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XI

Military Commissions: Old Laws for New Wars

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Introduction

The President's exercise of his constitutional authority to direct the Secretary of Defense to detain enemy combatants and to convene military tribunals to prosecute war crimes and other crimes triable by military commission[1] is both a lawful and practical response to the ascendance of terrorism. Though unpredicted by many,[2] and initially challenged as anachronistic, the exercise of jurisdiction by military commissions comports both with domestic and international law and can serve to advance the values that long have animated US national security strategy.

The apocalyptic effects of al Qaeda's attacks of September 11, 2001—the deaths of thousands of innocent civilians and the immutable gash in the skyline of our most populous city[3]—were pale harbingers of the significant changes to be wrought across the international and domestic landscapes when the United States initiated the Global War on Terrorism in response. That war, in turn, has introduced legal challenges that perhaps represent the quintessential example of the enduring impact of the attacks and the US response thereto. That the President should instigate a metamorphosis of old law to address the unique challenges of this new war was not surprising. History teaches that changes in the law are often

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significant consequences of war. So too, this war on terrorism has challenged and continues to challenge the limits of the constitutive tenets that have defined our international and domestic orders throughout the last half of the 20th century. A failure to participate thoughtfully and deliberately in fashioning the legal norms that are being developed—norms that will guide the global community for the next century—would constitute a missed opportunity of substantial moment.

US post-9/11 counterterrorist activities, particularly in the legal realm, have been the subject of much criticism. The decision to use military commissions to try alleged terrorists is a notable example. US efforts to cultivate those changes in extant law necessary to prosecute the war on terror frequently have appeared uncoordinated and ill-composed in immediate application. But this awkwardness is most accurately attributed to the fact that the progression in law required to deal with terrorism highlights both the confluence of what might previously have been viewed as disparate legal regimes—law enforcement and war—and the lacunae that reveal themselves in our attempts to merge the boundaries of these separate disciplines.

Paradigm Shift

To comprehend fully the issues raised by the decision to use military commissions, one must first recognize the significant strategic and operational shift associated with the 9/11 response. Historically, the strategy of the United States in responding to terrorism was grounded solely in law enforcement.[4] It was widely recognized and accepted that the magnitude of the 9/11 attacks, coupled with their penetration of the American homeland, rose beyond mere criminal conduct, amounting instead to an act of war.[5] The almost exclusive law enforcement responses to past terrorist attacks would not suffice; the use of military force had become not only a legitimate option, but also a necessity. The US Congress recognized the changed nature of the terrorist threat when, on September 14th, it enacted a joint resolution authorizing the President to use "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, and harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States."[6]

The military response to the events of September 11th marked the most significant use of military force in response to terrorist acts to date—what had for years been viewed and addressed as a criminal act now had started a war. This view was not limited to domestic observers. The use of military force in Afghanistan in response to 9/11 was well received both internationally and domestically.[7] On September 12th,

the Security Council passed a resolution expressly recognizing the right of the United States to respond in self-defense.[8] Days later, the North Atlantic Treaty Organization (NATO) took the unprecedented step of passing a resolution citing Article 5 of the NATO Charter.[9] Separate resolutions of the ANZUS and Rio Pact nations similarly condemned the 9/11 attacks as attacks on their respective collective memberships.[10]

Though the need to respond to terrorism via the armed conflict model was manifest—primarily as a preventive measure—it was undoubtedly attended by punitive aspects traditionally associated with law enforcement concepts. Similarly, in crafting the associated new legal paradigm, the United States incorporated elements of both law enforcement and warmaking. This was no mere academic choice, but one required by the circumstances at hand. Oliver Wendell Holmes's observation is appropriately recollected, "the life of the law has not been logic, but experience."[11] We were and remain clearly at war, but the stated objective of that war was and is, at least in part, to bring wrongdoers to justice.[12]

In theory, an act subordinate to and lawfully consistent with the decision to engage in armed conflict should enjoy support commensurate with that attending the core decision itself.[13] But that has not been the case.[14] The armed conflict model for addressing terrorism, most prominently embodied in Operation Enduring Freedom,[15] was accompanied by a number of subordinate actions that did not enjoy such a sanguine reaction within the international community. Issues related to the detention of alleged terrorists at Guantanamo Naval Base, Cuba,[16] and the proposed plan for prosecuting alleged terrorists before military tribunals[17] are most conspicuous among those that have been the object of international condemnation. Yet, these decisions are a natural outgrowth of the paradigm shift from one of law enforcement to one of war. Legally and logically, military tribunals are a natural extension of the President's authority as Commander-in-Chief of the armed forces; they are not a function of the United States' judicial authority as is so often claimed.[18] Domestic and international criticisms of the President's decisions have been cloaked in sweeping allegations of illegality. The apprehension animating those claims, however, is most frequently a misperception of an abuse of judicial authority or misidentification of policy concerns generated by the imperfect merger of the two relevant bodies of law.[19]

Executive versus Judicial Authority

The first misperception is the most widespread and also the most easily defeated. Much of this criticism is simply the natural consequence of continuing to address discrete acts related to the war on terrorism as if they fell squarely and solely within

the law enforcement arena. A response to terrorism framed solely in the law enforcement paradigm—particularly when the detention and trial of accused individuals is involved—invokes a body of law requiring significant procedural due process and according a suspect or accused a plethora of substantive rights. In addition, the concept of trials by military commission invokes a feature of domestic law that itself has been scrutinized substantially: procedures and rights attending the criminal trials of accused persons in civilian courts have been the subject of extensive legislation, have been implemented in detail by the executive branch of our government, and continue to be the object of considerable judicial scrutiny during the process.

Critical aspects of a wartime terrorist trial militate against using procedures and rules of evidence akin to those employed in times of peace in civilian jurisdictions. Criminal justice systems are not attuned to—nor could they be readily adjusted to accommodate—unique aspects of the law of war such as the indefinite incarceration of enemy combatants for the duration of hostilities. Processing an alleged terrorist through the civilian court system would likely implicate speedy trial and pretrial detention review norms that could be completely unworkable during armed conflict. An alleged terrorist detained for trial in the United States, for example, would have the right to appear before a federal judge within forty-eight hours of apprehension. At that juncture the judge would receive evidence to determine whether there existed probable cause that the crime had been committed, that the accused had committed it, and that pre-trial detention was necessary.[20] But a nation at war cannot be expected to pull military commanders from the battlefield to present the necessary evidence for such a judicial determination.

War crimes investigators would likely be hamstrung by a civilian court's strict rules of evidence. Such rules could prove counterproductive from both prosecution and defense perspectives. For example, it is far less likely that law enforcement investigators will be able to secure evidence amounting to more than hearsay (inadmissible in most US courts) or to document the chain of custody associated with the warrantless seizure of evidence from a remote Afghan cave by a military unit under fire. In civilian courts, these rules are often thought to operate to the detriment of the government, but in a war crimes trial held outside the accused detainee's country of residence, a rule favoring the admission of relevant evidence without regard to hearsay or established chain of custody might greatly assist the accused as well.

Another difficulty created by deferring to an extant peacetime criminal justice system is that the circumstances and evidence associated with a war crimes trial or trial for acts of transnational terrorism *during an ongoing conflict* are likely to require the production and disclosure of intelligence collection methods and

sensitive intelligence products to a degree rarely, if ever, encountered during civilian trials. The presentation of classified information in sensitive federal criminal prosecutions, while not routine, is possible under the Classified Information Procedures Act of 1980. Those trials are not normally conducted during an armed conflict, however, when the sensitivity of relevant intelligence information is at its peak. It is reasonable to presume that the presentation of classified information under seal and the requirement that defense attorneys submit to security clearance background checks would affect each and every terrorism case, substantially increasing the scope and volume of procedural safeguards required, escalating dramatically the cost of mounting such prosecutions, and contributing to extensive delay.[21]

There also exist a number of civil rights and prophylactic judicial rules that have no practical currency in a wartime prosecution regime. For example, a *Miranda*-like rights advisement is unlikely to be part of the operational doctrine of US ground troops when they take enemy combatants prisoner;[22] and an exclusionary rule in such instance would do nothing to further the rule of law or civil liberties of cave-dwelling terrorists. Similarly, statements made by alleged terrorists during initial interrogations are unlikely to have been preceded by a rights advisement. Certainly we cannot intend for intelligence debriefers to question only those detainees who have waived the right to silence and to consult a lawyer. And if there is no extant right to a lawyer during the debrief, there is no value in an exclusionary rule to guarantee compliance. These and like issues invoke legitimate concerns that have been addressed incrementally over years of practice in civilian courts.

Conversely, most actions associated with the conduct of war are governed by far less developed legal frameworks—domestically, the President's executive authority in the war-making arena and internationally, the law of armed conflict. It is in those arenas to which the law of war does not speak that hiatuses in the nascent legal paradigm associated with the Global War on Terrorism naturally reveal themselves. That these matters have been subject to heavy regulation in the law enforcement field exacerbates perceptions that the law of armed conflict is inapplicable or insufficient. Critical sensibilities are understandably influenced by familiarity with the criminal justice system. Those sensibilities yield negative visceral reactions to war-related actions that are readily, but inappropriately, analogized to law enforcement.[23]

The problem is compounded further by the existence of parallels between the areas in which war-related decisions may appear to correlate to actions normally associated with the criminal justice system and criticisms of those very aspects of the criminal justice system from another camp. Some argue that substantial deficiencies mar our criminal law enforcement system—deficiencies associated with

an overly charitable extension to criminal defendants of due process and other substantive rights.[24] The relatively flexible and unregulated norms associated with the law of war may then be seized upon as affording a welcome opportunity to avoid the overdeveloped procedures of federal criminal practice. The shadow of the OJ Simpson trial and its sensationalized treatment in the press cast a pall over any thought of a significant terrorist trial. This backdrop, coupled with the understandable need to protect classified intelligence in the national security trial of an alleged terrorist, may cause some to fear a Republican-led governmental overreaction to the prospect of a media-focused trial. They may also fear use of the intelligence protection rationale as a subterfuge to hold secret proceedings that will conceal a related erosion of civil liberties or trial-related human rights.[25] This persistent undercurrent lends a patina of credibility to some who would question the motives of those that elect to proceed within the law of war framework.

