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Trying Terrorists as War Criminals

Jennifer Elsea
Legislative Attorney
American Law Division

Summary

In the aftermath of the September 11 terrorist attacks on the World Trade Center and the Pentagon, the question of whether to treat the attacks as acts of war or criminal acts has not been fully settled. The purpose of this report is to clarify the rationale for treating the acts as war crimes and the ramifications of applying the law of war rather than criminal statutes to prosecute the perpetrators. The discussion focuses on the trial of alleged terrorists and conspirators by a military commission rather than the federal courts.

In the aftermath of the September 11 terrorist attacks on the World Trade Center and the Pentagon, the question of whether to treat the attacks as acts of war or criminal acts has not been fully settled. The distinction may have more than rhetorical value. The purpose of this report is to clarify the law enforcement implications of treating the terrorist acts as war crimes and to identify the possible ramifications of applying the law of war rather than criminal statutes to prosecute the alleged perpetrators.

Law Enforcement versus Law of War. Some observers have expressed concern that treating terrorist acts as acts of war may legitimize the acts as a lawful use of force and elevate the status of the Taliban and the terrorist networks to that of legitimate state actors and lawful combatants. However, it may be argued that an application of the law of war to terrorism does not imply lawfulness of the conflict, nor does it imply that perpetrators are not criminals.¹ Terrorists do not, by definition, conduct themselves as lawful combatants.² Under this view, they may be treated as war criminals and if captured, are not entitled to prisoner-of-war status under the Geneva Conventions. As suspected war criminals, they may be tried by any nation in its national courts or by a military commission convened by one nation or many.

¹ See LT. COL. RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 63-65 (1989).

² See Spencer J. Crona and Niel A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U.L. REV. 349 (1996).

The Justice Department is reportedly exploring whether to adopt the law of war approach to prosecute those responsible for the September 11 attacks. It appears that there are few legal impediments to adopting such an approach. Other practical considerations that may arise include the following questions: Must war crimes be investigated by military police, possibly implicating the *Posse Comitatus* Act? If federal or state police are used, must they follow the same standards that they apply to criminal cases? How will it affect the United States' ability to extradite terrorists captured abroad?

Such an approach could also have an impact on civil matters. Will there be any effect on the possible civil liability of terrorists to compensate victims?³ Would it matter if a particular victim was a government employee or someone located at a "military target" at the time of an attack? Will there be an effect on the liability of insurers?⁴ A decision to adopt a law of war approach to the terrorist acts currently at issue, or to all future terrorist acts, could also have significant foreign policy repercussions.

What is the Law of War? As a subset of the law of nations, the law of war is a composite of many sources and is subject to varying interpretations constantly adjusting to address new technology and the changing nature of war. It may also be referred to as *jus in bello*, or law in war, which refers to the conduct of combatants in armed conflict, as distinguished from *jus ad bellum*—law before war— which outlines acceptable reasons for nations to engage in armed conflict.⁵ The main thrust of its principles requires that a military objective be pursued in such a way as to avoid needless and disproportionate suffering and damages. Sources of the law of war include international agreements, customary principles and rules of international law, judicial decisions by both national and international tribunals, national manuals of military law, treatises, and resolutions of various international bodies.⁶

At the risk of oversimplifying the concept, three principles derived from the law of war may be applied to assess the legality of any use of force for political objectives.⁷

Military necessity. If the use of force is justified, that use must be proportional in relation to the anticipated military advantage or as a measure of self-defense. The principle applies to the choice of targets, weapons and methods. This principle, however, does not apply to unlawful acts of war. There can be no excuse of necessity if the resort to the use of arms is not itself justified.

Humanity. Lawful combatants are bound to use force discriminately. In other words, they must limit targets to valid military objectives and must use means no harsher than

³ Civil actions brought under 18 U.S.C. §2333 (terrorism remedies) may not be maintained for acts of war. 18 U.S.C. §2335. Defendants convicted under criminal proceedings are estopped from denying responsibility in any subsequent civil suit. 18 U.S.C. §2333(b). Under current law, it is unclear whether a conviction by military commission could be invoked in this way.

⁴ See Insurance Exclusion Clauses and Coverage of the Events of September 11, CRS Report RL31166 (Oct. 20, 2001).

