

January 2010

## Classification of Participants in Suicide Attacks and the Implications of this Classification on the Severity of the Sentence: The Israeli Experience in the Military Courts in Judea and Samaria as a Model to Other Nations

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### Recommended Citation

Amit Preiss and Chagai D. Vinizky, *Classification of Participants in Suicide Attacks and the Implications of this Classification on the Severity of the Sentence: The Israeli Experience in the Military Courts in Judea and Samaria as a Model to Other Nations*, 30 Pace L. Rev. 720 (2010)

DOI: <https://doi.org/10.58948/2331-3528.1043>

Available at: <https://digitalcommons.pace.edu/plr/vol30/iss2/22>

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# **Classification of Participants in Suicide Attacks and the Implications of this Classification on the Severity of the Sentence: The Israeli Experience in the Military Courts in Judea and Samaria as a Model to Other Nations**

**Amit Preiss\* and Chagai D. Vinizky\*\***

## **Introduction**

The twenty-first century witnessed a considerable rise in the number of suicide attacks. The largest suicide attacks were carried out by Al-Qaeda in the United States on September 11, 2001, when that organization crashed four passenger planes (including two into the Twin Towers and one into the Pentagon building), killing 2,973 civilians. Between September 11, 2001

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*[Editor's Note: Due to the inaccessibility of English translations for the Hebrew sources cited in this article, the editors of PACE LAW REVIEW have not reviewed the accuracy of all citations. The editors have, however, verified many of the authors' general propositions concerning the Israeli case law cited in the article.]*

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(hereinafter 9/11) and the time of this Article, suicide attacks have taken place in various countries throughout the world, including Turkey, Great Britain, Egypt, India, Jordan, Spain, and Iraq, leading to thousands of deaths. A large proportion of the suicide attacks have been carried out in Israel. This phenomenon was first seen in Israel in 1993 and continues to the present. During the course of 125 suicide attacks, 718 people were murdered. As a suicide terrorist is willing to take his life in order to put into effect his plan, and therefore does not need an escape route, he is able to cause the death of numerous innocent civilians.

The State of Israel, as a democratic state, has accumulated considerable experience dealing with this phenomenon through the use of legal devices. Usually this criminal phenomenon cannot occur in the absence of terrorist infrastructures, which include a number of functionaries such as the dispatcher, the transporter, the intermediary, and the suicide terrorist. The infrastructure that produces the suicide attacks in Israel generally originates in the region of Judea and Samaria. By virtue of its power to issue the orders needed to maintain proper government and preserve public order and safety in this region, the Military Government in Judea and Samaria promulgated orders in regard to the criminal law, under which, *inter alia*, Military Courts were established to try persons charged with these offences.<sup>1</sup>

As a large proportion of the suicide attacks are directed against Israeli citizens, and as many of those involved in these attacks are tried in the Military Courts in Judea and Samaria, the majority of the judgments given in respect of the participants in suicide attacks are the product of this system. Much of this case law has not been published and is not readily available to the community of lawyers and researchers. It is not surprising that the ratio of studies to case law is extremely low. As this is the legal system with the greatest experience in trying terrorists involved in suicide attacks, the ensuing case law holds great importance for countries which are victims of suicide attacks and have to conduct trials of those involved in them. In this Article, we shall focus on the factual and legal

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1. Netanel Benishu, *Criminal Law in the Administered Territories: Trends and Insights*, 18 IDF L. REV. 293, 294-97 (2005) (Isr.). The author also reviews the orders issued by the IDF on this matter. *See id.*

classifications of the participants in suicide attacks and examine the implications of these classifications on the severity of the ensuing sentences.

### I. A Brief Overview of the Legal Regimes in Israel and the United States

A pastoral atmosphere of tranquility at the heart of a vibrant city is transformed in an instant to a scene of loss, pain, and tears as a criminal takes his own life in order to achieve his goal of murdering innocent civilians. The phenomenon of suicide attacks, which in recent years has affected numerous countries, has caused the death of many Israeli citizens. In certain periods, this was a daily horror, and even now, after a significant decrease in the number of attacks, this is a phenomenon which can explode afresh at any given moment.<sup>2</sup>

As Israel is a state governed by the rule of law, which combats its internal enemies by following the path of the law, it confronts this phenomenon by using legal tools—regardless of whether it is dealing with suicide attacks that have already occurred or with planned suicide attacks that have been frustrated in time, sometimes even at the eleventh hour, by virtue of the resourcefulness of the security forces. Naturally, in the former case, the confrontation is with persons who do not bear direct criminal liability for the attack, as the direct perpetrator of the attack is no longer alive (except in those rare cases where the terrorist succeeds in killing others without concomitantly losing his life). In the latter case, the confrontation is with the intended perpetrator of the attack as well as with those bearing indirect criminal liability.

The majority of those responsible for committing suicide attacks in Israel are tried by the Military Courts of Judea and

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2. For an analysis of the various forms of terrorism, including specific reference to Islamic terror and one of its aspects, Palestinian terrorism, which includes suicide attacks, see Yuval Wolf & Ofir Frankel, *Terrorism: Toward an Overarched Account and Prevention with a Special Reference to Pendulum Interplay Between Both Parties*, 12 AGGRESSION & VIOLENT BEHAV. 259 (2007). For a discussion regarding the phenomenon of suicide attacks, see also ANAT BERKO, *THE PATH TO PARADISE: THE INNER WORLD OF SUICIDE BOMBERS AND THEIR DISPATCHERS* (2007).

Samaria,<sup>3</sup> as almost all those charged with responsibility for the commission of suicide attacks are Arab residents of this region (as distinct from Israeli citizens), and therefore are subject to the jurisdiction of this legal system. The Military Court system consists of two courts of first instance, one for the region of Judea and the second for the region of Samaria, and an appeals court.<sup>4</sup> In contrast to the system of military tribunals that are responsible for trying Israel Defense Force (IDF) soldiers, where the bench includes both judges possessing a legal education and a judge lacking a legal education, in the Military Courts system in Judea and Samaria, the trial is conducted solely by judges possessing legal educations.<sup>5</sup> The prosecution is conducted by the Military Prosecutor. In light of the gravity of the offences, those charged with responsibility for carrying out suicide attacks are represented by Israeli defense counsel or a resident of Judea and Samaria. The trials are conducted in accordance with the Israeli laws of evidence, and many of the Israeli rules of criminal procedure also apply. The substantive law consists of local statutes and orders issued by the Military Commander, in his capacity as the sovereign power in the occupied territory under the laws of war; however, with regards to the elements of the offences committed in the course of the suicide attacks, there are no major differences between this law and Israeli law.<sup>6</sup> The relevant legislation in relation to the classification of those responsible for committing the offence is the *Order Relating to Rules of Liability for an*

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3. A minority of those responsible for suicide attacks have been tried in the State of Israel by virtue of parallel jurisdiction in certain situations. See Penal Law, 5737-1977, S.H. 864, 226 §§ 7, 13-14 [hereinafter Israeli Penal Law]. In this connection, see also CrimC (TA) 1158/02 Israel v. Barghouti, [2003] Takdin Mehozi 2003(1) 327.

4. Until the withdrawal from the Gaza Strip there was also a military court responsible for that region. The court was closed upon the conclusion of the process of withdrawal. It is noteworthy that the decisions of the Military Court of Appeal are subject to judicial review by the Supreme Court sitting as the High Court of Justice.

5. In the past, the military court bench was also composed of judges lacking legal educations sitting alongside jurists. In 2002, this practice was abolished, and all the judges in this legal system now possess a legal education. For a further discussion on this process, see Benishu, *supra* note 1, at 305-06.

6. For a discussion regarding the legislative framework in which the military courts operate, the legal procedures, and the laws of evidence, see Benishu, *supra* note 1, at 294-304.

*Offence (Judea and Samaria) (No. 225), 5728-1968.*<sup>7</sup>

The Military Court system in Judea and Samaria, which operates in accordance with the ordinary laws of evidence and rules of procedure, including legal representation for defendants, can provide a model for other countries that face the need to try a large number of persons accused of terrorist activities. In the aftermath of 9/11, the United States was required to deal with the trials of those involved in terrorism in general, and those involved in suicide attacks in particular, including participants of the 9/11 attacks. These alleged terrorists are accused of planning, mediating, couriering, and attempting to take part in terrorist attacks.

During the American campaigns in Afghanistan and Iraq, the United States captured foreign nationals allegedly involved in terrorist activities. Many of these individuals were transferred to the Guantánamo base in Cuba.<sup>8</sup> While being held at Guantánamo, they were not given the rights usually afforded to detainees in the United States—i.e., they were not informed of the charges against them nor were they given access to counsel.<sup>9</sup> Some of these detainees, through “next friends,” challenged their detentions, alleging, *inter alia*, that they were being held unlawfully.<sup>10</sup> They sought various forms of relief, including writs of habeas corpus.<sup>11</sup> In *Al Odah v. United States*, the United States Court of Appeals for the District of Columbia Circuit ruled that foreign detainees in a territory that was not under the sovereignty of the United States—i.e., detainees held at the Guantánamo base—were not entitled to exercise the right of habeas corpus.<sup>12</sup> In so ruling, the court relied, *inter alia*, on the Supreme Court’s decision in

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7. Statutory compilation (Judea and Samaria) (no. 12), 467 [hereinafter Order Relating to Rules of Liability for an Offence].

8. See, e.g., *Al Odah v. United States*, 321 F.3d 1134, 1136-37 (D.C. Cir. 2003), *rev’d*, *Rasul v. Bush*, 542 U.S. 466 (2004).

9. See *id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1140-44. See also Shaul Gordon & David Shores, *The Military Commissions in Guantanamo and the Military Courts in the West Bank and Gaza Strip – A Comparative Analysis*, 2 IDF L. REV. 277, 282 (2005).

*Johnson v. Eisentrager*.<sup>13</sup>

In 2004, this decision was appealed to the Supreme Court.<sup>14</sup> The Supreme Court accepted the appellant's argument and rejected the Government's position, drawing a distinction between the case at hand and the circumstances considered in *Eisentrager*.<sup>15</sup> The Court held that while the United States lacked legal sovereignty in the Guantánamo area, in practice it was the sole governing body, and this gave rise to the Court's jurisdiction.<sup>16</sup> In addition, the Court did not find any statutory authority denying courts' jurisdiction in such cases.<sup>17</sup> Accordingly, the federal courts had jurisdiction to consider, within the framework of habeas corpus proceedings, whether foreign citizens were being lawfully held in Guantánamo Bay, and the government was powerless to prevent them from accessing the courts.<sup>18</sup> At the same time, the Supreme Court refrained from ruling that foreign citizens detained in American detention centers around the world were always entitled to the right to habeas corpus. The Court also declined to reverse the *Eisentrager* ruling, choosing instead to distinguish it from the case before it.<sup>19</sup>

Following *Rasul*, and in the absence of relevant legislation, the United States Government decided to establish a system of military commissions in accordance with the principles of the

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13. *Al Odah*, 321 F.3d at 1138-45 (discussing and citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), intermittently).

14. *Rasul v. Bush*, 542 U.S. 466 (2004).

15. *Id.* at 476-79.

16. *Id.* at 480-83. See also Gordon & Shores, *supra* note 12, at 283.

17. *Rasul*, 542 U.S. at 483-85.

18. See generally *id.* at 470-85. In this connection too, it is worth considering the approach taken by the legal system in Israel in an analogous situation. Following the Six Day War in which Israel seized the regions of Judea and Samaria and the Gaza Strip, the then-Attorney General Meir Shamgar (later President of the Supreme Court) decided not to argue that the residents of these areas lacked *locus standi*, and as a consequence of this decision, the Supreme Court of Israel granted *locus standi* to these detainees in the High Court of Justice. See Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967-1980: THE LEGAL ASPECT, at 13, 56 (Meir Shamgar ed., 1982); Moshe Landau, *Fifty Years of Law in Israel: I do not Believe in Judicial Activism*, 16 JUST. 3, 4 (1998); LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* 57 (2005).

19. *Rasul*, 542 U.S. at 475-79, 480-83. See also *id.* at 487-89 (Kennedy, J., concurring); Gordon & Shores, *supra* note 12, at 284.

laws of war, which deviate from the customary legal process, to deal judicially with detained enemy combatants. Under the Detainee Treatment Act (DTA), the federal courts were declared, *inter alia*, to have no jurisdiction to hear petitions brought by the detainees of Guantánamo.<sup>20</sup>

The Supreme Court ruled on the constitutionality of these commissions in *Hamdan v. Rumsfeld*.<sup>21</sup> In *Hamdan*, the Court held that these “military commission[s] . . . lack[ed] [the] power to proceed because [their] structure and procedures violate[d] both the [Uniform Code of Military Justice (UCMJ)] and the Geneva Conventions.”<sup>22</sup> First, the Court stated that the “the UCMJ, the [Authorization for Use of Military Force], and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”<sup>23</sup> Then, the Court analyzed whether the military commission at issue met that standard.<sup>24</sup> Particularly, Hamdan argued, *inter alia*, that the commission was illegal because he could “be convicted based on evidence he [had] not seen or heard, and [because] any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.”<sup>25</sup> Ultimately, the Court determined that court-martial rules had to apply in this case because it would not “be impracticable to apply [them].”<sup>26</sup> The Court also held that the rules of the commission contravened Article 3 of the Geneva Conventions, which provides, *inter alia*, that in a conflict of this type every state has to comply with a minimum array of accepted rules and rights recognized as being immutable upon trying detainees—including the basic right to be present during the trial, a right which was absent from the provisions of the Detainee Treatment Act.<sup>27</sup> Accordingly, the commissions had not been

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20. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 105(e)(3)(C)(ii), 119 Stat. 2680, 2743 (2005) (amending 28 U.S.C. § 2241).

