AGORA: MILITARY COMMISSIONS

International law has not resolved the question of how free societies under assault can accommodate the requirements of the international law of human rights with the need to protect their populations. The military order issued by President George W. Bush on November 13, 2001,[1] providing for the creation of special military commissions to try members of Al Qaeda, has raised many of these questions in the most acute way. Because of the international legal importance of the development, the *American Journal of International Law* invited members of the Board of Editors to express their views as to the international lawfulness of the president's initiative, even while it was still evolving. The *Journal* was on the eve of publication when the United States issued the long-awaited regulations[2] for implementing the president's order. The contributions to this *Agora* could therefore not take account of those regulations.

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THE USE OF MILITARY COMMISSIONS TO PROSECUTE INDIVIDUALS ACCUSED OF TERRORIST ACTS

In the wake of the terrorist attacks in the United States on September 11, 2001, a variety of proposals emerged for bringing the perpetrators to justice. These proposals included the use of courts-martial, the creation of a special tribunal (whether under the auspices of the United Nations or otherwise), and prosecution in U.S. federal courts.[1] On November 13, 2001, President George W. Bush issued a military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (Military Order).[2] Pursuant to the Military Order, the United States may establish military commissions to prosecute terrorists for violations of the laws of war and "other applicable laws."[3]

The United States began flying captured Taliban and Al Qaeda detainees—designated "unlawful combatants" by the Pentagon—to the U.S. Naval Station at Guantánamo Bay, Cuba, on January 10, 2002, and within a week, the population grew to 110.[4] Owing to the lack of secure space, the flights were suspended on January 23, 2002, when the population of 158 nearly filled the base's capacity for 160 cages eight feet square.[5] Ultimately, prison space for

[1] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[2] U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

[1] *See, e.g.*, Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39; Elizabeth Neuffer, *Justice in a Changed World*, BOSTON GLOBE, Oct. 28, 2001, at A17. See also the various options set forth in Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, in the current *Agora*, 96 AJIL 354 (2002).

[2] 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

[3] *Id.* §1(e).

[4] James Dao, *U.S. Is Taking War Captives to Cuba Base*, N.Y. TIMES, Jan. 11, 2002, at A1; Katharine Q. Seelye, *Red Cross Team Will Examine Prisoners from Afghanistan*, N.Y. TIMES, Jan. 18, 2002, at A10.

[5] Katharine Q. Seelye with Steven Erlanger, *U.S. Suspends the Transport of Terror Suspects to Cuba*, N.Y. TIMES, Jan. 24, 2002, at A1.

2000 detainees was projected for Guantánamo.[6] It is unclear how many, if any, of these individuals may eventually be tried by military commissions. In mid-January 2002, Bush administration officials announced that such tribunals will be used primarily to prosecute the senior leadership of the Taliban and Al Qaeda.[7]

I. THE MILITARY ORDER

Courts-martial are one permissible forum for prosecuting prisoners of war, although the Uniform Code of Military Justice (U.C.M.J.)[8] limits the personal jurisdiction of courts-martial to members of the U.S. military,[9] prisoners of war,[10] and certain specified categories of civilians.[11] Because unlawful combatants, saboteurs, and spies, among others, are not subject to the jurisdiction of courts-martial, such persons have historically been prosecuted by military commissions, which have been utilized to close the gap that might otherwise preclude trial of these categories of alleged offenders. Although the legal basis for military commissions derives from the constitutional provisions conferring the power to wage war on Congress, it has historically left the establishment of such tribunals to the executive branch.[12] Trial by military commission was used in World War II[13] and authorized (though not used) during the Korean War.[14]

The Military Order authorizes the contemplated military commissions to sit at any time and place, including within the United States,[15] and gives them subject matter jurisdiction to prosecute individuals for violations of "the laws of war and other applicable laws" concerning acts of international terrorism.[16] This jurisdiction is exclusive with respect to any such offenses allegedly committed by the accused.[17] The Military Order does not apply to U.S. citizens[18] and entitles the military commission to assert jurisdiction over an alleged offender only after the president has made a written finding (1) that the individual is or was a member of the Al Qaeda organization;[19] (2) that the individual engaged in, aided and abetted, or conspired to commit acts of international terrorism or preparatory acts thereof that have as their aim injury or adverse effects on the United States, or its citizens, national security, foreign policy, or economy;[20] or (3) that the individual knowingly harbored one or more individuals falling into the above categories.[21] Moreover, it must be in the interest of the United States that the alleged offender be subject to trial by a military commission.[22]

[6] Katharine Q. Seelye, *On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A16.

[7] Bryan Bender & Wayne Washington, *U.S. Is Fine-tuning Plans for Tribunals*, BOSTON GLOBE, Jan. 18, 2002, at A1.

[8] 10 U.S.C. §§801–946 (2000) [hereinafter U.C.M.J.]. The articles of the U.C.M.J. correspond directly to the subsections of the statute (e.g., 10 U.S.C. §801 is U.C.M.J. Art. 1). U.C.M.J. Article 2 contains the personal jurisdiction provisions of the code. The U.C.M.J. is reprinted in the MANUAL FOR COURTS-MARTIAL UNITED STATES (2000) [hereinafter MCM], *available at* <http://www.jag.navy.mil/documents/mcm2000.pdf>.

[9] U.C.M.J., *supra* note 8, Art. 2(1).

[10] *Id.*, Art. 2(9).

[11] *Id.*, Art. 2(10)–(11); Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§3261–3267 (2000); Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AJIL 446 (2001).

[12] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d rev. ed. 1920). For detailed analysis of military commissions during the nineteenth century, see *id.* at 831–46.

[13] *See* 7 Fed. Reg. 5101 (July 7, 1942); 7 Fed. Reg. 5103 (July 7, 1942) [hereinafter FDR Order].

[14] General Headquarters United Nations Command, Tokyo, Japan, AG 000.5 (28 October 50) JA (Oct. 28, 1950), *reprinted in* JORDAN J. PAUST, M. CHERIF BASSIOUNI, SHARON A. WILLIAMS, MICHAEL SCHARF, JIMMY GURULÉ, & BRUCE ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 724 (1996); Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command (rev. through Mar. 17, 1953), *excerpts reprinted in id.* at 725–32.

[15] Military Order, *supra* note 2, §4(c)(1).

[16] *Id.* §§1(e), (2)(a)(1)(ii).

[17] *Id.* §7(b)(1).

[18] *Id.* §2(a).

[19] *Id.* §2(a)(1)(i).

[20] *Id.* §2(a)(1)(ii).

[21] *Id.* §2(a)(1)(iii).

[22] *Id.* §2(a)(2).

Although the evidentiary and procedural rules governing trials by military commissions will be promulgated by the secretary of defense (secretary),[23] the Military Order also addresses certain fundamental matters relating to, inter alia, voting on conviction and sentencing by the military commission's members, appeals, detention, and legal counsel. Conviction and sentencing require the concurrence of two-thirds of the members of the military commission who are present and such decisions may be rendered when a majority of the members are present, provided that two-thirds of them agree.[24] The Military Order authorizes the death penalty for individuals convicted by military commissions.[25]

Once the trial has been completed, the secretary (or the secretary's designate) reviews the record of the proceedings and renders a final decision on the case,[26] without prejudice to the president's authority concerning the granting of pardons or reprieves.[27] Neither a right of appeal from the judgments of the military commission nor any form of habeas corpus relief is available.[28] In *Ex parte Quirin*,[29] the Supreme Court dismissed a petition for a writ of habeas corpus after hearing from the parties, notwithstanding similar language in President Franklin D. Roosevelt's order purporting to prohibit such petitions. The Bush administration cites *Quirin* as indicating that, despite the language of section 7(b)(2) of the Military Order, the accused will be able to petition courts for relief in the form of a habeas corpus proceeding.[30]

Individuals detained pursuant to the Military Order may be held at a location either within or outside the United States, as designated by the secretary,[31] and such persons are to be treated humanely and must not be discriminated against.[32] They are to be provided with adequate food, water, shelter, clothing, and medical treatment.[33] The Military Order stipulates that detained individuals are to be "allowed the free exercise of religion consistent with the requirements of . . . detention."[34] The secretary has the authority to designate the prosecuting attorneys and regulate the conduct of both prosecutors and defense attorneys.[35]

II. THE SECRETARY'S RULES

More than a dozen references to military commissions are contained in the final version of the Articles of War,[36] the precursor to the U.C.M.J., while the U.C.M.J. itself contains two relevant statutory provisions.[37] U.C.M.J. Article 21 provides that court-martial jurisdiction is not exclusive. Therefore, the fact that Congress has conferred jurisdiction upon courts-martial to adjudicate certain offenses does not deprive military commissions of concurrent jurisdiction with respect to either the offender or offenses that they are entitled to prosecute.[38]

[23] *Id.* §4(b).
[24] *Id.* §4(c)(6)–(7).
[25] *Id.* §4(a).
[26] *Id.* §4(c)(8).
[27] *Id.* §7(a)(2).
[28] *Id.* §7(b)(2).
[29] 317 U.S. 1 (1942). For a thoughtful discussion of *Quirin*, see Harold Hongju Koh, *The Case Against Military Commissions* in the present *Agora*, 96 AJIL 337, 339–40 (2002).
[30] Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.
[31] Military Order, *supra* note 2, §3(a).
[32] *Id.* §3(b).
[33] *Id.* §3(c).
[34] *Id.* §3(d).
[35] *Id.* §4(c)(5).
[36] A. Wigfall Green, *The Military Commission*, 42 AJIL 832, 836–37 (1948).
[37] U.C.M.J., *supra* note 8, Arts. 21, 36; *see also id.*, Arts. 104, 106.
[38] *Id.*, Art. 21.

In addition, Article 36 of the U.C.M.J. specifically authorizes the president to prescribe the pretrial, trial, and post-trial procedures, including the "modes of proof," to be used by military commissions. Those procedures, insofar as the president considers it practicable, must apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in U.S. district courts. Moreover, they should take the form of regulations, be uniform insofar as practicable, and not conflict or be inconsistent with the procedures set forth in the U.C.M.J.[39]

Section 1 of the Military Order sets forth seven findings that President Bush made to justify employing military commissions, the most significant of which relies on U.C.M.J. Article 36. In conformity with that article, and in light of the "danger to the safety of the United States and the nature of international terrorism," President Bush determined that, in cases tried by military commissions, it would not be practicable to apply "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[40] In lieu of applying these principles of law and evidentiary rules, the president delegated the authority set forth in U.C.M.J. Article 21 to the secretary of defense.[41]

In formulating these rules, which shall govern, but not be limited to, pretrial, trial, and appellate procedure, standards of evidence, and qualifications of attorneys,[42] the Military Order prescribes certain guidelines for the secretary to follow.[43] Military commissions must provide a "full and fair trial" and will sit as trier of both fact and law.[44] The standards for the admissibility of evidence are to be formulated on the basis of what a "reasonable person" would find to have probative value, in the opinion of the presiding officer.[45] Any commission member may request that the full panel render a decision (agreed to by a majority of the commission) on whether a reasonable person would find the evidence to have probative value.[46]

The relevant provisions of statutes and executive orders are to govern the use of classified information as evidence, such as accessing such information, handling and tendering it into evidence, and conducting the hearings, including instructions on access to and closure of the proceedings.[47] Under no circumstances are state secrets to be disclosed to any person who is not otherwise entitled to have access to them.[48]

As of February 6, 2002, the secretary had not promulgated the rules to govern the conduct of trials by the military commissions. However, a draft was leaked to the media in late December 2001.[49] As the promulgation of the Military Order drew "fierce criticism,"[50] the secretary may alleviate some of this criticism by issuing rules that uphold international standards

[39] *Id.*, Art. 36.

[40] Military Order, *supra* note 2, §1(f).

[41] *Id.* §4(b).

[42] *Id.* §4(c).

[43] *Id.*

[44] *Id.* §4(c)(2).

[45] *Id.* §4(c)(3).

[46] *Id.*

[47] *Id.* §4(c)(4).

[48] *Id.* §7(a)(1).

[49] Charles Lane, *Terrorism Tribunal Rights Are Expanded; Draft Specifies Appeals, Unanimity on Death Penalty,* WASH. POST, Dec. 28, 2001, at A1; Neil A. Lewis, *Rules on Tribunal Require Unanimity on Death Penalty,* N.Y. TIMES, Dec. 28, 2001, at A1.

The secretary promulgated the rules on March 21, 2002 (U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>), during the production of this issue of the *Journal,* and they alleviate some of the concerns raised in this essay. However, pursuant to paragraph 7(B) of the rules, in the event of an inconsistency between the rules and the Military Order, the latter prevails.

[50] Bender & Washington, *supra* note 7.

of due process. Moreover, Sen. Patrick Leahy, chairman of the Senate Committee on the Judiciary, intends to introduce legislation that would guarantee certain legal protections for individuals brought before such tribunals.[51]

The draft rules will bring the trial procedures into closer alignment with rules governing trial by civilian courts or courts-martial and will clearly surpass the Military Order in terms of protecting the rights of the accused. For example, the rules will require unanimity on imposing the death penalty and will provide for a separate military review panel to deal with appeals.[52] The commissions will be composed of five officers, and the review panel of three officers.[53] Moreover, the accused will be entitled to a military attorney at no expense and may hire civilian lawyers at their own expense.[54] The latter will require government clearances to handle classified material.[55] The proceedings will be open to the public and the media, unless closed proceedings are warranted to prevent the disclosure of national security information.[56] The standard of proof will be beyond a reasonable doubt, but hearsay and other types of evidence that would be inadmissible in civilian courts or before courts-martial will be admissible before the military commissions.[57]

III. INTERNATIONAL LEGAL ISSUES

International Human Rights Law

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)[58] is the most important human rights treaty provision governing due process rights. The treaty entered into force for the United States on September 8, 1992.[59] Although states may derogate from the terms of the ICCPR,[60] the United States has not formally announced the intention to do so. Additionally, on December 10, 1998, President Clinton ordered that the provisions of the ICCPR be observed by all federal departments and agencies of the United States.[61] Thus, unless President Bush cancels this order, the Department of Defense is bound to respect the terms of the ICCPR.

Pursuant to ICCPR Article 14, states must ensure that all persons are equal before the courts and tribunals, guaranteeing nondiscrimination during the legal process.[62] In addition, the minimum standards guaranteed by Article 14 include a fair and public hearing before a "competent, independent and impartial tribunal established by law";[63] the presumption of innocence;[64] due process rights;[65] and the right to appeal a conviction to a "higher tribunal according to law."[66]

[51] *Id.*
[52] Lane, *supra* note 49; Lewis, *supra* note 49.
[53] Lewis, *supra* note 49.
[54] Lane, *supra* note 49.
[55] *Id.*
[56] Lewis, *supra* note 49.
[57] *Id.*
[58] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].
[59] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, tbl. 1, at 886, 889 (1993).
[60] ICCPR, *supra* note 58, Art. 4. On military commissions as a derogation from human rights treaties in general, see Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, in the current *Agora*, 96 AJIL 345, 350–52 (2002).
[61] Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 15, 1998).
[62] ICCPR, *supra* note 58, Art. 14(1).
[63] *Id.*
[64] *Id.*, Art. 14(2).
[65] *Id.*, Art. 14(3).
[66] *Id.*, Art. 14(5).

The UN Human Rights Committee has specifically considered whether Article 14 permits trial of civilians by special military courts. After noting that many countries permit such trials, the Committee concluded that, although the ICCPR does not prohibit military tribunals, "the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[67]

In addition to the due process rights of the detainees, other international human rights norms may have been violated by the pretrial conditions imposed upon them. For example, hooding the detainees, even temporarily, might violate the 1984 Torture Convention,[68] and forcibly shaving them might breach the right to human dignity under ICCPR Article 10.

