
Which Courts Should Try Persons Accused of Terrorism?

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Abstract

The article considers the advantages and disadvantages of trying terrorists before regular US civilian courts, before military tribunals, before courts outside the United States or before an international tribunal. While civilian courts have problems with maintaining security and handling classified information, they possess a high degree of legitimacy. Military tribunals can be efficient in some ways, but their constitutional basis is questionable, depending largely on whether there is a 'war' going on. Foreign courts will occasionally have jurisdiction over persons captured in their territory, but some of them follow procedures that discredit them in the eyes of advanced states. The chances of an international criminal tribunal suitable for terrorist cases coming into existence in the near future do not seem good. The article concludes that, in most cases, the regular US courts will be preferable.

1 Introduction

Immediately after the attacks of September 11, the cry went up that the perpetrators should be brought to justice or that justice should be brought to the perpetrators. Osama bin Laden was wanted dead or alive (with some indications that the former was the preferable outcome). This demand eventually raised the question of which court, existing or to be created, should try cases involving charges of terrorist crimes. This article considers which courts may try the terrorists: the regular US civilian courts; the military commissions envisaged by the presidential order of 13 November 2001; the criminal courts of other countries; and a possible international criminal court. The article considers the advantages and disadvantages of each option. The article does not consider a further possibility, that of trial by regular courts-martial,

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since no support for that option has emerged.¹ Finally, the article notes that there is a further alternative that the US Government may in fact have adopted — to keep its captives in detention indefinitely, thereby avoiding confronting these choices. This option, too, has its problems. The article concludes that resort to the civilian courts is generally preferable.

2 US Civilian Courts

US civilian courts have had considerable experience in trying terrorists, dating back a century to when anarchists such as the man who assassinated President McKinley constituted a much feared terrorist movement. In fact, a trial in a case entitled *United States v. Osama bin Laden*² was moving ahead in the United States District Court in Manhattan even as the planes hit the World Trade Center towers. Three noteworthy cases involving supposed terrorists — Moussawi, Reid and Lindh — have been brought in civilian courts, as well as some minor ones. That is not to say that the question of their suitability is not a relevant one that should be reopened. Our discussion begins with the doubts critics have expressed.

First, we have the question of security — are judges and jurors being exposed to unreasonable risks in terms of retaliation by terrorist groups in response to their convicting and sentencing fellow terrorists? The ferocity of Al-Qaeda's actions lends credibility to such fears. In a small number of cases we have experienced violence of strictly domestic origins against judges, jurors and witnesses; for example, in *In Re Neagle* a US marshal killed a man about to attack a Supreme Court justice on circuit.³ However, steps can be taken to minimize the risk. Metal detectors and body searches are often employed. Newer courthouses are designed with a view to separating judges and jurors from others who may bear them ill-will. Judges can be assigned bodyguards and steps can be taken to minimize the chances of disclosing the identity of jurors. Nevertheless, there is a problem here,⁴ one which points towards using commissions staffed by military officers who, even if identified, work, and sometimes live, in more secure environments.

Secondly, there are concerns about the confidentiality of sensitive information in a civilian trial.⁵ Courts are bound by rules which aim to guarantee that persons on trial for criminal offences can examine the prosecution's evidence and other evidence that might serve to exculpate them. There has come into use the term 'graymail' to denote

¹ The possibilities of using courts-martial are explored in Aldykiewicz, 'Authority to Court-Martial Non-US Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts', 167 *Military Law Review* (2001) 74; and Everett and Silliman, 'Forums for Punishing Offenses Against the Law of Nations', 29 *Wake Forest Law Review* (1994) 509.

² Several rulings on legal points were laid down in *United States v. Bin Laden*, 92 F Supp 2d 189 (SDNY 2000).

³ *In Re Neagle*, 135 US 1 (1890).

⁴ Concerns about security are spelled out in Wedgwood, 'Al-Qaeda, Terrorism and Military Commissions', 96 *American Journal of International Law* (2002) 328 at 331.

⁵ See *ibid.*, at 330–331.

cases in which the defence has been able to negotiate a relatively favourable disposition of the charges by threatening to uncover evidence the government wishes to keep secret. The Classified Information Procedures Act⁶ was enacted to minimize that problem. However, the basic problem facing the prosecution remains unsolved: suppose that a judge finds that the evidence he or she reviews *in camera* is in fact relevant to the accused's defence and that the problem cannot be cured by paraphrasing or bowdlerizing the evidence. The defendant's constitutional right to have that evidence available must be respected.