21. 548 U.S. 557 (2006).

22. *Id.* at 567.

23. *Id.* at 594-95.

24. *Id.* at 595.

25. *Id.* at 615-16.

26. *Id.* at 623-24.

27. *Id.* at 629-33, 635. See also Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S.



constituted under a law enacted by Congress as necessary, or in accordance with the laws of war, and, therefore, they had to be dismantled.<sup>28</sup>

Following this judgment, Congress passed the Military Commissions Act (MCA),<sup>29</sup> providing these commissions with a statutory basis, again negating the jurisdiction of the courts to hear habeas corpus petitions submitted by detainees in the Guantánamo base, and removing the right to contend that the rights set out in the Geneva Conventions applied.<sup>30</sup> While the MCA enables appeals to be submitted to the United States Court of Appeals for the District of Columbia Circuit, this procedure can only be pursued in extremely limited circumstances.<sup>31</sup> Likewise, the MCA created a trial mechanism that was different from the ordinary legal process.<sup>32</sup> For example, the MCA provided that:

In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions: . . . Evidence shall be admitted as authentic so long as -- (i) the military judge of the military commission determines that there is sufficient basis to find that the evidence is what it is claimed to be; and (ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be

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No. 3364.

28. *Hamdan*, 548 U.S. at 635. The Court so held even though it

assumed . . . that the allegations made in the Government's charge against Hamdan are true . . . , that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity.

*Id.*

29. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

30. *Id.* § 5(a), 120 Stat. at 2631.

31. *Id.* ch. 47A, subch. VI, § 950f, 120 Stat. at 2622.

32. *See, e.g., id.* ch.47A, subch. IV ("Trial Procedure"), 120 Stat. at 2607-17.

given to the evidence.<sup>33</sup>

Following the passage of the MCA, the United States Court of Appeals for the District of Columbia Circuit ruled on Guantánamo detainees' "petitions for writs of habeas corpus[, which] allege[d] violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations."<sup>34</sup> The detainees argued, *inter alia*, that "the MCA, in depriving the courts of jurisdiction over the detainees' habeas petitions, violate[d] the Suspension Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 2."<sup>35</sup> The court, citing to *Eisentrager*, ruled that terrorist detainees held in territory not subject to the sovereignty of the United States had no right to petition for habeas corpus and were not entitled to the protection of the Suspension Clause.<sup>36</sup> Accordingly, no flaw could be found in the fact that the MCA precluded the federal courts from exercising the power of habeas corpus because the detainees were not accorded constitutional rights.

The matter reached the Supreme Court.<sup>37</sup> The key question was whether the detainees were entitled to constitutional rights and to the application of the Suspension Clause, enabling them to petition for habeas corpus.<sup>38</sup> The Court held that Guantánamo Bay detainees suspected of terrorist activities could appeal to the civil courts regarding their administrative detention.<sup>39</sup> The decision, reached by a 5-4 majority, held that the detainees had a constitutional right to petition the courts to examine the justification for their continued detention.<sup>40</sup>

The Court held that the *Eisentrager* ruling was not applicable to the Guantánamo detainees and that the right to habeas corpus was necessary to prevent the arbitrariness of government and to strengthen the principle of separation of

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33. *Id.* subch. IV, § 949a(b)(2)(D), 120 Stat. at 2608.

34. *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

35. *Id.* at 988.

36. *Id.* at 989-94.

37. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

38. *Id.* at 2240.

39. *Id.*

40. *Id.* at 2277.

powers.<sup>41</sup> It ruled that the MCA infringed on the Constitution and the principle of separation of powers and, therefore, had to be invalidated.<sup>42</sup> The Court declined “to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”<sup>43</sup> It did, however, provide some guidance on the issue and ultimately “[held] that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoners’ release.”<sup>44</sup> The Court, therefore, provided the President and Congress with a model of sorts that they could use to fashion new commissions that would not run afoul of the Constitution.

In this context, it is possible to draw for assistance upon an amicus curiae brief, which was submitted to the Court in support of the petition by a number of Israeli experts.<sup>45</sup> It presented Israel’s method of coping with local terrorism over a considerable period of time. This brief stated that Israel was committed to safeguarding human rights and accorded numerous legal rights and maintained due process in accordance with all the mandatory criteria necessitated by the framework of the Military Courts operating within the region of Judea and Samaria.<sup>46</sup> This array of rights also applied in extreme situations, such as during the period of the Defensive Shield Campaign, and, as former President of the Israeli Supreme Court Aharon Barak formulated it: “Every Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law. . . . There is no security without law.”<sup>47</sup>

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41. *Id.* at 2257-59.

42. *Id.* at 2262-74.

43. *Id.* at 2266.

44. *Id.* at 2266-71.

45. Brief for Specialists in Israeli Military Law and Constitutional Law as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2007) (Nos. 06-1195 & 06-1196), 2007 WL 2441592. The brief was written by Prof. Ariel Bendor, Prof. Eyal Benvenisti, Prof. Emanuel Gross, Prof. Asher Maoz, Prof. Barak Medina, Prof. Yuval Shani, and Prof. Amos Shapira.

46. *Id.*

47. *Id.* at 7 (internal brackets omitted) (quoting Chief Justice Barak).

On January 22, 2009, his first day after taking office, President Barack Obama signed an executive order directing the closing of the detention camp at Guantánamo Bay within a year.<sup>48</sup> The order required a review to be carried out to determine whether the detainees should be transferred to other countries.<sup>49</sup> With regard to those detainees who could not be transferred to other countries, the review would examine the possibility of pursuing criminal prosecutions against them within the United States and identify the appropriate court for the trial to take place.<sup>50</sup> Likewise, a review would be conducted as to whether it was possible to continue detaining persons in the United States who could be neither released nor prosecuted.<sup>51</sup> President Obama ordered a freeze on all proceedings in all trials being conducted in Guantánamo.<sup>52</sup> The freeze was aimed at enabling the administration to consider where it was possible to continue the prosecution of detained terrorist suspects.

Adopting the system operating in the Military Courts in the region of Judea and Samaria to try terrorists can, in our opinion, resolve some of the problems raised by the case law, legislation, and executive order discussed above. The Israeli experience shows that no difficulty ensues from enabling defendants to be represented. On the contrary, it is unwarranted for defendants accused of such grave offences to be unrepresented. Likewise, there is no need whatsoever for special evidentiary laws or rules of procedure. It is possible to try a large number of defendants efficiently without any need to deviate from the ordinary laws of evidence and procedural rules which are designed, *inter alia*, to protect the right of the accused to due process. We think that the Military Courts in Judea and Samaria can serve as an appropriate model to other countries that have to conduct trials against participants in suicide attacks.

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48. Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). See also Charlie Savage, *Delay Expected on Illinois Plan for Detainees*, N.Y. TIMES, Dec. 23, 2009, at A1 (reporting that officials believe Guantanamo Bay will be closed by 2011 at the earliest).

49. Exec. Order No. 13,492 §§ 3-4, 74 Fed. Reg. at 4898-99.

50. Exec. Order No. 13,492 § 4(c)(3), 74 Fed. Reg. at 4899.

51. Exec. Order No. 13,492 § 4(c)(4), 74 Fed. Reg. at 4899.

52. Exec. Order No. 13,492 § 7, 74 Fed. Reg. at 4899.

Likewise, it is possible to adopt the Israeli law relating to the Detention of Unlawful Combatants. This law, 5762-2002, is intended, according to Section 1, “to regulate the detention of unlawful combatants, who are not entitled to the status of prisoner of war, in a manner which is consistent with the commitments of the State of Israel under the legal provisions of international humanitarian law.”<sup>53</sup> According to Section 9, “[i]t is possible to commence criminal proceedings against an unlawful combatant in accordance with any law.”<sup>54</sup> With regard to detainees who are too dangerous to release but who also cannot be prosecuted, it is possible to adopt the laws of administrative detention prevailing in Israel. These laws incorporate rules of judicial review and the right of appeal to the Military Court of Appeal, which too is subject to judicial review by the Supreme Court sitting as the High Court of Justice. This course of action is not the preferred course, but is merely the course of last resort in these cases.

Beyond a procedural comparison, it is also possible to draw lessons from the Israeli experience with regards to substantive law. In this Article, we shall examine the classifications of various functionaries in a suicide attack (such as the dispatcher, intermediary, transporter, and prospective suicide terrorist) within legal categories applicable to participants in the offence (principal perpetrator, accomplice, accessory, and instigator) on the basis of extensive case law produced by the Military Court system regarding the classification existing under the *Order Relating to the Rules of Liability for an Offence (Judea and Samaria)*.<sup>55</sup> In this Article we shall not draw any

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53. Israeli Penal Law 5762-2002, 2002, S.H. § 1.

54. *Id.* § 9.

55. The Rules of Liability for an Offence (Judea and Samaria) (no. 225) 5728-1968 [hereinafter Rules of Liability (JS)] are similar to the rules of law prevailing in Israel prior to Amendment No. 39 to the Penal Law. See Israeli Penal Law (Amendment No. 39) 1994, S.H. 1481, 348 [hereinafter Amendment No. 39]. Therefore, they are unlike the law now prevailing in the State of Israel. For a discussion regarding the current law in Israel on this matter, see, e.g., Miriam Gur Arye, *Parties to an Offence – Amendment 39 to the Penal Law as Tested by the Case Law*, in DIRECTIONS IN CRIMINAL LIABILITY: INQUIRIES IN THE THEORY OF CRIMINAL LAW 83 (Eli Lederman ed., 2001) (Isr.); Arnold Enker, *On the Distinction Between a Principal Offender and an Accessory*, 17 BAR-ILAN L. STUD. 339 (2002) (Isr.); Mordechai Kremnitzer & Liat Levanon, *On Abetment of Crime and Interpretation of Criminal Law*, 17 BAR-ILAN L. STUD. 403 (2002) (Isr.); CrimA (XX) 2796/95 Anon. v. Israel, 51 [1997] P.D. 388(3); CrFH (XX) 1294/96 Meshulam v.

additional comparisons with the various legal classifications made in other legal systems that bring to trial those involved in suicide attacks. Attempting a comparison with the legal categories prevailing in any legal systems that may deal with the need to try participants in suicide attacks, such as those of Israel, England, Spain or the United States, would have created a great deal of obscurity and prevented this Article from achieving its goals. Such comparisons are worthy subjects of future articles. Within the framework of this Article, we shall present the extensive case law which has accumulated in relation to the classification of participants in suicide attacks in the Military Court system operating in the region of Judea and Samaria. We shall also examine the impact this classification has had on the severity of the penalty, so that those responsible for the judiciary in each legal system can learn from this case law about the appropriate standard of severity of the sentences which should be imposed on each functionary per se and relative to the others, in the chain which ultimately brought about the suicide attacks.

## II. Definition of the Term "Suicide Attack"

What does the term "suicide attack" mean? Does it refer to every attack in which the actual or potential direct perpetrator plans to lose his life during the process of executing it? Or, does it perhaps refer only to attacks in which the means of attack is a bomb carried on the body of the suicide attacker or placed in proximity to him? This question does not have legal significance when inquiring into the guilt of an alleged terrorist. In all of the cases where murder is committed, including cases of suicide attacks, the relevant offence is deliberately causing death contrary to Section 51 of the *Order Relating to Defense Regulations (Judea and Samaria) (No. 378) 5730-1970* (or an attempt to commit such an offence, in the event that the offence failed).<sup>56</sup> Accordingly, at this stage there

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Israel, 52 [1998] P.D. 1(5); SCrF (TA) 1158/02 Israel v. Barghouti, [2004] Takdin Mehozi 3430(2). For a comparison between the law prevailing prior to Amendment No. 39 and the subsequent law in relation to the issue of those liable for an offence, see IAAKOV KEDMI, ON CRIMINAL LAW: THE PENAL LAW, 315-408 (2005) (Isr.).

56. The offence of causing death deliberately is somewhat wider than the

is no need to define the term “suicide attack” because all lethal attacks, suicide attacks included, are treated as murders.

The definition of the term “suicide attack” is relevant only when determining the penalty, and in particular, when the court is considering the offence of an attempt to deliberately cause death. This is because in the completed offences of deliberately causing death, whether reference is to a suicide attack or to a different act of murder, the customary penalty is imprisonment for life,<sup>57</sup> save in exceptional circumstances where there are alleviating factors which focus not on the manner of commission of the murder but on the degree of involvement of the accused in the act of murder, or, special circumstances which relate to the level of understanding and judgment of the accused (particularly the fact that the accused is a minor). In contrast, when the offence is one of attempt to deliberately cause death, the definition of the term “suicide attack” is particularly important. For this offence, a sentence of life imprisonment is the exception and not the rule, as the actions have not led to the death of a person. Nonetheless, as we shall see below, this exception comes into play principally (albeit not in every case) where there is an attempt to cause death deliberately by means of a suicide attack.<sup>58</sup> Accordingly, the question of the definition of the term “suicide attack” is highly relevant when the offence is one of an attempt to cause death deliberately by means of a suicide attack.