International Humanitarian Law

The first finding made by President Bush in the Military Order states that international terrorists have carried out attacks on the United States "*on a scale that has created a state of armed conflict* that requires the use of the United States Armed Forces."[69] This armed conflict is arguably of an international nature, triggering certain U.S. duties pursuant to treaty obligations under international humanitarian law, specifically the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III).[70] Similar treaty obligations could arise from the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), if civilians should come into the hands of the United States.[71]

The threshold issue is whether the category of "[i]nternational terrorists, including members of al Qaida," falls within the ambit of Article 4 of Geneva Convention No. III, which defines prisoners of war (POWs) under the Convention. President Bush has apparently concluded that the individuals responsible for the terrorist attacks are unlawful combatants and thus may be tried by military commissions.[72] On February 7, 2002, he decided that Geneva Convention No. III applies to the Taliban but not to members of the Al Qaeda network.[73] At the same time, the president's spokesman was careful to state that the Taliban detainees were not entitled to POW status.[74] Thus, the Bush administration's position is that, although Geneva Convention No. III applies to the Taliban forces, these individuals are not entitled to the protections afforded by that treaty. Article 5 of the Convention provides that persons captured during an international armed conflict are entitled to the protections of the treaty even if their identity as POWs as defined by Article 4 is in doubt, until a competent tribunal has determined their status. Thus, the text of the treaty leads to the conclusion that a competent tribunal—and not the president of the United States acting unilaterally—must determine whether or not anyone captured is a lawful combatant.

[67] Human Rights Committee, General Comment 13/21, para. 4 (Apr. 12, 1984), *reprinted in* NOWAK, *supra* note 59, at 858.

[68] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85.

[69] Military Order, *supra* note 2, §1(a) (emphasis added).

[70] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention No. III]. As Joan Fitzpatrick notes in her article in the current *Agora, supra* note 60, at 347–49, "The War on Al Qaeda," the Geneva Conventions of 1949 and the 1977 Additional Protocols make no provision for an international armed conflict between a state and an organized transnational criminal network of the Al Qaeda type.

[71] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention No. IV].

[72] *See, e.g.,* David E. Sanger, *President Defends Military Tribunals in Terrorist Cases*, N.Y. TIMES, Nov. 30, 2001, at A1.

[73] Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives,* N.Y. TIMES, Feb. 8, 2002, at A1.

[74] Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), *available in* LEXIS, Legis Library, Fednew File; *see also* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *at*<http://www.whitehouse.gov/news/releases/2002/02/>.

The U.S. Army regulations concerning the law of war, set forth in Field Manual 27-10, provide that a "competent tribunal" for determining whether a detained individual falls within the scope of Geneva Convention No. III is a "board of not less than three officers acting according to such procedures as may be prescribed."[75] During the Vietnam War, the United States developed considerable experience with so-called Article 5 tribunals.[76] During that war, POW status was initially conferred upon the North Vietnamese regular forces but not the Vietcong, a policy that was subsequently reversed when both categories of combatants were granted such status.[77] Notwithstanding the position taken by the Bush administration, Article 5 clearly requires a case-by-case evaluation of the status of detained persons. The following analysis assumes that any person detained by the U.S. Armed Forces during the campaign in Afghanistan and made subject to trial by a military commission *is* a prisoner of war for purposes of Geneva Convention No. III.

Section VI, chapter 3 of Geneva Convention No. III governs penal and disciplinary sanctions that may be imposed on POWs.[78] Articles 84 and 99–108 guarantee certain due process rights to POWs, Article 102 being particularly important for present purposes. That provision states that the sentence imposed on a prisoner of war is valid only if it was pronounced by the same courts in accordance with the same procedure as for members of the detaining power's armed forces and the due process provisions of the treaty were observed.[79] In the same spirit, Article 106 requires the detaining power to provide the same rights of appeal to prisoners as to members of its own armed forces.[80] Moreover, Article 85 extends the protection of Geneva Convention No. III to POWs prosecuted and convicted for acts committed prior to their capture, which would apply to anyone charged with crimes occurring on September 11, 2001. Article 85 "aims to prevent a repetition of the practice followed by the Allied Powers after the Second World War with respect to war criminals of the Axis Powers."[81]

In a series of cases culminating with *Johnson v. Eisentrager*,[82] however, the Supreme Court ruled that the similar provisions in section V, chapter 3, part III of the 1929 Geneva POW Convention[83] do not apply to individuals prosecuted by military commissions, holding that these provisions cover offenses committed by the accused only during their confinement as POWs.[84] The Court offered a paucity of reasoning for this proposition and it seems to be incorrect as a matter of interpretation, since section V, chapter 3, part II, "Disciplinary Punishments," of the 1929 Convention can reasonably be construed as dealing with what the Supreme Court characterizes as "disciplinary offenses during captivity," and part III of the same chapter, "Judicial Proceedings," as applying to offenses occurring prior to detention.

With respect to judicial proceedings, POWs are entitled to the rights set forth in Articles 99–108 of Geneva Convention No. III. Article 99 reflects the principle *nullum crimen sine lege*, and limits prosecutions to those offenses that are crimes either under the laws of the detain-

[75] U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 71(c) (Field Manual 27-10, 1956).

[76] HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 57 (Naval War College Int'l Law Stud. No. 59, 1977). For a sample directive concerning the procedures to be employed, see Headquarters, U.S. Military Assistance Command, Vietnam, Directive 20-5 (Mar. 15, 1968), *reprinted in* 62 AJIL 768 (1968).

[77] Seelye, *supra* note 73.

[78] These provisions are virtually identical to the provisions set forth in section V, chapter 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 LNTS 343 [hereinafter 1929 Geneva POW Convention].

[79] *Compare* Geneva Convention No. III, *supra* note 70, Art. 102, *with* 1929 Geneva POW Convention, *supra* note 78, Art. 63, *and* Geneva Convention No. IV, *supra* note 71, Art. 71.

[80] *Compare* Geneva Convention No. III, *supra* note 70, Art. 106, *with* Geneva Convention No. IV, *supra* note 71, Art. 73.

[81] FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 61 (3d ed. 2001).

[82] 339 U.S. 763 (1950).

[83] 1929 Geneva POW Convention, *supra* note 78, sec. V, ch. 3, pt. III, Arts. 60–67.

[84] 339 U.S. at 790.

ing power or under international law at the time the offense was committed.[85] This provision would not pose a hurdle to the military commissions since the terrorist acts in question could be prosecuted under the U.S. Antiterrorist Act of 1990[86] or under international law as a crime against humanity (murder). Article 99 also requires the detaining power to permit prisoners to have access to defense counsel[87] and the opportunity to present their case,[88] and it forbids the use of "moral or physical coercion" to induce a guilty plea.[89] As for the rights and means of defense available to prisoners, Article 105 sets forth rather detailed provisions governing the assistance of counsel and the particulars of the charge(s) on which accused are arraigned; it also requires the charges to be presented to the accused in a language they understand and with adequate time to prepare a defense. Article 101 governs the application of the death penalty.[90] Other provisions of Geneva Convention No. III cover pretrial confinement;[91] notification of the proceedings, findings, and sentence to the protecting power;[92] and the execution of sentences imposed.[93]

These provisions may be problematic as regards the proposed military commissions, since if they are applicable, they would require the United States to try prisoners by court-martial, employing the applicable procedural and evidentiary rules.[94] Several examples will demonstrate this point, and may be contributing factors to any expansion of the rights of the accused by way of the secretary's rules. First, Court-Martial Rule 1004 sets forth the prerequisites for the death penalty to be adjudged. This rule requires, inter alia, the concurrence of all members of the court-martial present at the time of voting.[95] Second, RCM 921(c)(2)(B) sets forth the applicable rules with respect to voting on guilt or innocence and provides that *at least* two-thirds of the court-martial members present must vote to convict in order to make the verdict lawful.[96] Moreover, if the sentence to be imposed exceeds ten years' imprisonment, three-fourths of the court-martial members present must vote for that sentence.[97] Third, members of the U.S. Armed Forces are guaranteed the right of appeal, up to and including review by the Supreme Court.[98] Fourth, trial by court-martial is generally an open proceeding, subject to very limited exceptions.[99] Fifth, the accused before a court-martial have the right to select civilian defense counsel of their choice.[100]

[85] *Compare* Geneva Convention No. III, *supra* note 70, Art. 99, *with* Geneva Convention No. IV, *supra* note 71, Art. 67.

[86] 18 U.S.C. §2331 (2000), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, tit. VIII, §802(a), 115 Stat. 272, 376.

[87] *Compare* Geneva Convention No. III, *supra* note 70, Art. 99, *with* Geneva Convention No. IV, *supra* note 71, Art. 72.

[88] *Compare* Geneva Convention No. III, *supra* note 70, Art. 99, *with* Geneva Convention No. IV, *supra* note 71, Art. 72.

[89] Geneva Convention No. III, *supra* note 71, Art. 99. With respect to the rights and means of defense available to the prisoner, see *id.*, Art. 105.

[90] *Compare* Geneva Convention No. III, *supra* note 70, Art. 101, *with* Geneva Convention No. IV, *supra* note 71, Art. 75.

[91] Geneva Convention No. III, *supra* note 70, Article 103, limits such confinement to three months.

[92] *Id.*, Arts. 104, 107.

[93] *Id.*, Art. 108.

[94] Court-martial procedure is governed by the Rules for Courts-Martial [hereinafter RCM], whereas the Military Rules of Evidence (MRE) govern evidentiary issues. The RCM and MRE are reprinted in the MCM, *supra* note 8.

[95] *See also* RCM 921(c)(2)(A), *supra* note 94, which requires a unanimous vote of all members present to convict in cases in which the death penalty is mandatory. *Compare id. with* Military Order, *supra* note 2, §§4(a), 4(c)(6)–(7).

[96] *Compare* RCM 921(c)(2)(B), *supra* note 94, *with* Military Order, *supra* note 2, §4(c)(6).

[97] RCM 1006(d)(4)(B), *supra* note 94. *Compare id. with* Military Order, *supra* note 2, §4(c)(7).

[98] In general, see RCM, *supra* note 94, ch. XII.

[99] RCM 806, *supra* note 94. *Compare id. with* Military Order, *supra* note 2, §4(c)(4)(B).

[100] RCM 506, *supra* note 94. *Compare id. with* Military Order, *supra* note 2, §4(c)(5).

Pursuant to Article 130 of Geneva Convention No. III, "wilfully depriving a prisoner of war of the rights of fair and regular trial" is a grave breach,[101] punishable under international law. Grave breaches are also punishable under the U.S. War Crimes Act of 1996.[102] Thus, on the basis of the above analysis and the assumption that Article 5 applies, the use of military commissions will be difficult to reconcile with the U.S. obligations under the Geneva Convention, and if the accused is not afforded the minimum protections guaranteed by that treaty, U.S. officials may be subject to allegations of grave breaches. Moreover, if a detained individual *is* executed following a trial that does not conform to the provisions of Geneva Convention No. III, the result would be a war crime as defined by 18 U.S.C. §2441, and the offender could consequently face the death penalty as a matter of U.S. law.

IV. Conclusion

The perpetrators of the terrorist attacks on the United States must be brought to justice. Questions linger, however, about whether military commissions are the correct venues for trying the alleged perpetrators. The United States, as a party to a variety of human rights and humanitarian law treaties, is bound to respect its legal obligations. The Bush administration has taken the position that it cannot be doubted that the detainees are unlawful combatants, and are thus not entitled to the protection of Geneva Convention No. III. This position, however, is difficult to reconcile with the terms of Article 5 of that treaty. Moreover, if that Convention does apply, then the use of military commissions would seem to violate its terms, since such commissions are not the same courts as would have jurisdiction to prosecute members of the U.S. Armed Forces. The provisions of the Military Order concerning due process rights of the accused fall far short of those that would apply to U.S. citizens or military members tried by court-martial. Nevertheless, initial press reports indicate that the rules for the military commissions to be promulgated by the secretary may significantly close the gap. At a bare minimum, such changes should ensure that the United States does not run afoul of its obligations under the ICCPR, even if it fails to meet the stringent requirements set down by Article 5 of Geneva Convention No. III.

Daryl A. Mundis*

Al Qaeda, Terrorism, and Military Commissions

It is now more than an academic question whether one should regard terrorism as crime or as war. The attacks mounted by the Al Qaeda organization on September 11, 2001, were of unprecedented scale, heretofore seen only in wartime, killing three thousand people in a few hours' time. Most victims were civilians, and most were Americans, yet the dead included people from eighty-seven countries. Had the emergency evacuation of the World Trade Center towers not run efficiently, as many as twenty-five thousand more might have died.

The psychological sense that this was an act of war is founded on the extraordinary destructiveness of the act. In the past, even terrorism has evinced an implicit set of expectations—using violence to intimidate or gain publicity, targeting civilians so as to undermine the confidence placed in organized authority, but generally stopping short of this irrational magnitude of destruction. Only nihilism might seem to explain a scale of wreckage that serves no programmatic demands or political ambition.

[101] Geneva Convention No. IV, *supra* note 71, Art. 147, leads to the same result.

[102] 18 U.S.C. §2441 (2000).

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In a sense, Al Qaeda's real target was globalization itself—the willing premise that borders no longer matter, and that distinctions between alien and citizen status might gradually be erased. The free flow of goods and people across national boundaries can facilitate economic growth and intellectual exchange, but also permits more sinister commerce. So, too, the real target might seem to be liberalism, since Al Qaeda's enterprise exploits freedom's core values. Our delight in free association, privacy, and a multiethnic social fabric, and a stalwart sense that government should leave us alone were exploited by a violent jihad that corrupted the humanistic traditions of Islam.

Al Qaeda's published doctrine maintains that there are no innocent civilians in Western society, and this tenet leads it to the gravest of international crimes. In warfare, the principle of distinction requires that civilians never be singled out as targets. Yet Al Qaeda deliberately timed its hijackings to attack the World Trade Center in New York City during the morning rush hour when the office towers would be teeming with workers. Al Qaeda also acted as a piratical group that feigned civilian status, condemned by the laws of war as banditry and sabotage.

The American response to the Al Qaeda attacks looks like a war as well. The air campaign in Afghanistan has dropped thousands of tons of ordnance. American special forces entered Afghanistan to work alongside Afghan troops from the Northern and Eastern Alliance. The American use of force was endorsed in binding resolutions of the United Nations Security Council; the Council declared unanimously that an armed attack had occurred on American soil, within the meaning of Article 51, and that the United States had the right to use armed force in self-defense.[1] Its recognition of a profound threat to international peace and security also brought the Council to announce a rigorous new regime in which states are forbidden to give any aid, assistance, or asylum to the perpetrators of international terrorism.[2] The North Atlantic Treaty Organization declared (for the first time in the history of the security pact) that the "acts of barbarism" if "directed from abroad" amounted to an armed attack against a member state and called upon members to render assistance.[3]

The prosecution of the war in Afghanistan has now succeeded in displacing the Taliban regime, and permitted the creation of a transitional government in Kabul. Most Al Qaeda fighters in Afghanistan have fled across the border or been killed. More than four hundred combatants captured from the ranks of Al Qaeda and senior Taliban have been turned over to American custody. Over two hundred detainees have been flown to Guantánamo Bay, Cuba, and others will apparently follow.

The question addressed in the presidential order of November 13, 2001, is thus at hand. What should be done with members of Al Qaeda once they are in our hands? Should they be detained, and if so, on what basis? Should they be tried, and if so, in what court?

In the 1990s, when we cornered an Al Qaeda member, the preferred avenue was to mount a federal criminal trial in district court, charging terrorism and murder under American federal statutes. Detention of an Al Qaeda member as an enemy combatant was not contemplated. Rather, restraint on Al Qaeda's freedom of action was sought only where intelligence reports could be fleshed out by trial-quality evidence, with proof beyond a reasonable doubt. Otherwise, we stayed our hand. The most startling example was the White House's reported decision to turn down an offer by Sudan in the spring of 1996 to deliver Osama bin Laden into American or Saudi custody.[4] The doubt was that we might not convict him in a federal court. Apparently, no one contemplated that we could hold him as a combatant in an ongoing conflict, for the paradigm of crime had not yet admitted the pertinence of the norms of

[1] SC Res. 1368 (Sept. 12, 2001), 40 ILM 1277 (2001); SC Res. 1373 (Sept. 28, 2001), 40 ILM at 1278.
[2] SC Res. 1373, *supra* note 1, paras. 1–2.
[3] NATO Press Release (2001)124, Statement by the North Atlantic Council (Sept. 12, 2001), 40 ILM 1267 (2001).
[4] Ruth Wedgwood, *The Law at War: How Osama Slipped Away,* NAT'L INTEREST, Winter 2001/02, at 69.

war. Bin Laden then departed for Afghanistan, where his training camps have tutored thousands of mujahedin in the skills of combat and terror. The Saudi exile also continued to build his network of compartmentalized underground cells in Europe, Asia, and North America.