Doubts about the ability of civilian courts to act speedily — particularly in comparison with military tribunals — have been raised. Because of the venue provision relating to trials of extraterritorial crimes, the government has been able to bring several of these cases in the US District Court for the Eastern District of Virginia which is well known for the speed with which it disposes of cases. Nonetheless, considerable time has elapsed in pre-trial manoeuvring, which is to be expected in complex cases, particularly where the death penalty is potentially involved. The proceedings of the tribunals in the aftermath of the Second World War were certainly expeditious — indeed, some critics found them much too expeditious.⁷ Some trials would be more expeditiously and efficiently handled outside the United States — a point in favour of military courts, since US civilian courts do not sit abroad.

Civilian courts may also have to struggle with certain problems arising from the way in which the accused were handled before arraignment. Normally, the US Constitution is read as requiring that the accused have a judicial hearing within 48 hours of arrest.⁸ Federal law, however, calls for indictment within 30 days of arrest.⁹ Case law does, however, give some latitude for special circumstances, and the circumstances under which terrorists were arrested in foreign countries and in combat conditions would surely justify substantial delays in bringing them before a judge. Such delays plainly took place in the cases of US citizens tried as traitors after the Second World War.¹⁰ Controversy would also arise concerning the use against the defendant of a statement made by the defendant after intensive interrogation aimed primarily at developing information that would be useful for intelligence purposes. Such interrogations were most likely not consented to and took place under conditions not permitted by the *Miranda* rules. The statements might even be deemed not to pass the test of being made voluntarily.¹¹

Against these doubts must be weighed some significant advantages of the civilian

⁶ 18 USCA App 3. For interpretations, see *United States v. Poindexter*, 725 F Supp 13 (DDC 1989); and *United States v. Baptista Rodriguez*, 17 F 3d 1354 (11th Cir. 1994).

⁷ Consider, for example, the dissenting opinion of Justice Rutledge in *Homma v. Patterson*, 327 US 759 at 762 (1946) (defence counsel denied continuance beyond 15 days between arraignment and trial).

⁸ *County of Riverside v. McLaughlin*, 500 US 44 (1991).

⁹ 18 USC §§ 3161–3174. See Wayne LaFave, Jerold Israel and Nancy King, *Criminal Procedure* (3rd ed., 2000), chapter 18.

¹⁰ E.g. *Gillars v. United States*, 182 F 2d 962 (DC Cir. 1950).

¹¹ See *New York v. Quarles*, 467 US 649 (1984), allowing the use in a criminal trial of a statement made in response to questions based on 'public safety' grounds.

courts. The judges of the US federal system enjoy a reputation both at home and abroad for independence and impartiality. A conviction in that system would be convincing to all fair-minded observers. Similarly, such courts would be much more likely than a military tribunal to obtain the cooperation of foreign authorities in terms of extradition or assistance in obtaining witnesses or evidence. To this must be added the fact that the first case to be processed under the military tribunal system would produce a flood of motions, arguments and appeals that would impose major costs on the prosecution. The federal courts' advantages are apparent.

3 Military Commissions

On 13 November 2001, President Bush issued a military order¹² providing for the trial by military commission of persons (excepting citizens of the United States) who committed or aided and abetted terrorist crimes, including but not limited to Al-Qaeda members. In discussing military commissions we face an institution as yet untested, at least in any context much resembling the post-September 11 situation. Their use in US history has been sporadic, and they have been used in and after wars declared by Congress or in the Civil War (i.e. either a war or an insurrection).¹³ Military commissions were used, for example, in the trial of British Major John Andre for espionage connected with Benedict Arnold's treason, in the trial of Captain Wirz, commander of the Andersonville prison camp during the Civil War,¹⁴ in the proceedings against the conspirators in the assassination of President Abraham Lincoln,¹⁵ and in the trials of Generals Yamashita and Homma in the aftermath of the Second World War.¹⁶ In precedential terms, the case most relied upon is *Ex parte Quirin*, the case of the Nazi saboteurs who landed from a German submarine on Long Island and Florida in 1942.¹⁷ The majority of such cases emerged from military courts established during reconstruction of the South in the aftermath of the Civil War.¹⁸

¹² 66 Fed. Reg. 57, 833 (16 November 2001).

¹³ There are some examples of the use of military commissions during Indian wars — which may be explicable as cases of insurrection where civilian courts were unavailable. See Lacey, 'Military Commissions: A Historical Survey', *Military Lawyer* (March 2002) 41 at 45.

