

# WHAT TO DO WITH BIN LADEN AND AL QAEDA TERRORISTS?: A QUALIFIED DEFENSE OF MILITARY COMMISSIONS AND UNITED STATES POLICY ON DETAINEES AT GUANTANAMO BAY NAVAL BASE

KENNETH ANDERSON\*

## I. INTRODUCTION

The United States has successfully brought down the Taliban regime in Afghanistan. Together with increasing law-enforcement arrests and detentions of individuals alleged to be connected with the planning or execution of the attacks of September 11, the American military accomplishment has now pressed into the foreground essential moral, legal, and political questions about how those detained and accused of terrorist activity should be treated. Who should try them? What is the appropriate jurisdiction and authority? What rights do they have?

Proposals for how to treat the most serious category of suspects—those believed to have been involved in the planning or execution of the September 11 attacks—have fallen into three main camps. The first group has called for having them tried by international tribunals. Such proposals have included: extending the jurisdiction of the current Yugoslavia tribunal to cover the September 11 attacks and its Al Qaeda sponsors, establishing a new ad hoc tribunal under the authority of the

---

\* Professor of Law, Washington College of Law, American University. Professor Anderson was Legal Editor for *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* (Roy Gutman & David Rieff eds., 1999). In 2000, Professor Anderson was a Visiting Associate Professor at Harvard Law School, where he taught *The Laws of War*. Thanks to Ezra Field, Tod Lindberg, Madeline Morris, Aryeh Neier, David Rieff, Jean-Marie Simon, and Anne-Marie Slaughter for helpful discussion even where they disagreed strongly; and thanks to Robert Goldman, Tony Maurer, Herman Schwartz, and Paul Williams for their comments in the course of a panel discussion on this topic at Washington College of Law on November 26, 2001. Email: [kanders@wcl.american.edu](mailto:kanders@wcl.american.edu).

Security Council, or amending the terms of the not-yet-in-force International Criminal Court to allow it to begin hearing terrorist cases. Second, many commentators, especially in the United States, have called for terrorist suspects, no matter where they are found, to be tried in United States district courts for applicable violations of United States and international criminal law. Third, the Bush Administration has announced plans, pursuant to a Military Order signed by the President in his capacity as Commander in Chief, to create the option of trying non-citizen suspects in specially created "military commissions."<sup>1</sup>

The Military Order has provoked a storm of protest from various civil libertarians, civil and human rights organizations, newspaper editorialists, academics, members of Congress, and sundry others, mostly on the political left,<sup>2</sup> but including some prominent conservatives such as *New York Times* columnist William Safire<sup>3</sup> and Rep. Bob Barr (R-Ga.).<sup>4</sup> Combined with related criticism of other domestic security measures enacted by Congress in the wake of the attacks or put in place by the Bush Administration largely through actions by Attorney General John Ashcroft, protest over military tribunals and other perceived restrictions of civil liberties has constituted most of the domestic dissent from the Bush Administration's conduct in the wake of September 11.

Seemingly surprised by this criticism, the Bush Administration has moved to mollify opponents by promising additional regulations outlining the actual procedures for the military commissions (to be drafted by the General Counsel of

---

1. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(A)(1)(i)-(iii), 66 Fed. Reg. 57,833, 57,834 (2001) [hereinafter *Military Order*].

2. See, e.g., *Detentions: First Find Your Suspect; A Wider Net and New Military Tribunals*, THE ECONOMIST, Nov. 17-23, 2001, at 30 ("Civil libertarians were further exercised on November 13th by an announcement that President George Bush had signed an order allowing special military tribunals to try foreigners charged with terrorism.").

3. See, e.g., William Safire, Editorial, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A16; see also William Safire, Editorial, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A19; William Safire, Editorial, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001, at A29.

4. See Jess Bravin & Keith Johnson, *Military-Tribunal Plan for Terror Suspects Runs Into Resistance From Allies, Congress*, WALL ST. J., Nov. 26, 2001, at A1, ("On the House Judiciary Committee, Rep. Bob Barr (R., Ga.) has joined the committee's senior Democrat, Michigan Rep. John Conyers Jr., in calling for hearings on the tribunal plan.").

the Department of Defense). The regulations apparently will provide for greater procedural protection than the original order requires.<sup>5</sup> The Bush Administration has also moved, however, to challenge critics on grounds of national security and war-time exigency. In hearings before the Senate Judiciary Committee, for example, Attorney General John Ashcroft "bluntly [told] lawmakers that their 'power of oversight is not without limit,' and that, in some areas, 'I cannot and will not consult with you.'"<sup>6</sup>

The aim of this Article is to give a qualified defense of the use of military commissions to try, as the Military Order says, "Certain Non-Citizens in the War Against Terrorism,"<sup>7</sup> including their use to determine the legal status of detainees at Guantanamo Bay Naval Base. It is a highly qualified defense of military commissions, in that it does not seek to defend the actual terms of the Military Order, but instead simply the concept of military commissions as such.

Moreover, this Article leaves aside all the other domestic security policies that resemble the contours of a national security state modeled on the least attractive years of the Cold War. Indeed, a fundamental reason for supporting the making of war outside the United States is to prevent the erosion of our domestic arrangements and civil liberties by instead destroying those abroad who would bring war to this society, for it is better to make war on our enemies abroad and to destroy them and their threat than to create a long-term police and surveillance state at home. Quite possibly this is a fool's hope; the Bush Administration, consistent with the pattern of American governments across our history in time of war, including the administrations of great presidents such as Lincoln and Franklin Roosevelt, has sought to make war abroad a basis for constricting civil liberties at home. For the most part, this approach must be opposed.

Yet, imperfect as the Military Order is (one hopes those drafting the final regulations in the Pentagon will have learned

---

5. See, e.g., Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A25 (promising that the Military Order will be interpreted to give full and fair trials in military commissions).

6. Jess Bravin & Gary Fields, *Ashcroft Scraps With Senators Over Tribunals*, WALL ST. J., Dec. 7, 2001, at A3.

7. Military Order, *supra* note 1.

from the controversy), the fundamental concept of using military commissions is morally, politically, and legally justified. They can be shaped and made to work consistent with the Constitution, international law, and particularly the Geneva Conventions, to which the United States and its military are deeply and correctly committed. They—not international tribunals nor even ordinary United States district courts—ought to be the vehicle for the trial and punishment of at least the most serious categories of alleged terrorists, i.e., those who by their conduct and ideology have made themselves not merely criminals but our enemies.

## II. INTERNATIONAL TRIBUNALS

### A. *The Liberal Internationalist Argument For an International Tribunal*

The argument in favor of using international tribunals to try suspected terrorists can be made on either of two grounds, one broad and one narrow. The broad ground is that of liberal internationalism. The crimes committed by the terrorists are, it could be said, crimes against the world at large and offenses against universal morality as reflected in international law. They should therefore be tried for those international offenses and, moreover, those who try them should have and be seen to have the impartiality that is presumed to come with international rather than merely national institutions of justice.<sup>8</sup> Liberal internationalists conclude that the appropriate forum for trying accused terrorists ought to be some form of international tribunal, convened under the authority of some international body, rather than simply the national courts of the United States.

This approach is particularly attractive to “global elites,” for whom “national” is synonymous with “parochial” and, indeed, practically synonymous with “illegitimate.” More precisely, these groups instinctively favor international tribunals because they view “international” as synonymous with “universal.” To support international tribunals is to promote a universal sense

---

8. The most persuasive recent statement of the general argument for international tribunals is found in GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

of justice and morality, most nobly embodied in the various declarations of universal human rights.<sup>9</sup> For these folks—including many members of the international non-governmental organization (NGO) movement that generated support for international tribunals to deal with the atrocities in the former Yugoslavia and in Rwanda—advocating international tribunals is not a policy choice, but rather a cultural preference, more akin to a dietary taste or a religious choice than an argument deduced from empirical reason.<sup>10</sup> Universality is believed to be inherently more ethical; international institutions and mechanisms incarnate the universal in ways that, it is assumed, merely national or local institutions and mechanisms cannot. Therefore they hold a profound belief in the goodness of a *federal* world, a world in which local and national institutions must finally be subordinate to international ones.

It is difficult to argue against liberal internationalism, and the reflexive endorsement of international and supranational institutions that it inspires, for the simple reason that the position is simply presumed to be universal. The debate between liberal internationalism and its principal rival, democratic sovereignty, resembles ships passing in the night. Nonetheless, it cannot have escaped the attention of the most fervid liberal internationalist that, as Dominique Moisi, a leading French political commentator, observed in assessing winners and losers among institutions following September 11:

[t]he first beneficiary . . . is, undeniably, the institution of the state. In the post-cold-war global age, the state's legitimacy and competence appeared to be waning. Caught between the emergence of civil society and the growing power of transnational corporations, the state appeared to be fighting a rearguard battle. Now, with security a priority, it is back with a vengeance.<sup>11</sup>

Accordingly, the immediate reply to the "broad" liberal

---

9. See Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations With International Nongovernmental Organizations*, 2 CHI. J. INT'L L. 371, 374 (2001) ("[T]hat universality must equal the international . . . is at best unsupported.").

10. See generally Kenneth Anderson, *Secular Eschatologies of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 107 (Peter Juviler & Carrie Gustafson eds., 1999).

11. Dominique Moisi, Editorial, *Early Winners and Losers in a Time of War*, FIN. TIMES (London), Nov. 19, 2001, at 15.

internationalist call for international tribunals to try terrorists is that in a world in which people in the United States, in Europe, and elsewhere have immediately looked to their nation states for security and justice, the virtue of international tribunals is not obvious. Supporters tend to be academics, journalists, or members of the international NGO community. But it is striking how very little support they have elicited from the European Union, despite its enthusiasm for both the ad hoc tribunals dealing with the former Yugoslavia and Rwanda, and the nascent International Criminal Court. Few government press statements support international tribunals either. My private contacts among European diplomats have told me that the reason is security. Governments do not want the burden of hosting an international tribunal or, perhaps worse, being responsible for the imprisonment of convicted terrorists for long periods of time. They would much rather see the United States bear these risks.