One type of case that involves the query as to which

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corresponding provision in Israeli law—namely, the offence of premeditated murder under Israeli Penal Law 5737-1977, S.H. § 300(a)(2). For further discussion of this, see (JS) 79/99 Shamasna v. Military Prosecutor, [2005] Judgments of Adm. Terr. 14(1) 1.

57. The maximum penalty for the offence of causing death deliberately is death. At the same time, the military courts in Judea and Samaria have never imposed the death penalty in a final judgment, and for many years, the military prosecutor has also not petitioned for this penalty. Accordingly, in practice, the maximum penalty is life imprisonment. For a discussion on the issue of the death penalty, see Ofer Ben Haim, *The Death Penalty in the Case Law of the Military Courts in Israel and the Administered Territories*, 10 IDF L. REV. 35 (1989) (Isr.).

58. This exception of life imprisonment for acts which have not led to the death of a person was also recognized in certain circumstances where the accused participated in a large number of attempts to cause death deliberately. For a discussion on this, see Appeals (JS) 120+122+151+153/02 Nofel v. Military Prosecutor and Counter Appeal, [2003] Judgments of Adm. Terr. 14(1) 260 (unpublished).

situations are included within the term “suicide attack” is where planned massive gunfire is directed at a place teeming with human beings—or where such planned shooting is stopped in mid-fire—and the shooter is willing to lose his life during the commission of this offence. Such an attack is often called a “no-escape attack.” In other words, there are those who distinguish literally between this form of attack and the more familiar form of attack in which the potential or actual suicide terrorist carries an explosive device on his body and acts as a “living bomb.”

In the *Ha'nini* judgment,<sup>59</sup> the Military Court of Appeal for the first time directly considered the question of the above definition.<sup>60</sup> This case involved the trial of a defendant who had planned to commit a “no-escape attack” together with another person. The attack failed. When the defendant and his friend were close to their destination, they were stopped by IDF soldiers who opened fire on them. In reply, the defendant and his friend directed rapid fire at the soldiers and ran away from the site. The court held that the type of cases known as “no-escape attacks” falls within the definition of “suicide attacks.” In making this finding, the Military Court of Appeal preferred following an expansive approach to the definition of the term “suicide attacks.” The court emphasized the willingness of the potential attacker to lose his life during the course of the attack. In the opinion of the court, this willingness negated the difference in the potential killing between an attack by means of a “living bomb” and a “no-escape attack.”

In criticism of the adoption of the expansive approach, it is possible to note a number of grounds that support taking the narrow view that the “no-escape” type of attack should not be classified as a “suicide attack.” These grounds were set out by one of the judges in the court of first instance in *Ha'nini*.<sup>61</sup> For the purpose of fair disclosure, it should be noted that that judge

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59. Appeals (JS) 1049/05+45/04 Military Prosecutor v. Ha'nini and Counter Appeal, [2005] (unpublished).

60. The Military Court of Appeal discussed this matter *obiter* even beforehand in Appeals (JS) 1468/04 Shalabi v. Military Prosecutor, [2005] (unpublished).

61. Ct. (JS) 6249/03 Military Prosecutor v. Ha'nini, [2004] (unpublished).



was one of the authors of this Article.<sup>62</sup>

According to the expansive approach, which has been accepted as the prevailing legal ruling, a person who was on the verge of committing a “no-escape attack” will be sentenced to life imprisonment. This was indeed the sentence imposed on the defendant in *Ha’nini*. However, when the case concerns a defendant who carried out a shooting attack with the intention of murdering a large number of people using measures appropriate for that purpose (from the point of view of the type of weapon, shooting range, lack of protection of the targets, etc.), but without the intention of losing his life in the process, then, according to the rulings of the Military Court of Appeal, that defendant will be sentenced to a term of imprisonment of about ten years. This outcome is incoherent as a defendant who has been stopped on his way to a “no-escape attack” without having fired a single shot may be sent to prison for the rest of his life. In contrast, a defendant who has carried out a shooting attack, including cases where rapid fire is carried out and miraculously does not lead to the death of others, will be sentenced to a completely different quantitative and qualitative penalty merely because he did not intend to take his own life.

This problematic outcome, which ensues from the emphasis placed on the willingness of the attacker to take his own life during the course of the attack without regards to the potential death toll resulting from his acts, will lead to the situation where even someone who is willing to commit suicide

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62. Amit Preiss was one of the judges in the court of first instance in *Ha’nini*. The second author of this article, Chagai Vinizki, actually supports the position adopted by the Military Court of Appeal. There have been a number of “no-escape attacks” in which numerous people were killed. One example is the attack at Virginia Tech on April 17, 2007, in which thirty-two people were killed in a no-escape type killing spree begun by a student who ultimately also killed himself. See *Virginia Tech Shootings: Lives Lost*, WASH. POST, Apr. 19, 2007, [www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041802607.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041802607.html). On the other hand, there have also been many “living bomb” suicide attacks resulting in multiple injuries but in which no people were killed at all or which resulted in only a few fatal injuries. Even though it may be assumed that on average there will be more victims in “living bomb” type suicide attacks than in “no-escape” type suicide attacks, the important factor is still the murderer’s willingness to kill a large number of people accompanied by a willingness to take his own life. This willingness enables the murderer (both the “living bomb” type and the “no-escape” type) to harm a large number of people without need to ensure an escape route, and therefore a uniform classification must be given to the two cases.

during the course of a knife attack will be regarded as a suicide attacker. This hypothetical knife attacker will, therefore, be sentenced to life imprisonment. This ignores the fact that the potential risk involved in a knife attack is immeasurably smaller than the potential risk entailed by a shooting attack, and the potential risk entailed by a shooting attack is smaller than the potential risk entailed by an attack involving a "living bomb." From the point of view of the court's judgments, however, there is no difference between a knife attack, a shooting attack, and an attack involving a "living bomb," so long as the attacker intends to take his own life during the course of the assault.

The difference between the three types of attacks does not only apply in relation to the potential risk but also in relation to the ability to prevent the attack. When the attack is one which is to be conducted by means of a "living bomb," the terrorist can easily reach the center of the crowd with the explosive device strapped to his body or carried in a bag, and with one push of the button, destroy all those surrounding him. In contrast, when the attack is a "no-escape attack," the shooter will find it difficult to conceal his weapon (apart from cases when he is merely using a pistol) and therefore he will find it difficult to reach the center of the crowd without being disturbed. Moreover, in a "no-escape attack" the shooter cannot injure a large number of people in a single instant, compared to a terrorist who acts as a "living bomb," who needs only to press a button in order to execute a mass killing. The shooter in a "no-escape attack" is required to carry out a series of acts which include drawing the weapon, aiming it, and firing it intermittently, while during this period, which can last for a number of minutes, it is possible to thwart the continued commission of the attack and save the lives of potential victims.

In view of these differences, it is desirable (contrary to the *Ha'nini* ruling) to create a categorical distinction between the two types of attacks. This way those involved in "no-escape attacks" which have not achieved their goals, will not be given the maximum penalty of life imprisonment, but rather a sentence of imprisonment for a term of years, the length of which is consistent with the degree to which the attack succeeded, the level of involvement of the defendant in the

attack, and other punitive considerations.

So far we have considered the definition of the term “suicide attack.” As noted, the case law has chosen to adopt the expansive approach to this act, so that the definition will also include the class of “no-escape attacks.” We shall now describe how the case law has dealt with the other aspects of suicide attacks. For this purpose, we shall draw a distinction between suicide attacks which succeed, that is, which lead to the deaths of others—and therefore, the offence is one of causing death deliberately—and suicide attacks which fail during one of the stages of the attempt to commit them—and therefore, the offence is one of attempting to cause death deliberately.

### III. Suicide Attacks that Succeed

#### A. *Background*

When, unfortunately, the suicide attack has achieved its goal—the murder of innocent people—the relevant offence is causing death deliberately. In these cases, in light of the gravity of the offence, the general rule is that a sentence of life imprisonment will be imposed; only in exceptional cases will a more lenient sentence of a term of years be imposed. The decision whether to apply the rule or the exception in cases of a suicide attack is based on the degree of involvement of the accused in the successful suicide attack. The degree of involvement of the accused is derived from the classification of liability for his acts. In other words, it depends on whether he is the principal perpetrator, an accomplice, an accessory, or an instigator. Accordingly, as a starting point for determining the penalty to be imposed on the various persons involved in a suicide attack, it is necessary to consider the legal categories of the participants in the offence, as established in the law applied by the Military Courts in Judea and Samaria. This classification is conducted in accordance with Section 14(a) of the *Order Relating to the Rules of Liability for an Offence (Judea and Samaria)* which provides that:

- a. Where an offence is committed, each of the following is deemed to have taken part in its commission and to bear responsibility for it,

and it is possible to charge him with commission of the offence:

1. Any person who does the act or one of the acts or makes the omission or one of the omissions which constitute the offence,
2. Any person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence,
3. Any person who, whether or not he is present at the time the offence is committed, aids another person to commit the offence, a person is deemed to have aided another if he is present at the place where the offence is committed for the purpose of overawing opposition or of strengthening the resolution of the perpetrator or of ensuring the carrying out of the offence which is due to be committed,
4. Any person who counsels or procures any other person to commit the offence, whether or not he is present at the time the offence is committed.

The above Section 14 is similar in substance (albeit not identical) to Section 26 of the Penal Law, 5737-1977, prior to being amended by Amendment No. 39. As the above amendment was not adopted in the legislation applicable to the region of Judea and Samaria, the law in these areas is similar to the law prevailing in Israel prior to the above amendment and is substantively different from the law applicable in Israel today. When the Military Court of Appeal was required to interpret Section 14, it held that the first alternative in subsection (a) of Section 14 concerned the principal perpetrator

of the offence, the second concerned an accomplice to an offence, the third an accessory, and the fourth a counselor or instigator.<sup>63</sup>

It should be emphasized that according to Section 14, any person falling within one of the four categories mentioned will be deemed guilty of committing the offence, and in principle, may be subject to the maximum penalty set for the offence committed.<sup>64</sup> This is in contrast to the position in Israeli law after Amendment No. 39, which distinguishes between someone who is classified as the perpetrator or instigator, who may be subject to the maximum penalty set for the offence committed, and someone who is classified as an accessory to the offence, who may be subject to only half the penalty set for the offence (apart from certain exceptions).<sup>65</sup>

However, in a number of fundamental judgments<sup>66</sup> that will be reviewed in detail below, the Military Court of Appeal recognized the possibility that classification of the various participants in the commission of an offence would dictate the imposition of different penalties, even though the maximum penalty would be identical in relation to all the participants, whatever their classification. This ruling was given in the case of defendants who were convicted of involvement, as accessories or accomplices, in offences of causing death deliberately through suicide attacks. The ruling recognized the possibility of a distinction between the penalty given to the principal perpetrator and the penalty given to the accomplice or accessory. However, concurrently, it did not negate the possibility that there would be no distinction between the penalty of the first and the penalty of the second or third participants where the choice between the possibilities would be consistent with the circumstances of the case under consideration.

We shall now turn to an examination of the legal

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63. See, e.g., Appeals (JS) 320+323/03 Military Prosecutor v. Ali and Counter Appeal, [2004] (unpublished).

64. Order Relating to the Rules of Liability for an Offence (JS) (no. 225), 1968, S.H. § 14.

65. Israeli Penal Law, § 32.

66. See, e.g., Appeals (JS) 65/02 Moukadi v. Military Prosecutor, [2003] Judgments of Adm.Terr. 14(1) 159; Appeals (JS) 101/03 A'amouri v. Military Prosecutor, [2004] (unpublished).

classifications, in so far as they are relevant to suicide attacks. Initially, we shall consider, in relation to each classification, which of the “jobholders” involved in the suicide attack are contemplated by it, and next we shall examine how this classification has influenced the penalty imposed on each “jobholder.” As the offence is one of causing death deliberately, the classification will have ramifications for deciding whether the derivative penalty will be life imprisonment or imprisonment for a term of years.

B. *The Principal Perpetrator*

Who is considered to be the principal perpetrator in a suicide attack? As will be explained below, the Military Court of Appeal applied this legal category, which is the subject of Section 14(a)(1) of the *Order Relating to Liability for an Offence*, exclusively to the suicide terrorist himself. This was held in the judgment in *Ha'nini*.<sup>67</sup> This case concerned one of the first suicide attacks in Israel, carried out in the Mechola junction in the Jordan Valley in 1993, in which the suicide terrorist detonated a car that he was driving, which was laden with explosives. As a result of the attack, one person was killed and many others were injured. The defendant was a Hamas operative who was involved in planning the attack and, in particular, preparing the explosive vehicle after he had received instructions to generate a suicide attack. When considering the classification of the accused's liability for the purpose of Section 14(a), the Military Court of Appeal held that the defendant could not be deemed to be a principal perpetrator as he was not the one who had carried out the direct act leading to the death of the victim, that is, he was not the one who had detonated the lethal explosives. In other words, it was held that the principal perpetrator of the suicide attack was exclusively the person who had detonated the explosives (and with reference to a “no-escape attack,” which it will be recalled was also defined as a suicide attack, exclusively the one who carried out the fatal shooting). The significance of this was that only the suicide terrorist could be the principal

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67. Appeals (JS) 64+66/02 Military Prosecutor v. Ha'nini and Counter Appeal, [2004] Judgments of Adm.Terr. 14(1) 136.

perpetrator of the suicide attack. An identical ruling whereby only the suicide terrorist could be the principal perpetrator was delivered in the case of *Abu Saris*.<sup>68</sup>

A different broader approach regarding the definition of the principal perpetrator of a suicide attack was pursued in *Shachshir*.<sup>69</sup> This was a judgment given by the court of first instance, prior to the *Ha'nini* ruling, which became final in the absence of an appeal against it. The case concerned a person involved in a suicide attack in the Halisa neighborhood of Haifa in 2001, where fifteen people were murdered and numerous others were injured. The defendant had participated in the attack by agreeing to the suicide terrorist's request for assistance and arranging for a meeting between him and an operative of the military branch of Hamas. Afterwards, that operative, together with others, prepared and dispatched the suicide terrorist to carry out the attack.