¹⁴ Laska and Smith, "'Hell and the Devil": Andersonville and the Trial of Captain Henry Wirz, CSA, 1865', 68 *Military Law Review* (1975) 77.

¹⁵ Curiously, the question of the legality of the military trial of Dr Mudd for setting John Wilkes Booth's leg after the killing was recently in litigation although he was pardoned by President Andrew Johnson. *Mudd v. Caldera*, 134 F Supp 2d 138 (DDC 2001), appeal dismissed, 309 F 3d 819 (DC Cir. 2002). For a recent review of the case, see James Swanson and Daniel Weinberg, *Lincoln's Assassins: Their Trial and Execution* (2001).

¹⁶ *In Re Yamashita*, 327 US 1 (1946); *Homma v. Patterson*, 327 US 759 (1946).

¹⁷ *Ex parte Quirin*, 317 US 1 (1942). For background, see Belknap, 'The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case', 89 *Military Law Review* (1980) 59.

¹⁸ This history has never been fully explored. For some references, see William Winthrop, *Military Law and Precedents* (2nd ed., 1920) 831–862.

Given the context of the 2001 presidential order, any analysis requires a careful treatment of the issues that will be contested when such cases come to be heard.¹⁹

First, there are fundamental issues of constitutionality. The founders were hostile to military jurisdiction. They had experienced it under the auspices of King George III, and then memorialized that hostility in the Declaration of Independence.²⁰ When they came to draft the Constitution, they limited military courts by requiring that the right to a grand jury and trial by a petty jury be guaranteed except in cases 'arising in the land and naval forces'. In a series of cases in the 1950s, the Supreme Court held that court-martial jurisdiction could not be extended to civilian spouses accompanying military personnel or to persons who had been discharged from the armed forces.²¹ Practice and case law have sanctioned another exception: the Constitution says that the writ of *habeas corpus* may be suspended in case of invasion or rebellion; this has been interpreted as permitting the substitution of military for civilian courts in areas affected by such conditions.²² Finally, practice and case law, from the time of the founders onwards, have authorized the use of military tribunals to try crimes against the laws of war. It is this last exception that concerns us here.

Secondly, the same set of issues that surrounds the question of constitutionality comes up again as a matter of congressional intent: did Congress intend to authorize military commissions under these circumstances? The statutory text is the provision of the Uniform Code of Military Justice which provides that the provisions of the Code conferring jurisdiction on 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'.²³ Since the two statutes referred to both use the term 'war', as does the phrase 'law of war', the issue arises of

¹⁹ Analyses of military courts to date include Solis, 'Military Commissions and Terrorists', in Eugene Fidell and Dwight Sullivan (eds), *Evolving Military Justice* (2002) 195; Katyal and Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals', 111 *Yale Law Journal* (2002) 1259; Bradley and Goldsmith, 'The Constitutional Validity of Military Commissions', 5 *Green Bag* (2nd ser.) (2002) 249; Paust, 'Antiterrorism Military Commissions: Courting Illegality', 23 *Michigan Journal of International Law* (2001) 1; Lacey, 'Military Commissions: A Historical Survey', *Army Lawyer* (March 2002) 41; Anderson, 'What to Do with Bin Laden and Al-Qaeda? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base', 25 *Harvard Journal of Law and Public Policy* (2002) 591; Fletcher, 'On Justice and War: Contradictions in the Proposed Military Tribunals', 25 *Harvard Journal of Law and Public Policy* (2002) 635; and Orentlicher and Goldman, 'When Justice Goes to War: Prosecuting Terrorists Before Military Commissions', 25 *Harvard Journal of Law and Public Policy* (2002) 653.

²⁰ The British experience is recounted in Frederick Wiener, *Civilians under Military Justice: The British Practice Since 1689 Especially in North America* (1967), chapters V and VI.

²¹ *Reid v. Covert*, 354 US 1 (1954); *United States, ex rel. Toth v. Quarles*, 350 US 11 (1955).

²² *Ex parte Milligan*, 71 US (4 Wall.) 2 (1866).

²³ Other provisions of the Uniform Code of Military Justice give the President power to prescribe the procedure in cases before military commissions (10 USC § 836, Article 36) and authorize military commissions to punish any person for disruptive behaviour (10 USC § 848, Article 48).

what Congress meant by ‘war’. There are good reasons for a restrictive interpretation. As the Supreme Court said in *Coleman v. Tennessee*:²⁴

With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.

It has been argued that the President has inherent commander-in-chief power to convene military commissions and that the statutory references are merely confirmatory of that power. If so, it would still seem that there must be a war in progress to justify exertion of that power.