### *B. The Obligations of Democratic Sovereignty*

Even if their motivation is self-interest, allowing the United States to make the decisions and bear the security risks is morally correct. Whatever the outcome of the grand argument between liberal internationalism and democratic sovereignty, it is both the privilege and the awful responsibility of the United States to deal with those alleged to have planned or participated in the September 11 attacks. The tragedy certainly involved universally reprehensible crimes, such as making civilians both the means and object of attack. But fundamentally, September 11 was *not* an attack upon the whole world; it was an attack upon the United States, its territory, property, and people. A democratic polity owes to its members and citizens a good faith effort to protect them and do justice on their behalf, and it would be morally wrong for the United States, in a misguided attempt to provide "universal" justice through supposedly "universal" institutions, to seek to avoid this burden and refer it to international institutions.

Nor should the United States be swayed by arguments that only international bodies can provide "impartiality" and the appearance of "impartial" justice. Even accepting for argument's sake that international tribunals could provide more impartial justice than United States courts would, the

United States as a democratic polity owes its citizens, its people, and particularly those who died and lost loved ones, justice according to *United States* traditions. It owes *our* people *our* justice, and should see that our justice is done to those who have attacked us. This principle is the genuine lesson of the Nuremberg Trials, not the anodyne universalism of liberal internationalists. It would have been morally contemptible for the Second World War Allies to have proclaimed, in a fit of political correctness, that they should turn the judgment of the Nazi leaders over to those countries which were neutral and impartial to have them tried in a genuinely unbiased manner.

On the contrary, partiality can be a moral badge of honor and goodness. Partiality entitled countries to sit in judgment after World War II, because it evidenced having fought for the good rather than letting evil flourish and go unpunished. If there were to be trials at all, the Allies owed a solemn obligation to their own and all victims to conduct such procedures themselves. They earned the right and obligation to conduct such trials not only because of victory; but also because of their own payment in blood.<sup>12</sup> This principle remains true today. The United States owes *its* democratic community victory in this war, and the imposition of *its* justice upon those who would bring war and crime to its territory and people.

*C. The Pragmatic Argument for an International Tribunal:  
Legitimacy of an International Tribunal Among the Europeans*

The narrow argument for international tribunals rests upon multilateral rather than supranational or liberal-international grounds, and is fundamentally pragmatic and strategic in nature. Even if one does acknowledge that the United States has the moral right to try September 11 terrorists in its own institutions of justice, the argument runs, it should nonetheless cede that right to international tribunals in order to obtain the advantages of the international legitimacy that would derive from a trial conducted by international authorities. The advantage of this approach would be that a trial not held under

---

12. See Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 292 (1994) (book review) ("Nuremberg was a 'lovely hood ornament on the ungainly vehicle that liberated Western Europe, but it was not a substitute for D-day.' A military victory is not simply a practical prerequisite to a trial . . . but a moral necessity.").

the specifically national auspices of American justice would be seen by the world as having additional authenticity. The supposed benefit would be a potential end to the cycle of violence and revenge, since all parties would acknowledge that justice had been served.

The fundamental flaw in this argument is that it avoids asking whose auspices appropriately confer legitimacy. No doubt European elites would be happy if a trial were held under international tribunal auspices (if only the security issues could be resolved). Their satisfaction, however, would merely derive from a longer-term desire to constrain both United States power and the American sense of auto-legitimacy derived from our confidence in our internal, *democratic* legitimacy regardless of others' opinions about it. The European Union has difficulty mustering such democratic legitimacy. Its elites are in constant vacillation between praise for the ideal of democracy, contempt for its actual realization in America, however imperfect, and anxiety over its absence, now and seemingly forever, at the level of the European Union. So why should America care what European elites think?

From a pragmatic American standpoint, too, there is little benefit to heeding the views of European elites. It is true that European cooperation in tracking down terrorist cells and security cooperation is necessary. It is unfortunately especially necessary, as it turns out, that the seed beds of forces attacking America lie nearly as much in the despised immigrant Islamic communities that live at the margins of European societies—supposedly so vastly morally superior to America, but whose Muslim populations, from Britain to Germany, are systematically shut out of post-Christian Europe and shut in upon themselves—as in the corrupt regimes where the terrorists were born. It is an exaggeration, but not entirely so, that the United States could have done worse in dealing with Al Qaeda by simply attacking, for example, Belgium, Germany, and Italy—attacking Al Qaeda's strongholds among those who live in the shadows of a world they do not share.

European military forces, likewise although effectively useless in battle, can be helpful in long-term peacekeeping operations in Afghanistan. Europe can also assist in tracking down and seizing the financial assets of terrorists. These are important advantages, but one must still understand the

fundamentally self-centered nature of European support, given its underlying desire to constrain American power in pursuit of its own counter-hegemonic aspirations.

Hence, Europe's endorsement for America's coalition against terror is merely "in return for the privilege of restraining the United States from actions that it might otherwise take."<sup>13</sup> This perspective is as true now as it was before September 11. In addition, Europeans are keenly aware that the "coalition" against terrorism, despite all its fine multilateral phraseology, is the greatest adventure in American unilateralism in decades. America's refusal to join the fashionable projects of utopian international law—the ICC, Kyoto Protocols, etc.—pale by comparison. The early, but now eroding, steadfastness of the principal European leaders, Schroeder, Chirac, and Blair, in support of the Afghan war cannot conceal the fact that European elites will likely continue to embrace a rhetorical and substantive anti-Americanism. As Leon Wieseltier put it with respect to the perpetrators of September 11 and attempts by various European commentators to put the blame on America, "nothing changes a regressive creed into a progressive creed so quickly as the appearance within in it of anti-Americanism."<sup>14</sup> Meanwhile, a review of European media perspectives reveals, as Dominique Moisi says, that following the immediate shock of September 11:

The media seemed to lose faith in the war after only three weeks. Like television viewers impatiently zapping from channel to channel, commentators have been quick to identify failure and to denounce the human cost of the American bombings. Many seemed almost dismayed by the scenes of joy in liberated Kabul. . . . In France, for example, the media's early solidarity—the sense that we are all Americans—has slowly given way to a rampant and

---

13. Kenneth Anderson, *Language, Law and Terror*, TIMES LITERARY SUPPLEMENT (London), Sept. 21, 2001, at 13.

14. Leon Wieseltier, *Washington Diarist: The Incoherence*, THE NEW REPUBLIC, Oct. 29, 2001, at 46 (responding to what Wieseltier called the "hilarious October 4 issue of the *London Review of Books*, the one with the parade of progressive professors adrift in an ether of representations and signifiers."). "Appalling" would be more accurate than "hilarious," as exemplified by Cambridge professor Mary Beard announcing "the feeling, however tactfully you dress it up, the United States had it coming." Tariq Ali et. al., LONDON REV. OF BOOKS, 11 September: *Some LRB Writers Reflect on the Reasons and Consequences*, Oct. 4, 2001, at 20.

immature anti-Americanism.<sup>15</sup>

#### D. *Legitimacy of an International Tribunal Among Muslims*

If legitimacy according to the Europeans is relatively insignificant, given that their elites will never be persuaded to genuinely like American policy,<sup>16</sup> then perhaps the opinions of the Muslim world should be considered more closely? Harvard Law School professor and president-elect of the American Society of International Law Anne-Marie Slaughter presents a formidable argument:

George W. Bush appears to assume that the next step [for captured terrorists] would be trial in US courts. Such a course . . . would have enormous legitimacy problems for many other countries . . . . In effect, it would proclaim the US to be not only the world's policeman but also the world's judicial system. A better alternative is some kind of international tribunal to work in conjunction with national courts around the world . . . [such as] an ad hoc international tribunal with jurisdiction over all terrorist acts on or after September 11, wherever committed.<sup>17</sup>

Slaughter is careful to support creation of an ad hoc tribunal, under the authority of the U.N. Security Council (like the tribunals for the former Yugoslavia and Rwanda) on purely pragmatic grounds. She does not argue from broad ideological assumptions of liberal internationalism, but instead urges that it is in the interests of the United States to hand over terrorist cases to an international tribunal. She offers four justifications.

First, Islamic governments "would find it easier to surrender suspected terrorists to a global court," particularly one that included, as she also urges, "judges from the Muslim faith and Islamic legal systems."<sup>18</sup> Second, "a global court could try terrorists according to internationally agreed standards of evidence for crimes under not only national, but also

15. Moisi, *supra* note 11, at 15.

16. In addition, a sizable part of American elites and especially its intellectuals will continue desperately to seek approval from European elites, on the seemingly eternal ground that Europe is supposedly civilized, and America supposedly is not. Relations between Europe and America at the level of intellectuals, let it be said, have never really advanced beyond the novels of Henry James.

17. Anne-Marie Slaughter, Editorial, *Terrorism and justice*, FIN. TIMES (London), Oct. 12, 2001, at 15.

18. *Id.*

international law.”<sup>19</sup> Third, “the judgments of a global court—not only criminal prosecutions, but probably also fines, injunctions and orders freezing assets—would be easier to enforce in the national courts of many countries where they would have to be enforced to wage a global fight.”<sup>20</sup> Fourth, “an international tribunal for terrorism would work together with national courts around the world, much like the proposed International Criminal Court is supposed to do . . . [F]or certain masterminds of crimes against the global community, the international tribunal would be available.”<sup>21</sup>

Her argument is pragmatically appealing, but flawed. In the first place, it seems extremely doubtful that an international tribunal, even one with Muslim judges on it, would have legitimacy within the Muslim world. As University of Chicago law professors Jack Goldsmith and Bernard Meltzer note,

[i]t is doubtful that a multi-ethnic international tribunal would make much difference to those who now believe that US actions are unjust. The nations that would establish the tribunal have already condemned Osama bin Laden and Al Qaeda for September 11. Bin Laden’s sympathizers would probably view the tribunal as many Serbs view the United Nations-sponsored, multi-ethnic international tribunal at The Hague: as a biased tool of western power.<sup>22</sup>

Indeed, as Goldsmith and Meltzer also note, trial before an international tribunal could turn into a springboard for bin Laden and his associates to portray themselves as martyrs. In their words,

[s]uch a trial would . . . enhance Mr. bin Laden’s stature and appeal. He and other terrorists would use the event as a platform to attack the US’s culture, motives and policies—an attack that would reverberate throughout the Muslim world. Any dissent from a guilty verdict would weaken the judgment’s legitimacy and . . . increase the terrorists’ power and prestige. Acquittal on grounds of insufficient evidence would . . . be possible, especially if protection of intelligence sources precluded the presentation of evidence.<sup>23</sup>

---

19. *Id.*

20. *Id.*

21. *Id.*

22. Jack Goldsmith & Bernard Meltzer, Editorial, *Swift Justice for bin Laden*, *FIN. TIMES* (London), Nov. 7, 2001, at 15. Professor Meltzer served as assistant trial counsel at the Nuremberg International War Trials.