⁵ See DOCUMENTS ON THE LAWS OF WAR 2 (Adam Roberts and Richard Guelff, eds. 2000).

⁶ See *id.* at 4.

⁷ See *id.* at 9.

necessary to achieve that objective. They may not use methods designed to inflict needless suffering, and they may not target civilians.

Chivalry. Combatants must adhere to the law of armed conflict in order to be treated as lawful combatants. They must respect the rights of prisoners of war and captured civilians, and avoid behavior such as looting and pillaging. They may not disguise themselves as non-combatants.

Although these principles leave a great deal of room for interpretation, there can be little doubt, assuming such acts can be viewed as acts of war, that the attacks of September 11 were not conducted in accordance with the law of war. Even if one considers the Pentagon to be a valid military target, the hijacking of a commercial airliner is not a lawful means for attacking it. Acts of bioterrorism, too, violate the law of war, regardless of the nature of the target.

Constitutional Bases for Establishing Military Commission. The Constitution empowers the Congress to define and punish violations of international law⁸ as well as to establish courts with exclusive jurisdiction over military offenses.⁹ United States law recognizes the legality of creating military commissions to deal with “offenders or offenses designated by statute or the law of war.”¹⁰ Under the former Articles of War and subsequent statute,¹¹ the President has authority to convene military commissions to try offenses against the law of war.¹² Military commissions could be convened to try such offenses whether committed by U.S. servicemembers, civilian citizens, or enemy aliens.¹³ A declared state of war need not exist.¹⁴

Precedent. Although the current crisis does not fit the typical mold associated with war crimes committed by otherwise lawful combatants in obvious theaters of war, there is precedent for convening military commissions to try accused saboteurs for conspiring to commit violations of the law of war outside of the recognized war zone. In the World War II case of *Ex Parte Quirin*, eight German saboteurs (one of whom was purportedly a U.S. citizen) were tried by military commission for entering the United States by submarine, shedding their military uniforms, and conspiring to use explosives on unknown targets. After their capture, President Roosevelt proclaimed that all saboteurs caught in the United States

⁸ U.S. Const. art. I, § 8, cl. 10.

⁹ U.S. CONST. art. I, § 8, cl. 14.

¹⁰ 10 U.S.C. § 821. Statutory offenses for which a military commission may be convened include only aiding the enemy, 10 U.S.C. § 904, and spying, 10 U.S.C. § 906.

¹¹ The Articles of War were codified at 10 U.S.C. § 801 *et seq.* as part of the Uniform Code of Military Justice (UCMJ). Although the cases cited in this report interpret the Articles of War, the relevant sections of the UCMJ would likely be interpreted to be essentially identical. See Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 515 (1994).

¹² *Ex Parte Quirin*, 317 U.S. 1 (1942).

¹³ *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950); *Madsen v. Kinsella*, 343 U.S. 341 (1952).

¹⁴ *Johnson v. Eisentrager*, 339 U.S. at 786 (citing *Duncan v. Kahanamoku*, 327 U.S. 304 (1945)). See Crona and Richardson, *supra* note 2, at 360-61.

would be tried by military commission. The Supreme Court denied their writs of *habeas corpus*, holding that trial by such a commission did not offend the Constitution.

Power of the Military Commission. As a legislative court, a military commission is not subject to the same constitutional requirements that apply to Article III courts.¹⁵ Defendants before a military commission, like defendants before a court-martial, have no right to demand a jury trial¹⁶ before a court established in accordance with rules governing the judiciary.¹⁷ There is no right of indictment or presentment under the Fifth Amendment,¹⁸ and there may be no protection against self-incrimination or right to counsel.¹⁹ While Congress has enacted procedures applicable to courts-martial that ensure basic due process rights,²⁰ no such statutory procedures exist to codify due process rights for defendants before military commissions.

Congress has delegated to the President the authority to convene military commissions, set rules of procedure, and review their decisions. This authority may be delegated to a field commander or any other commander with the power to convene a general court-martial.²¹ Statutes authorize prosecuting persons for failure to appear as witness,²² punishing contempt,²³ and accepting into evidence certain depositions²⁴ and records of courts of inquiry.²⁵

Procedural Rules. Procedural rules and evidentiary rules are prescribed by the President and may differ among commissions.²⁶ Courts-martial are conducted using the

¹⁵ *Ex Parte Quirin*, 317 U.S. 38; *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989); Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J INT'L L. 75, 99 (2001). The same is true for a military court-martial conducted under the Uniform Code of Military Justice. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (noting a servicemember “surrenders his right to be tried by the civil courts”).