A *The Declared War*

After the attacks on the World Trade Center and the Pentagon, it was common to draw upon Pearl Harbor as an analogy and to conclude that the US was at war. Those who remember 7 December 1941 may be more inclined to see differences rather than similarities. The Second World War was not only declared to be such but involved drastic measures curtailing the freedoms and entitlements of US citizens. Selective service, rationing, war bond drives, increased taxes, and civilian service such as aircraft spotting and air raid warnings brought home the seriousness of the situation and the sacrifices that large numbers of Americans were making in the armed forces. By contrast, September 11 coincided with major tax cuts and calls to maintain spending to protect prosperity. We also remember vividly the termination of the war in 1945, which was a clear-cut and memorable event. There will be no comparably sharp cessation of the war on terror.

There was once a ‘classical’ concept of war; it began with a declaration by one state to another; there was (and still is) a Hague Convention prescribing the form of such a declaration.²⁵ The war continued until there was a treaty of peace (though the fighting might stop with an armistice to permit a peace to be negotiated). During such a war, the nationals of the other party were ‘enemies’, and other states were ‘neutrals’ and obliged to behave as such. There were always some exceptions to that usage as we will see. This unitary concept of ‘war’ has been blurred by recent national and international behaviour and semantics. Where it was once thought that war was a matter of choice for nations, the Kellogg–Briand Pact of 1928 had its parties renouncing war as an instrument of national policy,²⁶ and the United Nations Charter generally outlawed war. Painful and protracted violence has since been treated as ‘non-war’. Embarrassment about the word ‘war’ causes various semantic awkwardnesses. For example, Congress used the term ‘War Powers Resolution’.²⁷ In fact, it is

²⁴ 97 US 509 at 515 (1878).

²⁵ The Opening of Hostilities (Hague III), signed 18 October 1907, 36 Stat. 2259, 1 Bevens 619.

²⁶ Treaty Providing for the Renunciation of War as an Instrument of National Policy, done at Paris, 27 August 1928, 46 Stat. 2343, 2 Bevens 732. Article I provides that the signatories ‘condemn recourse to war for the solution of international controversies and renounce it as instrument of national policy in their relations with one another’.

²⁷ 50 USC §§ 1541–1548.

about ‘hostilities in the absence of a declaration of war’. Writers find it hard to avoid the forbidden word; it would be hard to entitle a study of the morality of fighting ‘Just and Unjust Hostilities’.

B *Imperfect Wars*

There were always exceptions to the idea that there had to be a declaration of war before the United States began hostilities against another state. In the early days of the republic, the US carried on naval operations against France in what the courts termed an ‘imperfect war’.²⁸ The US also fought the Barbary states to retaliate for what was the equivalent of the attack on the *USS Cole*.²⁹ Since 1945, the US has not declared war even once, but has been involved in bloody and protracted fighting in Korea and Vietnam. One of the semantic problems is a doubt as to the term to use for something that one does not want to call a war but is more exciting than peace. The old locution ‘imperfect war’ is accurate but unappealing. Such a state of affairs is an ‘emergency’. Legislation gives the President various powers in wars and national emergencies, although these are less than the full constitutional commander-in-chief powers one has in a real war (we learned that much from the *Steel Seizure* case). One complication is that some emergencies are not wars — for example the financial crises of 1933 under President Roosevelt³⁰ and of 1971 under President Nixon.³¹ The international law terminology is usually ‘armed conflict’ between states.

Courts could not lay down a single rule as to when a ‘war’ existed that was suitable for all questions, but had to decide whether there was a war for the particular issues involved in each case before them. Thus the Korean unpleasantness was held to be a war for the purposes of the provisions of the Uniform Code of Military Justice raising the penalties for sleeping on guard duty,³² but the fighting in Vietnam was held not to be a war for the purposes of the provision of the Uniform Code of Military Justice extending court-martial jurisdiction to ‘persons serving with or accompanying an armed force in the field’.³³ The Court of Military Appeals said that, although the fighting in Vietnam ‘qualifies as a war as that word is generally used and understood . . . such recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction’. In the classic *Steel Seizure* case, the Supreme Court held that during the Korean crisis President Truman did not have the same power to seize steel mills that President Roosevelt had exercised during the Second World War.³⁴ Similarly, nobody has suggested that the statute dating back to 1917 which forbids the sending of messages outside the United States in time of war except through the postal service and subject to presidential

²⁸ *Bas v. Tinney*, 4 US (4 Dall.) 37 (1800).