23. *Id.*

It is also entirely speculative to imagine how a new international tribunal could manage to coordinate, order, and enforce sanctions, asset freezes, and other actions by national courts. Some judges might comply, but others would not. Modeling this coordination on the ICC and its proposed procedures surely seems excessively optimistic given that the ICC does not even technically exist yet. Moreover, as American University law professor Paul R. Williams and New England School of Law professor Michael P. Scharf (both experts in the workings of the Yugoslavia tribunal) stress, proponents of international tribunals tend to underestimate the difficulty inherent in getting them to function, let alone assessing their eventual effectiveness:

[T]here exists no effective international forums [sic] for the prosecution of terrorists. . . . It would take many years to select a prosecutor and judges, let alone prepare an indictment against key terrorist figures. In the case of the Yugoslavia tribunal, it took seven years to indict Slobodan Milosevic. Likewise, an international terrorism court would take years to establish and potentially have the same deficiencies.<sup>24</sup>

The idea that the ICC open ahead of schedule to deal with terrorists—an idea that Slaughter rejects in favor of an ad hoc international tribunal—seems even more far-fetched. As Williams and Scharf note, “[w]hile the International Criminal Court has been mentioned as a possible venue, the treaty establishing it is not yet in force, its jurisdiction does not include terrorist crimes, and it does not have retroactive jurisdiction.”<sup>25</sup> Proposals to utilize the ICC appear to be based, not on United States interests, but instead on a liberal-internationalist hope for a back-door mechanism to draw the United States into accepting and joining the ICC, something it has consistently refused to do.

Justifying an ad hoc international tribunal according to America’s interests through increased legitimacy, coordination, and effectiveness appears dubious, at best. In particular, from the standpoint of safeguarding America’s practical interests, Yale Law School professor Ruth Wedgwood observes that

---

24. Paul R. Williams & Michael P. Scharf, Editorial, *Prosecute Terrorists on a World Stage*, L.A. TIMES, Nov. 18, 2001, at M5.

25. *Id.*

[t]he ad hoc criminal tribunals created for Yugoslavia and Rwanda by the U.N. Security Council have not enjoyed the confidence of Western powers in obtaining intelligence intercepts for use at trial. Americans could not expect to fill the majority of slots in an ad hoc tribunal, and a trial chamber of three to five judges might have no Americans at all. Moreover, the tribunal for Yugoslavia has operated at a snail's pace, trying only 31 defendants in eight years, at a cost of \$400 million.<sup>26</sup>

If the choice is between a forum for trying defendants that satisfies American demands for legitimacy within its democratic order, and a forum that cannot possibly fulfill demands for legitimacy outside of a narrow range of European public opinion, even on purely pragmatic grounds, the obvious choice is to use our own justice system.

#### *E. Islam and the Secular Rule of Law*

Professor Slaughter advocates, however, not merely an international tribunal, but a tribunal that explicitly incorporates Islam as a religion into its jurisprudence. She urges that an international tribunal

[b]e composed of justices from high courts around the world and co-chaired by a US Supreme Court Justice and a distinguished Islamic jurist of similar rank . . . A court along these lines would be more legitimate than a US national court. It would help convince countries around the world that this is indeed a fight about protecting global values rather than projecting US power. It would be particularly important for many Muslims because it would recognize the relevance and value of Islamic law. And acknowledging the contribution of Islamic jurists would distinguish the values and rules of Islam from the horrific acts of some of its practitioners.<sup>27</sup>

Slaughter's proposal is profoundly problematic despite its superficially sweet sense of multiculturalism and sensitivity. In the first instance, leaving aside the explicit religious questions, the war on terrorism *is* about projecting American power. While it is pleasing to know that our resources are being used consistently with the cause of global values, our first priority is

---

26. Ruth Wedgwood, Editorial, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

27. Slaughter, *supra* note 17, at 15.

to ensure that *American* values and interests are being furthered. In the words of columnist Mark Steyn: "This is not the time for Islamic outreach: the U.S. doesn't need to prove it's nicer than anybody else, just that it's tougher than anybody else."<sup>28</sup>

Second, Slaughter's assertion that matters of fundamental justice toward dead Americans ought to be addressed by justices from other nations suggests that all judicial systems are morally and functionally equivalent. Judicial legitimacy, however, is not a floating value that can be automatically solicited by any given tribunal, rather it is exclusively the product of a healthy democratic system and must be earned *within* a democratic polity. Obviously, there are many high court judges from other countries with integrity and probity equal to our own, and many of them serve democratic systems. But it is erroneous to suppose, based upon a sentimental moral relativism, that this legitimacy can be mechanically extended to an ad hoc international court without its own democratic underpinnings, especially in the politically and emotionally charged cases stemming from terrorist activities. Some judges will be politicized, and others will see themselves and be seen by others as representing constituencies (perhaps governments or religious/ethnic groups). Even those who are not overtly politicized may come from legal systems whose value systems are fundamentally incompatible with ours, leading to crucial differences over such basic concepts as the definition of terrorism. While such discrepancies would be relatively inconsequential in purely commercial matters—contracts, international business, and so on—it is harder to endorse the theory that having an internationally representative judiciary increases legitimacy in matters of national security.

Third, Slaughter's call for the explicit reservation of places for judges of a particular religion, while strategically understandable in light of her belief that inclusiveness automatically increases legitimacy, is flawed in principle. The independence of judicial deliberation is incompatible with the appointment of judges 'representing' particular constituencies. Although Slaughter may respond that merely holding a

---

28. Mark Steyn, Editorial, *Hey, George: No More Mr. Nice Guy*, SPECTATOR (London), Nov. 3, 2001, at 18.

place—in this case co-chief judge—for a particular religionist does not mean that he or she necessarily represents that religion, it is difficult to draw any other conclusion. It puts the individual judge into an untenable position vis-à-vis that constituency and the larger public. A conviction may be viewed as a betrayal of the constituency. An acquittal may be treated as a public betrayal. It is an invitation to a guaranteed accusation of bad faith and loss of reputation.

Finally, reserving slots for Islamic jurists is profoundly wrong because it implies that the law of a particular religion ought to be part of the standard by which a public court judges guilt or innocence. Slaughter is explicit about this: “[R]ecognize,” she says, “the relevance and value of Islamic law,” not merely in the abstract, but in the formulation of the tribunal.<sup>29</sup>

It is also wrong, not only because we reject explicit references to religion and religious codes in secular justice and government generally, but because, in the case of Islam, we in the West have come to reject important tenets of its faith, not least its view on the role and status of women. There is no way for Western liberals to elide this fact.<sup>30</sup> Is Sharia law concerning the status of women—whether construed to be truly at odds with Western feminism or not—relevant to a trial ostensibly about murder and the slaughter of innocents? Is that not simply focusing on the cultural preference of Western elites of the past few years to privilege any issue having to do with the status of women rather than the fundamental issues of this trial, which are murder and destruction? Yet it does not seem likely that Islamic law is neatly divisible—least of all in seeking to select a Muslim judge with properly “liberal” views on important issues. The act of selecting a judge on the basis of religion *also* inevitably means that we, outsiders, profane that religion in choosing an interpretation of it, by choosing its interpreter. We cannot acknowledge one part of Muslim law because it is conducive to the ends of this trial, but ignore another, thereby profaning a legal system inspired, in the eyes

---

29. Slaughter, *supra* note 17, at 15.

30. See, e.g., Richard Dowden, *This Woman Has Been Sentenced to Death by Stoning*, N.Y. TIMES MAGAZINE, Jan. 27, 2002, at 28. (Under Sharia law, “in northern Nigeria, as in Afghanistan under the Taliban, adultery now warrants the ultimate punishment—for half the couple, anyway.”).

of its adherents, by God by dividing it into what the worldly and secular find convenient and inconvenient.

The move from religious accommodation to semi-official inclusion of Islam by Western elites otherwise profoundly hostile to religion is deeply troubling. It represents a disturbing co-dependence between the Muslim world and Western elites, founded upon the principle of victimhood. It suggests that the widespread idea in the West that Islam is a religion that has merely yet to come to grips with modernity is at least partly wrong. On the contrary, Islam is in grave danger of *finding* a genuine place within modernity—the place and role of the eternal victim. It is a position deeply entrenched within modernity itself, one whose trope is a *pas de deux* of resentment and guilt, refined in recent decades into a familiar Western refrain played out most recently at the Durban conference on racism.<sup>31</sup>

More importantly, it is time to ask the question that Leon Wieseltier posed to Western elites as to whether the currently tender regard of the West toward Muslim religious sensibilities—going beyond tolerance and accommodation to acknowledging it as a legitimate foundation of government and as a doctrine to be enforced by the state in the West—is consistent with Western values or beneficial to ordinary men and women in the Muslim world:

Against the indecent religious thinking of Osama bin Laden and Mullah Omar, expert after expert testifies to the decent religious thinking of other figures in contemporary Islam. Does this Koranic verse enjoin war? Then that Koranic verse enjoins peace. The unchallenged premise of both sides in this debate is that the social and political arrangements of the Islamic world must forever establish themselves in holy writ. There is rule by radical imams and there is rule by moderate imams. What about rule by no imams at all?<sup>32</sup>

### III. TRIALS IN U.S. DISTRICT COURTS

#### A. *Practical Problems With the Organized Crime Model of*

---

31. See generally Arch Puddington, *The Wages of Durban: A Carnival of Hate, the World Conference Against Racism was Also a Prelude to the Events of September 11*, COMMENTARY, Nov. 2001, at 29.