In an intellectual shift, the Bush order announced that the paradigm of war fit the case after all. Al Qaeda's campaign throughout the 1990s against American targets amounted to a war. In recitation, this may seem more obvious now. The cumulative chain of events is quite striking—the 1992 attempt to kill American troops in Aden on the way to Somalia; the 1993 ambush of American army rangers in Mogadishu; the 1993 truck bombing of the World Trade Center by conspirators who later announced that they had intended to topple the towers; the 1995 bombing of the Riyadh training center in Saudi Arabia; the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia (five weeks after bin Laden was permitted to leave Sudan); the 1998 destruction of two American embassies in East Africa; and the 2000 bombing of the U.S.S. *Cole*, in a Yemeni harbor. The innumerable other threats against American embassies and offices around the world; the plot to down ten American airliners over the Pacific and to bomb the Lincoln and Holland Tunnels in New York, as well as the United Nations; the smuggling of explosive materials across the Canadian border for a planned millennium attack at Los Angeles Airport; and finally, the attacks on the Pentagon and the World Trade Center—were taken to constitute a coherent campaign rather than the isolated acts of individuals. Al Qaeda's open ambition to acquire a nuclear device has made the metaphor of war even more compelling.

The current debate on how one should respond to the acts committed by Al Qaeda may have profound operational consequences, and consequences for our culture. One can plausibly argue that the fabric of American liberalism and democracy would be irreparably coarsened if government proves unable to provide a reasonable guarantee of life and safety to its citizens. It is difficult to prove a negative, but certainly the prior effort to investigate Al Qaeda through the criminal justice channels of grand jury and trial was not sufficient to deter or intercept the later attacks.

Good faith suggestions have issued from several quarters that any trials against Al Qaeda members should take place in federal court or an ad hoc international tribunal. Some cases may be suitable for such modalities. But in the middle of a grave conflict with an efficient and undeterrable adversary, military commissions may be the most practicable course.

In federal court, for example, there is no method of protecting sensitive intelligence intercepts required as proof. The 1980 Classified Information Procedures Act permits some predictability in trials where sensitive information is at stake.[5] The accused's lawyers must notify the government if they wish to present classified information in their defense case. To a limited extent, generic descriptions may be substituted for particular data, and the government can seek a protective order to forbid the further disclosure of classified information that is not entered into evidence at trial. But ultimately, the presentation of proof remains entirely open to the public. Any intelligence used as proof against a defendant must, by definition, also be revealed to state or nonstate adversaries who care to listen.

Second is the problem of evidence. The rules governing the admission of evidence—what can be placed before a jury for consideration in fact-finding—are strict and unchangeable in federal criminal trials. In general, only eyewitness testimony can be heard, even where testimony of one degree's farther remove may have significant probative value. This high hurdle for what can be presented reflects a historical distrust of the jury's ability to weigh evidence, and is far less characteristic of continental legal systems and international courts. It poses a less daunting obstacle in an ordinary domestic trial because every citizen is pre-

[5] Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 696, §1 (2000)), *as amended by* Pub. L. No. 106-567, tit. VI, §607, 114 Stat. 2855 (2000).

sumed willing to obey the order of the court to give evidence. But in legal action against a terrorist group violent, skilled in countersurveillance, and compartmentalized, there may be no such ready reserve of available witnesses. It has been widely reported that Osama bin Laden telephoned his mother in Syria shortly before September 11 to warn her that a major event was imminent, and that he would be out of touch for some time. If the mother confided to a close friend about her son's warning, still one could not call the friend to give testimony, for technically it would be hearsay.

Similarly, federal court rules governing physical objects and documentary evidence found in searches may exclude probative evidence. The so-called exclusionary rule keeps from the fact finder any evidence found to have been taken in an illegal search by federal authorities (except where the search was pursuant to a warrant and the law was unclear at the time). The exclusionary rule has many strong proponents in ordinary circumstances, because it creates an incentive system for the proper execution of searches by government agents. In wartime, where accuracy in fact-finding is needed to prevent acts of terrorism, this rule finds a less obvious place. So, too, the usual rules on chain of custody and authentication may be difficult to meet for objects obtained in a battlefield environment, where many witnesses are scattered, deceased, or uncooperative. Consider, for example, the computer hard drives found by an American reporter in a market in Afghanistan, evidently scavenged from an abandoned Al Qaeda office and loaded with Al Qaeda memoranda.[6] The order of November 13 would allow a military commission to consider all forms of evidence that a reasonable person would find probative, and in this more latitudinarian rule, will create a broader record for evaluation by the fact finder.

Third is the problem of security. In ordinary times, the safety of the jury, judges, and prosecutor is beyond question. In prosecutions of Al Qaeda, the physical integrity of the trial is difficult to sustain. Guards with automatic weapons now protect the front doors of the federal courthouse at Foley Square in Manhattan. The federal judges who handled Al Qaeda cases during the 1990s have been provided with twenty-four-hour protection by special teams of federal marshals, rotated at short intervals for freshness, and they will probably require such protection for the rest of their lives. No such protection is available for juries, who are summoned to sit as a duty of citizenship, rather than as volunteers. In the aftermath of the first World Trade Center bombing case, Al Qaeda carried out a mass killing abroad and left a written message stating that the killing was in retaliation for the actions of the federal trial judge. The courthouse in Manhattan is a mere six blocks from the site of the now-destroyed World Trade Center towers. Perhaps it is only coincidence that the World Trade Center attack of September 11 took place the day before defendants from the Al Qaeda embassy bombing case were originally due to be sentenced in federal court. Perhaps it is also only bad luck that a defendant in the embassy bombings crippled a guard in the metropolitan correctional center in an unexpected attack with a filed-off plastic comb serving as a knife, or that Al Qaeda prisoners in Afghanistan have mounted attacks against their guards even after their surrender was accepted. But in the aftermath of September 11, with the demonstration of Al Qaeda's appetite for violence, some find it difficult to fathom how the security of trials can be assured against the network's members.

The idea of international trials presents similar difficulties—whether through a new ad hoc chamber created by the Security Council or a permanent international criminal court. Even though the statute of the United Nations tribunal for the former Yugoslavia has been read to permit anonymous witnesses and might be similarly read or amended to mask the source of intelligence information, the very act of revealing intelligence information to international

[6] Alan Cullison & Andrew Higgins, *How Al Qaeda Agent Scouted Attack Sites in Israel and Egypt—Account on Kabul Computer Matches Travels of Reid, the Alleged Shoe-Bomber*, WALL ST. J., Jan. 16, 2002, at A1.

court personnel in the midst of a war would be problematic. Even before the international community sets to work on a code of judicial ethics for international judges, one can acknowledge that some international judicial personnel remain in contact with their home governments, and some may not maintain the standard of financial transparency expected of domestic judges. Sharing intelligence intercepts after a conflict is completed may be less prejudicial. But while a conflict is ongoing, it would be hazardous in the extreme to risk disclosing how bin Laden is tracked. The Al Qaeda leader has repeatedly changed communications systems, and timely surveillance remains essential to our ability to intercept fresh attacks. The criminal tribunals created by the UN Security Council for the former Yugoslavia and Rwanda have dealt with regional conflicts that were local, confined, and largely completed.

In addition, security would be hard to provide. The trial of the Pan Am Flight 103 bombing, held at Camp Zeist before Scottish judges, was staged with the consent of Libya, the suspected state sponsor of the terrorist acts. Even then the trial was moved to the safer setting of a mothballed American military base outside The Hague, and security preparations took months. The Hague is hardly remote from the threats of Al Qaeda that have interleaved European cities, including recent threats to bomb the airport in Strasbourg, France, the situs of European human rights law.

The claim for greater legitimacy through an international tribunal also founders on the facts of international politics. Should the tribunal include broad representation from Muslim countries, in order to enhance the acceptance of verdicts within the Muslim world? Few, if any, Arab or Muslim governments could nominate a judge without fearing reaction from their own militant sectors, and the fatwas of bin Laden have announced that any Muslim government cooperating against him is an apostate enemy. There is also the place of Israel. Bin Laden's 1998 declaration of war was against all Americans and all Jews. Thus, Israel might also wish to send a judge to an international tribunal. Yet the sad fact of the world is that few, if any, Muslim governments would allow their judges to sit alongside an Israeli judge. And within the regional politics of the UN system, Israelis are rarely nominated, much less elected, to significant international bodies. In addition, only one American judge would likely be seated on such a tribunal, and crucial trial chambers would lack any American voice.

The shared commitment to the ethical and legal norms sheltering civilians against deliberate attack can be demonstrated in other ways. One can admit into evidence the respected works of Muslim legal scholars who reiterate that the human lives of innocent civilians are an inappropriate object of attack in wartime. The multiethnic nature of American society itself, including the American military, also serves as a reminder that the honorable rules of warfare are not confined to any particular cultural group.

The president's proposal for military commissions to try Al Qaeda suspects conforms to international law and does not represent any usurpation of civilian jurisdiction. Indeed, military commissions have been the historic and traditional venue for the trial of war crimes. The Nuremberg trials of the Nazi leadership were organized by the Allies in 1945 to educate the German public and the world, and were held in a mixed military commission. Military commissions tried war crimes throughout Europe and the Far East at the conclusion of the world war, and considered the cases of approximately twenty-five hundred defendants. Military commissions have been used throughout the history of the American Republic. Instances include the Civil War trials of Confederate soldiers who shed their uniforms to attempt to commandeer civilian sailing ships, and a Confederate spy named Robert Kennedy who tried to burn New York City.[7] The recent suggestion of Professor George Fletcher that military commissions were deployed only for cases of spying and not for other war crimes[8]

[7] *See Ex parte* Quirin, 317 U.S. 1, 31 n.10(1942).

[8] George P. Fletcher, *War and the Constitution: Bush's Military Tribunals Haven't Got a Legal Leg to Stand On*, AM. PROSPECT, Jan. 1–14, 2002, at 26, *available at* <http://www.prospect.org/print/V13/1/fletcher-g.html>.

is belied by the trial of the commandant of the Andersonville prison camp at the conclusion of the Civil War.[9]

The role of military commissions has been recognized by the Supreme Court in case law stemming from World War II—including the 1942 trial of German saboteurs who landed on the shores of Long Island and Florida,[10] the trial of Japanese General Yamashita at the conclusion of the war in the Pacific in 1945,[11] and the trial of German citizens in China who passed intelligence information to the Japanese even after Germany surrendered.[12] Though the trial procedure of the German saboteurs case and the *Yamashita* trial may not fully accord with our modern sensibility, the same may be said of many civilian trials of the same era. Any suggestion that military tribunals will never acquit a defendant overlooks the outcome of the proceedings against the Germans in China, in which six defendants were acquitted by U.S. Army judges. The story of some of the trials may be more complicated than is recognized as well. The case of the German saboteurs was held in a closed courtroom in the Justice Department, with daily press briefings, in part to mask the role of George Dasch, a defecting saboteur. Dasch had reported the sabotage plot to the Federal Bureau of Investigation, and his family remained in wartime Germany vulnerable to retaliation. The trial of General Yamashita, commander of the Fourteenth Army Group in the Philippines, is famous in human rights jurisprudence for its enunciation of the principle of command responsibility, holding that a military commander has a duty to monitor and restrain the activities of his troops. The *Yamashita* principle may indeed be central to the prosecutions of Radovan Karadžić and Slobodan Milošević in the UN tribunal at The Hague. The short preparation time accorded to Yamashita's counsel, and the disregard of the general's claim that he was preoccupied with repelling the American advance and could not effectively control the Japanese Navy forces, do not change the fact that the earlier events of Nanking had put every Japanese commander on notice that close monitoring of troops was necessary.

The accepted use of a military venue for the trial of war crimes is confirmed by the Geneva Conventions. Article 84 of the Third Geneva Convention of 1949 instructs that "[a] prisoner of war shall be tried *only by a military court*, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense."[13] Only in 1996 did Congress create any general federal court jurisdiction to try international war crimes,[14] limiting the scope to grave breaches of the Geneva Conventions and violations of common Article 3 and the Hague rules.[15] Crimes under

[9] Accounts of the early history of American military commissions can be found in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d rev. ed. 1920), and WILLIAM BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW (1914). On the history of commissions generally, see also Madsen v. Kinsella, 343 U.S. 341 (1952); A. Wigfall Green, *The Military Commission*, 42 AJIL 832 (1948). See further the statement of Major General Enoch H. Crowder, judge advocate general, on revision of the Articles of War:

> There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article [15] that in such cases the jurisdiction of the war court is concurrent.

S. REP. NO. 63-229, at 53, 98 (1912). On Article 15 of the Articles of War, see note 17 *infra*.

[10] *Ex parte* Quirin, 317 U.S. 1 (1942).

[11] *In re* Yamashita, 327 U.S. 1 (1946).

[12] Johnson v. Eisentrager, 339 U.S. 763 (1950).

[13] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 84, 6 UST 3316, 75 UNTS 135 [hereinafter Third Geneva Convention] (consented to by the United States Senate on July 6, 1955, with reservations) (emphasis added).

[14] 18 U.S.C. §2441 (2000) (as amended in 1996 and 1997).

[15] *Id.* §2441(c). For the Hague rules, see Regulations Respecting the Laws and Customs of War on Land, *infra* note 27. Violations of the Land Mines Protocol (Protocol II), May 3, 1996, 35 ILM 1206 (1996), to the Convention on Conventional Weapons can also be prosecuted under the War Crimes Act. Only cases where an American national or member of the American armed forces is involved as perpetrator or victim fall within the statute's reach.

the customary law of war remain outside federal criminal jurisdiction. And by memorandum of agreement between the Department of Defense and the Department of Justice, despite the new statute, any current member of the American armed forces still "would be tried for a violation of the War Crimes Act in a military court."[16]

Indeed, the jurisdiction of military commissions has been set by the bounds of international law directly incorporated within American law. Under the Articles of War and the Uniform Code of Military Justice, the disciplinary offenses of persons in American military service have been handled through courts-martial, including offenses such as failing to report for duty or misbehavior of a sentinel. Over the last fifty years, the American system of courts-martial has come to more closely resemble civilian trials, for example, adopting the Federal Rules of Evidence and a version of the *Miranda* rule even more liberal than is used in civilian courts (by requiring a warning of the right to counsel as soon as a person is suspected of an offense).

But each time Congress has revised the rules for courts-martial, it has also confirmed the right of the president as commander in chief to convene military commissions for the enforcement of the law of war. Article 15 of the 1920 Articles of War, for example, states that "[t]he provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be triable by such military commissions."[17] Similar language appears in the Uniform Code of Military Justice, passed by Congress in 1950 to replace the standing Articles of War.[18]

This statutory language acknowledges that the jurisdiction of military commissions is defined by the norms of the customary law of nations, namely, the law of war.[19] These provisions of the Articles of War and the Uniform Code of Military Justice are the fraternal twins, if you like, of the Alien Tort Claims Act, which also authorizes the incorporation of customary international law into United States law—a parallel noted by Chief Justice Stone in *Ex parte Quirin*.[20] (Some critics of *Filartiga*[21] may wish to reexamine their analysis in light of this direct Supreme Court authority.)