All things considered, past experience may prompt the conclusion that there exists no rubric under which terrorists can be held accountable for their crimes. What some see as criminal justice deficiencies and others view as appropriate procedural protections may in fact yield only systemic ineffectiveness when applied to the problem of international terrorism. The standard "extradite or prosecute" model simply has not worked, and to the extent it can be made to work in individual cases, one may question our ability to prosecute any sizeable number of alleged terrorists in the context of an expensive and over-laden US federal court system.[26]

Despite the contumely of some pundits, military commissions are not the novel concoction of clever Bush Administration attorneys. Since before the birth of the United States, "warriors have used such tribunals to determine the guilt or innocence of their fellow warriors for violations of the law of war."[27] The Supreme Court has consistently upheld as constitutional the trials of belligerents by military commission.[28] In establishing military commissions, the President has sought to navigate adeptly the confluence of law enforcement and the law of armed conflict, and at the same time to fill gaps in our legal landscape in a principled way that furthers the interests of the rule of law.

In addition to being well-grounded legally, the military commission decision is logically sound as well. President Bush's use of the military instrument involved a prolonged, deliberate, "boots on the ground" operation with the objective of killing or capturing terrorists and destroying their networks. To then shift to a law-enforcement paradigm after capture might appease certain human rights activists in the short-term, but it would create a perverse dynamic on the battlefield that could undermine the most fundamental tenets of the law of war. By further extending the use of the military instrument in authorizing the use of commissions to try enemy combatants, President Bush eliminated that potentially absurd dilemma

for the US soldier on the battlefield—whether to capture or kill an enemy who clearly will continue to pose a threat to the United States, and who, in this case, maintains no affiliation with a parent organization that, in more conventional circumstances, could direct surrender.[29]

Enforcing the Law of War: Military Commissions versus Courts-martial

Almost 50 years ago, Israeli Ambassador to the United States Abba Eban described international law as the law "the wicked do not obey and the righteous do not enforce."[30] For years, the international law of armed conflict has lacked an enforcement mechanism.[31] The President's Military Order of November 2001 created a framework for military commissions and set in motion a process to fill this void in the enforcement of the laws and customs of war.[32] Conversely, cynics view the Order and the commissions it establishes as an attempt to circumvent normal criminal procedures—a kangaroo court that eschews burdensome due process requirements, providing a mechanism to bring alleged terrorists to justice in a fashion that favors efficiency over human rights and civil liberties.[33] These concerns are partly a consequence of the changed circumstances associated with terrorism. More simply, however, they reflect that the President's chosen path regarding the prosecution of alleged terrorists—by military tribunal—has not been traveled in decades and improvements to that path, although identified as necessary years ago, have not yet been implemented.

After defining persons subject to the President's Military Order (terrorists and those who aid and abet them if designated as such by the President),[34] the Order clarifies that such persons will be held by the Department of Defense and, if tried, tried by military commission as opposed to some other forum.[35] Lawyers, human rights groups, and foreign capitals criticized the Order for derogating so substantively and substantially from relevant due process guarantees—regardless of the war/law enforcement paradigm shift.[36] Critics were somewhat quieted by the Secretary of Defense's implementing order issued four months later,[37] but subsequent steps in the direction of trial, such as the publication of additional implementing instructions restoked the anti-commission fires.[38] In the almost three years subsequent to promulgation of the Order, only eleven individuals have been designated as subject to its jurisdiction; two of these were subsequently transferred to the United Kingdom, their country of citizenship, and released. Although truncated preliminary hearings have been held in several cases, no trial has yet proceeded to the presentation of evidence on the merits.[39]

Delays and difficulties notwithstanding, however, we simply cannot avoid the mandate to conduct trials. Every United States president who has faced terrorism has

spoken of bringing its perpetrators to justice.[40] Moreover, international crime is clearly a growth industry, and its law enforcement complement has not kept pace.

It is useful to note that historically, military commissions have been viewed as a means of injecting a civilized, judicial component into an otherwise uncivilized chaotic world where killing is authorized and the fog of war often obscures the moorings of civilization. This military authority[41] has been used previously in three different roles: 1) to try individuals who violate the laws of war; 2) to administer justice in an occupied territory; and 3) to serve as a general court in an area where martial law has been declared and the civil courts are closed.[42] With respect to the Global War on Terrorism, we are primarily dealing with the first category of conflict-related offenses, but the likelihood that commissions may be needed in the future under other circumstances may play into the analysis of whether their establishment is a worthwhile endeavor.[43]

From a domestic perspective, the authority to convene military commissions derives from the President's Article II Commander-in-Chief powers.[44] As Justice Douglas noted, the executive's power "is vastly greater than that of any troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country and to punish those enemies who violated the law of war."[45] Congress has also explicitly acknowledged the President's preexisting authority in this regard. A pertinent provision of the Uniform Code of Military Justice (UCMJ) provides, "The provisions of this chapter . . . do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by military commissions. . . ."[46] A subsequent provision of the UCMJ authorizes the President to adopt regulations for military commissions.[47] Further, in subsequent related legislation, Congress appears to have taken great pains to ensure continued recognition of the President's authority with respect to military commissions.[48] A common cry among uniformed judge advocates, many of whom have spent years defending the military justice system from claims that it is inferior to civilian courts in protecting the rights of the accused,[49] is that military commissions are no longer necessary because courts-martial now have jurisdiction over the same set of offenses triable by military commission.[50] Therefore, the argument goes, we now should use the UCMJ as a guide because it contemplated, or should have, wartime exigencies. At the outset, we should recognize that the extension of jurisdiction over law of war violations in the latest rendition of the UCMJ is not as revolutionary as some might think. In enacting the current version of the UCMJ, first introduced in 1950,[51] Congress made a conscious decision to *continue* including the identical language found in a 1928 version of a Manual for Courts-Martial,[52] which clarified that the Articles of War did not "deprive military commissions . . . or other military

tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . or other military tribunals."[53] The 1950 Manual for Courts-Martial also extended that jurisdiction to general courts-martial—but only to the extent that military commissions already possessed such jurisdiction as a matter of custom.[54] Since adoption of the UCMJ, no war crime has ever been successfully tried by court-martial.[55] In fact, during the well-documented trial of Lieutenant William Calley on charges of premeditated murder related to the My Lai massacre, an appellate court noted in a footnote that there had been some consideration given to trying another alleged perpetrator for war crimes, "by military commission. . . ."[56]

Lack of historical use aside, the real weakness in the argument for the use of courts-martial to try terrorists—or war crimes in a more general sense—is that the UCMJ's evolution over the years has weakened its utility in this regard. Since the end of the Second World War, the UCMJ has been continuously modified, not to account for expanded jurisdiction involving violations of the law of war, but in response to perceived due process deficiencies in the forum—the possibility of trials inadequately sensitive to defendant rights that prevailed during Word War II and the years immediately thereafter. The response has been to make courts-martial look very much like federal district courts.[57]

What has never been addressed in the court-martial system is the ability to try war criminals for violations of the law and customs of war. While elements of crimes have been the subject of extensive drafting and judicial interpretation for all of the offenses specified in the UCMJ, the Manual for Courts-Martial has made no attempt whatsoever to define violations of the laws of war. Similarly, court-martial procedures fail to contemplate the trial of any defendant who is not a service member; the UCMJ establishes no appellate process for a convicted war criminal and the Manual for Courts-Martial makes no attempt to modify procedures for the non-service member accused. Public perception to the contrary, courts-martial are unlikely to be a panacea for the problems associated with trying terrorists.

Substantive Due Process

In March of 2002, the Secretary of Defense issued basic rules for the conduct of military commission trials. These rules were the subject of subsequent elaboration in a series of "Military Commission Instructions."[58] In keeping with the President's Military Order, these rules mandated a "full and fair trial"[59] purportedly designed to strike an appropriate balance—a balance that, on the one hand, recognizes the exigencies associated with warfare, and, on the other hand, demonstrates faithful adherence to the principles of fairness and due process that animate our domestic

criminal jurisprudence.[60] What the rules did not do is replicate the level of detail or procedural due process found in other more developed criminal justice systems. For this, the rules have been vociferously criticized.[61]

Anticipating the need for greater evidentiary flexibility, the military commission rules promulgated by the Department of Defense leave many procedural and evidentiary determinations in the hands of the triers of fact.[62] This same policy animates the International Criminal Court's rules of procedure and those of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.[63] Though similar in nature to the concept of military commissions, they operate under different conditions (e.g., post-hostility), and are hampered by the unique idiosyncrasies of their respective international processes. Because the tribunals used to prosecute 9/11 terrorists will play such an important role in defining available legal structures for the future, it is imperative that we identify and attach essential due process elements to the tribunal's conduct, but do so in a way that accounts for their unique mission.

Military commissions afford defendants several important protections that adhere faithfully to immutable principles of fairness and due process that animate our domestic criminal jurisprudence—protections such as the presumption of innocence, the ability to confront witnesses, and a standard of proof beyond a reasonable doubt.[64] They also explicitly make available to the government tools such as closed trials, intelligence shielding protective measures, and relaxed rules of procedure and evidence—tools that recognize the national security-related difficulties associated with war-time prosecutions, e.g., that evidence seized on the battlefield is unlikely to carry with it a chain of custody or a judicially approved warrant necessary to satisfy the reticulated requirements of judicial trials; that flexibility is required to bring criminals to justice while concurrently accommodating the prosecution of a war; and that war is attended by concomitant operational security concerns and the imperative to protect intelligence information, methods and sources.[65] The rules affect an appropriate balance with a view to providing justice in the context of a war against terrorism. Whether the balance may be off is open for debate—but it is a balance that, at present, no other forum has attempted to strike.

Compliance with the Law of War[66]

Another common criticism of military commissions is that, admitting the applicability of the law of war and the propriety of using military commissions in general, the incarceration and intended trial of enemy combatants simply violates the law of war. Here we must look at the law of war itself, and the applicability of various

provisions. In most cases, specific accusations of noncompliance are based on an inappropriate application of particular tenets.