The court classified the defendant as a principal perpetrator on the ground that a principal perpetrator, within the meaning of Section 14(a)(1), is anyone who performs the elements of the offence. When the offence is causing death deliberately, the elements of the offence are deliberately causing the death of another. Upon the existence of a causal connection between the acts of the accused and the lethal outcome, accompanied by the mental element of intent, there is a deliberate causation of the death of another, a situation which places the accused in the category of a principal perpetrator. Put differently, this decision includes within the category of a principal perpetrator of a suicide attack that has succeeded, not only the suicide terrorist who embodies the closest link to the lethal outcome of the attack, but also all the links who preceded him in the chain of causal connection (i.e., those who made an indispensable contribution to the commission of the offence and foresaw, or should have foreseen, the occurrence of the lethal outcome)—provided only that they had the accompanying mental element of intent to cause the

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68. Appeals (JS) 2003/05 *Abu Saris v. Military Prosecutor*, [2006] (unpublished) (finding that the defendant had no primary liability as part of the inner circle, but that he was criminally liable as an accessory to the crime).

69. Ct. (JS) 6184/03 *Military Prosecutor v. Shachshir*, [2003] (unpublished).

death of others. As noted, the *Ha'nini* ruling was later handed down, applying the category of principal perpetrator solely to the suicide terrorist. As we shall see below, in later case law, defendants who under the *Shachshir* ruling would have been deemed to be principal perpetrators, because of the existence of a causal connection between their acts and the resulting lethal attack, were placed in other categories.

In view of the unique characteristics of a suicide attack, the significance of the *Ha'nini* ruling is that the principal perpetrator of the offence will not be tried, if indeed he died during the course of the attack. It should be noted that, in fact, there have been situations where a “no-escape attack,” which it will be recalled has been held by the case law to be a suicide attack, has ended with the potential suicide terrorist succeeding in killing others but remaining alive; however, so far, no terrorist who intended to commit suicide but remained alive has been placed on trial—either because the terrorist was not caught or was subsequently killed. In these circumstances, the judicial delineation of the category of principal perpetrator in relation to suicide attacks is, in effect, purely negative, as its implementation in relation to defendants is limited to excluding them from this category, in the absence of any practical possibility of including *any* defendant within the category.

### C. *The Accomplice*

As explained, the *Ha'nini* ruling confined the category of “principal perpetrator” exclusively to the suicide terrorist. As a result, the categories relevant to the other participants in the preparation and execution of the suicide attack are: “the accomplice,” “the accessory,” and, where someone instigates the attack but does not take part in its preparation or execution, “the instigator.” Drawing a distinction between the categories of “accomplice” and “accessory” is not straightforward, and, consequently, there has been considerable discussion in the case law in this regard.

In *Ha'nini*, the Military Court of Appeal dealt for the first time with the classification of an “accomplice” to the commission of a suicide attack that succeeded. The court held that the behavioral element underlying the liability of an



accomplice to the offence of causing death deliberately is expressed by performing an act or making an omission, which is directed at enabling the principal perpetrator (the suicide terrorist) to commit the offence or assisting him to do so, *inter alia*, by providing tools or means to carry out the offence. It has been held that the mental element required is intention to cause death with the concomitant intention that the offence of causing death (and not any offence) will be carried out by the principal perpetrator (the suicide terrorist). Likewise, it has been held that it is not necessary for the accomplice to be aware of the details of the offence, rather it is sufficient that he is simply aware of its nature.

It will be recalled that this case involved a defendant who was involved in a suicide attack primarily by preparing the lethal explosives vehicle in fulfillment of instructions that he had received to bring about a suicide attack. The court held that the accused was an “accomplice” based on the elements of liability discussed above. Later, the court considered the issue of the sentence to be imposed on the defendant. In this regard, the court held that as the defendant belonged to the inner circle of accomplices to the commission of the lethal suicide attack, in contrast to junior accomplices, he had to be treated in the same way as those liable for murder, and, accordingly, he was sentenced to a penalty of life imprisonment.

In other words, in *Ha'nini*, classifying the defendant as an “accomplice” did not lead to a punitive result that was any different from what would have been achieved by classifying him as a “principal perpetrator.” The outcome was different in *A'amouri*.<sup>70</sup> That case concerned a defendant who was involved in a suicide attack carried out by means of a car bomb in the Megiddo junction in 2002. In this attack, seventeen people were murdered and many others were injured. The defendant had assisted his friends in Islamic Jihad to transport the devices needed to create the explosives in a bomb lab, purchased the car used for the suicide attack as well as its yellow registration plates, helped carry the containers of explosives from the bomb lab to the car, and even drove the car after it had been loaded with explosives.

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70. Appeals (JS) 101/03 A'amouri v. Military Prosecutor, [2004] (unpublished).

The Military Court of Appeal reiterated the principles of the *Ha'nini* ruling regarding the behavioral and mental elements required to find an "accomplice" liable for an offence and even noted that the principal liability of an "accomplice" stems from his willingness to assist in the commission of the offence, independent of whether the assistance is central or marginal and whether or not it would have been possible to commit the offence even without this assistance. Against the background of these principles, it was held that as the accused was well aware of the fact that the car and the explosive containers loaded on it were intended for use in a suicide attack, there was no doubt that he intended not only to cause the deaths of others, but also intended that his acts would assist in the commission of the specific offence that was actually carried out, i.e., the suicide attack in the territory of Israel (even though he did not know its specific details). He was, therefore, an "accomplice" to the attack and its lethal outcome.

When the court came to sentence the defendant, it noted that there was one accomplice whose liability was very near in gravity to that of the principal perpetrator, and, accordingly, the penalty of the two would be identical. There was another accomplice whose liability was far removed in severity from that of the principal perpetrator, and, consequently, there was room to distinguish between their respective sentences. In applying these principles the court stated that the latter defendant did not belong to the inner circle of the offence and it was unclear to what extent he regarded the offence as "his offence." His liability was, therefore, less severe, albeit only by a small measure, compared to the liability of a full accomplice, who was also involved in the preparatory stages of the offence and was aware of the details of its commission. Accordingly, the court saw fit to impose on the accused a sentence of seventeen terms of life imprisonment (for his part in the attack); however, it ordered that they be run concurrently, and thereby negated a difference in principle (albeit not one in practice) between the penalty appropriate for that accused and the penalty appropriate (theoretically) for the direct perpetrator of the attack.

Clearly, the different punitive outcomes of the two judgments did not stem from a fundamental shift in the nature

of the ruling, either in relation to the classification of liability or in relation to the appropriate penalty, but rather from the application of the ruling to the particular facts of the case. Both cases dealt with persons who were deemed, under the same tests, to be accomplices to the suicide attacks. In *Ha'nini*, the accused was held to be a full accomplice to the attack and was therefore sentenced to the penalty fitting the principal perpetrator of the attack (had he stood on trial). In contrast, *A'amouri* dealt with an accused who was not deemed to be a full accomplice, and he was, therefore, sentenced to a penalty that was different in principle. It was held that the distinction between the two types of accomplices would depend on the extent of the accused's affiliation with the inner circle of the offence and the question of whether or not he saw the offence as his own.

In the judgment in the *Jundiyah* case,<sup>71</sup> the Military Court of Appeal referred to a different "functionary" in the preparation of the suicide attack. The accused was involved in a suicide attack in the Kiryat Menachem neighborhood in Jerusalem during 2002 in which eleven people were murdered and numerous others were injured. The accused participated by establishing contact between the suicide terrorist and the dispatcher (at the time of making contact between the two, the accused was also brought up to date on the preparations for the attack). In particular, the accused fitted the suicide terrorist with an explosives belt, which the latter subsequently used to carry out the lethal attack. In these circumstances, using the tests applied in *Ha'nini* and *A'amouri*, it was held that the accused was an accomplice to the crime and belonged to the inner circle of accomplices. Accordingly, he was sentenced to eleven cumulative terms of life imprisonment for his part in the offences relating to this attack.

A *de facto*, albeit not *de jure*, shift in the definition of the term "accomplice" took place in the case of *Abu Saris*.<sup>72</sup> In *Abu*

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71. Appeals (JS) 2194/05 *Jundiyah v. Military Prosecutor*, [2005] (unpublished).

72. Appeals (JS) 2003/05 *Abu Saris v. Military Prosecutor*, [2006] (unpublished). This case involved a defendant who had been involved in a suicide attack that ended with the death of the suicide terrorist but did not lead to the deaths of others (and therefore we shall consider it further within the context of the discussion regarding suicide attacks that failed).

*Saris*, the Military Court of Appeal made a very important statement of principle that is relevant to the issue under consideration here. In that judgment, the court held that an accused who did not regard the suicide attack as “his offence,” and, therefore, did not belong to the inner circle of the offenders who actually executed the attack, would not be deemed to be an “accomplice” to the offence. In effect, *Abu Saris* narrowed—albeit not in a declarative fashion—the definition of an accomplice to an offence. Now, a defendant who did not belong to the inner circle because he did not see the offence as his own would no longer be deemed an accomplice. This is different from the result the court reached in *A’amouri*, in which it drew a distinction between full accomplices and junior accomplices. Under *Abu Saris*, it appears as if the *A’amouri* distinction is no longer relevant. Instead, it seems like an accused must meet the following requirements before he will be considered an accomplice to a suicide attack:

- A. The accused assisted in the commission of the suicide attack, even if the assistance was marginal and/or assistance without which the attack could still have been carried out;
- B. The accused intended to cause the deaths of others, and also intended that his acts would assist in the commission of the suicide attack, even if he did not know the precise details of the attack; and
- C. The accused regarded the suicide attack as his own offence and belonged to the inner circle of offenders.

As a punitive consequence of this ruling, an accomplice to a suicide attack will, in principal, only be subject to the penalties imposed in *Ha’nini* and *Jundiyah*—cumulative sentences of life imprisonment equal to the number of people murdered in the attack. The penalty imposed in *A’amouri* will no longer apply to accomplices because an *A’amouri*-type defendant will no longer be classified as an accomplice.

#### D. *The Accessory*

As noted, when a successful suicide attack has taken place, the classification of “principal perpetrator” will be assigned to the suicide terrorist alone. Accordingly, when reference is to another “jobholder” in the preparation or commission of a suicide attack, the other relevant classifications are “accomplice” and “accessory.” An accused who is not deemed to be an “accomplice” will almost certainly be regarded as an “accessory,” provided, of course, that he meets the threshold requirements of the latter category. Clearly, these threshold requirements are broader than the threshold requirements of the category of “accomplice,” as being an “accessory” involves liability of a lesser degree.

In the judgment in the *Moukadi* case,<sup>73</sup> the Military Court of Appeal was required, for the first time, to consider the liability of an “accessory” in relation to a successful suicide attack. That case concerned an accused who was involved in a suicide attack carried out in 1994 on a No. 5 bus on Dizengoff Street in Tel Aviv. Twenty-two people were murdered and many others were injured. According to the factual findings of the Military Court of Appeal, the defendant’s role included transporting the explosives used in preparing the lethal bomb, purchasing the bag in which the suicide terrorist carried the bomb, providing sleeping quarters for the terrorist on the night prior to the attack, transporting the terrorist on the day of the attack to the bus stop where he caught the bus taking him to Tel Aviv, and also delivering a tape recording to the news agency following the attack. It was further held that the accused knew that the suicide attacker intended to carry out a suicide attack in Tel Aviv using the explosives that he carried in his bag (albeit this knowledge did not attach to all the components of the planned attack). In addition, it was held that the accused intended, through the provision of his help, to bring about the lethal outcome that actually occurred.

When referring to the classification of the defendant’s liability, the Military Court of Appeal held that his liability

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73. Appeals (JS) 65/02 *Moukadi v. Military Prosecutor*, [2003] Judgments of Adm.Terr. 14(1) 159.

was that of an accessory. The court did not directly explain this finding; however, a perusal of other parts of the judgment clarifies, to a certain extent, the reasons for the court's conclusion and perhaps even establishes a delimitation of the category of "accessory" according to the judgment. As part of the discussion regarding the penalty to be imposed on the defendant, the court held that not all accessories would be dealt with in an identical manner, as there were some accessories who were proximate in terms of gravity to the principal perpetrator and there were some who were far removed from him. Under the facts of the case, a clear hierarchy of penalties had to be created between the accused and the principal perpetrators. This was necessary in order for a distinction to be made between him and those who procured, labored, and toiled to actually execute the offence because the accused was not involved in the details of the plan and did not participate in its preliminary planning. Concurrently, in the discussion of the mental element of the accused, it was held that it was insufficient to prove that he knew of the suicide terrorist's intention to carry out an attack in Tel Aviv and actually helped him. Instead, to obtain a conviction, the court had to be persuaded that the defendant also intended to cause the lethal outcome through the assistance he provided (and this indeed was proved in the case of this defendant). From these statements in the judgment, it is clear that the basic conditions for falling into the category of "accessory" are the behavioral element of assistance in actually bringing about the suicide attack, the mental element of intent to cause the deaths of others, and the intent that, by his acts, the defendant would assist in the commission of the suicide attack, even if the defendant did not know the precise details of the attack.