It is also wrong to suggest that military commissions can be convened only where there is a *de novo* statutory authorization—for Congress's language says that offenders and offenses can fall under a commission's purview either by statute or by the law of war. And lest there be scruple about the force of "old" statutes, it is worth noting that the legislative history of the 1996 War Crimes Act reiterates the grounding of commissions and their jurisdiction in the customary law of war.[22]

[16] Letter from Judith Miller, general counsel of the Department of Defense, to Congressman Bill McCollum (May 22, 1996), *reprinted in* H.R. REP. NO. 104-698, at 12, 13 (1996). *Compare id. with* Opinion of Attorney General James Speed, 11 Op. Att'y Gen. 297, 315 (1865) ("The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with or prevent a battle.").

[17] Articles of War, Art. 15, *in* Pub. L. No. 242, ch. 227, 41 Stat. 787, 790 (1920) (emphasis added).

[18] 10 U.S.C. §821 (2000), also cited in the preambular language of President Bush's order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[19] *In re* Yamashita, 327 U.S. 1, 20 (1946) (stating that "[b]y thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war," and that "the [*Yamashita*] military commission . . . [was] convened . . . pursuant to the common law of war").

[20] 317 U.S. 1, 29 n.6 (1942). Congress, noted Chief Justice Stone in *Ex parte Quirin*, "had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." *Id.* at 29. *See also* Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) (stating that "we have held in the *Quirin* and *Yamashita* cases . . . that the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war"); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 249 (1863) ("[M]ilitary offenses which do not come within the statute must be tried and punished under the common law of war.").

[21] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[22] H.R. REP. NO. 104-698, *supra* note 16.

The absence of a formal declaration of war makes no difference, for as the 1949 Geneva Conventions note, the law of war applies in any international "state of armed conflict." The statutes for the Rwanda and Yugoslav war crimes tribunals, crafted by the UN Security Council, also establish that the "laws and customs of war" govern civil wars, where declarations of war are ordinarily lacking. Countries rarely "declare war" anymore, perhaps because of the strictures of the UN Charter concerning the use of force in self-defense.[23] Congress has plainly authorized the president's use of force against Al Qaeda and its Taliban hosts.[24]

Likewise, the Third Geneva Convention does not preclude military commissions in this war against terrorism. First, Washington is warranted in considering Al Qaeda irregulars to be "unlawful" or "unprivileged" combatants who do not qualify as prisoners of war and hence do not enjoy the full privileges of the Third Geneva Convention.[25] Al Qaeda has failed to fulfill four prerequisites of lawful belligerency. These require a responsible commander, a distinctive and visible insignia, the open bearing of arms, and general observance of the laws and customs of war.[26] It is also open to question whether an international terrorist group that does not fight for a sovereign state (but, rather, if anything dominates the state) can ever qualify as a lawful belligerent. Thus, the specification of trial procedures in the Third Geneva Convention would not be applicable as such to Al Qaeda, except arguably for the customary norm reflected in common Article 3 calling for a "regularly constituted court" and the "judicial guarantees . . . recognized as indispensable by civilized peoples."

The Taliban also fail to qualify as lawful combatants or prisoners of war, under the tests of the Third Geneva Convention. In particular, they have abetted Al Qaeda's flagrant violation of the laws of war, and this assistance was condemned by the Security Council in Resolution 1373. Any claim that the Taliban are a "regular army" exempted from these qualifying conditions stumbles on the explicit language of the precedent 1907 Hague Rules of Land Warfare[27] and the 1874 Brussels Declaration.[28] It would make little sense to exempt a supposed "army" from the requirement of distinguishing themselves from civilians and reciprocally obeying the laws of war. The *Commentary* to the Third Geneva Convention notes that these "material characteristics" are prerequisite to even qualifying as "armed forces" and "regular armed forces."[29]

[23] UN Charter Arts. 2(4), 51.

[24] Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224, *reprinted in* 40 ILM 1282 (2001). The resolution authorized the President's use of

> all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. §2(a).

[25] Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), *available in* LEXIS, Legis Library, Fednew File; *see also* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *at* <http://www.whitehouse.gov/news/releases/2002/02/>.

[26] Third Geneva Convention, *supra* note 13, Art. 4(A)(2).

[27] Regulations Respecting the Laws and Customs of War on Land, Art. 1, annex to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[28] Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, Art. 9, 65 BRIT. & FOREIGN ST. PAPERS 1005 (1873–74), *reprinted in* THE LAWS OF ARMED CONFLICTS 27 (Dietrich Schindler & Jiří Toman eds., 3d rev. ed. 1988).

[29] As the Commentary notes:

> These "regular armed forces" [under Third Geneva Convention Article 4(A)(3)] have all the material characteristics and all the attributes of armed forces in the sense of [Article 4(A)(1)]: they wear uniform[s], they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in [Article 4(A)(2)].

INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 63 (Jean de Preux ed., 1960).

It is certainly relevant, as well, that the leader of the new interim government of Afghanistan, as the successor regime of the treaty party, has stated that he does not consider either Al Qaeda or the Taliban as qualified for prisoner-of-war status under the Geneva Convention.[30] This statement is of interest as a stipulation of their characteristics, and even as a waiver of any treaty claim that might be mounted on their behalf.

The criticism by some European allies may stem from their own decision to ratify the 1977 Additional Protocol I to the Geneva Conventions. This Protocol dilutes the requirements for lawful belligerency and prisoner-of-war status. But neither Afghanistan nor the United States has ratified Protocol I, and it is implausible to suggest that this sharply contested instrument has become customary law in all its parts.[31] Nevertheless, it should be noted that Protocol I itself apparently preserves the requirement that an armed group generally observe the laws of war in order to qualify as an "armed force."[32]

In any event, the implementing rules under the president's order of November 13 are likely to guarantee the full norms of fair trial set forth by the Third Geneva Convention, even for prisoners of war. The Convention does not forbid the weighing of hearsay evidence. Article 105 permits the detaining power to conduct portions of a trial "*in camera* in the interest of State security." And the Convention suggests in Article 106 that a right of petition from a sentence is a permissible alternative to a right of appeal.[33]

The implementing rules for the military commissions authorized by the president are still under consideration, as of this writing. The American Bar Association has supported the use of military commissions for the trial of Al Qaeda's violations of the law of war, subject to suitable safeguards, as has the United States attorney for the Southern District of New York who supervised the Al Qaeda terrorist trials in the 1990s.[34] Published reports on the draft rules suggest that they will indeed enunciate a presumption of innocence, require proof beyond a reasonable doubt, guarantee the right to full notice of charges and the right to call witnesses in defense, and ensure an effective right to counsel.[35] In addition, proceedings would be open except where the presentation of sensitive or classified evidence requires a limited clo-

[30] *Afghan Agrees with Bush on Prisoners*, N.Y. TIMES, Jan. 30, 2002, at A9.

[31] *Contra* Aryeh Neier, *The Military Tribunals on Trial*, N.Y. REV. BOOKS, Feb.14, 2002, at 11, *available at* <http://www.nybooks.com>.

[32] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 43(1), 1125 UNTS 3 ("armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict"). One may distinguish between the moral vagrancy of an individual, per Article 44(2), and of an entire fighting force, per Article 43(1).

[33] The only places where the Third Geneva Convention may differ from the likely commission rules for the unlawful combatants of Al Qaeda is in the possible reading of Article 105 that a qualified prisoner of war can choose any counsel he pleases (a choice that may logically be constrained by the demands of security clearance), and by the suggestion of a "most favored combatant" clause in Articles 102 and 106 to the effect that the sentencing procedure and mode of review must be the same as that accorded to the soldiers of the detaining power for like offenses. The latter is complicated when one notes that courts-martial are not the only available mode of trial even of American soldiers for violations of the law of war—indeed, the punishment of war crimes is not codified in the Uniform Code of Military Justice. Military commissions have been used historically for the trial of American soldiers as well as enemy combatants.

[34] AMERICAN BAR ASSOCIATION, TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (Jan. 4, 2002), *available at* <http://www.abanet.org>; Benjamin Weiser, *Ex-Prosecutor Wants Tribunals to Retain Liberties*, N.Y. TIMES, Jan. 8, 2002, at A13.

[35] The rules issued on March 21, 2002, are more forthcoming than most critics had expected, and guarantee, inter alia, the presumption of innocence, the right against self-incrimination, burden of proof on the government, the choice of civilian defense counsel to serve alongside military defense counsel, the right of cross-examination and presentation of proof by the defense, and proof beyond a reasonable doubt. In addition, there is a requirement of unanimity for any capital sentence, a right of petition to an appellate review panel with autonomous power to reverse any conviction, and participation of civilians on the review panel (though they will be nominally commissioned as officers during their service). U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

sure. In a liberal polity, one wishes to assure trial procedures that are as generous as possible, even amid the exigencies of a very real conflict.

Still, the problems of a different kind of war remain, especially for any trials that are convened in the middle of the battle. Some Al Qaeda actors may simply be held for the duration of an arduous conflict, as combatants captured in war, subject to administrative safeguards. Should criminal trials be held, we may wish to acknowledge that our familiar habits from civilian courts and United Nations tribunals are not the only models of fairness. The humanitarian law of war and the law of armed conflict are equally a part of international law, framed to meet the unsought circumstances of states that must protect the safety of their citizens.

RUTH WEDGWOOD*

THE CASE AGAINST MILITARY COMMISSIONS

In January 2002, Zacarias Moussaoui, a French national of Moroccan descent, pleaded not guilty in Virginia federal court to six counts of conspiring to commit acts of international terrorism in connection with the September 11 attacks on the Pentagon and the World Trade Center.[1] In other times, it would have seemed unremarkable for someone charged with conspiring to murder American citizens and destroy American property on American soil to be tried in a U.S. civilian court. More than two centuries ago, Article I, Section 8, Clause 10 of the United States Constitution granted Congress the power to "define and punish Piracies, Felonies committed on the High Seas, and Offenses against the Law of Nations," a power that Congress immediately exercised by criminalizing piracy, the eighteenth-century version of modern terrorism.[2] Since then, Congress has criminalized numerous other international offenses.[3] In recent decades, United States courts have decided criminal cases convicting international hijackers, terrorists, and drug smugglers,[4] as well as a string of well-publicized civil lawsuits adjudicating gross human rights violations.[5] Most pertinent, federal prosecutors have successfully tried and convicted in U.S. courts numerous members of Al Qaeda, the very terrorist group charged with planning the September 11 attacks, for earlier attacks on the World Trade Center and the U.S. embassies in Tanzania and Kenya.[6]

Had only three or three hundred died on September 11, no one would have suggested that their murderers be tried anywhere but in U.S. civilian courts. This history made even more surprising President Bush's military order (Military Order), issued on November 13, 2001, with-

* Of the Board of Editors.

[1] Brooke A. Masters, *Invoking Allah, Terror Suspect Enters No Plea: U.S. Judge in Alexandria Schedules October Trial*, WASH. POST, Jan. 3, 2002, at A1.

[2] Act of Apr. 30, 1790, ch. 9, §8, 1 Stat. 112, 113–14.

[3] *See, e.g.*, 18 U.S.C. §1201 (aircraft sabotage and kidnapping act), §1203 (criminalizing hostage taking), §831 (theft of nuclear materials) (2000).

[4] *See, e.g.*, United States v. McVeigh, 9 Fed. Appx. 980 (10th Cir. 2001), 2001 U.S. App. LEXIS 11804 (unpublished); United States v. Noriega, 683 F.Supp. 1373 (S.D. Fla. 1988) (trying Panamanian leader who was apprehended by U.S. Special Forces after extended military operations).

[5] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Marcos, 25 F.3d 1467, 1472–76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (reviewing litigation trend).

[6] *See* Charisse Jones, *Four Guilty in U.S. Embassy Attacks: Two Bombings in Africa Killed 224*, USA TODAY, May 30, 2001, at 1A; Martha T. Moore, *Bomb Verdicts Are 2nd Victory for Government*, USA TODAY, Nov. 13, 1997, at 3A. Under the Classified Information Procedures Act, U.S. prosecutors have regularly used special pretrial procedures in these cases to protect classified information. 18 U.S.C. app. 696, §1 (2000). *See generally* Richard P. Salgado, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427 (1988) (describing practice under the Act); Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31 ("Over the past eight years the U.S. attorney [for the Southern District of New York] . . . has successfully prosecuted 26 jihad conspirators, in six major trials and some minor ones.").

out congressional authorization or consultation, which declared that "[t]o protect the United States and its citizens, . . . *it is necessary for* (noncitizen suspects designated by the president under the order) . . . *to be tried for violations of the laws of war and other applicable laws by military tribunals.*"[7] It came as no surprise, however, that the Military Order quickly attracted intense criticism from constitutional and international lawyers.[8] That response has triggered a legal process of narrowing the order that seems likely to continue until the first commission cases are brought.[9]

Nevertheless, the practical question remains: given the exigencies created by the events of September 11, why should the United States not have the option of trying suspected terrorists before military commissions? Two simple answers: First, the Military Order undermines the United States' perceived commitment to the rule of law and national confidence in U.S. judicial institutions at precisely the time when that commitment and confidence are most needed. Second, by failing to deliver justice that the world at large will find credible, the Military Order undermines the U.S. ability to lead an international campaign against terrorism under a rule-of-law banner.

I. HOW COMMISSIONS FAIL

Undermining the Rule of Law

The Military Order's specific legal deficiencies have received extensive commentary and are cogently summarized in a recent letter to the chair of the Senate Committee on the Judiciary signed by more than seven hundred American law professors.[10] On its face, the order authorizes the Department of Defense to dispense with the basic procedural guarantees required by the Bill of Rights, the International Covenant on Civil and Political Rights (ICCPR), and the

[7] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(e) (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order] (emphasis added). The Military Order provides: (1) that "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts"; (2) that trials need not be open; (3) that conviction and sentencing shall be "only upon the concurrence of two-thirds of the members of the commission"; and (4) that defendants "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly," in any U.S., foreign, or international court. *Id.* §§1(f), 4(c)(4), 4(c)(6)–(7), 7(b)(2).

[8] *See* George Lardner, Jr., *On Left and Right, Concern Over Anti-Terrorism Moves: Administration Actions Threaten Civil Liberties, Critics Say*, WASH. POST, Nov. 16, 2001, at A40.

[9] The president's legal counsel subsequently asserted that the order "covers only foreign enemy war criminals" who are chargeable "with offenses against the international laws of war"; that the order "does not require that any trial, or even portions of a trial, be conducted in secret"; that "[e]veryone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense"; and that "anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." Alberto R. Gonzales, *Martial Justice, Full and Fair,* N.Y. TIMES, Nov. 30, 2001, at A27. While the regulations issued by the Department of Defense after this essay was written (U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at*<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>) respond to the heated criticism of the Military Order by providing more courtlike guarantees, they pointedly omit any opportunity for judicial review before a civilian court. The irony, as I suggest in the text, is that proceedings before these commissions will now be likely to suffer from many of the inefficiencies associated with judicial proceedings, but without garnering in return the global respect that genuine, credible judicial proceedings are accorded.

[10] Letter from Law Professors and Lawyers to the Honorable Patrick J. Leahy (Dec. 5, 2001), *at* <http://www.yale.edu/lawweb/liman/letterleahy.pdf> [hereinafter Law Professors' Letter]. Those law professors (including this author) called "the untested institutions contemplated by the Order . . . legally deficient, unnecessary, and unwise." In particular, they argued that the order violates separation of powers, "does not comport with either constitutional or international standards of due process," and "allows the Executive to violate the United States' binding treaty obligations." For devastating critiques of the Military Order under American constitutional law, see, for example, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals,* 111 YALE L.J. 1259 (2002) (arguing that order is unconstitutional on its face); George P. Fletcher, *War and the Constitution: Bush's Military Tribunals Haven't Got a Legal Leg to Stand On,* AM. PROSPECT, Jan. 1–14, 2002, at 26.