Given the eminence of the Geneva Conventions,[67] one might think that simply abiding by their terms—regardless of applicability as a technical matter—is most consistent with a commitment to the rule of law. Indeed, US military policy expressed in a Chairman of the Joint Chiefs of Staff Instruction mandates "compl[iance] with the law of war during all armed conflicts, however such conflicts are characterized."[68] The language regarding conflict characterization refers to the traditional parsing of international and internal armed conflicts. While most of the provisions of the Geneva Conventions are applicable to only international armed conflicts, military policy is to apply those provisions even if the conflict is "not of an international character." One could reason, then, that the characterization of the war on terrorism should not impact US policy as it pertains to the handling of captured enemy combatants or any other matter. The problem is that complying with a body of law and applying its provisions are two very different endeavors. While a legal regime might be applicable, a particular provision may not apply.

By way of analogy, one might elect to comply with safe driving standards regardless of whether the jurisdiction in which one drives effectively applies or enforces those standards. Self-imposed compliance does not mandate continuing to drive 45 miles per hour when the speed limit goes up to 65—even though the lower limit is arguably safer; applicable standards may change. Viscerally, failing to accord prisoner of war status to enemy combatants is, to some, a decision not to drive safely. To others, it is a simple recognition of changed circumstances. Many customary provisions of the law of armed conflict are appropriately rendered applicable as a matter of policy;[69] others, however, are dependent on circumstance.

Note that this relationship to circumstance could be a matter of either permission or prescription/proscription. Absent a required minimum, the authorization to drive 65 miles per hour does not preclude one's decision to drive slower. If the particular safety norm at issue involved, for example, on which side of the road one was to drive, the changed circumstance would *require* adjustment or head-on collisions would inevitably result. The pertinent provisions of Geneva Convention (III), which pertains to prisoners of war, detail specific requisite circumstances for applicability—demonstrating that the rights and regulations associated with prisoner of war status were not intended to be reflexively applied in all circumstances. Like the speed limit, however, they are clearly permissive in nature with respect to denial of prisoner of war status.

Nevertheless, the concern that the Global War on Terrorism has identified a significantly sized group that appears to fall largely outside the particularized

protections of various Geneva Conventions and Protocols[70] may indeed be a legitimate concern militating in favor of developing new international norms. A discussion is appropriate, but that discussion should be based on the common understanding that seizing on the legal regime associated with law enforcement as the basis for criticizing the treatment of captured enemy combatants is a misguided application of law by analogy.[71] In addition, useful dialogue can occur only subsequent to recognition of the legitimate, but differing perspectives on the current state of the law of armed conflict. We benefit from the insights of Paul Grossreider, the former Director General of the International Committee of the Red Cross (ICRC), who in the days following September 11th asserted, "with the September 11 terrorist attacks, the nature of war is changing. . . . With al Qaeda, we face an emerging new type of belligerent, . . . transnational networks. To cope with this change, [the international law of armed conflict] must adapt itself for fear of being marginalized."[72]

Nowhere does Geneva Convention (III) preclude, or even discourage, trials by military commission. Indeed, Article 84 reflects a preference for "military courts" as that term was broadly understood in 1949.[73] As opposed to mandating a particular procedure or forum, Geneva Convention (III) requires certain minimum standards of fairness in the forum choice elected. For example, the prosecution of prisoners of war must include "essential guarantees of independence and impartiality as [are] generally recognized." [74] The Conventions identify as a grave breach "willfully depriving a protected person of the rights of a fair and regular trial prescribed in the applicable convention."[75] It is unimaginable that any judicial system established by the United States would not meet these minimum requirements. So long as any particular military commission meets those broad fairness requirements, it would appear that even prisoners of war might be tried in such a forum.[76]

A more specifically applicable standard has been established since the 1949 Conventions, however, that provides greater detail regarding minimum trial standards. Article 75 of Additional Protocol I defines that article's applicability as being to, "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol. . . ."[77] It then provides, among other things, a moderately extensive list of trial rights that represent a minimum standard for the due administration of justice.[78]

Although the United States is not party to Additional Protocol I, many have opined that we should accept certain of its provisions, including Article 75, as reflective of customary international law.[79] The United States' military commission rules appear to comply with all requirements of Article 75. Perhaps the only colorable claim that military commissions, as contemplated, are noncompliant with the general normative due process standards enumerated in the Geneva

Conventions is found in the "independence" requirement set forth in Article 84 of the Third Convention.[80] The standard for independence is that which is "generally recognized."[81] Some may interpret the "independent" requirement as precluding a military commission's utilization of a trier of fact or lawyer who is subordinate to the military chain of command.[82] Such a reading, however, would be inconsistent with State practice since the 1949 Conventions were negotiated. Military tribunals have always involved military triers of fact, and there is no evidence in the Geneva negotiating records suggesting that anything to the contrary was intended.[83] Certainly, any such proposition should be forcefully rejected.

The bottom line when assessing the substantive due process accorded accused terrorists to be tried by military commission is that there is no reason to anticipate any derogation from fundamental fairness guarantees normally accorded to criminal defendants. The President's Military Order and the Secretary of Defense's rules require commissions to provide a "full and fair" trial. Even if there were no other protections provided by the rules or applicable instructions, military officers constituting a military commission should be expected to follow orders in providing a full and fair trial. The absence of particular rules, thus permitting pundits to identify potential abuses that *could* occur is hardly fodder for a substantial criticism, though it is likely a natural consequence of the slow and deliberate means by which trials have proceeded. At this juncture, criticism of military commission procedures amounts to nothing more than an attack on worst case hypotheticals.

Nondiscrimination Principle

Another principle of humanitarian law of potentially even greater impact on future terrorist trials is that which appears to require nondiscrimination in judicial proceedings applied to prisoners of war and members of the armed forces of the detaining power.[84] To date, the United States has made no statement regarding its interpretation of the principle's relevance to the trials of alleged terrorists. The most extreme textual articulation related to this norm is found in Article 102 of Geneva Convention (III), which states:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[85]

While arguably not directly relevant to trials currently contemplated (if only because the defendants are not entitled to the protections associated with prisoner of

war status),[86] other potential military commission trials—such as those deriving from the conflict in Iraq—may involve persons who do meet Geneva Convention (III) criteria for prisoner of war status.[87] Moreover, the norms are worth noting because they envisage circumstances similar to those found in the law of war paradigm for trials. And as a matter of policy, the United States has agreed to apply the principles of the Geneva Conventions to the extent practicable.[88]

Some would read the language of Article 102 as precluding the use of military tribunals were they not also employed to try US troops. Given that no US citizen may be subject to the President's Military Order or to trial by military commission, the principle of nondiscrimination would appear to bar the use of military commissions to try prisoners of war.[89]

The language of Article 102 is ambiguous in several important respects, however. Probing these ambiguities renders premature and overly simplistic the unquestioning acceptance that Article 102 bars absolutely the use of military commissions—even with respect to the trial of prisoners of war protected by Geneva Convention (III). In particular, it is unclear whether Article 102 applies only to post-capture offenses, or whether it may apply to pre-capture offenses as well.[90] Second, the language fails to clarify the meaning of either "same courts" or "same procedure."[91]

The language of Article 102 was carried over from Article 63 of the 1929 Geneva Convention.[92] In the famous post–World War II war crimes trial, *In re Yamashita,* that language was interpreted by the US Supreme Court to apply only to post-capture offenses committed by an individual who already was a prisoner of war.[93] While drafters of the 1949 Conventions clearly intended to provide procedural protections for those accused of pre-capture offenses, it is not clear that Article 102 was the intended vehicle for those protections. Nothing in the minor verbiage adjustments of the 1949 Convention appears to affect this original intended applicability (and terrorism-related trials are likely to involve only pre-capture offenses). Yet, Geneva Convention (III) not only retained the 1929 language that ultimately became Article 102, it added a new provision—Article 85—with no parallel in the 1929 Convention.[94] Some view the combination of Articles 102 and 85 as eviscerating the *Yamashita* limitation and requiring that the courts and the procedure utilized be the same for prisoners of war as for the armed forces of the detaining power—even with regard to pre-capture offenses.[95] Reasoning that the detaining power's procedures should apply when the detaining power's substantive law is in play appeals to both logic and fairness. But the claim that future war crimes trials must exactly mirror courts-martial should not be viewed as dispositive of the current state of the law, particularly given that the text of the 1949 Conventions reflects a

variety of competing interests.[96] And a closer review of Article 85 reveals a more focused orientation toward post-conviction treatment than to trial rights per se.[97]

Additionally, a narrower read of Article 102 as requiring nondiscrimination only in the prosecution of post-capture offenses is consistent with the underlying theory of prisoner of war "assimilation" in the armed force of the detaining power; that is, once captured, a prisoner of war must obey the rules and regulations that apply to the armed forces of the detaining power.[98] Such assimilation has no application when the issue is pre-capture, that is, pre-assimilation crimes.[99]

Setting aside for a moment the colorable argument that Article 102 does not apply to pre-capture offenses such as those for which terrorists would be prosecuted, the question persists as to the meaning of "same courts" and "same procedure." "Same" may be read to mean: what is jurisdictionally available, what has been used historically, what would likely be used in the future, or some other criteria. Indeed, no US court has considered the meaning of this term in this context. Although the "same courts" language may have a straightforward meaning and application when applied to a detaining power that prosecutes its service members in only one forum, it is not so straightforward in the case of the United States. Given that the United States may prosecute members of the armed forces in any number of fora, including Article III courts, courts-martial, and military commissions, there are different aspects of "sameness" that may apply.

Article 102 may be read to require only that prisoners of war must be sentenced by any of the same courts that may have jurisdiction over a US service member.[100] Because jurisdiction can be determined without regard to subjective intent, the greatest degree of clarity and precision inhabits this interpretation. Another reading of Article 102 is that it requires prisoners of war to be sentenced by the same courts that have historically sentenced US service members. This approach would look beyond bare jurisdiction to determine what courts and procedures have been "typically" used and require that prisoners of war be subject to trial by the same courts and under the same procedures as past trials of US service members. This analysis illuminates another potential problem, however. While recent history would militate in favor of the court-martial forum for standard military or civilian offenses, such would not be the case for violations of the international law of armed conflict. In fact, law of war violations by service members have only been prosecuted, as such, by military commission.[101]

Finally, another possible reading is that the cases to which prisoner of war prosecutions should be compared are those hypothetical cases that could arise from the same area or same conflict. Thus, to the extent that the executive evidences intent to prosecute its service members in a particular manner in a particular conflict, prisoners of war from that same conflict should be subject to those same courts and

same procedures. The current widespread exercise of court-martial jurisdiction in contradistinction to historic uses of military commissions for war crimes warrants some consideration of this possibility.[102]

The above discussion of the last two possibilities posed begs the question of what crime would apply for purposes of conducting the analysis.[103] Certainly the type of offense must play some role. If US soldiers most frequently find themselves in traffic court to deal with moving violations, does that mean that traffic court is an appropriate forum for war crimes committed by prisoners of war? If we limit our review in this regard only to violations of the law of war, we are left either with the conclusion that violations of the law of war must be tried by military commissions or a determination that future war crimes will be tried by courts-martial.[104] The idea that any "same courts" and "same procedure" procedure analysis must assume that the crime charged is the same as well is also consistent with the other relevant provisions in Geneva Convention (III).[105] Assuming this to be the case, note that Article III courts, courts-martial, and military commissions, each have certain jurisdictional authority to prosecute war crimes.