32. Wieseltier, *supra* note 14, at 48.

*International Terrorism*

If international tribunals are both an unrealistic and morally undesirable dream, trials of suspected terrorists in ordinary U.S. district courts also carry significant moral and practical downsides. For one, they merely extend the evident failure of U.S. policy over the past decade in dealing with terrorism against U.S. targets: the 1988 Lockerbie, Scotland plane explosion; the 1993 World Trade Center bombing; the 1996 Khobar Towers attack against U.S. military personnel in Saudi Arabia; the 1998 U.S. embassy bombings in Africa; and finally the 2000 attack on the U.S.S. Cole. American policy has been to regard the problem of terrorism against American targets, whether at home or abroad, as essentially a criminal matter, a question of long-arm criminal jurisdiction, under the investigation of the FBI, seeking extradition of suspects for prosecution by regular Justice Department prosecutors in ordinary U.S. district court. The CIA, notably, has been far less important than the FBI, and the Federal effort has been concentrated on solving past cases and bringing suspects in them to trial rather than taking intelligence actions aimed at preventing or deterring future action.

The criminal law approach of seeking to solve past crimes, and treating terrorism not as an enemy to be battled, but criminals to book, is primarily defended on the grounds of its effectiveness. James Orenstein, for example, a former Clinton Administration Deputy Attorney General, claims that the U.S. government "has decades of experience and success in using civilian courts to combat organized crime, and it has successfully applied that experience to fighting terrorism."<sup>33</sup> His evidence for that claim is, first, that the civilian courts have broad powers to protect information, witnesses, informants, judges, jurors, and those involved in the judicial process. Second, the use of prosecutorial techniques developed in fighting organized crime has taught prosecutors that they can get testimony in return for deals with low ranking members of a conspiracy, and that putting defendants on trial together gives a great ability to show jurors the full extent of the criminal organization. Third, he says, civilian prosecutions

---

33. James Orenstein, Editorial, *Rooting Out Terrorists Just Became Harder*, N.Y. TIMES, Dec. 6, 2001, at A29.

have obtained convictions in important cases—Sheik Omar Rahman, for example, in the 1993 World Trade Center bombing, or Wadih el-Hage, who was recently convicted (in a civilian court) for bombing the American embassies in Kenya and Tanzania,” among others.<sup>34</sup>

Few share Orenstein’s belief in domestic civilian prosecution’s effectiveness, however. More typical would be the assessment of Paul Williams and Michael Scharf:

In the past, the United States has pursued a failed policy of domestic prosecution of terrorists. In the cases of the 1996 Khobar Towers attack in Saudi Arabia, the 1998 bombings of US embassies in Africa, and Cole attack in 2000, and the 1993 bombing of the World Trade Center towers, the U.S. has been able to prosecute only a handful of low-level culprits and ideological supporters. With potentially thousands of Al Qaeda terrorists about to fall into the hands of the U.S. military or Northern Alliance, this process will neither serve as adequate justice nor as an effective deterrent to further acts of terror. More strikingly, domestic prosecution prevents the early apprehension of terrorists, as was the case when the Clinton administration declined Sudan’s offer in 1996 to turn over Osama bin Laden because there was not sufficient probable cause to try him in U.S. courts.<sup>35</sup>

The concerns about the effectiveness and practicality of civilian courts for trying terrorist suspects thus rest on its poor record, especially when one considers the scope of the attacks and their increasing audacity over time. The root sources of its failure is the process’ alleged virtue—the use of models drawn from the fight against organized crime. Organized crime and drug smuggling are, however, essentially problems stemming from material greed. In stark contrast, the motives of Al Qaeda are apocalyptic and ideological. As Ruth Wedgwood observes:

Perhaps it is only coincidence that the World Trade Center towers toppled the day before Al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies—in a Federal courthouse in lower Manhattan six blocks away. But certainly before September 11 no one imagined the gargantuan appetite for violence and revenge that bin Laden has since exhibited. Endangering America’s

---

34. *Id.*

35. Williams & Scharf, *supra* note 24, at M5.

cities with a repeat performance is a foolish act.<sup>36</sup>

What are the limitations of the U.S. federal courts in trying cases of these kinds? First, there are evidentiary limitations on what can be introduced in court. Unlike European criminal courts and the Yugoslavia tribunal—the darlings of international human rights advocates who are now complaining of the Bush Administration's plans under the Military Order—hearsay statements of probative value cannot be introduced in U.S. district court. Thus, as Wedgwood says, "bin Laden's telephone call to his mother, telling her that 'something big' was imminent, could not be entered into evidence if the source of information was his mother's best friend."<sup>37</sup> Second, there are limitations on what the intelligence community, concerned with possible future attacks rather than punishing past attackers, are willing to publish in open court. The 1980 Classified Information Procedures Act gives rules on using secret information at trial, but trials must remain open. Similarly important is information that is non-classified, but of great interest to terrorists, if published for example over the Internet—an example might be the capture of a terrorist procedures manual, public knowledge of the capture of which would then allow terrorist groups to make adjustments. Another example might be the publication, as took place in the 1993 World Trade Center bombing, of extensive engineering data on the construction of the towers; such information is public but not easy to obtain, unless, for example, it is brought into open court in a trial. The third reason is the long-term protection of participants, in a setting in which, because the perpetrators are driven by ideology rather than money, revenge may be considered a sacred, and hence permanent, obligation.

### *B. Criminals and Enemies*

These specifics refer back to a basic conceptual problem. The perpetrators of September 11 and other terrorist attacks are not morally and legally analogous to the perpetrators of domestic crime in a settled domestic society. For some, to be sure, such

---

36. Wedgwood, *supra* note 26, at A18. I draw liberally in this paragraph from Professor Wedgwood's analysis.

37. *Id.*

as former Clinton Administration Assistant Secretary of State of Human Rights and Yale Law School professor Harold Hongju Koh, they *are* similar and provide an opportunity to:

[p]romote values that must stand higher than vengeance: to hold them accountable for their crimes against humanity, to tell the world the true facts of those crimes and to demonstrate that civilized societies can provide justice for even the most heinous outlaws.<sup>38</sup>

This approach is seriously mistaken. The ability to prosecute domestic crime, and the necessity of providing constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake in both sides of the equation, as prosecutors and prosecuted, because we are part of the political community which must consider both individual rights and collective security.

It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. True enough, citizenship alone is enough to qualify a person to be tried for attacks upon that order, as in the case of a domestic terrorist such as Timothy McVeigh. But, in fact, the domestic legal system strains to acknowledge the awfulness of what someone like McVeigh has done: his crimes are *not* reducible to so many murders, so many injured victims, so much destruction of property, and so on in the way one thinks of ordinary criminals. The actual charges available to prosecutors in his trial, and hence the conduct of the trial itself, in a curious but profound way, missed the point of his act, which was not merely to murder people, but to make war upon the United States. McVeigh, like bin Laden and Al

---

38. Harold Hongju Koh, *We Have the Right Courts for bin Laden*, N.Y. Times, Nov. 23, 2001, at A33.

Qaeda, undertook not a deviation from the domestic order, but an attack upon it.<sup>39</sup> McVeigh's membership in the political community through citizenship was enough to grant him trial as though his acts were merely crimes and not attacks, but the moral reality is that McVeigh had transformed himself into a true outsider, not merely a deviant. He was not merely a criminal, but also an *enemy*. Al Qaeda has the same status—but the U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11.

#### IV. MILITARY COMMISSIONS

##### A. *Constitutional Questions*

The fundamental problem, of course, is that while it is easy to accept the distinction between domestic criminals, deviating from the domestic order, on the one hand, and those who are at once criminals and enemies of it, on the other, the question remains who shall make that essential determination in any particular case. I do not propose to critique the elements of the Military Order with regard to its various pronouncements on substantive law, procedure, and jurisdiction. Nor does this discussion take up the problem of separation of powers and the role of Congress, if any. The Military Order is deeply flawed in many of these matters, and I leave it to others to detail its problems. It is more useful instead to set out markers of what is constitutionally defensible, in conceptual terms.

First, the U.S. Constitution is not a document for the entire world. It is not a pact with the world, or a pact among people generally in the world. It is a document as among the members of a particular political community, and its burdens and

---

39. Moralists since the Holocaust and Nuremberg trials have oscillated on how to see the crimes and perpetrators at issue. There is a natural desire to scale down the "grandness" of the evil—thus Hannah Arendt's famous description of the "banality of evil," for example, or Albert Camus, in *The Rebel*, using the image of gangsters, and declaring that: "Deprived of the morality of Goethe, Germany chose, and submitted to, the ethics of the gang. . . . Gangster morality is an inexhaustible round of triumph and revenge, defeat and resentment." ALBERT CAMUS, *THE REBEL*, 150 (Anthony Bower trans., Alfred A. Knopf 1954) (1951).

benefits accrue to them. Particularly those in the international human rights community who now complain that the United States does not propose to extend full constitutional protections to categories of non-U.S. citizens on the ground that these protections are somehow required by notions of universal justice and due process seem to forget that this same human rights community has been careful to construct international tribunals, such as the Yugoslavia tribunal, which make no pretense of adhering to America's far more rigorous notions of procedure, due process, and evidentiary rules. Even in substantive law, too, the international human rights community has been more than happy to accept international standards on such things as incitement to racial hatred and hate speech that would clearly violate the First Amendment, on the ground that the U.S. Constitution does not and need not apply. Human rights activists cannot have it both ways.