²⁹ Abraham Sofaer, *War, Foreign Affairs and Constitutional Power* (1976) 208–224.

³⁰ *Norman v. Baltimore and Ohio RR*, 294 US 240 at 295 (1935).

³¹ *United States v. Yoshida International Inc.*, 526 F 2d 560 (CCPA 1975).

³² *United States v. Bancroft*, 3 CMA 3 (CMA 1953).

³³ *United States v. Averette*, 19 CMA 363 (CMA 1970).

³⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952).

ensorship is still applicable.³⁵ Meanwhile, a tendency has developed to use the word ‘war’ in connection with struggles against poverty, drugs or crime. A strong case can be made for the proposition that the authorization to use military commissions is at the upper end of the scale in terms of drastic effects, and should not therefore be used except in the case of a declared war.³⁶ That is what the founders had in mind when they drew boundaries around military jurisdiction, and that licence should not be extended.

A second line of argument would be to the effect that, even with a relaxed construction of ‘war’ that would have allowed military commissions during such an undeclared situation as the Korean conflict, the struggle with Al-Qaeda does not make the grade. A war must involve another state and not simply a private criminal entity.³⁷ The matter gets blurred again because of the connection between Al-Qaeda and the former Taliban regime. It is possible to join the two entities together and thus find that the US assault on Afghanistan amounted to a war. There are curious similarities with a case arising out of operations in China to suppress the Boxer Rebellion in 1900 — which involved a combination of a fanatical anti-Western movement and a government that, at least tacitly, protected it. *Hamilton v. McClaghry*³⁸ held that there was a ‘war’ within the meaning of the then articles of war governing court-martial jurisdiction. In fact, most discussions of legal issues surrounding operations in Afghanistan, in particular those concerning the treatment of prisoners, assumed that it was an ‘armed conflict’ between High Contracting Parties to the Geneva Convention.³⁹

One problem with this approach is that it can be strongly argued that, if there was a ‘war’ between the United States and Al-Qaeda/Taliban, it ceased when the US forces and their allies entered Kabul and the new government was recognized. The fact that US troops are assisting the new government by helping it overcome pockets of resistance is not sufficient to establish an international conflict. The force of this argument grows with the passage of time.

C The War Against Terror

One argument in support of military commissions is that there is a continuing ‘war against terrorism’ beyond what is happening in Afghanistan. This matches the wars on drugs, crime and poverty that have been proclaimed from time to time by the US Government. Nothing could be more dangerous to liberty in the United States than maintaining a state of ‘war’ until terrorism is ended, that is, until the Greek kalends, it would authorize the imposition of a wide range of freedom-constricting controls

³⁵ 50 USC App § 3(c) (1990).

³⁶ See Katyal and Tribe, *supra* note 19.

³⁷ *Pan American Airways Inc. v. Aetna Casualty & Surety Co.*, 505 F 2d 989 at 1013–1015 (2nd Cir. 1974) (United States not at war with Popular Front for the Liberation of Palestine for insurance policy purposes).

³⁸ 136 Fed. 445 (CCD Kans. 1905).

³⁹ Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, UST 3316, 75 UNTS 135, Article 2. Some provisions apply to an ‘armed conflict not of an international character’: see Article 3.

against an amorphous enemy. Congress determined in the National Emergencies Act of 1976⁴⁰ that it was grossly excessive that successive presidents had continued without interruption the emergency declared by President Truman in 1950. A continuing war combined with the powers that it entails would be far worse.

D *What Are War Crimes?*

If military commissions are legitimate and are used, the question will arise as to what are crimes against the laws of war and whether they include crimes against humanity and crimes against civilian criminal law. The war crimes analogy holds well for those who participated in the attacks on the World Trade Center since those individuals were assaulting civilians without a legitimate military target; the Pentagon case is more complicated, but retains the element that the individuals in question did not wear uniforms as they did their deadly work. But these people are dead and beyond the jurisdiction of any human court. It seems probable that one could prosecute anybody who could be shown to have given the order to undertake the attack — although it would not be as easy to prove as in the Second World War cases where the accused generals were in a formal chain of command above those who actually committed the atrocities.⁴¹ International criminal law has also grappled with the question of the responsibility of subordinates — when are they excused by their having received superior orders? But that law has little to say about ‘lateral liability’, that is, the guilt of people who neither acted nor commanded others to act but who helped the actors. What about people who knowingly assisted in the attacks? Military law does not afford us many examples of prosecutions of persons who in civilian law terms conspired with or aided and abetted the commission of atrocities. Every ordinary German soldiers fighting on the Eastern front against the Soviet Union provided the time and space for the SS units in the death camps to continue their ghastly work.⁴² But we did not charge anybody with a crime on that account, confining ourselves to those who either ordered the killings or carried them out. Some sought an analogy in portions of the judgment of the International Military Tribunal at Nuremberg which characterized as criminal various Nazi organizations such as the SS and the Gestapo.⁴³ The Tribunal categorized this step as a ‘far-reaching and novel procedure. Its application, unless properly safeguarded, may produce grave injustice.’⁴⁴ It does not appear to have been used except during denazification procedures in the occupied territories.⁴⁵ It would be a creative extension of international criminal law to prosecute those who provided training or logistical support for the terrorists at the