Third Geneva Convention of 1949.[11] Insofar as any of these guarantees—which include the presumption of innocence, the rights to be informed of charges and to equal treatment before the courts, public hearings, independent and impartial decision makers, the rights to speedy trial, confrontation, and counsel of one's own choosing, the privilege against self-incrimination, and review by a higher tribunal according to law—are subject to suspension in time of emergency, the Bush administration has taken no formal steps to enable it to derogate from them.[12] By omitting these guarantees, the Military Order violates binding U.S. treaty commitments under both the ICCPR and the Third Geneva Convention.[13]

Fundamentally, the Military Order undermines the constitutional principle of separation of powers. For under the order, the president directs his subordinates to create military commissions, to determine who shall be tried before them, and to choose the finders of fact, law, and guilt. However detailed its rules and procedures may be, a military commission is not an independent court, and its commissioners are not genuinely independent decision makers. Historically, a military commission is neither a court nor a tribunal, but "an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose."[14] Commissioners are not independent judges, but usually military officers who are ultimately answerable to the secretary of defense and the president, who prosecute the cases.[15] "Such blending of functions in one branch of the Government," Justice Black recognized, "is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."[16]

Admittedly, in *Ex parte Quirin*, a pressured Supreme Court upheld the use of World War II military commissions, reasoning that Nazi saboteurs who had entered the United States

[11] U.S. CONST. amends. V, VI, VIII; International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 14, 999 UNTS 171 [hereinafter ICCPR]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Arts. 4–5, 6 UST 3316, 75 UNTS 135 [hereinafter Third Geneva Convention]; *see also* Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AJIL 345 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AJIL 320 (2002) (both finding inconsistencies between administration's position and international standards).

[12] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (stating that the U.S. Constitution is a "law for rulers and people, equally in war and in peace, . . . at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."). In any event, the Bush administration has taken none of the requisite steps to declare a state of emergency warranting derogation from its ICCPR obligations. *See also* The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, UN Doc. E/CN.4/Sub.2/1997/19, para. 111 (1997) ("[M]easures adopted by a Government to combat terrorism should not affect the exercise of the fundamental rights set forth in the Covenant . . . . Regarding article 14 [fair trial requirements], the [Human Rights] Committee said that no derogation whatsoever from any of its provisions was possible.").

[13] Law Professors' Letter, *supra* note 10 (stating that the ICCPR "obligates States Parties to protect the due process rights of all persons subject to any criminal proceeding" and that the Third Geneva Convention "requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. Under Article VI of the Constitution, these obligations are the 'supreme Law of the Land' and cannot be superseded by a unilateral presidential order.").

[14] *Milligan*, 71 U.S. at 47 (quoting David Dudley Field's Supreme Court argument). Military commissioners are even less independent than court-martial judges, who operate under the statutory protections of the Uniform Code of Military Justice. Yet as Justice Black noted in *Reid v. Covert*, 354 U.S. 1, 36 (1957) (plurality opinion), even "[c]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges."

[15] Even when sitting American judges have served on military commissions, their independence has been compromised because they act as appointees of the executive branch capable of being fired or ordered to decide particular cases in particular ways. *See* ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, PROCEDURE 1343–45 (1988) (describing "United States Court for Berlin," an "Article II court" established in 1979 under authority of the U.S. high commissioner for Germany and presided over by Herbert Stern, a sitting Article III judge: "After that suit was filed in Berlin, the United States Ambassador . . . instructed the judge on how he was to decide the case; the ambassador ordered Judge Stern either to dismiss the case or to resign his commission.").

[16] *Reid*, 354 U.S. at 39.

clandestinely were "unlawful belligerents," having forfeited their prisoner-of-war status by removing their uniforms, surreptitiously entering the United States, and committing acts of sabotage.[17] But *Quirin* nowhere gave the president carte blanche unilaterally to create an alternative military system of criminal justice for suspicious aliens captured abroad.[18] Nor did *Quirin* authorize the president unilaterally to shift all cases involving war crimes by detained noncitizens into military commissions.[19] In *Quirin*, Congress had formally declared war, which it has not done here, and had specifically authorized the use of military commissions in its Articles of War.[20] In any event, it seriously disserves the long-term interests of the United States—whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead—to assert that any captive who can be labeled an "unlawful combatant" should be denied prisoner-of-war status under the Geneva Conventions, and hence subjected to trial for "war crimes" before military commissions.[21]

These specific legal deficiencies stand atop a much broader rule-of-law concern. International law permits the United States to redress the unprovoked killing of thousands on September 11, 2001, by itself engaging in an armed attack upon the Al Qaeda perpetrators. But should those culprits be captured, the United States must try, not lynch, them to promote four legal values higher than vengeance: holding them *accountable* for their crimes against humanity; *telling the world the truth* about those crimes; reaffirming that such acts violate all *norms* of civilized society; and demonstrating that law-abiding societies, unlike

[17] 317 U.S. 1 (1942). *Quirin* was itself an embarrassing "tale of . . . a prosecution designed to obtain the death penalty; . . . a rush to judgment, [and] an agonizing effort to justify a *fait accompli*." David J. Danelski, *The Saboteurs' Case*, 1 J. S.CT. HIST. 61, 61 (1996). Justice Douglas later recalled the procedure in *Quirin*, which announced a result with an opinion following later, as "extremely undesirable"; Justice Frankfurter, as "not a happy precedent." Justice Black's law clerk argued that "if the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for courts at all." *Id.* at 80; *accord* Robert E. Cushman, Ex parte Quirin et al.—*The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942) (recounting rush to judgment).

[18] Fifteen years after *Quirin*, Justice Black reiterated that "[e]very extension of military jurisdiction," including, presumably, the assertion of military jurisdiction over alien war crimes, "is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid*, 354 U.S. at 21.

[19] Far from endorsing such a broad divestiture of civilian jurisdiction over war crimes, Congress in 1996 enacted the War Crimes Act, which plainly envisioned that persons inside or outside the United States who commit certain statutory "war crimes" should be punished before the extant, functioning U.S. courts. War Crimes Act, 18 U.S.C. §2441 (2000); *accord Reid*, 354 U.S. at 41 (Frankfurter, J., concurring in the result) ("The normal method of trial of federal offenses under the Constitution is in a civilian tribunal. Trial of offenses by way of court-martial, with all the characteristics of its procedure so different from the forms and safeguards of procedure in the conventional courts, is an exercise of exceptional jurisdiction . . . ").

[20] *Quirin* carefully specified that "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions *without the support of Congressional legislation*." 317 U.S. at 29 (emphasis added). The Act of Congress passed immediately after September 11 does not authorize the adjudication by military commissions of past acts by apprehended terrorists. It only authorizes the president to use "force" against persons involved in the September 11 attacks so as to prevent future harm to the United States. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[21] *Accord* William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations,* N.Y. TIMES, Dec. 26, 2001, at B1 (citing international lawyers who argue that Military Order conflicts with the Geneva Conventions' guarantees of procedural rights to prisoners of war). Significantly, the first two reported American casualties in Afghanistan were a nonuniformed CIA agent killed at a prison riot and a Special Forces officer ambushed while investigating civilian deaths. John Diamond & Liz Sly, *Enemy Ambush Kills U.S. Soldier; Surrender Talks Continue near Omar's Hideout*, CHICAGO TRIB., Jan. 5, 2002, at 1, *available in* LEXIS, News Library, Majpap File. Under the broad definition now asserted by the Bush administration, both deceased Americans could have been labeled "unlawful combatants" potentially triable before military tribunals. This concern makes even more troubling the White House's recent, blanket determination that although the Geneva Conventions apply to Taliban detainees (but not Al Qaeda), anyone who fought for the Taliban violated the laws of war and thus cannot claim prisoner-of-war status. White House Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), *at* <http://www.whitehouse.gov/news/releases/2002/02>. A correct application of the Geneva Conventions would have required that all detainees in U.S. custody be presumed to be prisoners of war until each had his status individually determined by the "competent tribunal" required by Article 5 of the Third Geneva Convention, *supra* note 11. Thus, the president's announced decision to apply the Geneva Conventions to Taliban detainees should have required him to defer to a competent tribunal's individualized determinations as to whether particular detainees are entitled to prisoner-of-war status, not allowed him to make his own blanket determination that all detainees are per se unlawful combatants.

terrorists, *respect human rights* by channeling retribution into criminal punishment for even the most heinous outlaws.

The Military Order undermines each of these values. First, military commissions create the impression of kangaroo courts, not legitimate mechanisms of accountability. Second, rather than openly announcing the truth, commissions tend to hide the very facts and principles the United States now seeks to announce to the world. Third, because military tribunals in Burma, Colombia, Egypt, Peru, Turkey, and elsewhere have been perceived as granting judgments based on politics, not legal norms, the United States Department of State has regularly pressed to have cases involving U.S. citizens heard in civilian courts in those countries.[22]

Those who promote military commissions have been misled by the *O. J. Simpson* fiasco to conclude that standing American courts—whether civilian courts or military courts-martial—are somehow incapable of rendering full, fair, and expeditious justice in such cases. One might understand a country's resorting to a military commission when no currently functioning court could fairly and efficiently try the case. But over the centuries, the U.S. judicial system has amply demonstrated its ability to adapt to new, complex problems in criminal and civil law. Why should the United States try suspects in military commissions without congressional authorization when its own federal courts have fairly and openly tried and convicted Al Qaeda members? Perversely, the Military Order threatens national confidence in existing legal institutions and principles just when that confidence is already badly shaken by horrific terrorist attacks. Despite those attacks, both the presidency and Congress have continued to function, yet the order implicitly assumes that the third branch, comprising existing civilian and military courts, can no longer handle the very cases it dealt with just before the attacks occurred.[23]

Fourth and finally, military commissions provide ad hoc justice, hence uncertain protection for defendants' rights. Although the Defense Department's regulations implementing the order reportedly provide greater protections for the accused, unlike the Bill of Rights, the Federal Rules of Criminal Procedure, or the Uniform Code of Military Justice, those regulations cannot guarantee those rights, as they are subject to change at the president's will.[24] The absence of binding legal protection for the accused's human rights will become particularly acute should military commissions be convened at the United States Naval Base at Guantánamo Bay, Cuba, where scores of the detainees have been transferred.[25] In 1994, when large numbers of Cuban boat people were held on Guantánamo, the U.S. Court of Appeals for the Eleventh Circuit rendered the extraordinarily broad (and strongly contested) ruling that "these [alien detainees on Guantánamo] are without legal rights that are cognizable in

[22] When Peru, for example, branded Lori Berenson, an American citizen, a "terrorist," the United States properly protested that her "trial" was not held in open civilian court with full rights of legal defense, in accordance with international judicial norms. *See* U.S. DEP'T OF STATE, *Peru*, *in* 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, *available at* <http://www.state.gov/www/global/human_rights/1999_hrp_report/peru.html>.

[23] Attorney General John Ashcroft's own public defense of the Military Order before Congress was stunning in its dismissiveness about the capacity of United States judges and federal prosecutors (whose nominations he oversees) to try terrorist suspects fairly and expeditiously under existing judicial procedures. *See* Lane, *supra* note 10 (quoting testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary, Dec. 6, 2001 ("Are we supposed to read [terror suspects] their Miranda rights, hire a flamboyant defense lawyer, bring them back to the United States to create a new cable network of 'Osama TV,' provide a worldwide platform for propaganda?")).

[24] *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866) ("By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."). Under the so-called *Charming Betsy* principle, U.S. courts have regularly restrained proposed executive action within the bounds of international legal obligations. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). *See generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). To the extent that both the Third Geneva Convention and the ICCPR represent customary international law, fidelity to binding international obligations should require that the open-ended language of the Military Order be construed to require the procedural guarantees required by those instruments.

[25] Katharine Q. Seelye, *Troops Arrive at Base in Cuba to Build Jails*, N.Y. TIMES, Jan. 7, 2002, at A8 (Defense Secretary "Rumsfeld said he had not ruled out holding such tribunals at Guantánamo Bay").

the courts of the United States."[26] Read literally, the panel's holding would permit American officials deliberately to starve the alien detainees, to subject them to forced sterilizations, or to discriminate against them on the basis of their religion or skin color. Yet given the persistent U.S. criticism of Communist Cuba for violating the rights of its prisoners over the past forty years, it would be supremely ironic if the United States now created its own rights-free zone for alien detainees on that part of Cuba under American jurisdiction.[27]

Undermining Moral Leadership

The use of military commissions potentially endangers Americans overseas by undermining the U.S. government's ability to protest effectively when other countries use such tribunals. But just as troubling, espousing military commissions undermines U.S. moral leadership abroad when that leadership is needed the most.[28] The United States regularly takes other countries to task for military proceedings that violate basic civil rights. How, then, can the United States be surprised when its European allies refuse to extradite captured terrorist suspects to U.S. military justice?[29] When the Chinese or Russians try Uighur or Chechen Muslims as terrorists in military courts, U.S. diplomats protest vigorously and the world condemns those tribunals as anti-Muslim. How, then, can the United States object when other countries choose to treat U.S. military commissions the same way?

To win a global war against terrorism, nations that lay claim to moral rectitude and fidelity to the rule of law must not only apply, but also be universally seen to be applying, *credible justice*. Credible justice for international crimes demands tribunals that are fair and impartial *both in fact and in appearance*. By their very nature, military tribunals fail this test. Even if, through tinkering, the Defense Department's regulations could ensure that military commissions will operate more fairly in fact, they will never be perceived as fair by those skeptical of their political purpose, namely, the very Muslim nations whose continuing support the United States needs to maintain its durable coalition against terrorism. Ironically, the more the Defense Department tries to address the perceived unfairness of military tribunals by making them more "courtlike"—more transparent, with more procedural protections, more independent decision makers, and more input into their design by the legislative branch—the more these modifications will eliminate the supposed "practical" advantages of having military tribunals in the first place, yet without dispelling the fatal global perception of unfairness.

II. THE WAY FORWARD

Against this background, how should the United States pursue international justice in the months ahead? To ensure that the international community perceives that those convicted

[26] Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995). The Eleventh Circuit's broad ruling in the Cuban case would effectively treat alien detainees on Guantánamo as human beings without human rights. That ruling conflicted, however, with earlier decisions by the Second Circuit and a Brooklyn federal court involving Haitian refugees on Guantánamo. Haitian Ctrs. Council, Inc. v. McNary, 969 F. 2d 1326 (2d Cir. 1992*), vacated as moot on other grounds*, 113 S.Ct. 3028 (1993) (finding substantial likelihood that alien detainees on Guantánamo do have due process rights); Haitian Ctrs. Council v. McNary, 823 F.Supp. 1028, 1042 (E.D.N.Y. 1993), *vacated by settlement* (finding the same on the merits after a full bench trial). I should disclose that I served as counsel of record for both the Haitian and the Cuban refugees in the Guantánamo cases discussed here.

[27] *Cf.* Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 RICHMOND L. REV. 139, 140–41 (1994) ("[T]he United States government has consistently asserted—and some courts have agreed—that these offshore locations constitute 'rights-free zones,' where [alien detainees] lack any legal rights cognizable under U.S. law and American [lawyers] lack First Amendment rights to communicate with them.").

[28] *See UN Human Rights Expert Concerned over Military Order Signed by United States President*, UN NEWSLETTER (United Nations Information Centre New Delhi) (Nov. 24, 2001), *at* <http://www.unic.org.in> (urgent appeal of UN Special Rapporteur for the Independence of the Judiciary Param Cumaraswamy, calling Military Order regrettable for "the wrong signals it sent, not only in the United States, but around the world").

[29] *See, e.g.*, Sam Dillon with Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1 (suggesting that Spain will not extradite its suspects to U.S. military tribunal).

for the September 11 attacks will receive fair and impartial justice, the United States should send suspects only to standing tribunals that have demonstrated their capacity to dispense such justice in the past.