Second, the fundamental parameters of the United States political community are twofold: citizenship and territory. The case for full U.S. constitutional protection is strongest when dealing with U.S. citizens on the territory of the United States—even including *McVeigh*—while the weakest case is a non-U.S. citizen on foreign territory, such as non-citizen Al Qaeda suspects captured in Afghanistan. Even the *McVeighs* deserve U.S. constitutional protections in regular U.S. courts (and have received them), while aliens abroad have not: this is all ordinary jurisprudence, and is reflected in the Military Order insofar as only (certain) aliens may be tried by military commission. The questions arise in the mixed cases.

Third, in my understanding, permanent residents of the United States, like citizens, are accorded full constitutional protection. This view is at odds with the Military Order, however, which fails to treat alien permanent residency as a separate and protected category of non-citizen. Federal courts, however, have and, in my estimation, would continue to read the language of the Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," for example, as applicable to permanent residents. Quoting Harvard Law School professor Laurence Tribe, "[N]ot even Congress could empower a president to subject any resident alien to trial by tribunal whenever the president claims reason to believe that the

accused ever aided or abetted what the president deems international terrorism."<sup>40</sup>

Fourth, in my view, territoriality ought to be decisive in the case of nonresident aliens *lawfully* on the territory of the United States. For example, alien students present on student visas for legitimate reasons would not be subject to military commissions, on the simple but intuitively persuasive ground that military commissions, as so many commentators have pointed out, *are* constitutionally dangerous creatures and that territoriality is one way of limiting the damage they can do. On the other hand, someone who entered the United States on allegedly valid papers, such as a student visa, but with the intent of committing terrorism, would not be present "lawfully" in the United States, and so would be subject to a military tribunal. On the other hand, a permanent resident who had entered the country lawfully, perhaps many years before, and who, for example, underwent a conversion to doctrines of terrorism, ought not to be subject to military commission. Neither of these situations, however, is consistent with the Military Order, which makes no such distinctions. On the other hand, White House counsel Alberto Gonzales, in what amounts to a reversal of portions of the Military Order and not merely an interpretation of them—has stated that an individual "arrested, detained, or tried in the United States" by military commission will be able to "challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court."<sup>41</sup> Habeas can serve as the protection for those nonresident aliens with facially valid papers, present in the United States, but accused of terrorist intentions.

### *B. International Law and Military Commissions*

If these basic markers of constitutionally acceptable jurisdiction of military commissions are provisionally accepted, so that persons who fall under the jurisdiction are acknowledged not to benefit from U.S. constitutional protection, then the question is to what procedural and due process protections they are entitled under international law. In

---

40. Laurence H. Tribe, Letter to the Editor, *Military Tribunals: Too Broad a Power*, N.Y. TIMES, Dec. 7, 2001, at A28.

41. Gonzales, *supra* note 5, at A25.

the circumstances of armed conflict in which the United States is now embroiled, the applicable law is international humanitarian law. It is worth beginning with the observation that international humanitarian law applies when the facts indicate that an armed conflict is underway, as is now the case for the United States. It is not necessarily the case that at some point in the future the United States would continue to be at war in the *actual* sense of armed conflict, the actual conduct of hostilities, as distinguished from "war" in a metaphorical sense, such as the "war on drugs." The reason this distinction of actual armed conflict is relevant is that a different set of international laws might then apply outside the context of actual armed conflict, rather than international humanitarian law, including such agreements as the International Covenant on Civil and Political Rights.

In the present situation of armed conflict, however, the applicable laws are the Geneva Conventions, on the one hand, and customary international law, the so-called "laws and customs of war," on the other.<sup>42</sup> The Third Geneva Convention covers the treatment of prisoners of war (POW), including the definition of who constitutes a bona fide POW and procedures for criminal proceedings against POW's.<sup>43</sup>

It provides at Article 4 a definition of a lawful combatant, who thus benefits from the so-called "combatant's privilege", which provides: first, immunity from prosecution for such acts as killings and destruction that would, under other circumstances, be considered criminal acts, provided that they are carried out under the requirements of the laws of war; second, the privilege of surrender and quarter; and, third, the right to be treated as a POW in case of capture by the enemy. Article 4 provides, in part, that POW's include persons "who having fallen into the hands of the enemy," as:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including

---

42. Theodor Meron, *Customary Law*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 113 (Roy Gutman and David Rieff eds., 1999).

43. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

such organized resistance movements, fulfill the following conditions: that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; that of conducting their operations in accordance with the laws and customs of war.<sup>44</sup>

Protocol I also provides rules about the definition of a combatant entitled to POW treatment; Article 44(3) states in part:

[A combatant] shall retain his status as a combatant, provided that . . . he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>45</sup>

The United States, however, has never accepted this extended definition of a combatant in Protocol I, on the grounds that it lessens, rather than increases, protections for the civilian population. It has specifically named this article of Protocol I as a reason why it refuses to ratify Protocol I, and it will not be bound by it in the current circumstances.

The point, however, is that the terrorists and organization which planned and executed the September 11 attacks do not fit the definition of combatants entitled to receive POW benefits. Apart from the requirements of carrying arms openly and bearing a fixed distinctive sign visible at a distance, and apart from any theoretical controversy over the extended definition of a combatant under Protocol I not accepted by the United States, it is patently clear that the September 11 terrorists fail the requirement of conducting their operations in accordance with the laws and customs of war. They failed this requirement, of course, by using civilians as both the means and targets of their attacks, among other things.

What is the consequence of failing to qualify as a POW? It is not that a POW is entirely immune from prosecution. POW's are liable to prosecution, including by the forces holding them, for violations of the laws and customs of war—war crimes and

---

44. *Id.*, art. 4(A)(2)(a)-(d), 6 U.S.T at 3320, 75 U.N.T.S. at 138.

45. Protocol I: Protocol Additional to the Geneva Convention of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, (1977) art. 44(3), 1125 U.N.T.S. at 23.

grave breaches of the Geneva Conventions. Moreover, a national of a "party to a conflict" who is captured by his own sovereign government—a rebel fighter in a civil war captured by government forces, or even more to the point, an American citizen such as John Philip Walker Lindh, a Taliban fighter captured while engaged in combat against U.S. forces<sup>46</sup>—is liable to prosecution for treason, murder, and other national laws by his own government. The significance is that a POW may only be tried according to the rules laid out in the Third Geneva Convention, which provide for basic due process. Those rules, found at Articles 99-108 of the Third Geneva Convention, do not provide for extensive due process on their own.<sup>47</sup> They do provide, however, that a POW must be given essentially the same rights that as a member of the armed forces of the party trying him or her would receive under similar circumstances:

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.<sup>48</sup>

The provision means that if a member of Al Qaeda or some other accused terrorist *was* determined to be a bona fide POW, then the procedures required to try him would be those under which an equivalent U.S. serviceman or woman would be tried. Those procedures would be under the United States Uniform Code of Military Justice (UCMJ), which in nearly every respect provides for the same constitutional rights for military personnel tried under courts-martial that a civilian would have in civilian courts. This reference would, in large part, of course, defeat the purpose of the Military Order, which seeks to provide military trials, but specifically *not* under the elaborate and extensive procedural rules of the UCMJ and its full constitutional protections.

If a person accused of terrorist activity does *not*, however,

---

46. See Dexter Filkins, *With the Military Present, Red Cross Officials Talk to Captured U.S. Citizen*, N.Y. TIMES, Dec. 6, 2001, at B2.

47. The rules do, however, provide more extensive procedures in capital trials, and specifically provide that six months shall go by after giving a POW notice of sentence before a sentence of death may be carried out. See Third Geneva Convention, *supra* note 43, art. 101, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

48. *Id.* art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

meet the requirements of the Third Geneva Convention as a POW, does he then benefit from any protection under international humanitarian law? Such people would be counted, at that point, as what the Bush Administration has declared them to be, “unqualified belligerents” or “unqualified combatants”—combatants who do not meet the legal requirements to be POW’s and hence are liable to prosecution under national and international law for any belligerent actions they may have participated or conspired in. They are to be fought militarily as unqualified combatants, but if captured, treated as criminals.

Although unqualified belligerents benefit in international humanitarian law from some minimal procedural and due process protections, not even unqualified belligerents, spies, or civilian saboteurs may be dealt with summarily—that is, without benefit of a hearing to determine their status and fate. Article 75 of Protocol I lays out a roadmap to minimal procedural fairness accorded to such persons, and it states in part:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offense related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally principles of regular judicial procedures . . . .<sup>49</sup>

It may be argued that the military commissions established in the Military Order do not constitute a “regularly constituted court,” operating with “regular judicial procedures.” Moreover, the Commission may not be viewed as “impartial.” To this claim it might be tempting for the United States government to reply that it has never ratified Protocol I, from which this language is drawn. This response would be a mistake because the United States has an interest in ensuring that its soldiers, civilian operatives such as CIA agents, and so on, are not subjected to summary procedures in other circumstances. The procedures in Article 75 of Protocol I are so minimal that the United States would not be likely to have a problem acknowledging them as a restatement of customary international law.

It would be more correct for the United States to explicitly

---

49. Protocol I, *supra* note 45, art. 75(4), 1125 U.N.T.S. at 37-38.

frame its military commissions as compliant with Article 75 of Protocol I and to assert that they are regularly constituted courts, with regular judicial procedures, operating in an impartial manner. It is in this context that the history of military commissions convened by U.S. armed forces in conflicts from the Civil War to World War II becomes relevant—as evidence of practice which has been accepted by both U.S. civilian courts, including the U.S. Supreme Court, as well as by other armed forces such as the World War II allies.

It is worth noting what is *not* required by Article 75 (although it specifically reserves any other protection which a person might benefit from under any other law or provision). It does require that a person charged with an offense is presumed innocent until proven guilty. The Military Order is grievously wrong in this regard.<sup>50</sup> Moreover, Article 78 does provide for notice, a right to be heard, conviction only for personal penal responsibility rather than collective punishment, the right to be present in the hearing, the right to examine witnesses against one and put on one's own witnesses under the same circumstances as witnesses against one, for public pronouncement of the judgment, and the right to be advised of post conviction remedies.<sup>51</sup> Further, Article 75 prohibits prosecutions for *ex post facto* crimes.<sup>52</sup> But Article 75 does not mention a right to counsel, let alone a right to the counsel of one's choice. It does not provide for a public trial; only that it is a right of the convicted to have the judgment pronounced publicly. Nor does it provide for judicial review either by higher military or civilian authorities. It does not require any special procedures for reaching a capital verdict.

