals are no longer seen as mere parts of a collective. They cannot, at least in liberal democratic thinking, be collectively punished. Human dignity and due process require that each is treated on her own merits. The balance between human rights and national interests has changed dramatically.

Political developments of the early 21st century have disturbed this clear picture of steady ongoing one-directional developments. The rise of international terror organizations, their sophistication, the scope of their threat and the widening of their targets to practically all western democracies, have brought upon a shift of mind in many western democracies. Some have called to rethink the balance between national security interests and the protection of individual rights.³³ Many countries have enacted emergency laws to fight terrorism.³⁴ Democracies are challenged not to forfeit the progress made over decades that has so fundamentally contributed to human dignity

³²Ali Yusuf & Al Barakaat International Foundation and Abdullah Kadi v Council of the European Union and Commission of the European Communities (2005, The Court of First Instance of the European Communities, Second Chamber, Luxemburg) (at: <http://curia.eu.int>). To the plaintiff's appeals see Case before the Court of Justice, C-415/05 P (Ahmed Ali Yusuf v Council and Commission)—Appeal against Judgment of the Court of First Instance (Council of the European Union, Brussels, 5 January 2006).

³³One example is the writings of sociologist Amitai Etzioni calling for a more sympathetic view to national security concerns, while maintaining liberal principles. See: AMITAI ETZIONI, SECURITY FIRST: FOR A MUSCULAR, MORAL FOREIGN POLICY (2007).

³⁴Most notably “the Patriot Act”, Pub. L. no 107-56, 115 Stat. 272 (2001); but also among others: Terrorism Prevention and Investigation Measures Act 2011 in the United Kingdom; in Germany the Gesetz zur Änderung der Vorbereitung von schweren staatsgefährdenden Gewalttaten I BGB 926 (2015).

and prosperity in the western world, while keeping tools that can effectively deal with those aiming to destroy any such progress.

The law is called on stage to meet this challenge. We shall argue henceforth that it is yet to provide a comprehensive answer regarding the issue of enemy alien's right of access to justice. We will first look into how three democracies that face serious threats from international terrorism have dealt with this challenge. We believe this description points to a certain level of quandary among courts faced with questions of enemy alien's access to court. This discussion will be followed by our thoughts on the proper implementation of human rights of enemy aliens and legal balance between competing considerations.

3.1 *United Kingdom Case Law*

More than 550 years after the formulation of Common Law's general rule negating enemy alien's right of access to justice, the United Kingdom's declared it to still be the law of the land, while at the same time eliminating much of its force.

In the *Amin* case (2005), the Chancery Division stated the English law is that "the enemy subject in this country cannot come to sue in the courts any more than could an outlaw."³⁵ However, it also declared the military actions of the United Kingdom in Iraq, the nation of the plaintiff in the case, not to constitute a state of war between the two countries. It went beyond referring to the nature of that specific arena to declare that "The traditional concept of war has virtually disappeared from state practice since the Second World War... it is almost never necessary to invoke the traditional legal concept of war".³⁶ Finally, the court ruled that the traditional rule "is part of the rules of English law relating to the traditional laws of war and that there is no warrant for extending it to the modern armed conflict."³⁷

3.2 *United States' Case Law*

The United States being the undisputed global leader in the so-called "war on terror" has faced in the years passed since 9/11/2001 the richest caseload among western democracies of disputes in which one of the parties was an enemy alien.

The US attacks in Afghanistan, which marked the beginning of the 'war on terror,' led to the capture of hundreds of suspected terrorists. They were forwarded to the US military base at Guantánamo Bay, Cuba, where a few remain until this very day (Yoo 2006). This despite declared policy by the Obama administration to close down

³⁵*Id.*, § 23.

³⁶*Id.*, § 28.

³⁷*Id.*, § 28.

the facility, as a result of its bogus legal status. Those intentions were hampered by Congress.³⁸

The 2004 *Rasul* case, referred to the legality of detaining enemy combatants who were neither citizens nor residents, captured while armed during the hostilities in Afghanistan and later detained at Guantánamo Bay. The Supreme Court's majority opinion, finding for the plaintiffs, differentiated This case from the *Eisentrager* case. Contrary to the Germans in *Eisentrager*, the plaintiffs held at Guantánamo Bay had been neither tried nor convicted in a military or any other tribunal; they were not citizens of an enemy country, and they had denied any involvement in hostilities. Second, on jurisdiction, the detainees in *Eisentrager* were held in Germany, an area in which the US exercises no sovereignty, whereas, in *Rasul*, the Court ruled that according to the leasing agreement with Cuba, the US exercises "exclusive jurisdiction and control" in Guantánamo Bay. Third, although the plaintiffs in *Eisentrager* were denied *constitutional* access to courts (1950), the petitioners' right in *Rasul* did not rest on the Constitution, but explicit federal acts (2004).