The judgment does not establish an unequivocal rule for determining the liability of an accessory who belongs to the inner circle versus an accessory who does not. In other words, it is clear that the accused, who had satisfied the first two elements mentioned above, but did not belong to the inner circle of offenders, was an "accessory," albeit an accessory whose position was not proximate to that of the principal perpetrator. Nonetheless, no unequivocal ruling was made regarding an accused who satisfied the first two elements and also belonged to the inner circle—was he an accessory whose

position was proximate to that of the principal perpetrator? And if not—what type of accessory could be said to be in a proximate position to the principal perpetrator?

In effect, the first question was answered at a later stage in the above mentioned *Abu Saris* case, by virtue of the ruling that the accused was an “accomplice.” Against this background it would appear that today the only distinction between an “accessory” and an “accomplice” relates to whether or not the accused belongs to the inner circle, where the degree of proximity to the principal perpetrator will be a function of the intensity of the assistance. It should be noted that in the judgment in the *Moukadi* case, not only was there a reference for the first time to the category of “accessory,” but there was also a reference for the first time to the distinction between the various categories of Section 14(a) of the *Order Regarding Rules of Liability for an Offence*, a distinction which, it will be recalled, has merely punitive ramifications, if any. In other words, this judgment preceded the rulings in *Ha’nini* and *A’amouri* and certainly the judgment in the matter of *Abu Saris* mentioned above, which delineated the category of “accomplice” relative to the category of “accessory.” The judgment, in effect, dealt with the distinction, even if only in relation to the particular defendant whose case was being considered, between an “accessory” and a “principal perpetrator,” but not between an “accessory” and an “accomplice.” It should also be noted that it even follows from the judgment that those who procured, labored, and toiled in order to bring about the suicide attack were in the nature of principal perpetrators, contrary to the approach that confined the category of “principal perpetrators” to the suicide attacker himself who played a later role.

As a result of the ruling that the position of the accused in the *Moukadi* case was not proximate to that of the principal perpetrator, the sentence imposed on that accused was not derived from the sentence fitting a principal perpetrator, namely, a life sentence for each of the persons murdered in the suicide attack. Instead, the defendant was sentenced to a single term of life imprisonment. As we shall see below, in a series of later judgments relating to defendants who were found to be accessories to suicide attacks (but whose positions did not rise to that of a principal perpetrator), the Military

Court of Appeal took a further significant step along the same course, by creating a real and not merely semantic distinction between the penalty imposed on these accessories to suicide attacks and the penalty appropriate for the principal perpetrators of these attacks, by imposing on the former a pre-determined term of imprisonment. We shall now turn to a review of the positions of these accessories, classified according to the mode of assistance given.

### 1. The Transporter

Initially, we shall consider an accessory who transports the suicide terrorist. A number of acts of assistance may be considered in this connection, starting with the provision of escort and transport services from the point of departure, throughout the route and up to the scene of attack, and ending with the provision of aid to the suicide terrorist on a short segment of the route only. In the *Jaradath* case,<sup>74</sup> the accused transferred information to a person escorting the two terrorists regarding a way of entering the territory of the State of Israel in such a manner as to point to the particular route. That same day the two terrorists carried out a “no-escape” suicide attack in Afula, in which two people were murdered. The Military Court of Appeal saw fit to impose a determinate sentence of twenty-five years actual imprisonment on the defendant, rather than a sentence of life imprisonment. The main ground for this ruling was that the accessory’s part in the attack was limited in that he only pointed to a possible way of entering the territory of the State of Israel.

On the face of it, the judgment can be explained in terms of the special situation under consideration there. Generally, the person responsible for transporting the suicide terrorist during most of the, or the entire, route to the site of the attack will belong to the inner circle, so he will not be deemed an “accessory,” but rather an “accomplice,” and will therefore be sentenced to a penalty that consists of an indeterminate term of years.<sup>75</sup> In the *Jaradath* case the accused was not a member

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74. Appeals (JS) 1886/05 *Jaradath v. Military Prosecutor*, [2005] (unpublished).

75. See, e.g., Appeals (JS) 4/04 *Abu Abid v. Military Prosecutor*, [2004] (unpublished); Appeals (JS) 1322/05 *Auis v. Military Prosecutor*, [2006]



of the inner circle, and therefore, he was described as an “accessory.” Moreover, the assistance that he provided was momentary and for only a very specific, albeit important, segment of the journey. It appears that had the accused provided an “external service” to the members of the internal circle by way of transporting the suicide terrorist over all or most of the journey, i.e., had he been an “accessory” (but one providing assistance of great significance), he would not have been sentenced to a term of imprisonment of years. In any event, whereas in the *Moukadi* case, labeling the accused as an “accessory” whose position was not proximate to that of the principal perpetrator did not lead to the imposition of imprisonment for a term of years, but only to a semantic internal distinction within the category of indeterminate penalties, in the *Jaradath* case, a fixed term of years in prison was imposed on a person who was, in effect, an “accessory”—and this is what gives this judgment its importance.

## 2. The Intermediary

A short time after the *Jaradath* case, the Military Court of Appeal considered the *Madawi* case.<sup>76</sup> In *Madawi*, the court reached a similar punitive conclusion in relation to another “jobholder” in a suicide attack, namely, the intermediary between the suicide terrorist and the infrastructure dispatching him to execute the attack. An “intermediary” is one who makes the initial contact between someone who is interested in carrying out a suicide attack and a terrorist infrastructure that is interested in a suicide terrorist carrying out a suicide attack. The intermediary’s services can be provided upon the suicide terrorist’s request to locate people who will help him fulfill his plan, or at the request of operatives in terrorist organizations who are seeking a suicide terrorist. In any event, the intermediary performs his task and with that concludes his role in terms of the attack; only afterwards will the plan be put into effect.

The *Madawi* case dealt with an accused who had been

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(unpublished). It should be noted that the latter judgment concerned the same person as had escorted the terrorists in the *Jaradath* case.

76. Appeals (JS) 2040/05 *Madawi v. Military Prosecutor and Counter Appeal*, [2005] (unpublished).

asked to help commit an attack that was ultimately executed by the suicide terrorist in Kiryat Yuvel (in which, as mentioned, eleven people were murdered). Consequently, the accused approached a member of the infrastructure which eventually brought about the lethal attack and informed him of the wishes of the suicide terrorist. The Military Court of Appeal in effect regarded the accused as an “accessory” and imposed a sentence of twenty-five years actual imprisonment.

The Military Court of Appeal again reached a similar conclusion in the *Kamamagi* case.<sup>77</sup> That case dealt with an accused who was involved in a suicide attack carried out in the Amakim Mall in Afula, in which three people were murdered and dozens were injured. The accused’s part in the attack took the form of mediating between an operative who was in contact with the female suicide terrorist on one hand and military operatives of the Islamic Jihad, who eventually dispatched her to perform the attack, on the other hand. The court held that the accused was liable as an “accessory” (also in accordance with the agreement of the parties), and a sentence of twenty-five years imprisonment was imposed on him.

### 3. The Cameraman

Fixed terms of imprisonment were also imposed on “accessories” to suicide attacks who had the function of filming the suicide terrorists. As is well-known, terrorist attacks in general, and suicide attacks in particular, have a clear propaganda aspect. Accordingly, prior to many suicide attacks, the prospective suicide terrorist is filmed with a video camera, usually while uttering warlike declarations. Following the attack, this video tape is passed to the news media and is televised. The position of an accused who took part in such an abysmal production was first considered by the Military Court of Appeal in the *Sha’ablu* case.<sup>78</sup>

That case concerned an accused who transported two prospective suicide terrorists on two separate occasions to film

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77. Appeals (JS) 2823/05 *Kamamagi v. Military Prosecutor*, [2006] (unpublished).

78. Appeals (JS) 1125/04 *Sha’ablu v. Military Prosecutor and Counter Appeal*, [2005] (unpublished).

these types of videos. In both instances, the videos were made on the evening before the terrorist departed for the planned suicide attack; both times the filming was carried out in the presence of the accused. On one occasion, the person being filmed left to carry out the suicide attack but changed his mind and returned. In the second case, the person being filmed reached the entry point into Israel. Soldiers, however, suspected him of being a terrorist, fired at him, and, as a result, the explosives belt worn by him detonated, killing three civilians and injuring others. It should be noted in relation to the first incident that at the time of transporting the terrorist to the place where the film was made, the accused did not know that his passenger was a potential suicide terrorist, but he did know that this was a person involved in prohibited activities.

The Military Court of Appeal upheld the finding of the court of first instance regarding the liability of the accused for the offences of deliberately causing death and attempting to deliberately cause death, in accordance with the category of “accessory,” and imposed a sentence of twenty-five years actual imprisonment. In this case, the assistance was of a low level compared to the two types of accessories considered previously, and, therefore, it would appear that had the accused been convicted exclusively for his involvement in the attack which succeeded (like the accessories in the above judgments in the *Jaradath* case on one hand and the *Kamamagi* case on the other), his punishment would have been even lighter than that actually imposed on him.

The Military Court of Appeal reached a similar result in the *Daruza* case.<sup>79</sup> In that case, the accused acted together with the Sha’ablu in both of the incidents described. On each occasion he organized the transportation of the potential suicide terrorist by Sha’ablu to his (the accused’s) mother’s flat, where the filming took place. In relation to the attack that succeeded, he even delivered the resulting video tape to the television stations. This accused was convicted of the same offences as Sha’ablu, also as an “accessory,” and he too was given a sentence of twenty-five years actual imprisonment.

It follows that when an accused is convicted as an

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79. Appeals (JS) 1369 + 1375/05 *Daruza* v. Military Prosecutor and Counter Appeal, [2005] (unpublished).

“accessory” to a successful suicide attack, and the significance of the assistance is not such as to make his acts similar to the acts of the principal perpetrator, the Military Court of Appeal will deviate from the rule under which it would impose a sentence of life imprisonment upon the person convicted of the offence (or offences) of causing death deliberately, and instead will impose a sentence of a term of years, albeit for a lengthy period of time. This, in effect, was the only type of case in which a sentence of life imprisonment was not imposed on an accused involved in a suicide attack which succeeded.

#### E. *The Instigator*

In cases of suicide attacks, it is very difficult to identify a situation where only “procurement” has taken place. This is because the ideological background on one hand, and the complexity of the attack on the other hand, result in most of the cases involving figures who go far beyond mere procurement, and the instigator of the attack will generally perform additional tasks, which will make him liable for the attack in the capacity of an “accomplice” to the offence. Indeed, it has often happened that an officer in a terrorist hierarchy orders his subordinate to commit an attack. Generally, however, the person giving the order will quickly become involved in the concrete planning of the attack or will supply the means to carry it out—usually in the form of weapons or money. As such, that person will be considered an “accomplice” to the offence.<sup>80</sup>

Accordingly, one may ask what punitive considerations will apply in the case of a mere “instigator” of a suicide attack that succeeds.<sup>81</sup> Conceivably, the instigator may be likened to

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80. See, e.g., Samaria Court 7227/02 Military Prosecutor v. Abu el Hijah, [2005] (unpublished); Samaria Court 6431/03 Military Prosecutor v. Chatab, [2005] (unpublished); Samaria Court 7449/03 Military Prosecutor v. Ahmed Basha'rath, [2005] (unpublished). See also CrimA (XX) 2796/95 Anon. v. Israel, 51 [1997] P.D. 388(3). Cf. the majority opinions in CrFH (XX) 1294/96 Meshulam v. Israel, 52 [1998] P.D. 1(5) and SCrF (TA) 1158/02 Israel v. Barghouti, [2004] Takdin Mehozi 3430(2) (referring to liability as a “joint perpetrator” under the Israeli Penal Law).

81. One of the general objectives of punishment is deterrence. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91

an intermediary between the suicide attacker and the infrastructure, in the sense that both form a link in the chronology of the attack, but depart from the scene at one of the initial stages. Conversely, it can be argued that because of the initiative component, it is appropriate to distinguish the instigator from the intermediary (who responds to another's initiative—either the suicide terrorist's or the infrastructure's) and equate him rather to the accomplices to the offence in the sense that even though he does not belong to the inner circle, he is the compass who draws this circle. We should also recall that in the *Moukadi* case mentioned above, the accused was distinguished from those who “initiated, toiled and labored to bring about the attack,”<sup>82</sup> and this perhaps allows us to understand the view of the Military Court of Appeal to the effect that the instigator resides on the same level of gravity as the planners of the attack and those who carry it out.<sup>83</sup>

Immediately prior to the conclusion of this Article, a judgment was given regarding a rare case where a person at the top of the hierarchy in a terrorist organization confined himself “merely” to procuring persons to commit an attack. Indeed, the suicide attack failed, but it is possible to draw analogies from the judgment in relation to situations of procurement regarding a successful suicide attack. The judgment was given in the case of *Abu Hamdiya*.<sup>84</sup> That case concerned a defendant who ordered another to recruit people to take part in attacks within the framework of the Hamas organization. When that other person informed the defendant that a volunteer had been found to commit a suicide attack, the defendant authorized the plan, instructed the other person to proceed with the preparations, and asked him to remain in contact so that the defendant could take responsibility for the

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GEO. L.J. 949 (2003). See also Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002).