Article 75 of Protocol I is thus nearly void of procedural protections, yet it is the minimum due process required by international humanitarian law for persons, such as unprivileged combatants, who do not benefit from other protections of law. It is frankly far below what the United States has announced will be the procedural protections of the military commissions. Those protections ought to be far higher than announced in the Military Order, but the point is that the

---

50. *Id.* art. 75(4)(d), 1125 U.N.T.S. at 38.

51. *Id.* art. 75(4) (a)-(j), 1125 U.N.T.S. at 37-38.

52. *Id.*

United States can and should frame these military commissions as consistent with international humanitarian law in this time of actual hostilities.

The final question, however, with respect to international humanitarian law, is who has the power to determine whether a person is an unprivileged combatant subject to Article 75 of Protocol I or is instead a POW who benefits from the Third Geneva Convention. The United States, thus far, appears to have taken the position that those persons involved in the September 11 attacks are, by definition, unprivileged combatants because of the nature of the attacks themselves and their violation of the laws and customs of war, and that this determination can be made under the power of the commander in chief. The Bush Administration has accepted, in addition, at least according to the White House counsel, Alberto Gonzales, a right of habeas corpus to determine jurisdiction and status for persons "arrested, detained, or tried *in the United States*" by military commission that would otherwise make a final determination of the question of POW status.<sup>53</sup>

With respect to those who would not benefit from a writ of habeas corpus presented to civilian federal courts, because the person is a non-citizen arrested, detained, or tried outside the United States, neither the Third Geneva Convention nor Article 75 addresses the matter directly. The relevant article of the Third Geneva Convention provides, at Article 5:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POW's], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>54</sup>

The question is whether a military commission can be considered a "competent tribunal" (and in particular for persons who do not have other procedural avenues such as habeas corpus). In my opinion, a military commission can meet the requirements of a "competent tribunal" if it is within the requirements of Article 75, specifically, a regularly constituted court with regular judicial procedures and impartiality. It need

---

53. Gonzales, *supra* note 5, at A25 (emphasis added).

54. Third Geneva Convention, *supra* note 43, art. 5, 6 U.S.T. at 3364, 3394, 75 U.N.T.S. at 142, 212.

not be a court martial under the Third Geneva Convention rules applicable to bona fide POW's. If this were not the case, the truncated due process requirements of Article 75 would mean very little, because *every* attempt to proceed under the minimal requirements of Article 75 would result in recourse to a regular POW court martial under Article 5 of the Third Geneva Convention in order to determine an individual's status.

It is theoretically possible, one supposes, that recourse to full POW court martial proceedings in every case was the intent of the Article 75(8) provision stating that: "No provision of this Article [75] may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1."<sup>55</sup> Such an interpretation, however, is untenable under any plausible construction. Since the "persons covered by paragraph 1" are declared to be those who are *not* covered by any "more favorable treatment under the [Geneva] Convention or under this Protocol [I],"<sup>56</sup> then the persons referred to in Article 75(8) are not, by definition, POW's, because if they were, they would not be "covered by paragraph 1." If they are not POW's, then they are entitled only to a competent tribunal which, if Article 75 is to mean anything less than the full procedures required under the Third Geneva Convention, leads to the conclusion that a court legally convened under the lesser standards of Article 75 ought to be able to make a determination as to whether the accused is in fact a POW or unprivileged combatant. Nevertheless, it should be plainly stated that the Military Order departs from the concept of justice by not providing for a review even by other military judges. Appeal to a military appeals panel providing finality that could review the question of status would remove any doubt as to whether the requirements of Article 5 of the Third Geneva Convention or Article 75 of Protocol I had been met. Moreover, it is a desirable thing from the standpoint of military justice itself, even within the strictures of military commissions.

---

55. Protocol I, *supra* note 45, art. 75(8), 1125 U.N.T.S. at 38.

56. *Id.* art. 75(1), at 37.

V. THE DETAINEES AT GUANTANAMO BAY  
NAVAL BASE, CUBA

Since the writing of the main body of this Article in December 2001, the primary focus of debate and controversy over the application of the laws of war in the war on terrorism has been the treatment and legal status of battlefield detainees taken into the custody of the United States in the course of hostilities in Afghanistan and now transferred, or slated to be transferred, to a detention center at the United States military base at Guantanamo Bay, Cuba. As of this writing, on January 30, 2002, 158 detainees transferred from Afghanistan are being held at Guantanamo Bay; the New York Times reports that there are citizens of at least twenty-five countries among the detainees, including Britain, Australia, France, Belgium, Sweden, Algeria, Yemen, Afghanistan, Pakistan, and Saudi Arabia.<sup>57</sup> The United States had announced plans to bring hundreds more for an undetermined period of detention and final fate,<sup>58</sup> and has been in the process of constructing permanent facilities for 1,000 or more detainees.<sup>59</sup>

Complaints of inhumane treatment of the detainees has been vociferous, especially from European governments and international human rights activists, and especially so following the publication of photographs showing prisoners arriving from Afghanistan, “[s]hackled and blinded by blacked-out goggles.”<sup>60</sup> Amnesty International, for example, is reported as describing this arrival treatment as “classic techniques employed to ‘break’ the spirit of individuals ahead of interrogation.”<sup>61</sup> It and Human Rights Watch have further claimed that the open-walled pens in which the men are held

---

57. Katharine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand on Treating Captives of War: He Rejects P.O.W. Status*, N.Y. TIMES, Jan. 29, 2002, at A1.

58. See Jess Bravin, et. al., *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team’s Meeting*, WALL ST. J., Jan. 28, 2002, at A16 (“the 158 men imprisoned at the Guantanamo Bay Naval Base, and the hundreds more expected to join them.”).

59. See Jess Bravin, *U.S. Dismisses Queries About Cuba Detainees*, WALL ST. J., Jan. 23, 2002, at B12 (“Around the clock, Navy Seabees are building more cages, guard towers and other facilities to expand Camp X-Ray. Later, the camp will be replaced by a ‘more permanent’ prison designed for 1,000 inmates, said Marine Brig. Gen. Michael R. Lehnert.”).

60. *Id.*

61. *Id.*

violate provisions of the Geneva Conventions requiring that prisoner facilities shall "be entirely protected from the dampness and adequately heated and lighted, in particular between dusk and lights out."<sup>62</sup> In Britain, the Mail on Sunday newspaper headlined a photograph of the shackled and goggled prisoners "Tortured," while The Mirror headlined the same photograph with, "What the hell are you doing in our name Mr. Blair?"<sup>63</sup> London's Daily Mail opined that America was in the grip of a "revenge lust that has swept away normal moral concerns."<sup>64</sup> Jack Straw, the British foreign secretary, has "called for the British suspects to be sent home for trial,"<sup>65</sup> although, as of this writing, Prime Minister Tony Blair's has noted that the "three British prisoners at the detention center, called Camp X-Ray, 'had no complaints about their treatment.'"<sup>66</sup>

Notwithstanding the shrillness of the criticism, there appears to be little if any substance to the complaints about treatment of the detainees. The detainees, according to all the accounts of journalists and visitors to the camp of which I am aware, including a U.S. congressional delegation,<sup>67</sup> are receiving a quality of care, in the way of housing, food, medical attention, and religious requirements, that far exceeds the standard of the Third Geneva Convention, even assuming that it applied. As a British journalist who visited the Guantanamo facility has said, "There are 161 medical staff treating the [158] detainees. I have talked to surgeons who told me that hardened fighters suffering from shrapnel and bullet wounds had thanked them after being operated on."<sup>68</sup>

As for the allegations of torture and mistreatment so freely tossed about by European news media and international

62. Katherine Q. Seelye, *On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A14.

63. Toby Harnden, *X-Ray, From Close Up*, WALL ST. J., Jan. 30, 2002, at A18.

64. Katharine Q. Seelye, *Criticized, U.S. Brings Visitors to Prison Camp*, N.Y. TIMES, Jan. 26, 2002, at A6 (citation omitted).

65. *Id.*

66. Katharine Q. Seelye, *Rumsfeld Defends Treatment by U.S. of Cuba Detainees*, N.Y. TIMES, Jan. 23, 2002, at A1.

67. See, e.g., John Mintz, *Delegations Praise Detainees' Treatment*, WASH. POST, Jan. 26, 2002, at A15 ("Two congressional delegations that toured the prison camp . . . yesterday said they saw no evidence the prisoners are being mistreated.").

68. Toby Harnden, *X-Ray, From Close Up*, WALL ST. J., Jan. 30, 2002, at A18 (Washington bureau chief of the Daily Telegraph (London)).

human rights organizations such as Amnesty International, even if, as they claim, the Third Geneva Convention applied to these detainees, its provision would not invalidate the security procedures that the United States has used with respect to these men. They are, after all, precisely what the United States has said they are—hardened, tough fighters who pose an extraordinary threat not only to the United States but to the men and women guarding them. The “detaining power,” in the language of the Third Geneva Convention, even if it does apply, has full rights to use sensible security precautions, particularly with prisoners who have, in some cases, *already* abused their status as detainees. These detainees may include, after all, some of those who surrendered falsely in Afghanistan, only to begin fighting again, with the resulting death of CIA officer Johnny Spann.<sup>69</sup> Human rights organizations, such as Amnesty International, might reflect on the fact that abuse of the privilege of surrender, perfidious surrender, is itself a separate and distinct war crime, and that where a “detaining power” deals with prisoners among whom are likely to be those who have already shown a propensity for violating the privilege of surrender, it is entitled to use such measures as shackles and hoods.<sup>70</sup>

The core of the issue of treatment, therefore, comes down to two questions. The first is the question of interrogation of the prisoners. The second is how long the United States might hold them, and whether it has any legal obligations, either under international law or U.S. law, to bring charges or release them.