Following the *Rasul* decision, Pentagon established the Combatant Status Review Tribunals (CSRT),³⁹ special administrative tribunals mandated to review the detainees' challenge to their status, limiting their right of appeal to civil courts to the question of their status, but not their detention length or conditions.⁴⁰ Later, in December 2005, Congress passed a new act—the Detainee Treatment Act (DTA)—which stripped the court of its jurisdiction to hear petitions "for a writ of habeas corpus filed by or on behalf of an alien detained... at Guantánamo Bay".⁴¹ The act granted limited, exclusive jurisdiction to the Court of Appeals for the District Court of Columbia to review only "whether the final decision [of the military commission] was consistent with the standards and procedures in the military order."⁴²

In *Hamdan v. Rumsfeld*, the Supreme Court ruled that Common Article III to the Geneva Conventions apply to Guantánamo Bay; consequently, Guantanamo detainees held before the DTA should be tried by a regularly constituted court, not a military commission. The decision relied on a technical, statutory interpretation rather than on constitutional norms. The court ruled that the DTA, which had stripped the court of its jurisdiction to hear a petition for a writ of habeas corpus, could exert no influence on pending cases; that is, it had no retroactive effect.⁴³ The

³⁸For an analysis of the Obama administration's commitment to shut down the facility and its failure to do so, see: Priscila Alvarez, *Will Guantanamo Bay's Prison Ever Close?* **Theatlantic.com** (Dec. 21, 2016).

³⁹ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL (Memorandum from Paul Wolfowitz, July 7, 2004); IMPLEMENTATION OF COMBATANT STATUS REVIEW TRIBUNAL PROCEDURES FOR ENEMY COMBATANTS DETAINED AT GUANTANAMO BAY NAVAL BASE, CUBA (Memorandum of Gordon England, Secretary of the Navy, 2004).

⁴⁰A Status of "enemy combatant" and even "unlawful combatant" can be assigned to an American citizen as well. See Cert. Denied, 352 US 1014 (1957); *Quirin*, 317 U.S. 1 at 37–38; *In re Territo*, 156 F.2d 142 at 145; *Milligan*, 71 U.S. 2 at 762.

⁴¹Article 1 to the Detainee Treatment Act of 2005, Pub.L. 109–148, 119 Stat. 2739.

⁴²Articles 2 and 3 to the DTA.

⁴³On the date of its enactment (December 30, 2005), *certiorari* was already granted.

Court deliberately avoided examining the question of whether enemy combatants have constitutional access to federal courts using habeas corpus: “we find it unnecessary to reach either of these arguments” since “principles of statutory construction suffice to rebut the government theory, at least insofar as this case...is concerned” (2006).⁴⁴

A few months after the Hamdan decision, Congress passed the Military Commissions Act of 2006 (MCA). The MCA authorizes the President to establish military commissions. Section 7 of the act in practice left it for the executive to limit habeas corpus petitions, by stating that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States, who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

This section was found unconstitutional by the Supreme Court in the *Boumediene* case (2008). Justice Kennedy writing for a 5:4 majority determined that: “to hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this court, ‘say what the law is.’” In practice, this meant that the executive could not prevent the alien enemy combatants from accessing courts.

Not much can be rescued in terms of outlining the law on the right of access to courts by enemy aliens from US Supreme Court jurisprudence post 9/11. The court seems to have been cautious not to engage in overall stare decisis review. Rather, it resorted to more technical matters of retroactive applicability and, while protecting the constitutional right of habeas corpus, refrained from interfering in other limitations set by Congress on access to justice of enemy aliens on more substantial grounds. It is hard to avoid a sense that the Supreme Court at the same time felt uncomfortable with some of the pre-existing common law rules and was unwilling to declare it void in light of 21st-century legal norms regarding the rule of law and individual human rights.

3.3 *Israeli Case Law*

As early as four years after the foundation of the State of Israel, the Israeli Supreme Court declared that while it finds guidance in the common-law rules regarding access to justice of enemy aliens, it is not bound by them. In the relevant 1952 case,⁴⁵ the court declared the common law rule does not apply to public law cases, but only to private law cases. However, to the best of our knowledge, even regarding such cases, it never refused to discuss a case brought by an enemy alien on the merits.