82. Appeals (JS) 65/02 *Moukadi v. Military Prosecutor*, [2003] Judgments of Adm.Terr. 14(1) 159.

83. For a discussion on the liability of the instigator, which is similar to the liability of the primary perpetrator and perhaps even supersedes it, see CrimA (XX) 2796/95 *Anon. v. Israel*, 51 [1997] P.D. 388(3) 404; KEDMI, *supra* note 55, at 374.

84. Appeals (JS) 3333/05 *Abu Hamdiya v. Military Prosecutor and Counter Appeal*, [2007] (unpublished).

attack following its execution. Subsequently, the defendant also received reports regarding the progress of the preparations but did not involve himself in the planning and preparations. Ultimately, the prospective suicide terrorist was dispatched to commit the attack but retracted and returned. The court held that the accused had committed the offence of attempting to cause death deliberately as an “instigator” and imposed on him a sentence of life imprisonment. Clearly, it is possible to draw conclusions from the penal outcome of this judgment regarding the sentence that would have been imposed had the offence been one of procuring a suicide attack that succeeded. In other words, if a person procuring a suicide attack which failed was sentenced to life imprisonment, *a fortiori*, this is the sentence that would have been imposed had the suicide attack in fact succeeded. Put differently, it seems clear that, according to the case law, the position of a person “procuring” a suicide attack that succeeds is equivalent to the position of an “accomplice” to this offence.<sup>85</sup>

#### IV. Suicide Attacks that Fail

##### A. *Background*

As noted, where there is a suicide attack that happily does

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85. If a leader of a terrorist organization deliberately distances himself from involvement in attacks, he then sometimes cannot be convicted as an “accessory” or instigator. See SCrF (TA) 1158/02 Israel v. Barghouti, [2004] Takdin Mehozi 3430(2) ¶ 172 (explaining that “it is not possible to convict a person in Israel of the general offence of aiding an act of murder, and it is also not possible to convict him of the general offence of procuring an act of murder. In the same way as the aid must refer to a specific offence with a concrete goal, so too must the procurement be between one individual and another, and refer to solicitation to commit a specific offence with a concrete goal.”). Still, he may be convicted of the offence of holding a position in a prohibited organization, in accordance with Regulation 85(1)(b) of the Emergency Defence Regulations of 1945, which carries a maximum penalty of ten years imprisonment. See SCrF (TA) 1158/02 Israel v. Barghouti, [2004] Takdin Mehozi 3430(2) ¶ 139-40, 179 (where the accused was convicted, *inter alia*, of activities in a terrorist organization—an offence which carries a term of imprisonment of up to twenty years); Prevention of Terrorism Ordinance, 5708–1948, sec. 2. Currently, under Israeli law it is possible to convict a person accused of heading a criminal organization whose activities include the offences of murder, and impose a sentence of twenty years imprisonment on him. See Combating Criminal Organizations Law, 5773-2003, sec. 2.

not result in the death of others, regardless of whether it ends with the death of the suicide terrorist, the relevant offence is attempt to cause death deliberately. The general offence of an attempt to commit an offence is defined in Sections 19 and 20 of the *Order Regarding Rules of Liability for an Offence*, which provide as follows:

Section 19 of the *Order Regarding Rules of Liability for an Offence*:

Save if otherwise provided or implied in statute, any law applicable to the commission of the completed offence shall also apply to an attempt to commit it.

Section 20 of the *Order Regarding Rules of Liability for an Offence*:

- A. A person is deemed to attempt to commit an offence when he begins to put his intention to commit it into effect by some overt act and by means adapted to achieve such intention, but does not achieve such intention to such an extent as to commit the offence.
- B. It is immaterial, except as regards to punishment, whether the offender does all that is necessary on his part to complete the commission of the offence or whether the complete commission thereof is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.
- C. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.
- D. A provision which sets out a mandatory penalty for an offence or a minimum penalty

for an offence will not apply to an attempt to commit it.

Delineating the general offence of “attempt” exceeds the scope of this Article, however, in brief, it should be noted that there is no substantive difference between this delineation in the law applied by the military courts in Judea and Samaria and that prevailing in Israeli law. In contrast, a difference does exist between the two systems of law in relation to the maximum penalty. Whereas in Israeli law the maximum penalty imposed on a person attempting to commit the offence of murder is twenty years imprisonment,<sup>86</sup> according to the law applied in the military courts, the maximum penalty in the case of an attempt to cause death deliberately is the same as the penalty imposed for the completed offence—that is life imprisonment (theoretically, the death penalty could be imposed; however, it will be recalled that this is a penalty that is not imposed in practice).<sup>87</sup>

It is also important to recall the former language of Section 19 of the *Order Regarding Rules of Liability for an Offence*, which provided for the penalty to be imposed in the case of an attempt to commit an offence. This was language that was in force until June 2005 and that gave rise to judgments of principle that are important to cite. This language stated as follows:

A person who attempts to commit an offence shall unless some other punishment is provided by law or security legislation be liable –

- (1) to imprisonment for life if the offence which he tried to commit is one which a person committing can expect, upon conviction, to be punished by death;
- (2) to imprisonment for a term not exceeding ten years - if the offence which he tried to commit is one which a person committing can expect

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86. See Paras. 25, 27, 34D, 41, 300 and 305 of the Penal Law.

87. See generally Ben Haim, *supra* note 57.



to be punished by life imprisonment;

- (3) in every other case, to half the maximum punishment which a person committing the offence could expect to receive upon being convicted of the offence.<sup>88</sup>

In any event, both before and after the amendment, the courts treated the maximum penalty for the offence of attempt to cause death deliberately—life imprisonment—as an exception to the general rule of imposing imprisonment for a fixed term of years. This was similar to the approach taken towards every other offence, where only in exceptional circumstances would the maximum prescribed penalty be imposed. As we shall see below, in certain cases of liability for suicide attacks that failed, the maximum penalty of life imprisonment was in fact imposed. This sentence was imposed notwithstanding the two aspects that made it exceptional—first, the very imposition of the maximum penalty, and second, the very imposition of a life sentence on a person who did not cause the death of another. As we shall see below, the factors weighed by the courts when deciding whether to impose a fixed term of imprisonment or the exceptional penalty of life imprisonment were more varied than the factors courts weighed when deciding the same issue for those involved in a successful suicide attack. Thus, for example, reference was made not only to the function of the accused in the attack, but also to other issues, such as the extent to which the accused performed his part and how close the attack actually came to fruition.

An additional important aspect of suicide attacks that do not succeed is that the classification of “principal perpetrator,” which is reserved for the direct perpetrator of the attack, remains more than merely theoretical, as generally, the prospective direct perpetrator of the attack remains alive. In addition it is worth noting the variation that occurs when the court does not impose the exceptional penalty of life imprisonment, but rather imposes a sentence of a term of

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88. Following the amendment of Section 19, subsection D was inserted in Section 20 of the *Order Regarding Rules of Liability for an Offence*.

years, in contrast to the situation where the suicide attack has succeeded. Thus, whereas in relation to a suicide attack which has succeeded, even if the court has imposed a determinate sentence it will usually be expressed in a lengthy term of about twenty-five years actual imprisonment; in the case of a suicide attack that does not succeed, however, a shorter, and sometimes even significantly shorter, category of determinate sentences is available.

In the following section of the Article, we shall try and delineate the categories of penalties that were established by the case law regarding persons charged with attempting to cause death deliberately by means of a suicide attack, and thereby illustrate the punitive considerations guiding the courts in the difficult task of deciding which sentence to impose for this offence.

#### B. *Restrictions on Powers of Sentencing*

As we can see from the above discussion, when the maximum penalty for the offence of attempting to cause death deliberately is equivalent to the maximum penalty for the completed offence, there is no restriction on the power to sentence a person convicted of the former offence. However, the situation was different under the prevailing law prior to June 2005. Thus, under the former language of Section 19 of the *Order Regarding Rules of Liability for an Offence* a court was entitled to impose the maximum sentence of life imprisonment on a person attempting to commit an offence, which had he committed, would have carried with it the death penalty. In contrast, when the defendant was someone who had tried to commit an offence that, had he committed it, would have carried a sentence of life imprisonment, the restrictions on the power of sentencing confined the ensuing sentence to ten years imprisonment.

Prima facie, as the maximum penalty for the completed offence of causing death deliberately is the death penalty, it follows that the maximum penalty for attempting to cause death deliberately, including involvement in an attempt to carry out a suicide attack, is life imprisonment. The courts have, however, dealt with situations of attempts to carry out suicide attacks where it has been questioned whether the

defendant could have expected to be sentenced to the death penalty had he completed the offence because a negative answer would result in a restriction on the power to sentence him for the offence of attempting to cause death deliberately.

This fundamental question arose in the *Kaudasi* case.<sup>89</sup> That case concerned a 15-year-old youth who tried to penetrate the heart of the State of Israel in order to carry out a suicide attack with the aid of an explosives belt strapped to his body. This attack failed as the accused was stopped by soldiers on the seam line between the sovereign territory of the state and Judea and Samaria. The accused, who apparently realized that he had been spotted, attempted to detonate the explosives and blow himself up in order to injure the soldiers, but failed in this as well. The Military Court of Appeal examined the penalty that the accused could theoretically have anticipated had he committed the completed offence of causing death deliberately. Section 51 of the *Order Regarding Security Regulations*, which it will be recalled is the legislation providing for this offence, states in the second paragraph that if, at the time of committing the offence, the accused was less than 18 years of age, he shall not be sentenced to the death penalty. Accordingly, the court held that an accused minor convicted of the offence of attempting to cause death deliberately could not be deemed to have expected his offence, had it been completed, to carry the death penalty. Thus, such a minor was subject to a restricted sentence of ten years imprisonment. The accused was, therefore, sentenced to only ten years actual imprisonment for the offence of attempting to cause death deliberately, even though he was very close to committing a lethal suicide attack. It should be noted that the ultimate punishment of the accused was higher, as he was also convicted of other offences.

The *Kaudasi* ruling led to numerous other judgments with similar outcomes. The reason for this is that the phenomenon of minors being involved in the commission or attempted commission of suicide attacks, usually as the actual or potential direct perpetrators, is regrettably and shockingly not at all unusual. This legal outcome, which all would probably

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89. Appeals (JS) 128/02 *Kaudasi v. Military Prosecutor* 13 Judgments of Adm.Terr. 164 (2002).

agree is undesirable, led ultimately to the amendment of Section 19 of the *Order Regarding Rules of Liability for an Offence*, as explained above, and thus the *Kaudasi* ruling lapsed.

Prior to the amendment of Section 19, an attempt was made to expand the *Kaudasi* ruling in other directions. This was the case, for example, in *Sourakagi*,<sup>90</sup> which also dealt with the situation of a suicide terrorist, this time an adult, who attempted to detonate an explosives belt inside a bus, and who luckily also failed to accomplish his plan by reason of a technical malfunction and his subsequent arrest. In that case, it was argued that the accused could not be treated as someone who would have been subject to the death penalty had he committed the completed offence of causing death deliberately because the panel that had heard the case at first instance was not empowered to impose the death penalty (because it did not comprise three officers of the rank of lieutenant colonel).<sup>91</sup> Therefore, under the rationale in *Kaudasi*, as the defendant had been convicted of an attempt to cause death deliberately, he should not have been sentenced to a penalty exceeding ten years imprisonment. The Military Court of Appeal rejected this argument and held that the issue of the expected penalty for a completed offence was determined in light of two factors—the offence and the perpetrator. Incidental and theoretical factors, such as the composition of the bench that would have heard the case had it involved a completed offence could not be taken into account. Accordingly, it was held that, in this case, there was no restriction on the power to impose sentence and, in principle, it was possible to impose a sentence of life imprisonment.

To summarize, the *Kaudasi* ruling was left confined solely to the case of a minor committing the offence of attempting to cause death deliberately. This ruling was valid in relation to the old language of Section 19 of the *Order Regarding the Rules of Liability for an Offence*, but lapsed with the amendment to the section, so that today there is no restriction on the power to

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90. Appeals (JS) 303/03 *Sourakagi v. Military Prosecutor*, [2004] (unpublished).

91. Order Regarding Security Regulations (JS) (no. 378) 1970, S.H. § 47(a)(8).

sentence for the offence of attempting to cause death deliberately. Having examined the question of the power to impose punishment for the offence of attempting to cause death deliberately, we shall now turn to the use made of this power in relation to the different “jobholders” in a suicide attack which has failed.

### C. *The Prospective Suicide Terrorist*

First, we shall consider the central figure in every planned suicide attack—the prospective suicide terrorist. In contrast to a suicide attack that has succeeded, where this figure is no longer alive (except in the case of a “no-escape attack” which has not ended with his death), in a failed suicide attack, this figure always survives (except in cases of a suicide terrorist who blows himself up but does not “succeed” in killing others in the process).