With respect to the first question, interrogation, the United States has been adamant that it will interrogate the detainees relentlessly in order to obtain information that might help it avert future attacks on the United States.<sup>71</sup> Congressional visitors to Guantanamo have reported, for example, that interrogations “have yielded valuable intelligence on al

---

69. See, e.g., *Prisoners of Politics*, WALL ST. J., Jan. 30, 2002, at A18 (liberal critics who have “leapt to denounce conditions in Cuba for the killers of CIA agent Johnny Spann.”).

70. See, e.g., David Rhode, *Perfidy and Treachery*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 270-71 (Roy Gutman & David Rieff eds., 1999).

71. See, e.g., Katharine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand of Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1 (“The administration . . . wants the freedom to question.”).

Qaeda."<sup>72</sup> It is true that detainees who are classified as POW's under the Third Geneva Convention are more greatly protected from interrogation than those who are not; specifically, they may not be punished for refusing to reveal anything other than the classic "name, rank, and serial number." However, contrary to the impressions of some of the Bush Administration's critics, this does *not* mean that the "detaining power" may not ask any questions it likes. On the contrary, it may ask away; but it simply may not punish for failure to answer. The Third Geneva Convention under Article 17 is sweeping in its protection of POW's, but it does not preclude questioning as such:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.<sup>73</sup>

Moreover, even under the Third Geneva Convention, POW's may be *rewarded* if they do answer. In the end, there is considerable significance with respect to interrogation attached to being a bona fide POW, but less than some might think. After all, whether or not the detainees are treated as POW's, they may not be physically abused in the course of interrogation. Neither may they be psychologically abused, whether by reference to the detailed requirements of Article 17 or on some broader standard of human rights, although the standard for determining what constitutes non-physical abuse of detainees, whether POW's or otherwise, is inherently more ambiguous, and often will reside in a gray area that coincides with what are defensible security precautions, such as shackles. Moreover, the rights groups so solicitous for the rights of the Guantanamo detainees ought to consider that the interrogations are not merely in pursuit of strategic goals of warfare; they are *also* in pursuit of alleged war criminals in respect of past actions and, quite possibly, future ones. International human rights monitors are fond of announcing the universal international law obligation to pursue allegations

---

72. John Mintz, *Delegations Praise Detainees' Treatment*, WASH. POST, Jan. 26, 2002, at A15.

73. Third Geneva Convention, *supra* note 43, art. 17, 6 U.S.T. at 3330, 75 U.N.T.S. at 148.

of war crimes under all circumstances. Why should that obligation be any less just because the beneficiaries of success in tracking down perpetrators of past acts and conspirators towards future ones are likely to be Americans?

A much more serious issue is the question of how long detention might run. Here too, however, the issue of whether a detainee is a POW under the Third Geneva Convention is important but not the only consideration. It is true that bona fide POW's must be repatriated at the "cessation of active hostilities" (although prisoners serving sentences validly pronounced for war crimes or other crimes may be compelled to serve them).<sup>74</sup> However, even if the detainees were not covered by the Third Geneva Convention, a person may not be held forever without charges or trial. At some point, in some manner, whether through the vehicle of the international law of war or some other avenue, the question of indefinite and possibly permanent detention without trial must eventually arise.

That having been said, even if the Third Geneva Convention applied, at least at this moment, active hostilities in Afghanistan continue. Detention and internment, even of civilians and non-combatants, let alone combatants, under the Third and Fourth Geneva Conventions are quite acceptable, so long as certain procedures for their protection are in place. Not only fighters, but under certain criteria, even non-combatant civilians may be deemed a security risk and interned; there are limits to this power, but the Fourth Geneva Convention grants a certain level of discretion to the security needs of a party to a conflict. Moreover, one could argue—decisively, in my view—that as long as operations are being carried out against Al Qaeda, the organization whose destruction is one of the war aims of the United States, the United States is perfectly entitled under the Third Geneva Convention to detain fighters whom it determines to be a security risk in connection with that organization, not merely in Afghanistan, but elsewhere. The theater of war is wider than Afghanistan. It probably could not do so with respect to an endless and essentially metaphorical "war on terrorism" dealing with targets wholly unrelated to Al

---

74. Third Geneva Convention, *supra* note 43, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

Qaeda—a war which might indeed have no end—but it is certainly entitled to do so with fighters or civilians connected even loosely with Al Qaeda, wherever they may be. Absent the application of the Third Geneva Convention, the United States, while it must eventually bring charges and have some kind of trial, even if only a military tribunal as discussed above, has considerable latitude in the timing and preparation of those trials. They need not happen on a timetable to suit Amnesty International, Human Rights Watch, or the governments of the European Union.

Ultimately, of course, the outcomes of many of the issues raised above hinge largely, although not completely, on whether a detainee is regarded as a bona fide POW under the Third Geneva Convention or not. Three positions have emerged on this issue. First, the Bush Administration has asserted strongly that the detainees are not entitled to *any* application of the Third Geneva Convention, not even to determine their status as POW's or, instead, as unlawful combatants, as discussed above. This Article has already discussed, in connection with military tribunals, the requirements to be a POW under the Third Geneva Convention. The point made by the Bush Administration is that Al Qaeda is not a military force at all, even if the forces that seeking to destroy it are U.S. military forces. It is instead, in this view, a criminal organization pure and simple, and its fighters are not legal combatants, nor are they entitled to a determination under the Third Geneva Convention to ascertain whether they are.<sup>75</sup> To give them that status would be the same as saying that an international drug trafficker picked up, for example, in international waters by the U.S. Navy would be entitled to a hearing under the Third Geneva Convention to determine whether he or she was a POW, merely on account of the fact that those picking him or her up were military engaged in a military operation.

Although this position has been defended generally on grounds that the Geneva Conventions are simply inapplicable

---

75. See, e.g., Katharine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand of Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1. ("The administration has contended that the captives are terrorists, not conventional soldiers in a conventional war, and that they are therefore not deserving of the protections of the Geneva rules.").

to criminal terrorists, it is worth noting that a principled argument to the same end can be made on the basis of the Third Geneva Convention itself. Critics of the Bush Administration's position have focused, logically enough, on the language of Article 5 which provides that in cases of doubt, the matter shall be resolved by a "competent tribunal." I have argued *supra* that a competent tribunal may perfectly well be a military commission operating in conformity with Article 75 of Protocol I insofar as it embodies customary international law, rather than either civilian courts or a regular court martial. The text of Article 5, however, states a threshold before anything need be resolved by a "competent tribunal"; namely, a competent tribunal is required only "should any doubt arise" with respect to the status of detainees. Article 5 contains no requirement whatsoever that the question of whether there *is* any doubt must itself be a question for a "competent tribunal" versus a determination by military authorities as such. Thus, Secretary of Defense Rumsfeld could and has asserted that there is no doubt as to their status—" [t]here is no ambiguity in this case"<sup>76</sup>—and hence no requirement to hold a tribunal.

Despite the fact that one recoils at the implication that, in theory at least, every drug operation conducted by the U.S. military might require some kind of tribunal to determine POW status, and despite the fact that a principled argument can be made from the text of the Third Geneva Convention itself in Article 5, the Bush Administration's position is ultimately not persuasive. It is not persuasive principally for the reason that irrespective of such niceties as declaring war, by any understanding of the international law of war, the United States has and continues to be engaged in armed conflict. It is using its full military machinery to wage war. After all, what distinguishes the Bush strategy against terrorism from the Clinton-era strategy of law enforcement? It is emphatically *not* that law enforcement activities are being "supported" by military action. The United States went down that path, to its sorrow, in Somalia in 1993.<sup>77</sup> The fundamental difference between the current war and law enforcement is not the

---

76. Katharine Q. Seelye, *Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6.

77. See MARK BOWDEN, *BLACKHAWK DOWN: A STORY OF MODERN WAR* (1999).

participation of U.S. military acting as a posse sent out to arrest the bad guys. It is, rather, that Bush announced that the United States would *not distinguish* between terrorists and states that harbor them, and would bring down either as necessary.<sup>78</sup> Announcing aims that deliberately link non-state actors and states means, if you use the weapons of modern war, that politically, morally, and legally, you are at war. In this instance, then, Human Rights Watch is correct in its assessment:

The United States government could have pursued terrorist suspects by traditional law-enforcement means, in which case the Geneva Conventions would not apply . . . But since the United States government engaged in armed conflict in Afghanistan—by bombing and undertaking other military operations—the Geneva Conventions clearly do apply to that conflict.<sup>79</sup>

The second position is that espoused at least occasionally by Amnesty International officials and a handful of other commentators. According to the Washington Post, although “Amnesty International has not taken a formal stand on the POW question . . . officials with the human rights group say they believe Al Qaeda fighters qualify as POW’s because they were at the time intermingled with regular Taliban forces in Afghanistan.”<sup>80</sup> The argument appears to be that by being “intermingled” with regular Taliban fighters, Al Qaeda fighters were somehow assimilated into Taliban command structure and so (presuming that Taliban fighters are entitled to regular POW status) they overcame the problem of Al Qaeda not adhering to the laws of war by being part of an organization that (presumably) did, at least enough for its fighters to qualify as legal combatants.

This second position appears dubious at best. It is not in the least bit obvious that by being an Al Qaeda fighter, someone who has come typically from outside Afghanistan to train and fight, becomes “part” of a “legal” organization by

---

78. See Address to a Joint Session of Congress on the United States and the American, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001), available at <http://whitehouse.gov/news/releases/2001/09/20010920-8.html>.

79. Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Condoleezza Rice, National Security Adviser (Jan. 28, 2002), quoted in Katharine Q. Seelye, *A P.O.W. Tangle: What the Law Says*, N.Y. TIMES, Jan. 29, 2002, at A14.