An attempt by the Israeli legislature to deny enemy aliens legal remedies in tort suits against the state was partially struck down by the Supreme Court. In 2005 the

⁴⁴See also Justice Scalia dissenting opinion at 2819.

⁴⁵For later cases see H CJ 574/82 Al-Nawar v. Minister of Security SC 39(3) 449 (1985) and H CJ 4487/98 Asaf v. Israel (1998).

Knesset enacted amendment 7 to the Civil Torts Act. The act denied remedy from any enemy alien who suffered a tort where the tortfeasor was the State of Israel, regardless of the existence or non-existence of wartime or hostilities context. The Supreme Court preferred to exert its review on the case based on the breach of the right to property, which is enumerated in Israel's basic laws, than on the right of access to courts. It found the law's harm to private property to be disproportional and thus unconstitutional. The Court rejected overarching presumptions in the law that any remedy to an enemy alien constitutes an advantage to the enemy or compromises national security. The court ruled that an individual review of every claim is required, thus rejecting the old traditional view of enemy aliens as by-definition participants in the assault on the state. However, the court rejected as premature claims of unconstitutionality regarding another stipulation in the law which denied the cause of action to enemy aliens (unless lawfully residing in Israel), those active in or members of terror organizations or those acting on their behalf while suffering a tort (2006).

The seminal Supreme Court case focused on the question of enemy aliens' status in Israel's law was reviewed by the Supreme Court not once, but twice under the practice of "additional hearing" reserved to those rare cases involving both novel and highly complex matters of legal interpretation. In *Dirani v. Israel* Moustafa Dirani, a senior member of 'Amal' a Lebanese organization considered a terror organization by Israeli law,⁴⁶ who was detained in Israel between 1994–2004, filed a torts-based lawsuit against the state for allegedly subjecting him to torture in the course of his detention. The case was filed when he was still held in Israel. However once Dirani was released and returned to Lebanon (in exchange for Israeli POWs), the state asked the Tel-Aviv district court to dismiss the case under the common law rule, and given that Dirani returned to active engagement in terror activities against Israeli (Dirani's commitment to this violent action was declared by him and not disputed). The State's argument was rejected (2005).⁴⁷ The judge stated that Dirani is indeed an enemy alien by territorial rule (domiciled in Lebanon), individual rule (citizen of Lebanon) and organizational affiliation (active Hizbollah senior, another terror organization by Israeli law) as well as by his actions. Yet, Given the constitutional status of the right of access to justice, it cannot be limited unless done so explicitly and proportionally by a statute.⁴⁸

This determination was at the heart of the Supreme Court's ruling on appeal. In their 2011 ruling, the justices agreed that Dirani holds a procedural cause of action. They also agreed that the existing common law rule is that an enemy's claim needs not be reviewed. They differed, however, on the applicability of this rule to Israeli law. The majority ruled that "... proper constitutional regime confers legal protection to enemies as well" and that that in itself does not endanger the State, but rather "guarantees its moral force". This goes especially to claims regarding human rights

⁴⁶As determined by executive order under the Terror Prevention Ordinance (1948).

⁴⁷It should be noted that this case did not come under the legislation discussed in *Adalah v. Minister of Defense* (*supra*, fn. 88) as the alleged torts were inflicted on the appellee occurred before the period covered by the law.

⁴⁸As required by Section 8 of Israeli's Basic Law: Human Dignity and Freedom.

abuses, said the majority. The dissenting Justice argued that the common law rule is indeed part of Israeli law. “I find it hard to see why,” he wrote

that a certain rule will thrive for 400 years in progressive nations, notwithstanding serious challenges such as the world wars, and only in our state, we will choose to reject it completely... I can see not why England, Canada, and the United States will find that there is no justification to offer an enemy tools by way of monetary suits in their legal system (subject to adequate exclusions) and we shall find that there is no difficulty in allowing the worst among our enemies, while residing in their home countries to manage monetary lawsuits against the State of Israel.

Following the ruling the state filed a motion for rehearing of the case, which was accepted by the President of the Supreme Court. On rehearing, the enlarged bench reversed the first decision by a 4:3 majority (2012). The court found that the common law rules are indeed part of Israeli law, but as part of the state’s law need to be modified in two separate ways, one expanding it and the other narrowing it.