Article III courts probably have the narrowest range of authority with respect to law of war violations,[106] although recent developments with respect to the "material support to terrorism" charge may give them equal or better coverage over substantive conduct of terrorism.[107] Only specified war crimes are chargeable under the War Crimes Act, including crimes identified as "grave breaches" under the Geneva Convention.[108] Subject matter jurisdiction extends to aliens (including prisoners of war) only if the victim of the war crime is a member of the US armed forces or a national of the United States.[109] The Act also authorizes prosecution of US service members irrespective of the status of the victim.[110]

Were prisoners of war to be prosecuted in Article III courts, a pure jurisdictional understanding of "sameness" would support an argument that the requirements of Article 102 had been met. That is, because US service members may be tried for enumerated violations of the laws of war in Article III courts, prisoners of war also may be. Historically, though, US service members have not been tried in Article III courts for violations of the laws of war or even for crimes that could have been charged as such.

As previously mentioned, prisoners of war are subject to trial by courts-martial for violations of the UCMJ committed after establishing prisoner of war status.[111] Additionally, 10 U.S.C. § 818 appears to establish jurisdiction over a broader group of persons triable under the law of war.[112] This could include jurisdiction over prisoners of war during the period of time preceding their attainment of prisoner of war status.[113] The claim that Article 102's nondiscrimination requirement had been satisfied then could be grounded in jurisdiction or perhaps historical use.

Historical use, however, would cut in different directions. On the one hand, although courts-martial have jurisdiction to try violators of the laws of war, they have not been employed for that purpose since the UCMJ was enacted. On the other hand, the United States has sent US service members to courts-martial for crimes that could have been charged as war crimes.[114]

Nevertheless, there are other complications attending the court-martial route worth noting. Because courts-martial have been designed with an emphasis on prosecution of US service members, certain adjustments to the procedures would have to be effected to permit the process to function properly in the trial of a prisoner of war. From a practical perspective, procedures such as rules for membership on panels[115] and the conduct of pretrial confinement reviews[116] would require modification to fit the unique circumstances attending prisoners of war. Moreover, one might argue that given the *Calley* precedent of charging what could be a war crime as an enumerated offense under the UCMJ, one could not claim that prosecution of a prisoner of war was proceeding under the "same procedures." For example, for the same factual offense, a US service member would be charged with murder (subject to the elements of that charge as well as the sentence limitations) while a prisoner of war would be charged with a law of war violation (with no enumerated elements or sentence limitations). Thus, although the court-martial may at first seem a comfortable fit with the requirements of Article 102, a closer look reveals a more complicated and potentially problematic relationship.[117]

Finally, assessing military commissions from an Article 102 perspective, we find they easily fit a jurisdictional method of analysis. Past precedent makes clear that military commissions may be used to try US citizens.[118] As one court held, "citizens and non-citizens alike—whether or not members of the military, or under its direction and control, may be subject to the jurisdiction of a military commission for violations of the law of war."[119] Thus, trial of prisoners of war by military commission would be by one of the same courts that has jurisdiction over a US service member for a similar crime. From a historical use perspective, military commissions have been convened against US service members,[120] indeed, even against "camp-followers and other civilians employed by the government in connection with the army."[121] On the other hand, no military commissions have been convened since the period immediately following World War II.

One adjustment to the current state of affairs could improve the perception that the trial of prisoners of war by military commission comports with the nondiscrimination principle; that would be to modify the President's Military Order establishing commissions so as not to exclude US citizens from its jurisdiction. Of course, an even stronger argument that the military commission forum complies

with the requirement of nondiscrimination could be made if US service members actually were brought before such tribunals.[122]

In fact, were it not for the wartime setting, it would appear that neither courts-martial nor military commissions would have sufficient jurisdiction to address appropriate offenses.[123] It is only when terrorist conduct amounts to an act of war that military commission or expanded court-martial jurisdiction engages.[124] Thus, the concept of military commissions languished in desuetude during the last 50 years. This, in turn, explains why the parameters of the governing substantive law were not addressed during the same period. As has always been the case, development of the law of war comes after changes to war itself.

Conclusion

So what is the best way to bring terrorists to justice? Certainly that question existed prior to September 11, 2001, but the collapse of New York's tallest buildings imposed on us, as Americans, and as citizens of the world, a mandate to find an answer. Today, almost three years later, we have moved toward an answer, but there remains much work yet to be done. Our challenge is to answer that question deliberately. As the United States proceeds with military commission trials of alleged terrorists, history will be written. As in the aftermath of World War II and Nuremberg, we are in the process of establishing a future world order. September 11, 2001 stands out conspicuously as a historic inflection point, but the long-term impact of that day ultimately may prove to be the new legal paradigms established in its wake.

The manner and tempo at which legal transformation takes place is important to preserving and improving international cooperation. Many US allies evinced discontent early in observing the shift from addressing terrorism solely as a law enforcement matter. The best United States response will be in making a point of consciously influencing appropriate and useful changes to the law of war. The law needs to adapt and adjust, and we are in the best position both to identify that need and to lead the way in satisfying it. It has always been both "our national interest" and "in our national interest" to establish the rule of law domestically and internationally. And the United States today has an unprecedented opportunity to establish an international order based on the rule of law. The war on terrorism should be pursued to victory, but it should also be pursued in such a way as to develop the law most effectively.

It is too easy to simply criticize something that represents change—and that is the case with most criticism of military commissions. Over the past several years, the United States Government has faced the challenge of attempting to apply the

existing laws of war to the Global War on Terrorism. That application may not please everyone, but neither does it deserve the condemnation associated with claims of denigrating the rule of law. As in the aftermath of past conflicts, international law has moved forward by effectively establishing a pattern of State practice that eventually may be adopted as customary law or codified by convention. That process is at work today.

If there is one legitimate criticism of the US decision to initiate military commissions, it is the failure to explain adequately its legal reasoning to reluctant allies. A key component to any planned evolution of existing law through a consistent State practice is the public articulation of the norm, values, and principles guiding that practice. State practice is almost meaningless if a deontologically acceptable explanation does not accompany its execution.[125] Our State practice, without explanation, amounts to nothing more than fuel for criticism based on inconsistency or ignorance. In this regard, enough cannot be said about the importance of clearly engaging and communicating with the international community. To shape the law intentionally, we must communicate why certain decisions are consistent with the rule of law as we see it, and, if change is needed, our intent—both to effectuate the change itself, and to maximize our standing to do so.

Alone, neither the law governing domestic criminal enforcement nor that governing war is well situated to address the ascendance of terrorism. The work of the future is to adjust or perhaps merge these paradigms in a way that contemplates the future. Military commissions are as good a potential component to such a future legal regime as any. They represent both a well-founded precedent from the past, and a forward-looking change for the future. The task before us is not to reject precedent, but rather to build on the foundation of existing law—national security law, criminal law, and the law of armed conflict—as we seek to apply their relevant tenets, justly, to the challenges of the war on terrorism. We can expect that such change will be accompanied by a bit of anguish and perhaps a few missteps, but we must not be dissuaded by the fact that change never comes easily.

The law of war has been written primarily in the aftermath of crisis—crafted to address the concerns of past conflicts—with the hope of providing relevant guidance for those of the future. That hope having seen its limitations as applied to our current conflict, the law of war must be retooled to address the changed circumstances of the war on terrorism. A commander with whom I once had the privilege of serving was fond of saying, "if you want a new idea, go read an old book—it's all been done before." In military commissions, as reshaped to fit a unique and unforeseen adversary, we have something that is both old and new. In this same vein, we do well to recall the paradoxical words of Alexander Bickel who, praising the heroes among common law judges, characterized them as those who "imagined

the past and remembered the future."[126] The United States, in using military commissions to try terrorists, is shaping the law imparted by the past, all the while seeking to make it relevant, not just for today, but for tomorrow.

Notes

1. On November 13, 2001, the President of the United States issued a Military Order providing that "[a]ny individual subject to this order shall, when tried, be tried by military commission." Military Order of Nov. 16, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Federal Register 57,833 (Nov. 16, 2001) [hereinafter President's Military Order]. The initiation of military tribunals aptly illustrates the unforeseen legal challenges of the post–9/11 world. *See, e.g.,* Elisabeth Bumiller & David Johnston, *A Nation Challenged: Immigration; Bush Sets Option of Military Trials in Terrorist Cases*, NEW YORK TIMES, Nov. 14, 2001, at A1; Anne Gearan, *Terrorists Could Face Military Trial*, AP ONLINE, Nov. 14, 2001, *available at* 2001 WL 30244845.
2. This action was unexpected by most. William K. Lietzau, Address at the Harvard Program on Humanitarian Policy and Conflict Research Conference on *International Humanitarian Law and Current Conflicts: New Dilemmas and Challenges for Humanitarian Organizations* (Nov. 1, 2001) (answering a question regarding the possible use of military commissions by stating that while possible in a theoretical sense, military commissions were a thing of the past). Several authors were more prescient in recognizing the viability of military commissions to try terrorists. *See, e.g.,* Spencer J. Crona & Neal A. Richardson, *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism,* 21 OKLAHOMA CITY UNIVERSITY LAW REVIEW 349 (1996) (advocating the adoption of the military tribunal to try accused terrorists); Daniel M. Filler, *Values We Can Afford—Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson, id.,* at 409 (arguing that accused terrorists should be tried in civilian courts).
3. *See, e.g.*, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASHINGTON POST, Sept. 12, 2001, at A1; Eric Lipton, *Struggle to Tally All 9/11 Dead by Anniversary*, NEW YORK TIMES, Sept. 1, 2002, at 1 (reporting that the final World Trade Center death toll will drop no lower than about 2,750, not including the 10 hijackers. Counting the 233 killed in Washington and Pennsylvania, it will remain the second-bloodiest day in United States history, behind the battle of Antietam in the Civil War). The dead include citizens of more than 90 countries. A City of New York Office of the Comptroller estimated the overall economic loss to New York City resulting from the 9/11 attacks as totaling between 82.8–94.8 billion dollars. *See* http://www.comptroller.nyc.gov/bureaus/bud/reports/impact-9-11-year-later.pdf.
4. *U.S. Issues Warning on Terrorist Attacks; State Department's Concern Partly Based on Seizure of Explosives, Arrests in Spain*, LOS ANGELES TIMES, Dec. 15, 1989, at P2 (259 people aboard the plane and 11 on the ground were killed in the 1988 bombing of Pan American Flight 103). The first Bush Administration treated the problem of apprehending suspects as one of diplomacy and extradition, clearly a law enforcement matter. *See* Nejla Sammakia, *Libya Starts Parliamentary Process That Could Give Gadhafi Way Out*, ASSOCIATED PRESS, May 8, 1992, *available at* 1992 WL 5296910 (reporting that the United Nations had instituted sanctions on Libya that would continue until two Libyan suspects in the Pan Am bombing were turned over to either the United States or the United Kingdom). In the 1993 World Trade Center bombing, six people were killed and over 1,000 injured. Law enforcement officials conducted an extensive investigation, resulting ultimately in the apprehension, extradition, trial, and conviction in US