When one examines the case law that deals with these situations, it becomes apparent that the principal consideration affecting the penalty imposed on the potential suicide terrorist is to what extent the accused acted to fulfill his part of the mission, whereas the degree to which the attack almost reached fruition is a consideration of only secondary force. This is, of course, only the case when the court is free of restrictions on the power of sentencing introduced by the above *Kaudasi* ruling. In mathematical terms, it is possible to say that the sentence is a function of two variables—the variable which relates to the extent to which the accused has completed his part and the variable which relates to the proximity of the attack to fruition. The first variable is of key influence on the value of the function whereas the second variable possesses merely secondary influence. Below we shall examine a number of potential situations, with reference to the above variables, and we shall consider the penalties ultimately imposed in cases falling within these categories.

The first type of case we shall consider concerns a prospective suicide terrorist who does everything possible to carry out the planned attack, and only a hairsbreadth stands between him and the success of his mission. The *Sourakagi* case is an example of this situation—a suicide terrorist who tried to blow himself up inside a bus but failed only because of

a technical malfunction in the explosives and his subsequent arrest. In that case, after the court rejected the argument that it was restricted in its power of sentencing, it sentenced the accused to life imprisonment.

Another type of case involves a prospective suicide terrorist who does everything he can to execute a planned attack, but fails because the attack is foiled before the terrorist reaches the planned site of execution. An example of this is the *Tubasi* case.<sup>92</sup> The accused in that case was dispatched to execute a suicide attack in the “City Hall” club in Haifa. The accused succeeded in entering the territory of the State of Israel but was arrested near the seam line with the explosives beside him in his vehicle. Here, too, the accused was sentenced to life imprisonment. In the *Bushkar and Ramadan* case,<sup>93</sup> however, an apparently contradictory punitive outcome was produced. The latter case concerned a potential suicide terrorist and his transporter who departed to execute a planned attack in Tel Aviv. The two succeeded in entering the State of Israel but were arrested near the seam line. *Prima facie*, this case was identical to that of *Tubasi*, although, ultimately, a sentence of life imprisonment was not imposed—the defendants received a sentence of twenty years actual imprisonment. In imposing this sentence, the court explained that the test of proximity to completing the attack is not geographical; rather, it refers to the scope of the additional acts needed in order to implement the planned attack. In that case the defendants were caught prior to being equipped with explosive belts, which awaited them in a concealed place close to the planned site of the attack, and, therefore, the court did not see fit to impose the maximum penalty on them. Instead, the court chose to impose a determinate sentence, albeit one entailing a heavy term of imprisonment.

The next type of case deals with the situation where a hairsbreadth separates the potential suicide terrorist from the realization of his plan, but where he has not done everything possible to implement that plan. An illustration of this is the

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92. Appeals (JS) 133/03 *Tubasi v. Military Prosecutor*, [2004] (unpublished).

93. Appeals (JS) 311 + 318 + 314 + 317/03 *Bushkar and Ramadan v. Military Prosecutor and Counter Appeal*, [2004] (unpublished).

*Shalchati* case.<sup>94</sup> The suicide attack planned there was in two parts. One suicide terrorist was supposed to blow himself up and immediately afterwards, the second terrorist was supposed to fire an automatic weapon in all directions. The attack was planned to take place at the central bus station in Tel Aviv. Ultimately, only the first part of the attack was carried out, injuring a number of civilians. The accused, who was the prospective second suicide terrorist, threw away his weapon and ran from the scene. The court at first instance imposed a sentence of life imprisonment on the accused, but the Military Court of Appeal replaced this sentence with a lengthy prison term of thirty years actual imprisonment. In this way the court acknowledged, on the one hand, that the attack had led to injury to others and only as an accident of fate failed to lead to any deaths, while, on the other hand, also recognized that the accused, at the last critical moment, chose not to carry out his part of the attack, thereby preventing a more serious result from occurring.

Another rare case is where a hairsbreadth separates the potential suicide terrorist from the realization of his goal, but where the attack is prevented because he fully retracts. This occurred in the *Tauwalbah* case.<sup>95</sup> There, the accused, acting under the malevolent and persistent influence of his older brother, a senior terrorist in the Islamic Jihad, reached Haifa in order to execute a suicide attack using an explosives belt strapped to his body. The accused was at the point of detonating the explosives belt near a crowd of people on two occasions, but each time—a moment before he was to pull the switch—he retracted. Afterwards, the accused also removed the explosives belt and left it in an abandoned building with the detonator detached and inoperative. The Military Court of Appeal regarded the acts of the accused as expressing complete withdrawal from his plan. Moreover, the court took into account the fact that the willingness of the accused to proceed was, from the beginning, only the result of the persistent, ill-fated pressure exerted by his brother. The court, therefore, imposed on him a lenient sentence of seven years actual

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94. Appeals (JS) 304/03 *Shalchati v. Military Prosecutor*, [2004] (unpublished).

95. Appeals (JS) 225/02 *Tauwalbah v. Military Prosecutor*, [2004] Judgments of Adm.Terr. 14(1) 319.

imprisonment. In this case, the court also took the highly unusual step of rejecting the plea bargain submitted to it (under which the court was asked to impose a sentence of eleven years actual imprisonment on the accused) on the ground that it was excessively harsh.

There is good reason for the huge discrepancy between the two cases just described. Indeed, both defendants refrained at the last moment from executing their part of the plan, thereby not killing themselves or others. However, whereas in the first case the defendant was involved in an attack that was carried out in part, and only by a miracle did not end in the deaths of others but “only” in their injury, in the second case, the attack did not take place at all. Moreover, in the second case, the court concluded that there had been complete repentance, a rare occurrence in relation to someone who had already gone out to execute a suicide attack, whereas in the first case the court did not reach a similar conclusion.

The last type of case concerns a suicide terrorist who goes out to execute an attack, retreats before implementing the plan, usually because of the presence of the security forces, but does not abandon his original intention to carry out the attack and, in effect, fails to make good on this intention because of his subsequent arrest. This category—failure of the attack as a result of the arrest of the potential suicide terrorist after he has postponed the attack for tactical reasons—is an intermediate case between the extreme situations of failure of the attack as a result of the full repentance of the potential suicide terrorist and failure of the attack merely because of the arrest of the potential suicide terrorist en route to the planned attack. Accordingly, a standard of punishment of twenty years actual imprisonment—or even a little more—has been set for this class of circumstances, placing it in the range between the levels of punishment in the two extremes described above. This was the situation in the cases of *Sa'id*<sup>96</sup> and *Jauwad* respectively.<sup>97</sup> Both cases concerned a suicide terrorist who had made his way to execute a suicide attack in the Sharon area, but retraced his footsteps near the seam line because of

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96. Appeals (JS) 1650/04 Military Prosecutor v. Sa'id, [2004] (unpublished).

97. Appeals (JS) 1917/04 Jauwad v. Military Prosecutor, [2004] (unpublished).



the presence of the security forces, and, at a certain later stage, was arrested. In the second case, a sentence was imposed in accordance with the above standard of punishment with the court even taking the unusual step of rejecting a plea bargain, which sought to impose fifteen years actual imprisonment on the defendant, on the ground that it was overly lenient.

This review of the types of situations that arise points to the fact that the primary factor weighing on the punitive outcome relates to the question of the lengths to which the potential suicide terrorist has gone to fulfill his part in the scheme, whereas, on occasion, the secondary factor of the proximity of the attack to fruition also carries weight. In the case law, implementation of the primary consideration needed for the full action generally led to a sentence of life imprisonment, an action which was partial by virtue of full repentance led to a sentence of seven years actual imprisonment, and an action which was partial for tactical reasons led to a sentence of twenty years actual imprisonment and a little more. So great was the impact of this consideration that in one case partial implementation of the attack did not lead to a sentence of life imprisonment, in view of the non-fulfillment on the part of the accused. The secondary consideration influenced the penalty in a situation where there was an absence of the determinative component of the proximity to fruition because the accused had not yet equipped himself with the destructive implements. In that case, the secondary consideration led to a more lenient sentence so that instead of the sentence of life imprisonment generally imposed on someone acting to fulfill his part, a sentence of twenty years actual imprisonment was imposed. Naturally, these penalties were imposed in cases where the court was not restricted in its sentencing power, since such restrictions, when applicable, dictate the punitive outcome.

Having examined the sentencing considerations and the punitive consequences in relation to the principal “functionary” in a failed suicide attack, namely, the potential suicide terrorist, the time has come to examine these factors in relation to other “functionaries” in the suicide attack. Ultimately, the position of each “functionary” will be compared to that of the potential suicide terrorist in similar circumstances.

D. *The Dispatcher*

The “jobholder” we shall turn to next is the dispatcher of the suicide terrorist. As we shall see below, the case law has not confined this category to the person who is the driving force behind the “production” of the planned attack. The leading judgment in this matter was produced in the case of *Atzam Jerar*.<sup>98</sup> That case concerned a defendant who was convicted of, *inter alia*, involvement in a suicide attack that failed because the two potential suicide attackers retraced their steps in the area of the seam line after encountering the increased presence of the security forces. The involvement of the defendant in the attack primarily took the form of helping to prepare the explosive belts, filming the two suicide terrorists with a video camera for familiar propaganda purposes, and helping to transfer the explosive belts to the terrorists, all while he was aware of the details of the planned attack.

The Military Court of Appeal regarded the accused as a full accomplice to the offence in view of the fact that he was a member of the inner circle of the offence, and accordingly, saw him as one of the dispatchers of the suicide attackers. Referring to the legal position of the dispatcher, the court held that events taking place after the potential suicide attacker had departed for his mission were irrelevant. This was because by dispatching the suicide terrorist the dispatcher had done everything possible in order to achieve the lethal outcome, similar to a person pressing on the trigger of a firearm. The court further noted that the legal position of a dispatcher should be even more serious than that of the suicide terrorist himself for two reasons. First, a person wishing to take his own life cannot be deterred by the threat of punishment should he fail, whereas this is not true of his dispatcher who is not willing to lose his life, and therefore, can be subjected to a deterrent punishment. Second, the dispatcher is more dangerous. Whereas the suicide terrorist performs his mission and dies, the dispatcher continues to act and seeks to bring about additional attacks.

In view of these principles, the court imposed a sentence of

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98. Appeals (JS) 183 + 190/03 Military Prosecutor v. Atzam Jerar and Counter Appeal, [2004] (unpublished).

life imprisonment on this defendant, even though the planned attack was not carried out and the potential suicide attackers retreated prior to infiltrating the sovereign territory of the State of Israel. Moreover, the suicide attackers, including Jauwad—mentioned above in the category of potential suicide attackers—were not given a sentence of life imprisonment.<sup>99</sup> In contrast, the *Atzam Jerar* judgment placed an emphasis on the accused fulfilling his role completely; therefore, the fact that the desired lethal outcome did not ensue did not act in his favor, whereas in relation to the potential suicide attackers, this fact did act in their favor, as the failure was the result of their decision, albeit for tactical reasons only. In this way, the court gave effect to its approach that, on occasion, the dispatcher's sentence will be harsher than that of the potential suicide terrorist himself. In this connection it is also important to emphasize that Jauwad was not the "driving force" behind the attempted attack, but was the "second fiddle" and perhaps even "third fiddle" in that event. Yet, the Military Court of Appeal regarded the inner circle of the offence as the geometrical place for the category of dispatcher of the suicide attacker, and accordingly held, as a matter of principle, that all the members of this circle deserved a sentence of life imprisonment, including the defendant.

Not long afterwards the Military Court of Appeal heard the case of an additional participant in the same event, Mahmed Jerar.<sup>100</sup> The accused, a family member of the previous defendant, was involved even more deeply in the attack, particularly in preparing the explosive belts, giving them to the terrorists, and explaining to the potential suicide attackers how the belts should be activated. At the same time, the defendant was not the "driving force" behind the attack—that was a third person who planned the attack and on whose instructions all the other participants acted, both in relation to the preparation and the attempt to commit the attack. It should also be noted that this third party was not tried by the court but rather by a higher force.

Prima facie, in view of the decision in the case of *Atzam*

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99. Appeals (JS) 1917/04 Jauwad v. Military Prosecutor, [2004] (unpublished).

100. Appeals (JS) 284 + 289/03 Military Prosecutor v. Mahmed Jerar and Counter Appeal, [2004] (unpublished).

*Jerar*, there was certainly no obstacle to imposing a sentence of life imprisonment on the defendant Mahmed Jerar. In that case, however, the prosecution did not ask for a sentence of life imprisonment in the court of first instance, but merely “suitable punishment” (as part of an arrangement between the parties). It is a well-known rule that only in exceptional cases will the court impose a sentence on the defendant that is not asked for by the prosecution, *a fortiori* when the sentence is one of life imprisonment, and even more so when the issue is the imposition of a sentence of life imprisonment for an offence where no one was killed. This was the background for the conflicting opinions in the judgment. According to the majority opinion, the decisive factor was the fact that the accused was the dispatcher of a suicide terrorist and, therefore, according to the principles established earlier in the *Atzam Jerar* case, he had to be sentenced to life imprisonment. According to the dissenting opinion, the decisive factor was the manner in which the prosecution had asked for the sentence, and, accordingly, on this view, the punishment that the accused merited was that imposed on him by the court of first instance—thirty years actual imprisonment.