The majority’s opinion, delivered by Chief Justice Grunis, opened with comparing the situation in the UK and the US with that in Israel. The majority acknowledged that the traditional common law rule was somewhat relaxed along the centuries, but determined that it remained in force in at least two ways: first, as related to enemy aliens living in enemy territory; secondly when relating to torts cases, which differ substantially from Habeas Corpus cases on which the appellee relied upon.⁴⁹ Both of these protect the original rationale of the rule against enemy access to the justice system, which was not to transfer funds to enemy territory during the war and thus abet it.

Traditional common law rule, the court found, limits itself to the presence of “actual” and “formal” war between the state and that of the plaintiff’s, which is limited in time. This is doubtfully the situation between Israel and Lebanon. However, the court stated, a variety of international armed conflicts are known to us today which do not lend themselves to this definition. The rule should be applied to the fight against terror, and similarly, to its traditional form, it will be removed once the hostilities are over. The appellee will then be allowed to file his claim. On the other hand, the traditional common law rule applied to any enemy alien, regardless of his hostility towards the state or his detachment to any actual acts of violence. In the traditional context, this problematic aspect of the rule is mitigated by the limited time span of the war. However, in the context of the fight against the terrorist organization, the timeframe is wide open. Such wide application is disproportionate, and hence unconstitutional by Israeli law that requires (in addition to statutory basis and befitting state values and proper purpose), proportionality when violating the right to human dignity, seen as incorporating the right of access to justice.⁵⁰ Therefore, the rule should be limited to those individuals engaged in actual violent actions against the state.⁵¹ The court found this to be the case with Mr. Dirani.

⁴⁹Indeed, the court mentioned, Dirani filed several claims regarding his detention conditions with Israeli courts, all of which were dealt with and some of which were accepted, and in none of them the issue of enemy alien’s right of access was disputed.

⁵⁰Dirani III, p. 120

⁵¹Dirani III, p. 56.

4 Towards a New Law Governing the Right of Enemy Aliens' Access to Courts

We stated at the outset that it was a settled matter for centuries, that from the legal aspect, enemy aliens have no right of access to courts. Towards the end of our discussion of this matter, it seems that we are on solid ground stating that in the 21st century it is settled that no such overarching rule can stand. Yet, the basic rule has not been declared void de jure, in spite of the consistent practice of courts to carve exceptions in all but the most extreme circumstances. Cases such as *Dirani* in Israel have rendered it largely void de facto, while still presenting themselves as implementing it. In the following, we explain why this is the case and then follow with some thoughts on why the law has thus far refrained from declaring the basic rule's anachronism. A new model to replace the traditional rule is suggested towards the end of this part, as well as delineation of some unresolved issues that require further discussion.

4.1 *The Historical Rule's Incompatibility with Modern Warfare*

The historical rule limiting enemy aliens' access to courts, and specifically the common law rule based on the territorial model, came to be under a certain wartime philosophy. One which saw war as a total struggle between nations in an all-inclusive, general sense; the nation as a whole went to war. War was waged not only between countries but between their citizens. As asserted by Immanuel Kant, who wrote that war is "not only the relation of one state toward another as a whole but also the relation of individuals of one state toward the individuals of another (Kant 1785)."

Another characteristic of wars was that they were seen as an exception to the norm. A temporary series of events limited in time and space. War had a start date, an end date and was conducted in specific arenas. This state of affairs allowed the emergence of the norm/exception dichotomy, in which legal mechanism such as limiting enemy aliens' access to courts was seen an exceptional tool, the use of which is a response to a necessity that is a result of exceptional circumstances.⁵² Once normality is restored, such tools would become unnecessary, and the normal state of affairs, that in which any individual may access courts, would be restored.

⁵²On the concept of necessity as a justification to divert from entrenched constitutional norms and notions see in this volume Hadjigeorgiou & Kyriakou, Entrenching hegemony in Cyprus: The doctrine of necessity and the principle of bicommutality, and Gurpuran, Constitution and Law as instruments for normalising abnormality: States of Exception in the Plurinational Context.

By the time of writing of this paper, early-2017, it is much a banality to iterate that modern wars no longer meet these criteria of totality and limited time and space.⁵³ The “War on Terror” waged by the US after the 9/11 terror attacks in 2001, as well as other massively violent confrontations such as the Israeli-Palestinian conflict or the fight of various nations and groups against “The Islamic State” (ISIS) have no foreseeable end date and do not limit themselves in space. Thus the idea of “suspended remedies” for instance, becomes irrelevant. Applying the historical rule, especially in its common-law territorial form, in modern-day warfare raises many ambiguities in a world in which combatants often do not combat from a defined territory but are, instead, “supra-national” actors, active across numerous states. Civil law implications of the rule do not fit a reality of multinational legislation, global organizations, and borderless trade relations.