District Court of most of the suspects of the bombing, including Sheik Omar Abdel Rahman. Again, we observe what was unquestionably a law enforcement response. *See* United States v. Rahman, 837 F. Supp. 64 (S.D.N.Y. 1993) (stating that the United States charged Omar Ahmad Ali Abdel Rahman with crimes associated with the 1993 bombing of the World Trade Center). *See also Death Toll From Bomb Rises to 6; Searchers Sifting the Wreckage at World Trade Center Uncover the Body of a Missing Man*, ORLANDO SENTINEL, Mar. 16, 1993; Larry Neumeister, *Verdict: Sheik, All Co-defendants Guilty in Terror Trial*, ASSOCIATED PRESS, Oct. 2, 1995, *available at* 1995 WL 4408662. The 1998 embassy bombings in Nairobi, Kenya, and Dar es Salaam, Tanzania, claimed the lives of 12 Americans and over 200 Kenyans and Tanzanians. The United States conducted a one-strike military response, and indictments were issued against 15 individuals, four of whom were apprehended by foreign governments, extradited to the United States, and tried and convicted in US District Court. *See* Remarks by President William Clinton at Ceremony Honoring the Men and Women who Lost Their Lives in the Bombings of the Embassies in Kenya and Tanzania, Andrews Air Force Base, Maryland, The White House, Office of the Press Secretary (Aug. 13, 1998) ("The 12 Americans and the 245 Kenyans and Tanzanians were taken from us in a violent moment by those who traffic in terror and rejoice in the agony of their victims. We pledge here today that neither time, nor distance can bend or break our resolve to bring to justice those who have committed these unspeakable acts of cowardice and horror. We will not rest. We will never retreat from this mission."). *See* John Diamond, *Strikes Only Partly Successful, Reports Suggest*, AP ONLINE, Aug. 21, 1998, *available at* 1998 WL 6711944. See *U.S. Department of State, Office of the Spokesman, Fact Sheet, Steps Taken to Serve Justice in the Bombings of U.S. Embassies in Kenya and Tanzania (Aug. 4, 1999)*, *available at* http://www.state.gov/www/regions/africa/fs_anniv_steps.html. *See also* United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (stating that the United States charged Usama Bin Laden and others with crimes stemming from the bombing of the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania); *See also* Greg B. Smith, *Osama's Tech-Thug Pal Bombings Planner in Jail, Report Says*, NEW YORK DAILY NEWS, Mar. 18, 2002, at 9. International initiatives to address the terrorist threat also have reflected a predisposition to law enforcement. The United States responded to the Khobar Towers attack both by launching a law enforcement investigation and by commencing an international initiative that ultimately resulted in the negotiation and entry into force of the Terrorist Bombing Convention. International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 37 INTERNATIONAL LEGAL MATERIALS 249. We attempted to shore up weaknesses in the law enforcement model through treaties establishing a regime of *aut dedere aut punire* (extradite or prosecute) for terrorism offenses; *id.*, art. 8 (providing that States, in whose territory a person is present who has committed or is alleged to have committed an offense under the Convention, agree to investigate his involvement in the offense, and, if appropriate, take such person into custody for the purpose of prosecution or extradition. If a Party does not extradite the person, it is obliged, without exception whatsoever, to prosecute him.). Another example of this general emphasis is the Terrorist Financing Convention. International Convention for the Suppression of the Financing of Terrorism art. 10(1), Jan. 10, 2000, 39 INTERNATIONAL LEGAL MATERIALS 270 [hereinafter Terrorist Financing Convention].

5. *See* Dick Polman, *"War" is Now More than a Metaphor; Deadly Terror Attacks—and the Promised U.S. Response—Make a Long Overused Word Mean Just What It Says*, PHILADELPHIA INQUIRER, Sept. 13, 2001, at A5; Katherine M. Skiba, *Terror Hits Were "Acts of War,"* MILWAUKEE JOURNAL SENTINEL, Sept. 13, 2001, at 1A.

6. Joint Senate Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

7. The international community readily embraced the right of the United States to respond with armed force. *See, e.g.,* David Clark, *Terror in America: Mr. Blair Must Be Prepared to Stand Up to President Bush,* INDEPENDENT (LONDON), Sept. 14, 2001, at 4 (noting that "[c]lear evidence that Usama Bin Laden orchestrated [the 9/11] atrocities will necessitate military action to eliminate the threat he and his organisation pose"); *Bush Tells US to be Patient*, AUSTRALIAN FINANCIAL REVIEW, Sept. 17, 2001, at 1 (noting that President Bush "has broad commitments of international support for his response to the attacks" of 9/11 and that the "President of Pakistan, General Pervez Musharraf, agreed to help in whatever might be required").
8. *See* S.C. Res. 1368, U.N. SCOR, 4370th mtg., 40 INTERNATIONAL LEGAL MATERIALS 1277 (2001) [hereinafter 9/11 Resolution] (recognizing the "the inherent right of individual or collective self-defense in accordance with the Charter").
9. *See North Atlantic Treaty Organisation (NATO): Statement by NATO Secretary General, Lord Robertson*, 40 INTERNATIONAL LEGAL MATERIALS 1268 (2001) (resolution quoting Article 5 of the NATO Charter and emphasizing that the attack on the United States "shall be considered an attack on all" NATO members).
10. *See* Australian Prime Minister Media Release, Application of ANZUS Treaty to Terrorist Attacks on the United States ("The Government has decided, in consultation with the United States, that Article IV of the ANZUS Treaty applies to the terrorist attacks on the United States."), *available at* http://www.pm.gov.au/news/01_news.html. Article IV provides, in pertinent part, that: "Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Security Treaty between Australia, New Zealand and the United States of America (ANZUS), Sept. 1, 1951, 3 U.S.T. 3420; T.I.A.S. 2493; 131 U.N.T.S. 83. The Rio Treaty (Inter-American Treaty of Reciprocal Assistance), Dec. 3, 1948, T.I.A.S. 1838; 21 U.N.T.S. 77 [hereinafter Rio Pact], has been ratified by twenty-three States in the Western Hemisphere, including Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Cuba, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela. After the September 11th terrorist attacks, a special session of the General Assembly of the Organization of American States (OAS) being held in Lima, Peru on that very day "condemned in the strongest terms the terrorist acts . . . and reiterated the need to strengthen hemispheric cooperation to combat this scourge that has thrown the world and the hemispheric community into mourning." Ten days later, the OAS, acting pursuant to the Rio Pact, labeled the attacks on the World Trade Center and the Pentagon as "attacks against all the American States." See Terrorist Threat to the Americas, RC.24/RES.1/01, OAS Doc. OEA/Ser.F/II.24/RC.24/RES.1/01 rev. 1 corr. 1, at operative para. 1 (Sept. 21, 2001) (24th Meeting of Consultation of Ministers of Foreign Affairs).
11. *Lecture 1—Early Forms of Liability, in* OLIVER WENDELL HOLMES, THE COMMON LAW (1881).
12. *See* President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html ("We will . . . bring terrorists to justice.").
13. *See* Richard Morin & Claudia Deane, *Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights*, WASHINGTON POST, Nov. 29, 2001, at A1.
14. As a general rule, the community of nations has not as completely accepted the paradigm shift from law enforcement to war. This could be partly explained by the fact that it is the United States that most conspicuously associates armed conflict with use of the military instrument. Other governments use the military for some instances of domestic law enforcement, while the

United States has traditionally rejected the same. *See, e.g.,* The Posse Comitatus Act, 18 U.S.C. § 1385 (2004) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned. . . ."). Some academics have also suggested that it is appropriate to use the military instrument in an act of war as a matter of self-defense without triggering the laws of war. Thus, while most would agree that the Global War on Terrorism does not amount to a traditional armed conflict, some would argue that it does not amount to an armed conflict at all. This view should be rejected as amounting to a situation where there is almost no accepted legal regulation of the extraterritorial use of force.

15. The military response to the September 11, 2001 terrorist attacks on the United States was assigned the name Operation Enduring Freedom. The initial military objectives of Operation Enduring Freedom, as articulated by President Bush, included the destruction of terrorist training camps and infrastructure within Afghanistan, the capture of al Qaeda leaders, and the cessation of terrorist activities in Afghanistan. Long-term goals included the end of terrorism, the deterrence of State sponsorship of terrorism, and the reintegration of Afghanistan into the international community. *See* President George W. Bush, Address to a Joint Session of Congress (Sep. 20, 2001) and Address to the Nation (Oct. 7, 2001), *available at* http://www.globalsecurity .org/military/ops/enduring-freedom.htm.

16. *See* Roy Gutman, Christopher Dickey & Sami Yousafzai, *Guantanamo Justice?,* NEWSWEEK, July 8, 2002, at 34.