While I have long supported international adjudication, I am skeptical about the international community's ability to overcome existing political obstacles and create a fair international tribunal quickly.[30] International tribunals make the most sense when there is no functioning municipal court that could fairly and efficiently try the case, as happened in the former Yugoslavia and Rwanda. But even if the United States government were to support such a tribunal here (which it seems unlikely to do), at least two other permanent members of the Security Council—Russia and China—would probably withhold their consent from any body that might pursue trials of Chechen or Uighur rebels whom they have labeled as domestic "terrorists." Recent history shows that building new international tribunals from scratch is slow and expensive and requires arduous negotiations.[31] Although proponents claim that an international tribunal would be more likely to be viewed as impartial than a U.S. court, it is unclear why an ad hoc tribunal created for the express purpose of trying the September 11 terrorists and their supporters would find greater acceptance throughout the Muslim world than the judgments of a civilian court system that has been in place for more than two centuries. Finally, those who believe that an international tribunal with Muslim judges would ensure "Muslim buy-in" into the international adjudicatory process should recall that the last United Nations gathering before September 11 was the World Conference Against Racism, in which several Islamic countries sought to use the forum to pursue their political grievances against Israel.[32] Many of the same countries would doubtless use their diplomatic clout to argue that any UN tribunal to try terrorists should also try Israeli officials who bore no connection to the September 11 attacks, an alternative that potential Western signatories to the tribunal would surely reject. We should not conclude, therefore, that only international tribunals can grant meaningful justice for international crimes. Absent extant, functioning international tribunals, the most credible justice will be delivered by time-tested domestic judicial institutions, such as the United States' Article III courts and courts-martial.

In surveying its justice options, the United States should carefully distinguish between its most pressing concern—redressing and preventing the murder of Americans on American soil—and much broader efforts to support the creation of an enduring post-Taliban system of justice in Afghanistan. International justice demands a clear and simple division of labor: American prosecutors and judges should try crimes committed against Americans on American soil, while experienced UN and international lawyers should address crimes committed against Afghans on Afghan soil.

Cases primarily involving crimes in Afghanistan—whether committed by the Taliban or the Northern Alliance—will be best addressed by rebuilding the judicial system of Afghanistan itself, a task that, like the rebuilding of the Sierra Leonean, East Timorese, Bosnian, and Kosovar legal systems, will require substantial and sustained international and UN input.[33]

[30] Some distinguished scholars have argued that such cases should be heard before an international tribunal, preferably one on which both American and Muslim judges sit. *See, e.g.*, Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23. *But see* Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, 96 AJIL 354 (2002) (reviewing practical reasons why it remains unlikely that such a tribunal will be created).

[31] For example, the Sierra Leonean tribunal has yet to hear any cases several years after the mass killings there, and a war crimes tribunal for Cambodia has yet to be set up more than twenty-five years after the operative events. *See* Seth Mydans, *Khmer Rouge Trials Won't Be Fair, Critics Say*, N.Y. TIMES, Feb. 10, 2002, §1, at 12.

[32] *See* Ellis Cose, *Silver Linings from a Summit*, NEWSWEEK, Sept. 17, 2001, at 40.

[33] The precise shape of the Afghan judicial system remains to be determined. I have no objection, for example, to an Afghan tribunal that would combine domestic and international elements, such as the Sierra Leonean tribunal created under UN auspices is designed to do. Whatever happens, United Nations transitional support and involvement will be critically necessary to stabilize the postconflict environment of Afghanistan, to promote the Bonn process of building a representative post-Taliban government, and to address justice, accountability, and truth telling about past human rights abuses by all parties to the Afghan conflict. This part of the judicial problem,

However heinous the offenses of Afghan war criminals against other Afghan citizens may be, they have little to do with the United States, and should not be adjudicated by American courts or courts-martial that have little interest or expertise in the decades-old Afghan conflict. Egregious Afghan violators such as Mullah Omar and his close deputies should be given treatment similar to that given brutal rebel leader Foday Sankoh of Sierra Leone: namely, arrest, humanitarian treatment in custody, permanent exclusion from further governmental activity, no amnesty for war crimes or crimes against humanity, and eventual trial before the emerging Afghan judicial system.[34] Wherever possible, third-party combatants should be sent back to the country of their nationality to face national punishment, with assurances that their trials will strictly observe international due process standards.

Under this strategy, the U.S. government should send only those cases involving defendants (such as leading Al Qaeda members) who are charged with or suspected of murdering or plotting to murder American citizens on American soil to American civilian courts for criminal trials by seasoned federal prosecutors. Since three Al Qaeda suspects—Zacarias Moussaoui, the "American Taliban" John Walker Lindh, and the "sneaker bomber" Richard Reid—have already been charged before U.S. civilian courts, I see no need to charge any future defendants before untested and suspect military commissions.[35]

In sum, the battle against global terrorism requires credible justice, which military commissions cannot provide. Credible international tribunals can provide credible justice but may be difficult to create under the current political circumstances. That leaves standing civilian courts or courts-martial that operate under preexisting and transparent rules. Sweeping all "unlawful combatants" who have committed "war crimes" into untested, unwise, and legally deficient U.S. military commissions will invite hostile foreign governments reciprocally to "try" and execute captured nonuniformed American personnel before similar tribunals. If the United States wants to show the world its commitment to the very rule of law that the terrorists sought to undermine, it should take this opportunity to demonstrate that American courts can give universal justice.

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however, differs little from that faced in Bosnia, East Timor, Kosovo, and Sierra Leone, where the United States similarly supported multilateral military operations that eventually secured a war-torn territory for a new, more democratic government. What makes this military struggle distinctive—and the element that engages U.S. judicial jurisdiction—is that this conflict was triggered by the massive September 11 attacks that killed thousands of American and other civilians on American soil.

[34] While I agree with much of Professor Matheson's sensible analysis, I disagree with his suggestion that persons who commit violations of the law of armed conflict on the battlefield of Afghanistan but have no provable connection to the September 11 attacks should be tried before U.S. military commissions. Instead, I share his alternative view: that "[e]ven for these persons, the alternative of trial . . . by any suitable Afghan tribunals should be considered." Matheson, *supra* note 30, at 358.

[35] My colleague Professor Wedgwood speculates that federal court trials of Al Qaeda suspects will jeopardize classified information, limit available evidence, and endanger the security of judges and jurors. Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AJIL 328 (2002). Having dealt regularly with classified materials and federal trials during stints at both the State and Justice Departments, I find these claims vastly overstated. As one journalist has noted, during twenty-six successful federal prosecutions of jihad supporters over the past eight years, "[n]either the Justice Department nor prosecutors in New York could recall for me a single specific instance when national security was actually compromised during the trials in New York." Keller, *supra* note 6. Nor is it clear why the potential excludability of some evidence should cripple prosecutors, given the huge volume of evidence that will be amassed in what has regularly been called the largest criminal investigation in history. And although extra security measures should doubtless be taken to ensure the safety of juries, judges, and prosecutors, such measures have been taken routinely in the past, not just in Al Qaeda cases, but also in numerous cases involving organized crime, drug kingpins, and the like. In any event, it now seems clear that the Justice Department has not deemed any of these concerns sufficiently serious to militate against charging Moussaoui, Reid, and Walker in federal court. The Justice Department's indictment practice so far thus casts serious doubt on Professor Wedgwood's claim that "military commissions may be the most practicable course" for trials against Al Qaeda members. Wedgwood, *supra*, at 330.

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JURISDICTION OF MILITARY COMMISSIONS AND THE AMBIGUOUS WAR ON TERRORISM

The Military Order issued on November 13, 2001,[1] by President George W. Bush does not offer a clear rationale for subjecting international terrorists, and persons suspected of links to them, to trial by military commissions. Military commissions can be designed for several purposes: (1) to prosecute violations of the law of war, as an alternative to courts-martial; (2) to fill a legal vacuum where armed conflict disables the civil courts; and (3) to impose swift and certain punishment against civilians suspected of specific crimes. While the first two purposes are legitimate and reflected in past United States practice, the third is questionable and a sharp departure from democratic traditions. The ambiguous nature of the "war" against international terrorism and the sweeping text of the November 13 Military Order obscure which objective(s) the order is intended to accomplish.

The contradictions in the administration's characterization of the armed conflict underlie the confusion and controversy surrounding the status of the prisoners/detainees held at Guantánamo, and were not resolved by the president's decision to acknowledge the formal applicability of the Geneva Conventions to the Taliban while denying prisoner-of-war (POW) status to all captives.[2] This brief article focuses on the proposed military commissions, but the order may ultimately prove to be more significant for its unprecedented policy of offshore indefinite detention of terrorist suspects without charge or trial. While the Geneva Conventions contemplate internment during hostilities of prisoners of war (POWs), civilians in occupied territory, and enemy aliens in the territory of warring states, they do not provide a legal framework for indefinite detention of suspected criminals in a global and indefinite campaign against nonstate actors. The Military Order must be narrowed to comply with jurisdictional limits mandated by humanitarian law, the prohibition on the unconsented exercise of law enforcement authority in other states, and the derogation requirements of the International Covenant on Civil and Political Rights (ICCPR).[3]

This "war" provides little lawful scope for U.S. military commissions, which could, but probably will not, try suspects for war crimes committed during the armed conflict in Afghanistan. The Military Order raises many complex legal questions, and I will address four: (1) the nature of the "state of armed conflict" to which the order refers;[4] (2) whether a legal vacuum exists that may appropriately be filled by military commissions; (3) whether military commissions may function as a special security court to supplant civil courts in the trial of suspected terrorists; and (4) whether Al Qaeda and Taliban forces captured in Afghanistan qualify as "prisoners of war." The procedural details to be addressed in the Department of Defense's regulations, albeit important, are largely irrelevant to these issues of jurisdiction and status.

[1] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

[2] White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *at* <http://www.whitehouse.gov/news/releases/2002/02/>. The procedural regulations issued by the Department of Defense confirm that persons subjected to trial by military commission will be deprived of crucial structural protections against prosecutorial abuse that are constitutionally secured in federal criminal trials, including the right to grand jury indictment, jury trial, trial by a politically independent judge, and appeal to politically independent judges. That the regulations bring the commissions closer to a court-martial model (than the original order seemed to envision) does not undermine the point that no adequate justification for their use has yet been offered by the administration. U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

[3] International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 4, 999 UNTS 171.

[4] Military Order, *supra* note 1, §1(a).

I. The War Against Terrorism—Metaphor, New Paradigm, or Known Concept?

The legal character of the post–September 11 "war" and the identity of the warring parties are confused and changeable. Four possibilities exist: (1) a metaphorical "war on terrorism," which is essentially a multinational police action against organized, politically motivated, transnational criminal syndicates, of worldwide scope and indefinite duration; (2) an international armed conflict against Al Qaeda as a kind of quasi state, establishing a dramatic new paradigm in the law of armed conflict, with uncertain consequences; (3) an international armed conflict in Afghanistan (although not *against* Afghanistan), which may be extended to additional states such as Somalia and Iraq; and (4) a proxy war in the context of the quarter-century-old internal armed conflict in Afghanistan. My view is that situations (1) and (4) exist, that precedent exists only for use of military commissions to try suspects for crimes directly linked to the armed conflict in Afghanistan, and only with the participation of the new Afghan interim government. The Bush administration's legal characterization of the war remains remarkably ambiguous, although the POW policy announcement suggests that at some point the United States was engaged in an international armed conflict with the Taliban.[5]

The War on Terrorism

The United States and other democratic states have long faced a serious threat from international and domestic terrorism. The response to this threat has been the deployment of a variety of law enforcement resources, including the adoption of treaties to enhance international cooperation. In this brief essay it is impossible to catalog the numerous international instruments that address terrorism. These treaties define certain types of terrorist offenses as international crimes (notably, airplane hijacking and attacks on embassies); impose obligations of mutual criminal assistance; and deal with specific transnational aspects of terrorist activity. Terrorist offenses that are international crimes may be subject to universal jurisdiction, and treaties may impose an obligation to extradite or prosecute (*aut dedere aut judicare*). Some agreements are designed to streamline the extradition process, while others focus on transnational activity, such as financial transfers.

The large body of international instruments on terrorism has not heretofore been regarded as an aspect of the international law of armed conflict. Terrorist crimes do not generally violate the laws of war. Mutual criminal assistance with respect to other transnational crimes, such as drug trafficking and migrant smuggling, is similar to international cooperation against terrorism. The fact that military forces participate in law enforcement activities against terrorists or drug traffickers has not in the past sufficed to change the character of the "war on terrorism" or the "war on drugs" from a criminal law paradigm to an armed conflict paradigm. "War" terminology signifies a high priority, a marshaling of substantial resources, and a sustained commitment to eradicating the threat.

The United States prosecutes international terrorists and drug traffickers in ordinary criminal courts, and has not used military commissions even in instances where the defendant was taken into custody by members of the armed forces. The arrest of General Manuel Antonio Noriega in Panama is perhaps the most vivid example of this practice.

Have the attacks of September 11 resulted in a shift from metaphorical war/actual crime control to actual armed conflict? The suggestion that international terrorists pose a criminal threat is met with impatience in some quarters, as if it somehow diminishes the magnitude

[5] White House Fact Sheet, *supra* note 2 ("Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.").

of the events of September 11. Terrorist crimes arguably differ from other transnational crimes, in that they are politically motivated and pose a threat to national security. However, in democratic societies, crimes against national security—espionage, for example—are not generally handled by military commissions. The Military Order of November 13 appears to rest on a perception that the current terrorist emergency is legally of a warlike character, and not simply a danger to national security or suitable grounds for military involvement in law enforcement.

The order refers generally to individuals and groups involved in international terrorism, and to the necessity for the United States Armed Forces to respond to their threats, to subject suspected terrorists to military detention and trial, and to depart from "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" because of the "danger to the safety of the United States and the nature of international terrorism."[6] Trial may be for violations of any "applicable laws."[7]

If the war on terrorism is now to be conceived of as an international armed conflict, it is one of startling breadth, innumerable "combatants," and indefinite duration. The United States considers a wide variety of groups to be engaged in international terrorism, as reflected in the lists of foreign terrorist organizations adopted by the secretary of state.[8] These groups include Aum Shinrikyo, Basque Fatherland and Liberty, the Kurdistan Workers' Party, the Liberation Tigers of Tamil Eelam, the Real IRA, and the Shining Path. The U.S. military provides support to some governments engaged in internal armed conflicts against listed groups, notably the Revolutionary Armed Forces of Colombia and the Abu Sayyaf Group in the Philippines. This war on terrorism will endure until all these groups, and others similar to them, are eradicated.

The administration may conceive of the "armed conflict" in this very generalized manner, but it remains unclear whether this characterization is rhetorical or legal. Such a broad conception exceeds accepted definitions of international armed conflict, and may lead the United States to violate Charter prohibitions on the use of force, as indicated in the State of the Union Address:

> What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning. . . .
>
> Thanks to the work of our law enforcement officials and coalition partners, hundreds of terrorists have been arrested. . . . These enemies view the entire world as a battlefield, and we must pursue them wherever they are. . . .
>
> . . . .
>
> While the most visible military action is in Afghanistan, America is acting elsewhere. We now have troops in the Philippines, helping to train that country's armed forces to go after terrorist cells . . . . Our soldiers, working with the Bosnian government, seized terrorists who were plotting to bomb our embassy. Our Navy is patrolling the coast of Africa to block the shipment of weapons and the establishment of terrorist camps in Somalia.
>
> My hope is that all nations will heed our call, and eliminate the terrorist parasites who threaten their countries and our own. . . .
>
> But some governments will be timid in the face of terror. And make no mistake about it: If they do not act, America will.[9]

[6] Military Order, *supra* note 1, §1(d), (e), (f).

[7] *Id.*, §1(e).

[8] 8 U.S.C. §1189 (2000); U.S. Dep't of State, Office of the Coordinator for Counterterrorism, 2001 Report on Foreign Terrorist Organizations (Oct. 5, 2001), *at* <http://www.state.gov/s/ct/rls/rpt>; U.S. Dep't of State, Designation of Foreign Terrorist Organizations (Dec. 26, 2001), *at* <http://www.state.gov/secretary/rm/2001>.

[9] George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), 38 WKLY. COMP. PRES. DOC. 133 (Feb. 1, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.htm>.