⁴⁰ 50 USC §§ 1601–1631 (2003).

⁴¹ *In Re Yamashita*, 327 US 1 (1946). For a general review, see Damaska, ‘The Shadow Side of Command Responsibility’, 49 *American Journal of Comparative Law* (2001) 455.

⁴² Charles S. Maier, *The Unmasterable Past: History, Holocaust and German National Identity* (1998) 21–22.

⁴³ International Military Tribunal, Judgment and Sentences, 1946, reprinted in 41 *American Journal of International Law* (1947) 172.

⁴⁴ *Ibid.*, at 250.

⁴⁵ For background, see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992) 276–285.

cutting edge. Federal civilian criminal law provides many more bases for prosecution for conspiracy, aiding and abetting or committing more specific crimes such as visa fraud, money-laundering and other acts supportive of Al-Qaeda.⁴⁶ However, US constitutional law severely limits the government's capacity to criminalize an individual's membership in a criminal group without 'guilty knowledge and intent'.⁴⁷

E *Military Commission Procedures*

Then there are questions about the procedures used by military commissions. Between the original presidential order in November 2001 and the issuance of formal regulations on 21 March 2002,⁴⁸ there was considerable concern in legal circles, particularly among present and former judge-advocates, that military commissions would abandon the safeguards for the accused that exist in both civil and military courts. These critics were conscious of the virtual revolution in military criminal law procedure that was represented by the Uniform Code of Military Justice as enacted in 1950 and reformed from time to time thereafter. As published, the rules allay most, but not all, of those concerns.⁴⁹ For one thing, the rules require unanimity in death penalty cases, as does the Uniform Code. The provisions as to safeguarding government secrets are not too far removed from those that prevail in federal civilian courts.⁵⁰ They do call for admitting 'evidence which would have probative value to a reasonable person', thereby setting aside the hearsay rule and perhaps the confrontation clause of the Sixth Amendment. A further complication is that, if a prisoner is a 'prisoner of war' within the definition of the Geneva Convention of 1949,⁵¹ he is entitled to the same type of trial which is imposed on members of the capturing force. That would mean the application *en bloc* of the procedures in the Uniform Code of Military Justice and the Manual for Courts Martial. The fact remains of course that the military commissions consist of personnel appointed by the same person who refers the charges to trial, in this case the Secretary of Defense. This is why both the US Constitution and treaties such as the International Covenant on Civil and Political Rights regard military commissions as not being independent.

F *Civilian Court Review*

Finally, we have the issue of civilian review of military commission rulings. The drafters of the November 2001 presidential order sought to exclude such review, thus

⁴⁶ Individuals who assisted the *Quirin* defendants by providing false credentials, etc., were prosecuted for treason. See *Haupt v. United States*, 3300.5.631 (1947).

⁴⁷ *Scales v. United States*, 367 US 203 at 228–230 (1961).

⁴⁸ Department of Defense, Military Commission Order No. 1 (Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 21 March 2002).

⁴⁹ For a critical view, see Paust, 'Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure', 23 *Michigan Journal of International Law* (2002) 677.

⁵⁰ Department of Defense, Military Commission Order No. 1 (Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 21 March 2002), paras 5 and 6D.

⁵¹ Geneva Convention III, Articles 84, 102 and 105.

copying the order produced in 1942 establishing the military commission that tried the Nazi saboteurs. The 2001 order states:

- (1) Military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
- (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

More careful consideration would have brought the drafters of the 2001 order to the realization that the Supreme Court in the saboteur case swept aside that provision and reviewed the work of the military commission. Thus the accused *can* attempt to challenge his detention at the start by resorting to *habeas corpus*. Note that the question of the jurisdiction of the military commission over the individual blurs with the question of his guilt. In previous cases, the status of the accused as a member of a hostile armed force was not in issue, since the accused had been uniformed soldiers at one point; all that was at issue was whether they had committed the particular war crimes of which they were accused. In the 2001 order, the question whether one is a terrorist is in effect both the jurisdictional predicate and the crime. Civilian court review of the jurisdictional question before trial could nullify most of the advantages claimed for military commissions by having a civilian hearing prior to a military trial.