4.2 The Historical Rule’s Incompatibility with Human Rights’ and Humanitarian Law

It is perhaps more self-evident that the historical rule, allowing a breach of basic individual rights because of an individual’s association with a given political unit, is incompatible with modern Human Rights and Humanitarian Law. One of the basic goals of Humanitarian Law is to set apart civilians from combatants, and no longer view all of the individuals residing in a belligerent state as themselves parties to war. This is not to say that states may not decide that certain legal assertions cannot be applied to the status of an enemy alien, but such assertions require justifications not negating the civilian/combatant distinction and not illegally violating human rights of any individual.

Human Rights law has enshrined a robust set of rights bestowed on any human being regardless of her national identity, which is to be respected by all nations at all times. Thus, Article 4 of the International Convention on Civil and Political Rights states that state parties can derogate from their obligations to the rights protected by the convention in times of public emergencies “which threatens the life of the nation” only “to the extent strictly required by the exigencies of the situation” and even then, a state party cannot derogate from its obligation under Article 16 in which it agrees that “[e]veryone shall have the right to recognition everywhere as a person before the law”. This in addition to other non-derogate rights which may require courts’ interference to protect.

⁵³The war/peace dichotomy was brought into question as early as the mid-20th century, when a new category of “status mixtus” was suggested. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 15 (5TH ED., 2012).

4.3 *Legal Systems' Hesitation in Nullifying the Traditional Rule*

The 21st century reality as described above begs the question: why did courts refrain from declaring the laws of their different jurisdictions that limit enemy aliens' access to courts null and void. Why did they not state the obvious, which is that any individual has a right to be recognized as a person before the law (as stipulated in the ICCPR) and thus to access its courts when in need of legal remedy? This remains a puzzle.

We believe this refrain might be an example of the uneasy situation of courts called to protect the rights of enemy aliens in times of warfare. Courts called to protect the rights of enemy aliens, often find it necessary to emphasize the limited reach of their decision and its narrow scope. In *Boumediene* for instance, the court stated that:

Our decision today holds only that the petitioners before us are entitled to seek the writ... The only law we identify as unconstitutional is MCA §7... both the DTA and the CSRT process remain intact. Our holding... should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. (2008).

Many other cases creating exceptions to the traditional rule followed this path.⁵⁴ Courts in such situations are not unaware of the public implications of their rulings. Public sentiment in times of warfare might be very sensitive to any sign of support to the enemy, and perhaps less sensitive to principles of procedural fairness which might be more appreciated in peace times. Thus, courts may avoid stating more than is strictly necessary to solve the case in front of them, in order to avoid, or minimize, public outcry. However, such avoidance may prove counter-productive in the medium to long term.

4.4 *A New Rule Suggested*

The discussion so far leads us to the conclusion that a rule treating enemy aliens as one category in regard to the right to access to courts is incompatible with current human rights law, as well as irrelevant to current warfare. It should be declared null and void. Such a statement on behalf of national courts is important in stressing that in general any individual in want of legal remedy has the right to seek it in a nation's courts.

This, however, does not mean that any enemy alien should be allowed access to courts in any circumstance. We believe the *Dirani* case for one exemplifies how legal

⁵⁴For the narrow application of the *Milligan* case see as well as others, see: Andrew Kant, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex parte Quirin, The Nazi Saboteur's Case*, 66(1) VANDERBILT L. REV. 153, 204 (2013).

procedures can be abused as weapons in psychological warfare. We believe submitting court systems to such abuse risks creating an unnecessary division between them and the public at large.

A new rule to govern enemy aliens' right of access to courts needs to be wider and narrower than the one it aims to replace. Narrower in the sense that it must limit itself to individuals for whom specific justifications can be found to limit their access to courts, and not to a category of individuals collectively stripped of their rights. Wider, in the sense that for those certain individuals whom we believe can justly be denied access to courts, this denial need not hinge on exceptional or temporary circumstances.

The rule we suggest here can be titled as a "Functional Rule." It centers on the function of the enemy alien approaching the court and the expected function of the proceeding itself. It limits the violation of the right of access to justice to those specific cases which stand in contrast to the justifiable interests of nations at war.