80. John Mintz, *On Detainees, U.S. Faces Legal Quandary*, WASH. POST, Jan. 27, 2002, at A22.

intermingling with them. The issue is command and control. It is simply a fact of international law that one's status as a legal or illegal combatant under the Third Geneva Convention depends in part on the nature of the *organization* for which one fights. If the organization collectively fails the test of the Third Geneva Convention, its fighters individually are not POW's, irrespective of whether they have individually committed war crimes or not: This is the meaning of Article 4(a)(2)(d) of the Third Geneva Convention requiring that those who are not members of "regular" armed forces be part of an organization capable of adhering to the laws of war.<sup>81</sup> Al Qaeda plainly does not meet that test. Whether the Taliban meet that test is an open question, given that the Taliban was recognized as a government by no more than three states in the world and that it came to power through civil war that did not necessarily convey any status of a successor state. Even if the Taliban did meet that standard, however, merely being with them does not constitute being part of them in the relevant sense of command and control. On the contrary, it is far easier to argue that whatever legal status the Taliban enjoyed was instead vitiated by the incorporation of obviously illegal combatants into its ranks. It is far more persuasive to think that the Taliban weakened the claim of its fighters to POW status by fighting with Al Qaeda than that Al Qaeda fighters strengthened their claims by fighting with the Taliban.

The third, and most persuasive position, is that currently being enunciated by the U.S. State Department in discussions within the Bush Administration taking place.<sup>82</sup> Under this view, the detainees are covered by the Third Geneva Convention in the sense that they are entitled individually to a hearing by a "competent tribunal" to determine their status as either bona fide POW's or else unlawful combatants. The question of their status, however, is determined by their membership or participation in an organization, Al Qaeda, that does not meet the requirements of the Third Geneva

---

81. Of course, they can only be held *individually* criminally liable for their own individual actions, including actions as conspirators, but the *procedures* under which they can be tried—full Third Geneva Convention POW procedures or truncated Article 75 procedures—will be determined by the nature of the organization for which they fought.

82. See, e.g., Seelye & Sanger, *supra* note 75, at A1.

Convention. The sole issue for a tribunal is to determine their connection to organizations not meeting those requirements (and, significantly, whether they fought *for* some organization that met the requirements—fighting “solo,” so to speak, also flunks the Third Geneva Convention tests). If they cross that threshold, they are treated as POW’s, and if not, they are illegal combatants. At some point, even as illegal combatants, they must be charged and tried, but they would receive no greater protections than the customary law provisions already outlined under the discussion of Article 75 of Protocol I.

The question then remains of what constitutes a “competent tribunal” within the meaning of the Third Geneva Convention. At that point, the legal analysis re-joins that already discussed with respect to military commissions. A competent tribunal need *not* be a tribunal convened with full POW protections under the Third Geneva Convention. The argument that providing provisional POW protections to a detainee in respect of treatment further means that a “competent tribunal” must also be a court martial under the Third Geneva Convention itself fatally ignores the specific provisions of Article 75, which—drafted some thirty years after the 1949 Conventions and fully cognizant of them—affirmatively establish a lower standard of process. To require that every hearing be under the Third Geneva Convention POW standard would render pointless the lesser procedures specifically established under Article 75 and customary law for dealing with those accused of abusing their civilian status, such as spies, saboteurs, and other illegal combatants. Rather, all that is required is what has already been stated under Article 75. It is a procedure which does not require an open trial, does not require counsel, and does not even require an appeals process although, as earlier stated, I believe the United States ought to provide for one.

In my view, the best way for the United States to proceed with the detainees at Guantanamo Bay Naval Base would be under the terms of its own regulations dating from 1997 and contemplating exactly this situation.<sup>83</sup> The determination of POW or illegal combatant status should be done by a three

---

83. See ARMY PUBLICATIONS AND PRINTING COMMAND, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES AND OTHER DETAINEES § 3 (1997), <http://books.usapa.belvoir.army.mil/cgi-bin/bookmgr/BOOKS/JI31304/CCONTENTS>.

officer tribunal, using a majority vote, and a standard of the preponderance of the evidence.

What kind of evidence should a panel consider, given that Al Qaeda is not an organization handing out membership cards? Among the factors to be considered ordinarily dispositive with respect to the fighters taken from Afghanistan to Guantanamo would at least figure whether the fighter had trained in Al Qaeda camps. Similarly ordinarily dispositive ought to be nationality; although there may well be Afghan Al Qaeda, foreigners fighting in Afghanistan should be regarded as Al Qaeda. Such tribunals could be convened quickly and efficiently. If conjoined with a limited appeals process made solely to a military tribunal (but during which time the United States would be free to treat the detainee as an illegal combatant subject to reversal by the appellate panel), the interests of a fair procedure under international law and the pursuit of illegal combatants could both be accommodated. Some level of infra-military appeals process also has the important political virtue of allowing a quick initial panel with an appeals panel (no counsel at any level, consistent with Article 75) that can consider appeals more slowly while still treating the detainees as formally adjudged illegal combatants. The political risk of not having an appeals process is that any initial trial panel would inevitably be denounced as a kangaroo court, and in order to respond to criticism—especially coming from so many erstwhile “allies” with nationals in custody—the Bush Administration would inevitably slow down the process and complicate the procedure. Better instead to have an appeals process, strictly within the military. Beyond that, it should ignore the shrill voices of those whose policy amounts to a tender solicitude for the alleged rights of anyone, just so long as they are not American.

## VI. CONCLUSION

Nevertheless, a serious moral lacuna remains. The Military Order provides for trial by military commission on charges of “violations of the laws of war and other applicable laws.”<sup>84</sup> White House counsel Gonzales says that those tried “must be chargeable with offenses against the international laws of war,

---

84. Military Order, *supra* note 1, § 1(e).

like targeting civilians or hiding in civilian populations and refusing to bear arms openly."<sup>85</sup> The same substantive terms would apply to an international tribunal or to a U.S. district court trial. Yet it somehow misses the point.

If we were to elaborate the crimes with which the perpetrators of September 11 should be charged in any of these fora, we would include murder, conspiracy to murder, destruction of property, and others. Under international humanitarian law, they could also be charged with violations of the laws and customs of war, including the targeting of civilians and using prohibited means and methods of attack. Others would even add a charge for crimes against humanity. Yet, this does not quite satisfy us, because beyond the methods of warfare, in the traditional sense of *jus in bello*, we Americans also want to punish them, in a categorical, not narrowly legal, sense, for their aggression against the United States. We want retribution not just for crimes against individuals, but for aggression against the United States of America.

Liberal internationalists, it is true, have an easy solution to this conundrum. They would simply make such aggression an international crime and give it an international forum for trial. The ICC statute, for example, opens the possibility for the ICC to have jurisdiction over crimes of aggression—the traditional category of *jus ad bellum*, the law governing the resort to force rather than simply the law governing the conduct of combatants.<sup>86</sup> But this would require agreement as to the substance, as well as the justiciability, of aggression. This enterprise, for many sound reasons, has failed since Nuremberg. The nascent United Nations, through its Charter, left the determination of what constitutes a threat to international peace and security solely to the political discretion of the Security Council, thus wiping out what the American prosecutor at Nuremberg, Justice Jackson, thought was his finest achievement in making the crime of aggression judicially cognizable. In addition to the Security Council, a state under both the U.N. Charter and customary international law retains its customary right of self-defense and, by

---

85. Gonzales, *supra* note 5, at A25.

86. Rome Statute of the International Criminal Court, July 17, 1998, art. 5(1)(d), U.N. Doc. A/CONF.183/9 (1998).

implication, at least partly its independent judgment as to what constitutes aggression requiring self-defense. This independent determination, also valid under customary law of self-defense, underlies the U.S. basis for armed action in this conflict.

Given the existence of sound reasons for not judicially criminalizing aggression, its punishment becomes harder to conceive—at least in a world in which people are conditioned to believe that punishment must always be *judicially* mandated. With respect to those who we capture who are, as I argued earlier, criminals as well as our enemies—those who are criminals, but not criminals within the sense of a domestic or political order, and who by their actions and ideology have made themselves our enemies—we are left in a moral quandary. If our enemies were destroyed in battle, then that may be taken as punishment enough. Aggression defeated and punished in the same action. But what about those whom we capture? We try them for crimes, war crimes and domestic crimes, that do not wholly satisfy our sense of their evil acts, and yet we do not believe, either, that those who are outside of our domestic political arrangements ought to be treated as ordinary criminals.

This is part of the moral argument that takes us to military commissions, because they permit us to treat these accused with a form of due process, but which is a process unlike that given to ordinary criminals. If what is most objected to, at bottom, in the establishment of military commissions under the Military Order, is that they leave to the political determination of the President and his political appointees which individuals, within certain categories, may be subjected to them—well, that is also their moral virtue. The determination of who is not merely a criminal, but a criminal who is *also* an enemy is, and ought to remain, a fundamentally political decision. It requires a finding of criminality by a court—criminality in the sense of ordinary crimes or war crimes. This judicial finding of criminality, however, is a determination to be made by the military commission *after* it has received a suspect by referral from the President. And while the President ought to make a referral in part because he has a serious reason to think that domestic or international law of war has been violated, in part the President should act only because he has determined that this person has committed aggression against the United States,

and is therefore an enemy of the United States. The procedure for a referral to a military commission does not treat aggression as a justiciable crime, but neither does it simply ignore the moral reality of it.

It is incontrovertible that commissions grant great power to the Presidency, to the Commander in Chief, and therefore ought to be exercised with great caution. But they do have the virtue of addressing a great moral gap. It is one we lived with in punishing McVeigh because, in the end, he was both an enemy and one of "ours." With Al Qaeda suspects who are not citizens and who are either unlawfully in the United States or beyond our shores, we have little, indeed no, reason to do so.

A military commission must be free to determine whether or not allegations of criminality are true or not, impartially and dispassionately, and what punishment, if any, might be deserved. But the determination that someone is an *enemy* of the United States, and therefore subject to this forum for trying their alleged criminality—is a political, not a judicial, decision. Judges determine who is guilty of a crime. Political authorities determine the identity of our nation's enemies. Military commissions must be invoked with vigilance for their propensity to threaten civil liberties, but the initial judgment of who—standing outside the embrace of the Constitution and on account of aggression—is an enemy of the United States is finally and properly one for the political branches of democratic government.