17. *See, e.g.,* Christopher Schroeder, *Military Commissions and the War on Terrorism*, 29 AMERICAN BAR ASSOCIATION LITIGATION 28, 32 (2002).

18. US CONST. art. II. § 2. *See also* Joan Biskupic & Richard Willing*, Military Tribunals: Swift Judgments in Dire Times*, USA TODAY, Nov. 15, 2001, at 1A.

19. STEPHEN M. DUNCAN, A WAR OF A DIFFERENT KIND: MILITARY FORCE AND AMERICA'S SEARCH FOR HOMELAND SECURITY 170–172 (2004); *see generally Note: Responding To Terrorism, Crime, Punishment, and War*, 115 HARVARD LAW REVIEW 1217, 1235–37 (2002) [hereinafter *Terrorism, Crime, Punishment, and War*].

20. County of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991).

21. *See* Classified Information Procedures Act of 1980 (18 U.S.C. App. III).

22. *See* Miranda v. Arizona, 384 U.S. 436, 467–72 (1966) (noting that the right to remain silent is "fundamental to our system of constitutional rule," while the "right to have counsel present at the interrogation is [an] indispensable [right]."). *But see* 148 Congressional Record S733 (daily ed. Feb. 13, 2002) (statement of Sen. Arlen Specter of Pennsylvania upon his introduction of a bill to establish procedures for military commissions, arguing that *Miranda* rights are appropriately employed with regard to trials by military commission).

23. *See, e.g.*, Senator Edward M. Kennedy Statement on the Pending Nomination of William Haynes (May 11, 2004) *available at* http://kennedy.senate.gov/~kennedy/statements/04/03/ 2004311703.html.

24. *See, e.g.*, *Terrorism, Crime, Punishment, and War*, *supra* note 19.

25. Joanne Mariner, O*J. and Osama, the Fear of a Highly Publicized Bin Laden Trial, and the Problem with Military Commissions*, FINDLAW LEGAL COMMENTARY, Nov. 26, 2001, *available at* http://writ.news.findlaw.com/mariner/20011126.html.

26. *See* Ryan H. Berry*, Modern Use of Military Tribunals: A Legal "Can" and a Political "Should"?,* 28 OHIO NORTHERN UNIVERSITY LAW REVIEW 789, 808 (2002) (noting that "the case of *United States v. Rahman* took nine months, involved seventy-one defense witnesses and resulted in a massive opinion. In its opinion, the US Court of Appeals for the Second Circuit

even praised the trial judge for his "outstanding achievement in the face of challenges far beyond those normally endured by a trial judge." All this was to bring nine men, tried at once, to justice. While it is laudable that the United States domestic system was able to handle this case, imagine the effect on the judicial system if over three hundred similar prisoners were brought to trial in the domestic courts. Placing these cases in one court, such as the Federal District Court for Alexandria, Virginia, would create a massive backlog for that court. Spreading the cases throughout the country would create a legal nightmare of differing decisions on identical issues across the circuits, leading to different treatment of similar cases. The Supreme Court would eventually have to resolve these potential controversies. . . .").

27. *See* Michael O. Lacey, *Military Commissions: A Historical Perspective*, ARMY LAWYER, Mar. 2002, at 49. Military commissions were utilized during the Civil War, the Second World War, and, in between, the Indian Wars, the Spanish American War, and the First World War, all employed the "commission concept to punish violations of the law of war." *See also* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY (2000).

28. *See, e.g.*, *Ex Parte* Quirin, 317 U.S. 1 (1942); *In re* Yamashita, 327 U.S. 1 (1946). Only in the Civil War's *Ex parte Milligan* decision did the Court limit the jurisdiction of such tribunals, holding that US citizens could not be tried by military commission in a state not invaded and not engaged in rebellion, in which the Federal courts were "open, and in the proper and unobstructed exercise of their judicial functions." *Ex parte* Milligan, 71 U.S. 2, 121, 221 (1866). *See also,* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME (1998) (providing a detailed history of the facts underlying the *Milligan* decision).

29. This dilemma is not unworkable, but it highlights the unintended consequences of the presumed preference for more developed judicial systems. By way of example discussed in greater detail below, Colombian soldiers are regularly involved in fighting an insurgency conducted by the Revolutionary Armed Forces of Colombia (known by its Spanish acronym, FARC) and other narco-terrorists. *See* Dan Burton & Barton Gillman, *Miscues in the Drug War*, WASHINGTON TIMES, Apr. 11, 1999, at B4. The military frequently kills these terrorists during armed conflict (and vice versa). If terrorists are captured, however, in compliance with the law, they must be submitted almost immediately to the normal domestic court system, which, in turn, can be influenced by the very terrorist groups the military is fighting. *See FARC Leaders Charged*, LATIN AMERICAN NEWS LTD., May, 15, 2001, at 228. A conversation with a Colombian military officer elicited this disturbing comment, "In a firefight, we try to kill as many of [the narco-terrorists] as possible before they can surrender. The ones we capture go before the courts and may end up back in the jungle—killing our relatives." Confidential interview with Colombian military officer, Spring 2004 (notes on file with author).

30. Person to Person (CBS television broadcast, Sept. 20, 1957), *quoted in* GERHARD VON GLAHN, LAW AMONG NATIONS 4 (1981).

31. The Security Council attempted in recent years to fill part of this void ad hoc—but the International Criminal Tribunals for the former Yugoslavia and Rwanda never were intended to replace the sovereign exercise of national jurisdiction to bring wrongdoers to justice. The International Criminal Tribunal for the Former Yugoslavia, headquartered at The Hague, was created by the Statute for the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter Statute of the ICTY]; The International Criminal Tribunal for Rwanda, headquartered at Arusha, Tanzania, was created by Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter Statute of the ICTR]. The International Criminal Court (ICC), which the United States does not view as an appropriate permanent international forum for addressing violations of the laws of

war, has been praised as inaugurating an end to the "era of impunity." Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter ICC Statute]. The ICC came into existence on July 1, 2002. It is the first permanent court ever established to investigate and try individuals for the most serious violations of international humanitarian law, including war crimes, crimes against humanity, and genocide. *See* Barbara Crossette, *Long-Range Justice Raises Fears for Sovereignty*, NEW YORK TIMES, July 1, 2001, §1 at 8 (quoting William Pace, convener of the Coalition for an International Criminal Court). But even its proponents agree that the benefit of the ICC lies primarily in encouraging the exercise of national jurisdiction. United Nations, General Assembly, 56th Session, Statement by the International Committee of the Red Cross, New York, Establishment of the International Criminal Court (Nov. 12, 2001), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/iwpList.

32. *See* President's Military Order, *supra* note 1, at Sec. 4(c)(2).

33. *But see* David Greenberg, Uncivil Courts: *America's Military Tribunals Through the Ages*, SLATE, Dec. 5, 2001, http://www.slate.com/?id=2059375&device= (arguing military tribunals are not normally kangaroo courts).

34. *See* President's Military Order, *supra* note 1, at Sec. 2, ¶ (a):

> The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determined from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaeda;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

35. *Id.*, at Sec. 3, Detention Authority of the Secretary of Defense; and Sec. 4, Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

36. *See, e.g.,* Joan Biskupic & Richard Willing, *Military Tribunals: Swift Judgments in Dire Times*, USA TODAY, Nov. 15, 2001, at 1A; Gearan, *supra* note 1; Bumiller & Johnston, *supra* note 1. *See generally* Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties Since September 11*, Sept. 5, 2002, at 32 (Claiming that the order creates a parallel criminal justice system in which defendants would have only those rights that the President or Secretary of Defense decide they would have, reciting a litany of specific concerns associated with the process accorded an accused tried by military commission, and asserting that some of the cherished principles on which the country is founded have been eroded or disregarded.).

37. Department of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commission of Certain Non-Citizens in the War Against Terrorism (Mar. 21, 2002) [hereinafter MCO No. 1].

38. Department of Defense, Military Commission Instruction No. 1, Military Commission Instructions (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission (Apr. 30, 2003) [hereinafter MCI No. 2]; Department of Defense, Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors (Apr. 15, 2004); Department of Defense,

Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel (Apr. 15, 2004); Department of Defense, Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel (Apr. 15, 2004); Department of Defense, Military Commission Instruction No. 7, Sentencing (Apr. 30, 2003); Department of Defense, Military Commission Instruction No. 8, Administrative Procedures (Apr. 20, 2003); Department of Defense, Military Commission Instruction No. 9, Review of Military Commission Proceedings (Dec. 26, 2003).

39. *See* Department of Defense Military Commissions, Presidential Decisions, *available at* http://www.defenselink.mil/news/presidential_decisions.html ("The President determined that there is reason to believe that each of these enemy combatants was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.").

40. *See* President William Clinton, Remarks About the Saudi Arabia Explosion (June 25, 1996), *available at* http://www.cnn.com/WORLD/9606/25/clinton.remarks/index.html ("The United States will be firm with terrorists. We will not make concessions. . . . If we find states supplying money, weapons, training, identification, documents, travel, or safe haven for terrorists, we will respond. Our aim is to demonstrate to these countries that supporting terrorism is not cost-free. We will bring terrorists to justice. We will . . . identify, track, apprehend, prosecute, and punish terrorists. Terrorism is crime, and terrorists must be treated as criminals."). *See* Department of Defense, Compendium, Terrorist Group Profiles, Nov. 1988, at 1 (Four days before Christmas, 1988, Pan American Flight 103 from London to New York exploded over Lockerbie, Scotland. All 259 passengers and 11 people on the ground were killed. In discussing his horror at the bombing, President Reagan stated "Now that we know definitely that it was a bomb, we're going to make every effort we can to find out who was guilty of this savage and tragic thing and bring them to justice." *See* http://www.pbs.org/wgbh/pages/frontline/shows/target/etc/script.html. *See generally* LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 654 (1991) (quoting President Reagan's remarks on signing an anti-terrorism bill on August 27, 1986). President Reagan also promulgated National Security Decision Directive 207, National Program for Combating Terrorism (Jan. 1986) (outlining the basic tenets of US policy for responding to international terrorism, whether conducted inside or outside US territory), *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-207.htm.

41. *See* US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (November 6, 2001) (concluding that under 10 U.S.C. § 821 and pursuant to his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks [hereinafter Legal Counsel Memo for Gonzales].).

42. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

43. Had an effective military tribunal system been extant in the Spring of 2003, the second historic role of military commissions—as an occupation court—might have been a relevant topic for discussion as well. Consider, for example, the potential utility of establishing military commissions to assist in maintaining security in occupied Iraq. Such commissions could have included Iraqi panel members and more efficiently established a judicial process for certain categories of offenses. Many agree that, had commissions been established in other contexts in more recent history, far greater consideration would have been accorded their use in Iraq.

Perhaps more importantly, we should recognize that Winthrop's articulation of historical precedent (*id.*) is merely a reflection of how the judicial arm of the military instrument developed in the 18th and 19th centuries. We should anticipate its evolution in the future as well. The use of commissions against individual members of transnational terrorist organizations might stand on its own as an independent example of the use of military commissions in the future.

44. *See supra* note 41.

45. Hirota v. MacArthur, 338 U.S. 197 (1948) (Douglas, J., concurring).

46. *See* Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 [hereinafter UCMJ], at 10 U.S.C. § 821. General Enoch H. Crowder, Judge Advocate General of the Army, appeared before Congress in 1916 as a sponsor for the adoption of the Articles of War and made it clear that the concept of military commission jurisdiction enacted in the Articles of War was meant to be preserved. He stated, "As long as the articles . . . provided that [persons subject to military law] might be tried by court-martial, I was afraid that, having made special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced." *See In re* Yamashita, 327 U.S. 1, 20 n.7 (1946); *see also* Madsen v. Kinsella, 343 U.S. 341 (1952) ("[Article 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient" (quoting General Crowder's testimony at S. Rep. No. 130, 64th Cong., 1st Sess. 40)).

47. 10 U.S.C. § 836.

48. *See, e.g.*, 18 U.S.C. §326 (providing that the Military Extraterritorial Jurisdiction Act of 2000 would not effect jurisdiction of military commissions); 10 U.S.C. § 828 (providing for employment of interpreters at military commissions); 10 U.S.C. § 3037 (noting that a judge advocate of the Army must prepare records of proceedings in military commissions); and 18 U.S.C. § 3172 (noting that the Speedy Trial Act does not apply to trials by military commissions).

49. *See, e.g.*, Jan E. Aldykiewicz, *Authority to Court-Martial Non-U.S. Military personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MILITARY LAW REVIEW 74, 145–48 (2001).

50. UCMJ art. 18 ("general courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818); UCMJ art. 21 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821.). *See* Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court?*, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 659, 673–75 (1996) (noting that a "United States court-martial trying an alleged war criminal would provide further safeguards. All of the protections accorded in the Hague Tribunal [ICTY] would be accorded. In addition, the accused would be protected by elaborate rules of evidence, such as those generally excluding hearsay. Were he convicted, the presentencing procedures would give him the benefit of relaxed rules of evidence to present matters in extenuation and mitigation, while continuing to impose strict rules on the prosecution. Were a sentence imposed on him, he also would receive several levels of direct appeal.").

51. The Uniform Code of Military Justice, was originally promulgated on May 5, 1950 as Pub.L. 81-506, 64 Stat. 107-49. The law took effect on May 31, 1951 and was codified at 10 U.S.C. §§ 801–946.

52. Manual for Courts-Martial, effective Apr. 1, 1928, at 213–16 (1936).
53. 10 U.S.C. § 821.
54. 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war.").
55. *See* Department of the Army, International and Operational Law Department, The Judge Advocate General's School, Operational Law Handbook 518 (2000) (It is DoD policy that a member of the armed forces who commits an offense that qualifies as a "war crime" will be charged with a specific article of the UCMJ.).
56. U.S. v. Calley, 46 C.M.R. 1131, 1137 (C.M.A. 1973).
57. 10 U.S.C. § 800, *et seq.* Manual for Courts-Martial, United States, Military Rules of Evidence 1102 (2002) [hereinafter MCM]. In fact, courts-martial now so mirror federal criminal proceedings that eighteen months after their effective date in the federal system, changes to the Federal Rules of Evidence are automatically applicable to courts-martial unless action to the contrary is taken by the President.
58. *See supra* note 38.
59. *See* MCO No. 1, *supra* note 37.
60. *Id.* at § 6.B(1) (stating that the commission must give "a full and fair trial"); *Id.* at § 5.B (stipulating that the defendant "shall be presumed innocent until proven guilty").
61. *See, e.g.,* Mariner, *supra* note 25. Unlike the civilian courts with their underpinnings of legislative activity and judicial review, the law of war has no similar mechanism for developing a baseline procedural framework for military commissions. Perhaps the best law of war analog exists vis-à-vis the common law characteristics of our domestic criminal law system—incremental changes in the law are rooted in a priori reasoning and guided by past practice. The common law of war, however, is truly a function of the practice of nation States. Fortunately, State practice with respect to many elements of the law of war has been limited; unfortunately, it is perhaps most limited with respect to the prosecution of violations of the law of armed conflict.
62. *See* MCO No. 1, *supra* note 37, at § 6.D(2)(d)("The Presiding officer may authorize any methods appropriate for the protection of witnesses and evidence.").
63. *See* ICC Statute, *supra* note 31; Statutes of the ICTY and ICTR, *id.*; (all establishing a "probative value"–based evidentiary admission policy).
64. *See* Polman, *supra* note 5; Skiba, *supra* note 5.
65. For example, they permit protective measures, including closed trial sessions, to accommodate the operational imperative of shielding intelligence information, methods, and sources.
66. The focus of this section is on only those areas most significantly impacted by the war on terror. This section does not purport to provide an exhaustive collection of pertinent law of war standards regarding the trial process.
67. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303, *reprinted in* THE LAWS OF ARMED CONFLICTS 409 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter 1929 Geneva Convention]. *See also* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.S.T.S. 85 [hereinafter Geneva Convention (II)]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]; Geneva Convention (IV) Relative to the

Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

68. Department of Defense, Chairman of the Joint Chiefs of Staff Instruction 5820.02B, Implementation of the DoD Law of War Program (Mar. 25, 2002).

69. For example, Article 36 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 67, at 422 [hereinafter Additional Protocol I], requires that the acquisition process include a legal review of all new weapons to determine whether they comply with pertinent provisions of international law. Note that the United States is not party to Additional Protocol I, but see Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419, 428 (1987) (declaring that it is US policy to consider parts of Additional Protocol I customary international law). The Defense Acquisition Program in turn requires a legal review of all intended weapon acquisitions—regardless of whether the treaty is applicable regarding a conflict with the likely adversary against whom the weapon might be used. Department of Defense, Directive 5000.1, The Defense Acquisition System (May 23, 2003), para E1.1.15.

70. *See* Geneva Conventions (I), (II), (III) and (IV), *supra* note 67; Additional Protocol I, *supra* note 69; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 67, at 483. This is not to say that the law of armed conflict is silent regarding the persons in question. It is well accepted that belligerents can be detained without charge until the end of hostilities. *See Ex Parte* Quirin, 317 U.S. 1, 31, 37 (1942); Colepaugh v. Looney, 235 F. 2d 429, 432 (10th Cir. 1956); *In re* Territo, 156 F. 2d 142, 145 (9th Cir. 1946). But Geneva Convention (III) only regulates the detention of those entitled to participate in hostilities. Moreover, additional questions not specifically addressed by relevant treaties arise in the context of the Global War on Terrorism, such as when the conflict that pertains to a particular unprivileged belligerent ends or what status a detainee has when apprehended in a location away from a traditional battlefield.

71. *See A Nation Challenged; Agency Differs with U.S. Over P.O.Ws,* NEW YORK TIMES, Feb. 9, 2002, at A9; Seth Stern & Peter Grier, *Untangling the Legalities in a Name*, CHRISTIAN SCIENCE MONITOR, Jan. 30, 2002, at 3.

72. Interview with Paul Grossreider, Director, International Committee of the Red Cross (ICRC), *Le Temps,* Jan. 29, 2002 ("Le droit humanitaire doit s'adapter sous peine d'être marginalize" *translated as* "Humanitarian law must adapt or risk marginalization."). The ICRC has since distanced itself from the Grossreider comment, clamoring for the trial or repatriation of the Guantanamo Bay detainees. *See generally* Report of the 28th International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,* Dec. 2–6, 2003 (emphasizing throughout that international humanitarian law is specifically designed to take account of both State security and individual rights).

73. Geneva Convention (III), *supra* note 67, art. 84 (stating, in part, "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 offence alleged to have been committed by the prisoner of war.").

74. *Id.*, art. 84 ("In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.").
75. *Id.*, art. 130; Geneva Convention (IV), *supra* note 67, art. 147.
76. Some Geneva Convention requirements are not reflected in the Military Commission Instructions promulgated for al Qaeda. For example, pursuant to Geneva Convention (III), *supra* note 67, art. 105, a prisoner of war is entitled, among other things, "to assistance by one of his prisoner comrades." These less substantively important provisions could be easily accommodated with additional implementing instructions were it to be decided that all the technical provisions of Geneva Convention (III), Article 102 were appropriate for application to unlawful combatants.
77. Additional Protocol I, *supra* note 69, art. 75.
78. *Id*. Article 75 reads, in pertinent, part:

> 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
>
> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) Anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) No one shall be compelled to testify against himself or to confess guilt;
>
> (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and

(i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

79. *See* Matheson, *supra* note 69. In the only recognized authoritative statement on the subject by a US Government official, Mr. Matheson, then US Department of State Deputy Legal Advisor, expounded at a law of armed conflict conference on those provisions of Additional Protocol I the United States deemed to constitute customary international law. He included Article 75's provisions among them.

80. Geneva Convention (III), *supra* note 67, art. 84.

81. *Id.*

82. *Cf.* Melvin Heard, Robert P. Monahan, William Ryan & E. Page Wilkins, *Military Commissions: A Legal and Appropriate Means of Trying Suspected Terrorists?* 49 NAVAL LAW REVIEW 71 (2002) (criticizing the "most significant weakness" in MCO No. 1—the lack of an independent appellate court).