According to this model a state must not deny access to courts to an enemy alien, except when the case is found to meet one of three conditions:

- (a) It is brought by an enemy organ, or an official thereof present in territory outside the state or its effective control.
- (b) It is a result of a legitimate act of war.
- (a) It is intended to benefit the enemy's political or military goals.

An exception to this exception is habeas cases and other cases which are necessary to protect the most fundamental human liberties. When a plaintiff seeks a warrant to put an end to an active and ongoing violation of International Humanitarian Law or Human Rights law, courts must not be allowed to avoid offering substantive due process. However, our rule would apply where human rights violations are alleged in civil cases seeking monetary redress or declaratory remedies.

This formulation warrants several clarifications and justifications.

Who is an "enemy alien"? Ideally, attribution of such a status would be the result of an inquiry into the individual's behavior rather than blanket applications based on nationality. However, we accept that in times of war, such inquiry is not always possible, and one or another form of territorial or national models may be used. We suggest therefore to supplement those with a requirement to show that the enemy alien whose legal actions the state limits is an "enemy organ," i.e., an official of a terror organization or a belligerent army or government, a corporation owned by them, or another agent of the enemy.

What is an "act of war"? An act of war may occur with no present "State of War" (Eagleton 1941), as not every action in state of war is an act of war. The relevant question is not who carried out the action, but what the substance of the act was. Israel's Supreme Court ruled that to define an act as one of war, various issues need to be observed, including the actions goal, location, duration, the acting forces and threats involved (2002). It should be noted that by using the definition "legitimate act of war," we ipso facto exclude those actions which are found to be in breach of the laws of war. Such cases cannot be denied hearing according to our rule, unless the plaintiff meets one of the two other criteria (as was the case in *Dirani*).

When is a legal proceeding intended to “benefit the enemy”? This might be the complicated of the decisions our model requires. However, we believe the only legitimate rationale for denying enemy aliens' access to courts is preventing abuse of the justice system for the enemy's ends. This is the prism through which we believe courts should examine this issue. Not any monetary benefit to an individual enemy alien supports the enemy's economy and war efforts. Sincere and authentic applications to court should be allowed even if they may cause some indirect or insignificant support to the enemy. However, where the court concludes that the plaintiff *seeks* such benefit, and she uses the judiciary as a means to achieve it, the reverse applies. This issue could be determined by court as a preliminary matter raised by the respondent government at the opening of a legal procedure.

How would our suggested rule play out in the *Dirani* case? It would indeed support the court's finding in the additional hearing. Dirani, according to the findings of the Supreme Court of Israel, is an official of an enemy organ present in territory outside Israel.⁵⁵ After release from Israeli prison he merged his own organization with the “Hezbollah” movement and became active in it. According to our suggested rule, he would thus be prevented from filing his case with an Israeli court. We argue that the traditional rule according to which a country's legal system should not be made available to its enemies, is still good law in those few cases where the person aiming to use can be identified as an “enemy organ”.

Dirani's case set, supposedly, to seek redress for torture Dirani underwent while prisoned in Israel. This excludes the case from our second criterion, as torture is not a legitimate act of war. Had this been the only applicable criterion among those suggested in our model, the court would in our opinion be obliged to hear the case, regardless of Dirani's whereabouts.

Our third criterion would call upon the court to determine whether the case is brought *inter alia* with an intention to benefit the enemy's political or military goals. We argue that this is likely to be the case with Dirani. When an individual is strongly identified with an enemy organ, and is committed to its goals, it can be reasonably presumed that the benefits to the organ with which he strongly identifies, play some role in his legal action.

5 Conclusion

We have argued in this article for a change in the law governing enemy alien's right of access to courts, which proceeds in two seemingly contradictory directions. The first is setting part with the historical rule significantly limiting the right of access to courts of enemy aliens. We have shown that this rule has been consistently narrowed over the centuries, but that courts have been hesitant to declare it void, and that at times it has been upheld. We believe it cannot stand in the current legal system of both public international law and the constitutional law of democratic countries, and

⁵⁵*Dirani*, para 101 to President Grunis' opinion.

thus, that courts should be open to any person seeking redress for wrongs afflicted upon him by a national government.

The other direction at which we have pointed argues that courts should be able to avoid hearing some cases of enemy organs. We argued that this is the case when enemy organs or their officials outside territory under the country's control bring suit against it, or when a case stems from a legitimate act of war or when a case aims to benefit the enemy. Such exceptions must not cover applications to court aimed at stopping active breaches of humanitarian international law or human rights law.

We believe the proposed model properly balances between the right of access to courts and the need to protect the right itself and the judiciary from abuse.

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