Based on these two judgments, it appears clear that the Military Court of Appeal applies a firm principle under which a “dispatcher” of a suicide terrorist will always be sentenced to life imprisonment irrespective of how the suicide terrorist acted after he was dispatched on his mission. Likewise, a dispatcher will be defined broadly, i.e., any person belonging to the inner circle of the offence—that is to say, an accomplice. Accordingly, it has frequently occurred that the sentence imposed on the dispatcher, in the broad sense, was life imprisonment, whereas the potential suicide terrorist was given a determinate sentence. As already mentioned, an identical rationale supports the case law concerning persons confining themselves to “procuring” a suicide attack, even if the attack fails.<sup>101</sup>

#### E. *The Transporter*

This category consists of defendants whose job is to escort

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101. Appeals (JS) 2805 + 3333/05 Abu Hamadiya v. Military Prosecutor and Counter Appeal, [2007] (unpublished).

potential suicide terrorists en route to executing attacks. Sometimes the transporters only escort the terrorist along a short stretch of the route. When dealing with the category of the potential suicide terrorist, we considered the case of *Bushkar and Ramadan*.<sup>102</sup> It will be recalled that that case concerned a potential suicide terrorist and his escort who were arrested in the seam line area en route to carry out a suicide attack using an explosives belt that awaited them near the scene of the planned attack. The Military Court of Appeal imposed a sentence of twenty years imprisonment on the two, and we analyzed the reasons leading to this verdict. The important point in relation to the transporter is the fact that the court made no punitive distinction whatsoever between the transporter and the prospective suicide terrorist. We are not concerned here with the fact that the punitive outcome was identical, but rather with the manner in which the court achieved this result, specifically the court's failure to draw any distinction between the two "jobholders."

Two additional cases also considered the position of people transporting prospective suicide terrorists, this time ones who retraced their footsteps—the cases of *Ra'ed el Ashkar*<sup>103</sup> and *Nagi el Ashkar*<sup>104</sup>. These cases concerned the transportation of a prospective suicide terrorist, Ali Sa'id, who managed to cross the seam line into Israel but withdrew in view of the increased Israeli security presence. He was later caught. His position was reviewed earlier in relation to the category of prospective suicide terrorists. With respect to each of the transporters, it was held as a matter of principle that a distinction had to be drawn between each of them and Sa'id, as they had played a lesser role than he. Accordingly, each of the transporters was sentenced to a lighter sentence than Sa'id. Thus, whereas Sa'id was sentenced to a term of twenty-one years actual imprisonment, Nagi el Ashkar was sentenced to eighteen years imprisonment and Ra'ed el Ashkar was sentenced to fifteen years imprisonment. It should be noted that the distinction

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102. Appeals (JS) 311 + 318 + 314 + 317/03 *Bushkar and Ramadan v. Military Prosecutor and Counter Appeal*, [2004] (unpublished).

103. Appeals (JS) 2688/04 *Ra'ed el Ashkar v. Military Prosecutor*, [2005] (unpublished).

104. Appeals (JS) 363/03 *Nagi el Ashkar v. Military Prosecutor*, [2004] (unpublished).

between the two transporters stemmed from factual differences in the involvement of each in the transportation of Sa'id.

A comparison of these judgments shows that whereas in the *Ramadan and Bushkar* case, no distinction, whether fundamental or punitive, had been drawn between the prospective suicide terrorist and his transporter, in the *Ra'ed el Ashkar* case, the transporters were distinguished as a matter of principle in their favor compared to the prospective suicide terrorist. Accordingly, each was given a more lenient sentence, reduced by a number of years compared to the prospective suicide terrorist, and a distinction was even drawn between the transporters *inter se*, in accordance with each one's role in the transportation process.

In any event, when dealing with a transporter, it is clear that what happens to the prospective suicide terrorist is relevant in the same way that it is relevant to determining the appropriate sentence for the prospective suicide terrorist himself. In contrast, what happens to the prospective suicide terrorist is irrelevant when it comes to sentencing dispatchers. The same outcome was achieved in the *Hama'amra* case.<sup>105</sup> That case concerned a defendant who escorted the prospective suicide terrorist over a long stretch of the route. The terrorist and a second escort were later killed when the explosives in their car detonated. The Military Court of Appeal treated the defendant as an accomplice to the offence, but not as one reaching the level of dispatcher, and, accordingly, he was not sentenced to a term of life imprisonment as he would have been had he been deemed a dispatcher. Instead he was sentenced to a term of thirty years actual imprisonment, undoubtedly a heavy sentence, but still substantively and fundamentally different from life imprisonment. Consequently, even though this escort was held to be an accomplice to the offence, the principal consideration in terms of the punishment was still the fate of the suicide terrorist (who certainly was closer to completing his part in the attack than those who retreated tactically as described above), and, accordingly, he was given a longer sentence than escorts of those who withdrew tactically.

These issues have added importance when we return to a

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105. Appeals (JS) 2377/04 Military Prosecutor v. Hama'amra, [2005] (unpublished).

consideration of the *Atzam Jerar* ruling, which, it will be recalled, was the guiding ruling in relation to dispatchers. There it was held that the accomplice to the attempt to execute a lethal suicide attack was similar to a dispatcher who was subject to a sentence of life imprisonment. In the *Hama'amra* case, the escort was held to be an accomplice; nonetheless, the court did not deem him to be a dispatcher. It is not clear whether by this the court intended to restrict the definition of dispatcher in the *Atzam Jerar* ruling; however, it is clear that, from the point of view of the court, a sharp line has to be drawn between the "transporter" and the "dispatcher," in terms of both punitive considerations and punitive outcomes.

#### F. *The Intermediary*

As will be recalled, this category consists of persons who, even prior to the commencement of the planning of the attack, mediate between the prospective suicide terrorist and the infrastructure that sends that terrorist on his mission, either by way of identifying the infrastructure for the suicide terrorist or by way of identifying a suicide terrorist for the infrastructure.

The issue of sentencing "intermediaries" arose in the *Abu Aiesha* case.<sup>106</sup> That case concerned the attack that was the subject of the *Shalchati* case referred to above, which ended with the death of the suicide terrorist and injuries to a number of civilians. The accused in that case was the person who mediated between the infrastructure and the suicide terrorist. The court of first instance was asked as part of a plea bargain to sentence the accused to a term of eighteen years actual imprisonment. The court, however, rejected this plea bargain and imposed a sentence of twenty-five years actual imprisonment. The Military Court of Appeal reduced the sentence to make it consistent with the plea bargain and stated that while the plea bargain was lenient, it was not so extreme as to justify its rejection. The main reason for this was the nature of the sentence imposed on *Shalchati*, namely, thirty years actual imprisonment. It will be recalled that *Shalchati's*

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106. Appeals (JS) 38/04 *Abu Aiesha v. Military Prosecutor*, [2004] (unpublished).

function was to shoot passers-by following the explosion, but instead he ran away from the scene of the attack and thereby prevented a more serious death toll.

It is clear from the judgment that the intermediary is not subject to the same punitive considerations as those applicable to the dispatcher, in view of the fact that he is not sentenced to life imprisonment. A more meticulous reading of the judgment shows, however, that the court apparently also regards the position of the intermediary as less serious than that of the prospective suicide terrorist. This is because there is a significant discrepancy in the punishment imposed on the intermediary and the punishment imposed on Shalchati, who planned to lose his life during the execution of the attack, even though Shalchati was credited with the fact that he did not complete his part of the attack. Thus, the judgment relied on the premise that a more lenient sentence had to be imposed on the accused, Abu Aiesha, compared to Shalchati. It should be noted that even if we regard the appropriate punishment for an intermediary to be slightly more severe than that imposed in this case, this conclusion remains valid.<sup>107</sup>

An additional relevant judgment was that given in the case of *Abu Saris*,<sup>108</sup> mentioned previously in a different context. That case concerned an accused who mediated between a suicide terrorist and the infrastructure, where the suicide terrorist blew himself up and as a result three people were injured. The Military Court of Appeal upheld the sentence of twenty-two years actual imprisonment that was imposed on the accused by the lower court even though the court stated that it was only by miracle that the attack did not result in the loss of lives and that it could have, if it chose, imposed a more severe sentence.

The result of this judgment is similar to the one reached in the *Abu Aiesha* case, which was even cited in the *Abu Saris* judgment.<sup>109</sup> Thus, even in the most serious situation possible

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107. It will be recalled that the issue was the adoption of a plea bargain that was stated to be lenient but not excessively so.

108. Appeals (JS) 2003/05 *Abu Saris v. Military Prosecutor*, [2006] (unpublished).

109. Indeed, it is interesting that in this quotation it was said that Abu Aiesha deserved the sentence of twenty-five years actual imprisonment although it was not imposed in view of the special circumstances of that case, i.e., the existence of the plea bargain and the sentence imposed on the



in relation to a suicide attack that failed, where only a hairsbreadth separated the attack from one which achieved its goal—the murder of others—the intermediary was still only sentenced to a term of years—a term of years that was not even the maximum term available for determinate sentences, unlike the position applicable to the dispatcher and even the transporter. If we take a step back we will recall that a comparable punishment was imposed on intermediaries in suicide attacks that did succeed in achieving lethal results.

Thus, the position of an “intermediary” is less grave than that of the “potential suicide terrorist,” so that the fate of the latter dictates the punitive outcome of the former, subject to the appropriate punitive differential. This result is not accidental as is clear if we recall the rulings of principle made in the *Abu Saris* case, which we have already discussed, where the prospective suicide terrorist was the principal perpetrator (even if only potentially so) and the intermediary was in the nature of an “accessory.”

## V. Conclusion

In recent years the State of Israel has faced the complex reality of multiple suicide attacks. As a democracy, the state has chosen the legal process as the appropriate means for dealing with those participating in these attacks. Among the legal systems operating in the State, the military courts in Judea and Samaria were chosen as the legal arena for facing this challenge. As a result, in recent years, the military courts have dealt with the positions of numerous defendants who were involved in suicide attacks that both led and failed to achieve lethal outcomes. As part of this process, the courts were required to contend with a variety of issues. In this Article we have tried to present the principal issues while focusing primarily on the judgments of the Military Court of Appeal. In the majority of judgments, if not all, the court recognized the need to find a balance between two important considerations. The first consideration is the importance of broadcasting a clear and unequivocal message to the effect that participating in this criminal phenomenon, which is so extraordinary in its

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accomplice Shalchati.

seriousness (particularly because of the atmosphere of terror it has instilled in the citizens of Israel since the establishment of the State of Israel and even from an earlier date), will lead to extraordinarily severe punishment. The second consideration is the need to ensure compatibility between the circumstances of each specific attack and the punishment imposed.

Accordingly, a policy of severe punishment has developed for those involved in suicide attacks, compared to those involved in other types of attacks. Concurrently, this policy has created a hierarchy between the different types of participants in the suicide attacks that depends primarily on the role played in the attack and less on whether the attack has led to a lethal outcome or how close it has come to being lethal. Suicide attacks have been defined broadly to include “no-escape attacks.” This outcome is desirable from the point of view of the goal of deterrence. In various contexts, the courts impose harsher sentences for particular offences in order to increase the deterrent effect.<sup>110</sup> From the point of view of this objective, it is important not only to impose harsher punishments, but also to create certainty that it will be imposed. Therefore, a final outcome that consists of severe punishments that are uniform and stable is desirable from the point of view of the goal of deterrence.<sup>111</sup>

Where the suicide attacks have led to a lethal outcome, this hierarchy is sometimes confined to the conceptual arena, in which distinctions are drawn between consecutive life sentences and concurrent life sentences or a single life sentence. When the case involves accessories, however, the hierarchy sometimes leads to substantive and practical distinctions, so that these defendants are made subject exceptionally to a determinate sentence, albeit for a very lengthy period. It should be noted that in this context no difference can be seen in the case law between the sentencing of participants in lethal suicide attacks and the sentencing of participants in “other types” of murderous attacks.

When the courts are concerned with suicide attacks which

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110. See JAKOB BAZAK, PUNISHMENT PRINCIPLES AND APPLICATION IN ISRAEL AND IN JEWISH LAW 81 (1998) (Heb).

111. Silvia M. Mendes, *Certainty, Severity, and their Relative Deterrent Effects: Questioning the Implications of the Role of Risk in Criminal Deterrence Policy*, 32 POL'Y STUD. J. 59 (2004).

have not led to a lethal outcome, a more severe approach has been taken than with respect to “other types” of attacks which have not led to a lethal outcome, to the extent that the court has imposed sentences of life imprisonment—the maximum and exceptional sentence for the offence of attempting to cause death deliberately. Naturally, here too a hierarchy has been created; however, bearing in mind the character of the offence and its circumstances, the range of sentences imposed within the framework of the hierarchy has been considerably broader than in relation to suicide attacks that have succeeded, to the point where the court has even imposed a determinate sentence of merely a few years imprisonment in exceptional cases of a more minor nature.

Yet, placing the chief emphasis on the role played by participants in the attack has also led to a certain anomaly, from the point of view of the aspiration to achieve, or at least achieve in so far as possible, an outcome whereby the person dispatching the suicide terrorist is subject to a punishment of life imprisonment even if the suicide terrorist fails in his mission to bring about the deaths of others or is even not close to achieving this goal. Indeed, on occasion, persons assisting a suicide attack that has led to the deaths of others are subject to a lesser punishment, both in practice and in quality—namely, imprisonment for a term of years.

In any event, it is clear that the military court system in Judea and Samaria has considerable experience in dealing judicially with the monstrous phenomenon of suicide attacks. This experience may well be useful in the State of Israel and abroad, when legal systems are required to contend with this aberrant situation using the tools of a cultured nation.