The War on Al Qaeda

The "war on terrorism" might be perceived as an international armed conflict with Al Qaeda, although the Military Order extends more broadly. The United States has transferred persons not captured during the fighting in Afghanistan to the detention camp at Guantánamo.[10] Some Al Qaeda suspects (including Zacarias Moussaoui, Richard Reid, and John Walker Lindh) are instead being prosecuted in federal court.

One of the striking aspects of the September 11 attacks is their vivid demonstration that nonstate actors are now capable of shaping international events and relations more powerfully than many states. Do the magnitude of the attacks and the resulting national emergency require that they be regarded as an act of war? Can Al Qaeda be seen as a quasi state engaged in international armed conflict with the United States? Can sovereignty be divorced from territoriality? Does the rhetoric of jihad accompanying Al Qaeda's attacks amount to a declaration of war with legal effects?[11]

The Geneva Conventions of 1949 and the Protocols Additional of 1977 make no provision for an international armed conflict between a state and a transnational criminal network with control over no territory, a "head of state" who is apparently stateless, a multinational membership, and operational cells in many states. Common Article 2 of the Geneva Conventions envisions armed conflict between states, as only states may become high contracting parties.[12] Protocol Additional I extends the concept of international armed conflict to wars of liberation against colonial domination and racist regimes,[13] but the relevance of this definition to the U.S. struggle against Al Qaeda is dubious, to say the least. Internal armed conflict involves organized armed groups with control over territory, and is distinguished from "isolated and sporadic acts of violence."[14] The September 11 attacks did not launch an internal armed conflict in the United States, as understood in international humanitarian law.

Perhaps humanitarian law is deficient in failing to address international armed conflict against terrorist networks, and the war against Al Qaeda is shaping new customary norms. The Military Order could then be regarded as premised upon a doubtful claim of "instant custom." The administration seeks to avoid constitutional and international legal constraints upon the treatment of Al Qaeda captives, and to fight a "war" with essentially no rules. Al Qaeda captives are suspected of past or future terrorist crimes, not violations of the laws of war, and no legal basis exists to detain or try them as "unlawful combatants."[15]

If a new paradigm is being suggested, significant and undesirable implications may result. Characterizing the struggle to eradicate Al Qaeda as an international armed conflict should logically make U.S. military installations legitimate targets for Al Qaeda, using lawful methods of warfare. The result would be to decriminalize violent conduct that can now be treated

[10] Brian Whitmore, *Fighting Terror, Taking Custody/Bosnia; Six Suspects Handed to US*, BOSTON GLOBE, Jan. 19, 2002, at A9, *available in* LEXIS, News Library, Majpap File.

[11] Dr. Ayman Al-Zawahiri describes Al Qaeda's 1996 declaration of war on the United States, on behalf of the Muslim "nation," in his book *Knights Under the Prophet's Banner*. Excerpts from the book, translated from Arabic into English from a serial version published in London by Al-Sharq Al-Awsat in December 2001, are available at <http://www.fas.org/irp/world/para/ayman_bk.htm> (visited Feb. 5, 2002).

[12] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 2, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention No. III].

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], Art. 1(4), June 8, 1977, 1125 UNTS 3.

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], Art. 1(1), June 8, 1977, 1125 UNTS 609. Common Article 3 of the Geneva Conventions of 1949, *see, e.g.*, Convention No. III, *supra* note 12, refers less precisely to conflicts not of an international character.

[15] Thus, the head of the interim Afghan government, Hamid Karzai, agreed that the Guantánamo captives were not prisoners of war, but on the rationale that they were "criminals" and there was "no war." *Afghan Agrees with Bush on Prisoners*, N.Y. TIMES, Jan. 30, 2002, at A11. *See* text at note 2 *supra* and at notes 26–33 *infra*.

as terrorist or common crimes. If the administration wishes to argue that the principle of distinction does not apply to this new type of international armed conflict, or that the principle only decriminalizes acts of war committed by the antiterrorist coalition, it must provide some legal justification for this position. Al Qaeda must be distinguished from other criminal gangs, perhaps by the attribution of some type of quasi sovereignty, or perhaps simply by its capability to launch terrorist attacks of a yet undefined magnitude. Al Qaeda depicts itself as the army of the Islamic *umma,* the "nation" of believers. Al Qaeda operatives possess many different nationalities and cannot easily be characterized as "alien enemies" under either international norms or U.S. law.[16]

While the United Nations Security Council and NATO recognized the appropriateness of armed self-defense against the perpetrators of the September 11 attacks, these resolutions do not label the struggle as an international armed conflict between the United States and Al Qaeda.[17] Notably, the European Union has responded by enhancing ongoing efforts for mutual criminal assistance against international terrorism.[18] The prospect that persons suspected of involvement in the September 11 attacks might be tried by military commissions stands as an additional impediment to the extradition of suspects to the United States from Europe.

International Armed Conflict with States Harboring Al Qaeda

The attacks of September 11, if attributable to a foreign state linked to Al Qaeda, clearly could give rise to an international armed conflict between the United States and the sponsor state. Military commissions have a legitimate role both in and after international armed conflict to try violations of the laws of war and to fill a legal vacuum created by the defeat of the enemy government or wartime disruption of civil courts.

Massive military involvement by the United States in Afghanistan beginning in October 2001 routed the de facto Taliban regime and eliminated it as a governing entity. Taliban fighters joined forces with Al Qaeda fighters, against the United States and its various Afghan allies. The POW policy suggests that an undeclared international armed conflict existed at some point between the United States and the Taliban. The Afghan conflict is one where military commissions could serve their intended functions—to try war crimes and, in the absence of ordinary courts, other crimes.[19]

However, the analogy to the Second World War and the military commissions that tried German and Japanese combatants for war crimes is quite weak. The United States is deliberately not an occupying power in Afghanistan, which significantly limits the scope of operation for U.S. military commissions there after the conflict. The U.S. military intervention was conducted jointly with the Northern Alliance, the armed wing of the de jure Afghan government. The United States quickly recognized the interim Afghan government that took office in December 2001 and seeks friendly relations with it. Continued military action by U.S. forces in Afghanistan is at the sufferance of the new government, and U.S. law enforcement activities there are performed with its formal consent, as in the Philippines.

[16] 50 U.S.C. §21 (2000) ("all natives, citizens, denizens, or subjects of [a] hostile nation or government" with which the United States is engaged in a "declared war").

[17] SC Res. 1368 (Sept. 12, 2001), 40 ILM 1277 (2001); SC Res. 1373 (Sept. 28, 2001), 40 ILM at 1278; NATO Press Release (2001) 124, Statement by the North Atlantic Council (Sept. 12, 2001), 40 ILM at 1267.

[18] *See, e.g.,* European Union, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 40 ILM 1264 (2001).

[19] The key judicial precedents for U.S. military commissions are four cases arising during the Second World War, *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); and *Johnson v. Eisentrager*, 339 U.S. 763 (1950); and one arising in the Civil War, *Ex parte Milligan*, 71 U.S. 1 (1866).

The United States has relatively little interest in trying captured Taliban and Al Qaeda combatants for crimes arising out of the war. It seeks leaders responsible for the September 11 and earlier attacks on U.S. targets, along with Al Qaeda operatives who may be linked to past or planned terrorist crimes. While the United States could lawfully help the Afghan government to establish courts, so as to fill the legal vacuum created by the defeat of the Taliban, it appears unlikely that the military commissions authorized by the November 13 order will operate in Afghan territory.

A Proxy War in Afghanistan's Internal Armed Conflict

The most coherent reading of the "war" is that the United States in October 2001 intervened in Afghanistan's ongoing internal armed conflict to shift the balance of power decisively in favor of the anti-Taliban forces, and thus to eliminate Afghanistan as a haven and training ground for Al Qaeda. The United States can find little scope for autonomous military commissions in a conflict of this character. Common Article 3 of the Geneva Conventions prohibits trial of detained combatants or civilians during an internal armed conflict except by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[20]

The interim government has exclusive law enforcement authority in Afghanistan. The crime control priorities of the United States may be in serious tension with the nation-building priorities of the Afghan government. That government has discretion to render criminal suspects to other states, including the United States. The United States has indicated little interest in the establishment of an international tribunal, a mixed international/national tribunal, or a new Afghan judiciary.

The basic premises for military commissions are lacking where violations of the laws of war are not alleged and where the commissions do not fill a legal void created by armed conflict. Only the third premise—that international terrorists are too dangerous for or undeserving of trial in civilian courts—is served by trying captured suspects in military commissions. The compatibility of the November 13 order with derogation norms is briefly described next in part II.

II. Military Commissions as a Derogation from Human Rights Treaties

The pattern of subjecting terrorist suspects to military trial is familiar to those who study states of emergency. However, states do not typically exempt their own citizens from the jurisdiction of such special courts, which frequently focus on domestic terrorism. The United States has heretofore refrained from this practice, which may involve serious violations of internationally protected human rights.[21] In addition, prolonged detention without charge or trial has frequently been practiced during states of emergency, which are also often characterized by violations of the prohibition on torture and cruel, inhuman, and degrading treatment or punishment.

Basic Derogation Norms

The United States is a party to the ICCPR, whose Article 4 limits derogation as follows.

1. Rights may be suspended only during a state of emergency that threatens the life of the nation. The attacks of September 11 arguably created an emergency, especially while the identity of the perpetrators remained unknown and the nation was apprehensive about imminent addi-

[20] Geneva Convention No. III, *supra* note 12, Art. 3.

[21] Castillo Petruzzi, Inter-Am. Ct. Hum. Rts., ser. C, No. 52 (May 30, 1999), *available at* <http://www.corteidh.or.cr/seriecing/index.html> (human rights violations in trial of Chilean civilians accused of terrorism by "faceless" military judges in Peru).

tional attacks. A permanent risk of international terrorism, however, would not satisfy this threshold because of the essential temporary nature of emergencies.

2. Certain rights are nonderogable and may not be suspended even if the life of the nation is at stake. Article 4(2) would prohibit the operation of military commissions so as to violate the right to life; the prohibition on cruel, inhuman, and degrading treatment or punishment; the prohibition on retroactive criminal penalties; the right to recognition as a person before the law; and freedom of thought, conscience, and religion.

3. Derogation measures must not be applied in a discriminatory manner. On its face the Military Order discriminates on the basis of citizenship. Under Article 4(1), derogation measures may not be applied in a manner that discriminates solely on the basis of race, color, sex, language, religion, or social origin. Especially as criminal suspects not captured in Afghanistan are transferred to indefinite detention at Guantánamo, the nondiscrimination norm takes on added importance, in particular as it relates to religion.

4. Derogation measures must be strictly required by the exigencies of the circumstances. The strict rule of proportionality measures the specific steps taken by the derogating state against the particular dangers posed by emergency conditions. Detentions on Guantánamo have already, by February 2002, stretched into periods of months, without prospect of charge or trial and under harsh conditions. The degree to which the military commissions will derogate from fair trial rights guaranteed by the ICCPR remains unclear. The assertion that the "nature of international terrorism" requires trial by military commission would undergo searching scrutiny. The fact that trials of Al Qaeda operatives have been successfully conducted in federal court, without disrupting or compromising national security, is quite relevant to this proportionality analysis.

5. No derogation is valid unless the state proclaiming the emergency provides official notification of the provisions from which it has derogated and the reasons why it imposed the specific emergency measures. At the time of writing, the United States had not filed a derogation notice with the other states parties, through the Secretary-General of the United Nations, as required under Article 4(3). Notice must indicate which fair trial or other ICCPR rights are being suspended, with details concerning derogation measures.

Derogability of Fair Trial Rights and Judicial Proceedings to Challenge Detention

While the ICCPR does not impose a categorical bar on military trials of civilians, certain aspects of fair trial rights are functionally nonderogable. In August 2001, the UN Human Rights Committee issued General Comment No. 29, interpreting Article 4 of the ICCPR.[22] General Comment No. 29 reflects many years of derogation jurisprudence handed down by human rights treaty bodies and merits careful consideration in assessing the Military Order.

General Comment No. 29 addresses two different issues relating to fair trial rights—the link between certain procedural protections and the preservation of nonderogable rights, and the significance of the strict proportionality rule. On the first point, the Committee states:

> It is inherent in the protection of [nonderogable] rights . . . that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. . . . Thus, for example, as article 6 [the right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition on retroactive penalties].[23]

[22] UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), *available at* <http://www.unhchr.ch/tbs/doc.nsf>.

[23] *Id.*, para. 15.

In capital cases tried by the military commissions established by President Bush, therefore, the Human Rights Committee would question any suspension of the fair trial rights set out in Article 14. These include a fair and public hearing before a competent, independent, and impartial tribunal; closure of trial proceedings only when strictly required by important interests, including national security; the presumption of innocence; prompt and effective notice of charges; defense counsel chosen by the defendant; speedy trial; confrontation of witnesses and assistance in obtaining the presence of defense witnesses; interpretation; protection against compelled self-incrimination; review of conviction by a higher tribunal according to law; and prohibition of double jeopardy.

Aside from the connection of fair trial rights to the protection of nonderogable rights, the Human Rights Committee also suggests that suspension of the former rights may often fail the test of proportionality:

> Safeguards related to derogation . . . are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.[24]

General Comment No. 29 thus does not suggest an absolute bar on military trials of civilians, but it does indicate that the military commissions under consideration here must comply with international humanitarian law and may not deny fair trial rights where not strictly required.

The November 13 order, in section §7(b)(2), includes a startling clause:

> the individual [subject to detention] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.[25]

This executive claim to displace the jurisdiction of federal and state courts, foreign courts, and international tribunals is questionable on many grounds. For human rights purposes, what is most significant is that the order does not purport to suspend the writ of habeas corpus, and fails to mention 28 U.S.C. §2241. The jurisdiction of U.S. military commissions sitting inside and outside the United States has been subject to habeas corpus review, even where no direct judicial appeal from conviction is permitted.

The Human Rights Committee in General Comment No. 29 affirms the nonderogability of judicial proceedings to challenge the lawfulness of detention.[26] That those held under the Military Order are entitled to judicial review of detention assumes growing importance, as it appears increasingly likely that few will be charged with crimes or brought to trial.

III. Prisoners of "War"

The POW policy announced on February 7, 2002, appears to recognize a state of international armed conflict between the Taliban and the United States and the formal applicability of the Geneva Conventions of 1949, although the duration of that conflict remains unclear.[27] However, the administration's decision to deny prisoner-of-war status to captured

[24] *Id.*, para. 16.
[25] Military Order, *supra* note 1, §7(b)(2).
[26] UN Human Rights Committee, *supra* note 22, para. 16.
[27] White House Fact Sheet, *supra* note 2.

Taliban and their Al Qaeda colleagues is disingenuous, if not contemptuous of international law. The blanket denial of POW status violates Article 5 of the Third Geneva Convention, which requires a "competent tribunal" to determine whether any "persons, having committed a belligerent act and having fallen into the hands of the enemy," qualify as prisoners of war.[28] Members of militias and organized resistance movements may be POWs, under defined circumstances.[29] Thus, some Al Qaeda suspects captured during fighting in Afghanistan may also be entitled to presumptive POW status.

POWs are entitled to a wide range of treaty protections, including exemption from punishment for lawful acts of war, humane treatment, limits on interrogation, trial rights equivalent to those afforded soldiers of the capturing military, and equivalent housing.[30] They must be repatriated at the conclusion of hostilities, unless they have been duly charged with or convicted of crimes.[31] Mistreatment of POWs, including by unfair trial, is a grave breach.[32]

The president's decision on POW status derisively notes that the Convention privileges being denied to the Guantánamo captives include access to a canteen, monthly pay, personal financial accounts, and sports outfits.[33] As noted above, the denial of POW status brings with it far more serious and relevant deprivations, including such vital protections as exemption from punishment for lawful acts of war, repatriation at the conclusion of hostilities, and internationally defined fair trial rights.

The administration has chosen to characterize its law enforcement actions in Afghanistan, and in Bosnia, as a war against "unlawful combatants."[34] The Military Order seeks enhanced power to detain captives and to establish ad hoc military commissions, while rejecting the legal restraints imposed by international humanitarian law during genuine armed conflicts.