There is thought to be a problem with regard to persons held overseas and not within the district of any US federal court. In fact, this problem was overcome in *United States, ex rel. Toth v. Quarles*, where an American discharged from the air force was arrested and taken to Korea to face charges that he had committed a murder there while in the service. The *habeas corpus* writ was served on the Secretary of the Air Force, operating within the domain of the District Court for the District of Columbia. The denial of review to aliens tried in China and imprisoned in Germany in *Johnson v. Eisentrager*⁵² depended on the substantive idea that an enemy belligerent not in the United States has no rights for a court to protect; presumably that precedent would not govern a case in which a foreigner in the United States contested the charge that he was an enemy belligerent. It certainly would not be an obstacle to proceedings on behalf of a US national held abroad. The question whether Guantanamo Bay is a part of the United States for these purposes is a contentious one currently before the courts.⁵³

In short, the first trial before a military commission will be fascinating for observers, on account of the many new issues it will raise. That same factor may lead the military to avoid taking those steps and to turn their prisoners over to the civil authorities. Alternatively, it may lead to a preference for indefinite detention. Prominent use of

⁵² 339 US 763 (1950).

⁵³ It is persuasive of its status as US territory that the Lease of Coaling or Naval Stations, done 16 and 23 February 1903, Article 3, 31 Stat. 898, 6 Bevans 1113, states that 'the United States shall exercise complete jurisdiction and control over and within said areas'. But see *Rasul v. Bush*, 215 F Supp 2d 55 (DDC 2002); and *Coalition of Clergy v. Bush*, 189 F Supp 2d 1036 (MD Cal. 2002) (stressing language about ultimate Cuban sovereignty).

military commissions would enhance the propensity of foreign authoritarian regimes to cite US practice in support of their use of military tribunals against those they regard as enemies of the state.

4 Foreign Courts

Given the dispersed nature of the Al-Qaeda network, as well as that of other terrorist networks, it is likely that many terrorists will face trial in civilian courts outside the United States. We know that Hamburg served as a base for Al-Qaeda operatives and that most of those were nationals of Saudi Arabia. The fact that the United States was the target of Al-Qaeda's campaign does not give it exclusive jurisdiction over prosecutions, despite its moral claim. Another country capturing such a person and believing that they have committed violations of local law is entitled to prosecute rather than extradite. That is the case generally with US bilateral extradition treaties⁵⁴ and with various multilateral anti-terrorist conventions such as those on the hijacking of aircraft.⁵⁵ In many cases, this will be the most convenient procedure if the foreign country also has control of the relevant witnesses and evidence. Indeed, foreign prosecution may avoid some nasty issues attendant upon extradition to the United States. Such issues include the unwillingness of countries, particularly those in Europe party to the European Convention on Human Rights,⁵⁶ to extradite (or even provide evidence) if there is a danger that the person will be subjected to the death penalty. The same countries may also find difficulty in cooperating with military courts, which they may view as not being 'independent' as required under the International Covenant on Civil and Political Rights and the European Convention on Human Rights.⁵⁷ Of course, if the trial takes place abroad, the US will have no control over the procedures used there, which in some countries may violate those basic rights of the accused recognized in the United States and under international law.

5 An International Court

Distinguished commentators have made persuasive cases for the proposition that terrorists should be tried before an international tribunal. They assert that such an

⁵⁴ Treaty on Extradition, US–Mexico, 4 March 1978, Article 15, 31 UST 5059; Treaty on Extradition, US–UK, 8 June 1972, Article V, 28 UST 227.

⁵⁵ Articles 6–8 of the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 16 December 1970, 22 UST 1641, 860 UNTS 105.

⁵⁶ International Covenant on Civil and Political Rights, 16 December 1970, Article 14(1), 6 ILM 368, 999 UNTS 171; Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 6(1), ETS No. 5. See *Morris v. United Kingdom*, Application No. 38784/97, (2002) 34 EHRR 52 (applying Article 6(1) to hold British court-martial not independent or impartial). In *Boudella v. Bosnia and Herzegovina*, Case No. CH/02/8679, 11 October 2002, the Human Rights Chamber found a violation of the rights of four persons turned over by Bosnia and Herzegovina to the US armed forces as presumed terrorists.