83. *See* MCM, *supra* note 57, Rules for Courts-Martial 504, 505 (prescribing a military panel as the trier of fact). Moreover, if Geneva is interpreted as requiring that the trier of fact function be segregated in a different branch of government, several hundred years of military courts-martial practice would have to be invalidated as well. To an American audience, "ludicrous" may be an appropriate modifier for the above postulate that a military jury is not sufficiently "independent" to comport with modern standards. It would be equally ludicrous to suggest that the United States Senate, in ratifying the Geneva Conventions, was acceding to an international law standard that would afford alleged war criminals theoretically superior trial rights than those accorded US soldiers. We should be aware, however, that others may see things differently. Indeed, the European Court of Human Rights has done just that. In Findlay v. United Kingdom, 24 E.H.R.R. 221 (1997), that court found insufficient independence in British courts-martial to comply with parallel human rights provisions found in the European Convention on Human Rights. Findlay at para. 59. The European Court of Human Rights, which has authority over the United Kingdom, nullified a British court-martial and established a rule that required an entire revamping of the United Kingdom's military justice system. *See* Simon P. Rowlinson, *The British System of Military Justice*, 52 AIR FORCE LAW REVIEW 17 (2002). In articulating the rule of law we deem both correct under currently accepted norms and appropriate for a future that involves an

ongoing war on terrorism, we must be cognizant of European and other sensibilities in this area and ensure we are not unwittingly setting undesirable precedent.

84. *See* Geneva Convention (III), *supra* note 67, arts. 84, 85, 102.

85. *Id.*, art. 102.

86. *See* Legal Counsel Memo for Gonzales, *supra* note 41.

87. *See* Geneva Convention (III), *supra* note 67, art. 4.

88. The White House, Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002) [hereinafter White House Fact Sheet—Status of Detainees], *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

89. President's Military Order, *supra* note 1, at Sec. 2. One of the negotiators of the 1949 Conventions has argued that only courts-martial are now legally available for war crimes trials. *See, e.g.*, Raymund T. Yingling & Robert W. Ginane, *The Geneva Conventions of 1949*, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW 393 (July 1952). It is not clear what consequences this reading of Article 102 might impose on the United States, but at the very least, the President's Military Order language prohibiting trial of US citizens becomes problematic, if not as a legal issue, then certainly as one of international public relations.

90. *See* Geneva Convention (III), *supra* note 67, art. 99 (beginning the chapter in which article 102 is contained with language implying that the chapter will discuss offenses relegated under the detaining power's law—i.e., post-capture offenses).

91. *Id.*, art. 102.

92. Geneva Convention, *supra* note 67.

93. *In re* Yamashita, 327 U.S. 1 (1946).

94. Geneva Convention (III), *supra* note 67, art. 85 (providing that "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.").

95. *See* Yingling & Ginane, *supra* note 89 (concluding, in an article published shortly after the negotiation of the 1949 Conventions, that the courts and the procedure utilized must be the same for prisoners of war as for the armed forces of the detaining power—even with regard to pre-capture offenses). A more recent paper authored by Ed Cummings, Deputy Legal Advisor to the US Department of State, reached this same conclusion.

96. Geneva Convention (III) essentially retained the 1929 language that ultimately became Article 102, but the new additive provision, Article 85, had no parallel in the 1929 work.

97. Geneva Convention (III), *supra* note 67, art. 85. An expansive reading of Article 85 would make superfluous another provision of the Convention—Article 84—also first added in 1949 (suggesting that if a choice of courts is available; military courts must be used unless civilian courts have jurisdiction.) If the "same" courts must be used for pre-capture crimes, however, then there is no choice of courts as described in Article 84, and the language is meaningless.

98. *Id.*, arts. 99–100.

99. *Id.*

100. The terms of Article 84 suggest just such a reading of Article 85. Article 84 turns on jurisdiction; it requires trial 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 to the particular offense alleged to have been committed by the prisoner of war."

101. In the course of the *Calley* case, there was some discussion among prosecutors about whether Calley should be charged under provisions of 10 U.S.C. § 821 with the commission of war crimes in addition to the UCMJ charges for the substantive offenses underlying such war crimes. Prudential concerns resulted in the charging only of non-law of war charges. U.S. v. Calley, 46 C.M.R. 1131 (1973).

102. This interpretation is rife with inherent subjectivity. A random sampling of the meaning of Article 102 among uniformed judge advocates would probably yield a belief that the provision requires trial by court-martial—simply because that is the forum with which most have the greatest familiarity.
103. That is, if a certain subset of criminal offenses is applicable for consideration, then a court-martial would undoubtedly be the most prevalent forum, both historically and with respect to future probability.
104. That courts-martial charges have been brought against those accused in the prisoner abuse scandal of Abu Ghraib provides continued support for this proposition. *See, e.g.,* Sergeant Javal S. Davis—Charged under the UCMJ with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees; and making a statement designed to deceive an investigator; and Corporal Charles Graner—Charged under the UCMJ with conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees; committing indecent acts; adultery with Private First Class England; and obstruction of justice. Charge sheets available at http://news.findlaw.com/hdocs/docs/iraq/. *See also* Edmund Sanders & Richard Serrano, *Contrite GI Pleads Guilty to Abuse*, LOS ANGELES TIMES, May 20, 2004 ("Choking back tears and expressing remorse, US Army Spc. Jeremy C. Sivits pleaded guilty Wednesday in Baghdad, Iraq, to abusing detainees at the Abu Ghraib detention center and was demoted, sentenced to a year in military prison, and expelled from the Army. The sentence makes him the first US soldier court-martialed in an evolving scandal that authorities say could reach beyond the seven soldiers implicated so far."). *See also Hearing Scheduled for Pfc. Lynndie England on Prisoner Abuse Charges, Lawyer Says*, THE ASSOCIATED PRESS, May 28, 2004 (noting that "Army Pfc. England, who appeared in Abu Ghraib prison photographs pointing at Iraqi prisoners' genitals and holding a leash attached to a detainee, will face a military court hearing known as an "Article 32," scheduled for June 21–25, at Fort Bragg, North Carolina. The Article 32 is a proceeding where military prosecutors present evidence and a judge decides whether to go forward with a court-martial. It is similar to a civilian grand jury. England is one of seven soldiers facing military charges in the Abu Ghraib prison scandal. England is charged with assaulting Iraqi detainees, conspiring with Spec. Charles Graner Jr. to mistreat the prisoners and committing an indecent act by forcing prisoners to masturbate."), *available at* http://ap.tbo .com/ap/breaking/ MGBOZ4HGSUD.html.
105. *See*, *e.g.*, Geneva Convention (III), *supra* note 67, art. 84 (authorizing trial by civil courts when such courts have jurisdiction over "the particular offense alleged to have been committed"). *See also* Yingling & Ginane, *supra* note 89 (arguing that Geneva limited the Supreme Court's decision in *Yamashita* approving differing treatment of POWs vis-à-vis US service members "for a like offense").
106. The War Crimes Act of 1996, 18 U.S.C. § 2441 (war crimes); 18 U.S.C. § 371 (conspiracy).
107. The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 702(a), 110 Stat. 1214, 1291–94 (codified at 18 U.S.C. § 2332b)(defining the charge of "material support to terrorism").
108. The War Crimes Act, *supra* note 106, at § 2441(c).
109. *Id*. at § 2441(b).
110. *Id.*
111. *See* 10 U.S.C. § 802 (prescribing that "prisoners of war in custody of armed forces" are subject to the UCMJ).
112. *See* MCM, *supra* note 57.
113. *Id.*
114. *See, e.g.*, U.S. v. Calley, 46 C.M.R. 1131 (1973).

115. MCM, *supra* note 57, part III (2002).
116. *Id.*
117. Treating prisoners of war "the same" at a court-martial raises problematic jurisdictional issues as well. For example, the UCMJ limits its jurisdiction over US armed forces to crimes committed after the member is under military control, and thus has no jurisdiction over pre-enlistment or pre-commission crimes. Because Article 102 requires that prisoners of war be treated the same way US armed forces are treated, one might argue that a court-martial has no jurisdiction over pre-capture crimes.
118. *Ex Parte* Quirin, 317 U.S. 1 (1942).
119. Mudd v. Caldera, 134 F. Supp. 2d 138 (D.D.C. 2001) (citing *Ex Parte Quirin*). Only one case has limited the reach of military commission jurisdiction over US citizens. *See Ex Parte Milligan,* 71 U.S. 2 (1866). In *Milligan*, the Court determined that a US citizen who was not a belligerent—and who resided in a state without active hostilities and where the civil courts were open and operating—could not be tried by military commission. *Id.* These considerations would not serve to limit the jurisdiction of military commissions over military members, however. *Id.* at 118 (citing accused's lack of military status as a factor in finding that military commission lacked jurisdiction).
120. *See* WINTHROP, *supra* note 42.
121. *Id.* (noting that, *inter alia*, officers' servants, government detectives, medical cadets, and lieutenants in the revenue service were tried by military commission in the Civil War).
122. This would, however, not only create obvious political concerns, it would also raise constitutional issues. For example, in response to a defense argument that the Fifth and Sixth Amendments required trial by jury, the *Quirin* Court held that the "offenders were outside the constitutional guarantee of trial by jury, not because they were aliens but only because they had violated the law of war." *Quirin*, *supra* note 118, at 44. Read broadly, the decision may be interpreted as placing all military commission proceedings outside of the realm of Constitutional guarantees. *Id.* at 45 ("We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission. . . ."). But there is some risk that a reviewing court may read *Quirin* more narrowly and find that some constitutional provisions do apply at military commissions convened to try US citizens. In the case of a US citizen for example, if the 6th Amendment Confrontation Clause was found to apply, commission hearsay rules might be restricted to reflect that right. This would raise the concern, of course, that the trials of prisoners of war would no longer be using the "same procedures" as trials of US service members (most of whom are citizens).
123. Except perhaps in the unique case when a service member was prosecuted for terrorist-related activities using either an enumerated violation of the UCMJ or an assimilated crime charged as a violation of Article 134 of the UCMJ.
124. *See* MCI No. 2, *supra* note 38 (requiring that the contextual element for each offense, when read in light of definitions, mandates a war nexus).
125. *See* Remarks by Alberto Gonzales, Counsel to the President, American Bar Association Standing Committee on Law and National Security, Washington, D.C., Feb. 24, 2004, *available at* http://usinfo.state.gov/dhr/Archive/2004/Mar/17-834301.html.
126. Bickel was quoting Sir Lewis Bernstein Namier in an address originally delivered in the 1969 Oliver Wendell Holmes Lecture series at Harvard Law School, *reprinted in* ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).