

Al Qaeda, Terrorism, and Military Commissions

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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.

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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 crimes⁸

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 Warfare²⁷ 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 Art. 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 & Jifí 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)].

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-

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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.").