⁵⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.

action would enhance worldwide assurance of the justice of the conviction of terrorists and would solidify the alliance against terrorism by having more countries participate in its actions. But this is an even more contingent proposition than trial by military commission, and a great deal would have to be done before a trial before such a body could begin. The only court presently in existence that might have jurisdiction is the International Criminal Court (ICC) that recently came into being as a result of the Rome Statute. The US is not only not a party but has explicitly, even vociferously, declared that it will not cooperate with the ICC. The jurisdiction of the ICC covers crimes against humanity, which include murder or inhumane acts of a similar character when knowingly committed as part of a widespread and systematic attack directed against any civilian population.⁵⁸

Alternatively, a new and dedicated anti-terrorist court could be constituted, presumably by order of the Security Council. This would be a major and time-consuming undertaking. Many problems would need to be addressed. What would be the appropriate membership of such a court? For maximum acceptability, it would have to include representatives of the Islamic legal system. Would judges from such systems be willing to serve? Without them, would a conviction have any more weight than one rendered by a national court? What procedures would apply? Should, for example, those of the international court with the most experience — the International Criminal Tribunal for the former Yugoslavia — be adopted? Who would take care of security arrangements? And who would foot the bill? At present, it seems unlikely that anybody would invest the resources needed to create a new international criminal court in the face of US opposition.

6 Indefinite Detention

From the perspective of the US Government, there is some advantage in doing nothing, that is, in leaving the prisoners in Guantanamo Bay and elsewhere to vegetate indefinitely. This avoids the problems involved in actually prosecuting them. At the same time, it amounts to what may be life imprisonment, which (short of the death penalty) is as harsh a punishment as is available. There are some drawbacks to this solution, however. First, it may interfere with a later decision to put such persons on trial. Normally, a criminal prosecution must, under international law and US constitutional law, be initiated expeditiously after a person is arrested. It is not clear whether time spent in other types of confinement counts in this calculation. Secondly, it is hard to defend in principle under US constitutional law and under international law. The US does not generally allow persons to be detained indefinitely. There are exceptions for persons quarantined with communicable diseases or persons found to be sexually dangerous. Clearly, these exceptions do not apply here. The humanitarian conventions limit detention insofar as they provide for the prompt repatriation of both

⁵⁸ For development of this analysis, see Drumbl, 'Judging the 11 September Terrorist Attack', 24 *Human Rights Quarterly* (2002) 323.

prisoners of war and civilian detainees when the hostilities have ended.⁵⁹ These conventions do, it is true, also provide for the continuation of proceedings already brought against civilian detainees and for the completion of penal sanctions. As stated above, there are good grounds for concluding that hostilities are now over and that international law calls for the release of those now in captivity. In addition, the US has conceded that indefinite detention, for example of the so-called Mariel fugitives from Cuba, violates customary international law, although the US courts have also ruled that the Attorney-General has the power to overrule that norm.⁶⁰

The Supreme Court's ruling in *Zadydas v. Davis*⁶¹ indicates that there are also constitutional problems with indefinite detention. Difficulties with obtaining judicial relief for detainees held abroad do not entirely solve these problems.

7 Conclusion

We find ourselves at a point where the US Government has not fully disclosed its intentions with respect to the trial of terrorists. This may be largely because the government caught so few of them that they can choose not to refer cases to the new and untested military commissions. The first case to be heard before a military commission would incur major costs and risks to the government in the course of clarifying the legal questions raised above. The prisoners in Guantanamo Bay have been there a long time, and as time goes by it will be increasingly difficult to give them a fair trial. It will also become increasingly difficult to keep the Guantanamo Bay prisoners confined as the hostilities in Afghanistan recede further and further into the past. Appeals to emergency powers will receive a progressively less sympathetic hearing as a certain 'normalcy' returns.⁶² The probability seems to be that there will be few trials and that those that do take place will be heard in ordinary US civilian courts. In any case, it is becoming more apparent that criminal processes will play only a modest role in the struggle against terrorism. Still, the human urge to punish crimes will ensure that some trials will take place.

⁵⁹ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287, Article 133: '[I]nternment shall cease as soon as possible after the close of hostilities.'

⁶⁰ *Garcia-Mir v. Meese*, 788 F 2d 1446 at 1455 (11th Cir.), cert. denied 479 US 889 (1986).

⁶¹ 121 S Ct 2491 (2001).

⁶² Of course, activities in Iraq mean that there is an 'imperfect war' in progress as we go to press.