IV. Conclusion

Until the military commissions begin to operate, it cannot be determined how gravely they may violate the international humanitarian and human rights obligations of the United States. The indefinite detentions of hundreds of prisoners in harsh conditions and their unclear legal status have already aroused significant international concern.

The legal premises for the November 13 order are dubious and confused. Military commissions are linked to wartime, specifically the prosecution of violations of the laws of war and the legal vacuum often created by the exigencies of war, either through the defeat of an enemy government or through the disabling of domestic civil courts by armed conflict. To the extent that the United States employs military commissions to try those directly involved in the armed conflict in Afghanistan, their use may be justified. However, their scope of operation is limited by the fact that the United States is not an occupying power in Afghanistan and the risks of impinging on the sovereignty of the interim government.

To the extent that military commissions may displace the federal courts by trying suspected perpetrators of international terrorism who are not combatants in Afghanistan, their

[28] Geneva Convention No. III, *supra* note 12, Art. 5; International Committee of the Red Cross, Press Release, Geneva Convention on Prisoners of War (Feb. 9, 2002), *at* <http://www.icrc.org>.

[29] Geneva Convention No. III, *supra* note 12, Art. 4(A)(2) (responsible command, fixed distinctive sign, carrying arms openly, conducting operations in accordance with laws and customs of war).

[30] *Id.*, Arts. 13–32, 82–88, 99–108.

[31] *Id.*, Arts. 118–19.

[32] *Id.*, Art. 130.

[33] White House Fact Sheet, *supra* note 2.

[34] *Most Wanted: Dead or Alive?* S.F. Chron., Jan. 10, 2002, at A9, *available in* LEXIS, News Library, Majpap File (detainees include Abdul Salam Zaeef, Taliban ambassador to Pakistan; Fazel Mazloom, Taliban army chief of staff; and Abdul Aziz, Saudi official with the Wafa Humanitarian Organization).

use is unprecedented and legally insupportable. Any detentions of terrorist suspects and trials by military commissions must conform to strict derogation standards of the International Covenant on Civil and Political Rights and the procedural minima of humanitarian law.

JOAN FITZPATRICK*

U.S. MILITARY COMMISSIONS: ONE OF SEVERAL OPTIONS

At the time this essay is being written (in mid-February), much is still not known about the system of military commissions contemplated by the president's Military Order of November 13, 2001, and about the circumstances in which such commissions will be used.[1] For example, it is not yet clear what offenses will be tried, what rules of evidence will be adopted, whether the defendants' choice of counsel will be restricted, and whether defendants will be able to pursue a judicial appeal of their conviction or a collateral challenge to their detention. Presumably, these points will be clarified by further orders or regulations from the executive branch.

Administration officials have already pointed out what they consider to be the advantages of such commissions, including the possibility of limiting public exposure, restricting access to classified information, expediting the proceedings, providing better security, eliminating risks to civilian jurors, and reducing the difficulty of securing convictions. On the other hand, use of such commissions could have distinct disadvantages—from both a legal and a policy point of view—in certain situations. Therefore, it is incumbent on commentators to ask whether there are alternatives that might be preferable in these circumstances. I will address that question here from the point of view of international law and policy, including the desirability of encouraging the broadest possible international support for the prosecution of offenders and other actions that may be necessary in the continuing campaign against terrorism.

I. THE OPTIONS

Military Commissions

Both U.S.[2] and international practice[3] recognize national military tribunals or commissions as a means of prosecuting offenders in at least some circumstances in the context of armed conflict. Such tribunals or commissions were extensively used during and after World War II to try German and Japanese nationals for offenses under the laws of war. Military commissions are thus an accepted means of trying persons who commit offenses against the laws of war, such as the deliberate targeting of civilians, abuse of prisoners, and failure of combatants to distinguish themselves from the civilian population.

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[1] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

On March 21, 2002, after the completion of this essay, the Department of Defense issued its Military Commissions Order No. 1 (U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non–United States Citizens in the War Against Terrorism (Mar. 21, 2002), *at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>), which (among other things) addresses the rules of evidence and the defendants' choice of counsel, and provides for review of findings and sentences by a review panel of three military officers. The scope of offenses to be tried is not further clarified, nor is the question of collateral challenge resolved.

[2] *See, e.g.*, 10 U.S.C. §§821, 836 (2000); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942).

[3] See the international practice cited in *Ex parte Quirin*, 317 U.S. 1 (1942). The 1949 Geneva Conventions confirmed that military courts are a lawful means of trying prisoners during armed conflict. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 84, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention No. III].

For this to be a lawful and viable option for the United States in the circumstances following the attacks of September 11, 2001, the outstanding issues about the structure and procedures of the proposed military commissions need to be resolved in an appropriate way. In particular, the United States has an obvious interest in minimizing accusations of violating the rights accorded by the law of armed conflict. Under the Third Geneva Convention of 1949, a prisoner of war (POW) is entitled to certain specific procedural protections, including counsel "of his own choice"[4] and a right of appeal or petition "in the same manner as the members of the armed forces of the Detaining Power."[5]

Of course, many (if not all) of the persons who might be tried are likely not to qualify as POWs under the Third Convention—for example, Al Qaeda personnel who were not members of the regular armed forces of a state, who committed attacks against civilian targets, or who failed to distinguish themselves from the civilian population in conducting their operations.[6] On the other hand, members of regular armed forces (even of an unrecognized government) are entitled to POW status,[7] and if there is doubt as to whether particular persons would fall into this category, the Third Convention requires that they be given the protections of the Convention until their status is determined by a competent tribunal. [8]

Given the potential ambiguities regarding the POW status of particular detainees and the desirability of demonstrating U.S. support for the Geneva Conventions, the prudent course would be to give all defendants the benefit of these procedural protections (without necessarily conceding that any are legally entitled to them). Granting these procedural protections would probably not inhibit the effective prosecution and punishment of these persons. (In particular, the Geneva Conventions make clear that prisoners of war against whom criminal proceedings are pending at the time of the cessation of active hostilities need not be released but may be detained until the end of those proceedings and the completion of any punishment.[9])

Even if these procedural issues are adequately resolved, however, national military commissions are only one of several options that might be used to try various types of offenses purportedly committed by Al Qaeda or Taliban personnel. For example, some persons allegedly connected with Al Qaeda have already been indicted in U.S. federal courts for various offenses under U.S. law, including at least one person allegedly involved in the September 11 attacks. Administration officials have indicated that certain detainees may be tried by Afghan authorities or other states (such as their states of nationality). Clearly, the administration recognizes that the proposed military commissions are not the best option for all cases and will be used selectively. The following sections briefly survey the primary alternatives.

U.S. Civilian Courts

U.S. courts have jurisdiction over several offenses that appear to have been committed by Al Qaeda or Taliban personnel. For example, Zacarias Moussaoui has been charged with violating various federal antiterrorism statutes in connection with the September 11 attacks,

[4] Geneva Convention No. III, *supra* note 3, Art. 105.

[5] *Id.*, Art. 106.

[6] *See id.*, Art. 4(A)(2).

[7] *Id.*, Art. 4(A)(3).

[8] *Id.*, Art. 5. On February 7, the administration announced that it would accept the applicability of the Third Convention to the Taliban because Afghanistan is a party to the Convention, but took the position that Taliban detainees are not entitled to POW status, apparently because of their failure to meet the conditions of Article 4(2). (Presumably, the administration considers Taliban forces not to be "regular armed forces" for the purpose of Article 4(A)(3).) Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), *available in* LEXIS, Legis Library, Fednew File.

[9] Geneva Convention No. III, *supra* note 3, Art. 119.

as well as conspiracy to murder U.S. employees and to destroy property.[10] (These charges include the provisions that implement U.S. obligations under international agreements for the protection of civil aviation, including the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage).[11] John Walker Lindh has been charged with conspiring to murder U.S. nationals, providing material support and services to foreign terrorist organizations, engaging in prohibited transactions with the Taliban, and carrying firearms during crimes of violence.[12]

At this point we do not know what specific offenses will be included in the jurisdiction of the proposed military commissions. The president's Military Order of November 13 provides only that individuals will be tried for "any and all offenses triable by military commission."[13] As noted, such commissions have traditionally been used to try violations of the law of war, including sabotage, espionage, and hostile acts by unlawful combatants.

To the extent that the jurisdiction of the proposed military commissions does not cover the full range of relevant offenses under U.S. law, prosecutors might find themselves at a disadvantage in their efforts to secure convictions or to persuade defendants to cooperate if they are tried by military commission rather than in federal court. Proving at least some of these offenses under U.S. law might turn out to be much easier than proving that the September 11 attacks were part of an armed conflict and that persons involved in some aspect of their preparation committed offenses under the law of war. (In any event, U.S. courts also have jurisdiction over various war crimes committed by or against U.S. nationals, including grave breaches of the 1949 Geneva Conventions and violations of the prohibition in the 1907 Hague Conventions against attacks on undefended towns and buildings.[14])

In addition, there are international considerations that may favor civilian over military trials in various cases. The prosecution of defendants in open proceedings in U.S. courts is likely to be more favorably received in states with which we are seeking extradition or other forms of cooperation in the fight against terrorism, particularly where a proposed defendant is a national of such a state. (This factor may have figured in the federal indictment of Moussaoui, a French national.) Further, the United States has an interest in demonstrating its intention to prosecute violations of the major antiterrorism conventions, such as the Montreal Convention on air sabotage.

Against these considerations may be cited the administration's concern for secure and expeditious trials, but the indictments of Moussaoui and Walker Lindh suggest that such risks are in fact thought to be manageable in appropriate cases. There may therefore be good reasons—including the more effective prosecution of our international campaign against terrorism—to try September 11 conspirators in U.S. courts rather than U.S. military commissions.

Foreign Courts

By the same token, foreign nationals or persons arrested in third countries might well be subject to prosecution for a wide variety of crimes under foreign law that would not fall within the jurisdiction of either U.S. military commissions or U.S. courts. For example, Al Qaeda operatives in a third country might have violated foreign immigration laws, forged

[10] United States v. Moussaoui, No. 01-455-A (E.D. Va. filed Dec. 11, 2001).

[11] 49 U.S.C. §46502 (2000) (aircraft piracy); 18 U.S.C. §32 (2000) (destruction of aircraft). For the Convention, Sept. 23, 1971, see 24 UST 564.

[12] United States v. Walker Lindh, No. 02-37a (E.D. Va. filed Jan. 15, 2002).

[13] Military Order, *supra* note 1, §4(a).

[14] 18 U.S.C. §2441 (2000); *see, e.g.*, Regulations on the Law and Customs of War on Land, Art. 25, annex to Hague Convention on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

official documents, engaged in unlawful financial transactions, illegally acquired weapons, and so on. Third-country nationals taken into custody in Afghanistan might have violated laws of their state of nationality concerning participation in foreign conflicts or material support for terrorist organizations.

These violations of foreign law may be much easier to prove than violations of the law of armed conflict. Foreign governments may find it politically more palatable to prosecute such violations than to surrender these individuals for trial by U.S. military commissions—even if the possible imposition of the death penalty could or would be waived by U.S. military authorities. U.S. demands for extradition for military trial under such circumstances could strain the prospects for other essential cooperation by the country in question with U.S. measures against terrorist networks. Foreign trials, on the other hand, could reduce the international reaction to unilateral U.S. actions that can so easily become a serious political distraction from the international campaign against terrorism. There may therefore be good reasons to seek or accept trial of such persons in their home countries or in countries where they were arrested, rather than insist on trial in U.S. military commissions—provided, of course, that those countries give adequate assurances of effective prosecution and serious punishment, as well as fair treatment, of the accused.

The same may well hold true with respect to possible trial by Afghan authorities, since Al Qaeda and Taliban personnel captured in Afghanistan are likely to have committed a wide variety of offenses under Afghan law that could be easier to prove and less politically problematic. The viability of this option would depend on the prompt creation of credible Afghan judicial institutions that could meet minimum international standards—not an easy task in light of the devastation of the Afghan legal system that has accompanied the destruction of so much of Afghan civil life over the past two decades. However, the recreation of the justice system will logically receive high priority in international reconstruction efforts in Afghanistan, as in Bosnia, Kosovo, East Timor, and elsewhere, and the proper disposition of war criminals and other dangerous irregulars would be an urgent part of that process. The UN Security Council might even lend its Chapter VII authority to such a process—as it did in Kosovo and East Timor—either by establishing a system of interim courts, or (what is perhaps more likely) by supporting Afghan national trials of offenders and calling on states and international institutions to help. Consequently, there may also be good reasons to seek or accept trial of such persons in Afghanistan, rather than insist on trial in U.S. military commissions—again, provided that the Afghan authorities give adequate assurances of effective prosecution and serious punishment in accordance with international standards.

In cases where military trial seems preferable, consideration might also be given to the use of military commissions or tribunals created jointly by the United States and one or more other states involved in the international coalition currently fighting against the Taliban and Al Qaeda. Joint military tribunals were used after World War II to prosecute many of the Axis war criminals and their creation would be a valid extension of the use of national military tribunals in cases involving more than one state. In the current situation, joint tribunals or commissions would have the advantage of greater international political acceptability, especially if they included members from Islamic countries such as Turkey and Bangladesh, and Western countries such as Britain and Germany.

Of course, the United States would have less direct control over the process and might in particular cases have reason to question the resoluteness and reliability of some possible participants. The possible imposition of the death penalty might also pose a problem for European tribunal members. Nonetheless, in some cases such joint tribunals or commissions might be appropriate—for example, for Taliban and Al Qaeda personnel captured in Afghanistan who have no proven connection to the September 11 attacks.

International Tribunals

A final hypothetical possibility would be trial by an international criminal tribunal, which might be accomplished through the establishment by the Security Council of a separate ad hoc tribunal for the perpetrators of the September 11 attacks or some broader category of international terrorist offenses, or through the expansion of the jurisdiction of one of the existing ad hoc tribunals to cover such offenses. As a legal matter, this would be a perfectly valid option, since the Security Council has already determined that the situation constitutes a threat to the peace and has invoked its Chapter VII authority to deal with the September 11 attacks and other acts of international terrorism.[15]

I suspect, however, that the Council would not be willing to do so: it already suffers from "tribunal fatigue" and would probably be reluctant to incur the political difficulties and expense of providing for international prosecution in a situation where so many avenues for national prosecution are readily available. It would be unusual to create an international tribunal to prosecute the crimes of a single day, no matter how serious, and doubtful that the Council would take jurisdiction over any broader category of "international terrorist" crimes in a manner that would satisfy the various points of view represented on that body. International prosecution should be reserved for situations where effective national prosecution cannot be realized, or where national prosecution would complicate the restoration and maintenance of peace and security.

II. Conclusion

All of these factors suggest that the use of U.S. military commissions can be a lawful and appropriate option in some circumstances (assuming that the rights of defendants are properly provided for in accordance with international standards). The best example might be the trial of persons who have committed violations of the law of armed conflict on the battlefield in Afghanistan but have no provable connection to the September 11 attacks. (Even for these persons, the alternative of trial by joint military tribunals or commissions or by any suitable Afghan tribunals should be considered.) For persons whose involvement in the September 11 attacks (or similar terrorist attacks on U.S. targets) can be proved, trial in U.S. courts may be preferable, since it could more effectively strengthen the international coalition and enable prosecutors to pursue a series of offenses that may not be available to military commissions. For persons whose involvement in the September 11 attacks or specific violations of the laws of war cannot be proved—or who are in the hands of foreign authorities that would be reluctant to surrender them for U.S. military trial—the best alternative may be trial by the courts of Afghanistan or other countries for miscellaneous violations of their national laws.

The bottom line, in my view, is that trial by U.S. military commissions is a valid option, but that it should be resorted to only in those specific cases where it enjoys real advantages over the available alternatives. This decision should be a pragmatic one and not reflexive or ideological, and should take fully into account U.S. interests in building and maintaining the strongest degree of international support for the campaign against terrorism.

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[15] SC Res. 1373 (Sept. 28, 2001), 40 ILM 1278 (2001).

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