¹⁶ *Ex Parte Quirin*, 317 U.S. 1, 45 (1942).

¹⁷ *Weiss v. United States*, 510 U.S. 163 (1994) (rejecting challenge to the military justice system based on the fact that military judges are not “appointed” by the President within the meaning of Article II of the Constitution, and the judges are not appointed to fixed terms of office).

¹⁸ *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

¹⁹ *Middendorf v. Henry*, 425 U.S. 25 (1976) (holding there is no right to counsel under U.S. Const. amends. V or VI in summary courts-martial).

²⁰ *Weiss* at 178 (holding procedures established by Congress to govern military justice to be adequate to ensure a fair trial consistent with the Due Process Clause of the Fifth Amendment).

²¹ *In re Yamashita*, 327 U.S. 1 (1946).

²² 10 USCS § 847.

²³ 10 U.S.C. § 848 provides for 30 days’ confinement or a fine of \$100, or both, for any person who disturbs the proceedings.

²⁴ 10 U.S.C. § 849. Such evidence is inadmissible in a capital case in a court-martial proceeding.

²⁵ 10 U.S.C. § 850.

²⁶ 10 U.S.C. § 836. The President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [10 USCS §§ 801 et seq.] triable in courts-martial, military commissions and other military (continued...)

Military Rules of Evidence set out in the Manual for Courts-Martial;²⁷ however, these rules need not apply to trials by military commission.²⁸ Subject to the statutory provisions above, the President may establish any rules of procedure and evidence he deems appropriate.

Although there may be little judicial review available to persons convicted by U.S. military commissions, it is surely necessary to provide for trials that will be fundamentally fair under both U.S. and international standards regarding the application of the law of war.²⁹ Telford Taylor noted in evaluating World War II war crimes trials:

It is of the first importance that the task of planning and developing permanent judicial machinery for the interpretation and application of international penal law be tackled immediately and effectively. The war crimes trials, at least in Western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is generally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions.³⁰

There is some historical precedent from which an international norm regarding procedural rights for accused war criminals might be derived. The Nuremberg Tribunals provide a good starting point,³¹ as further refined by the International Criminal Tribunals for Yugoslavia and Rwanda.³² Perhaps the most recent embodiment of the requirements of the international law of war is to be found in the procedures of the not-yet-operational International Criminal Court established by the Rome Statute.

The evidentiary rules used at Nuremberg and adopted by the Tokyo tribunals were designed to be non-technical, allowing the expeditious admission of “all evidence [the

²⁶ (...continued)

tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter [10 USCS §§ 801 et seq.].

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

²⁷ Exec. Order 12,473, 49 Fed. Reg. 17, 152 (1984). These rules essentially mirror the Federal Rules of Evidence. *See* Everett & Silliman, *supra* note 11, at 517.

²⁸ *In re Yamashita*, 327 U.S. at 20. *See* Everett & Silliman, *supra* note 11, at 513.

²⁹ The President realized the necessity of adhering to the Articles of War in convening the military commission in *Ex Parte Quirin*. *See* Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 854 n.11 (1999).

³⁰ Telford Taylor, *An Outline of the Research and Publication Possibilities of the War Crimes Trials*, 9 LA. L. REV. 496, 507 (1948-49) (cited in Wallach, *supra* note 30, at 852.)

³¹ *See* Wallach, *supra* note 30, at 860 (noting that the rules formulated in accordance with the London Agreement of August 8, 1945, by the Allies setting trial procedures for German war criminals, served as a model for subsequent tribunals). The rules used at the Nuremberg trials were, in turn, largely modeled after American military commissions. *See id.* at 851.

³² *See* Major Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 55-56 (1999)(describing due process and evidentiary rules of the tribunals).

Tribunal] deems to have probative value.”³³ This evidence included hearsay, coerced confessions, and the findings of prior mass trials.³⁴ While the historical consensus seems to have accepted that the war crimes commissions were conducted fairly,³⁵ some observers argue that the malleability of the rules of procedure and evidence could and did have some unjust results.³⁶ For some, the perception is that “victors’ justice” was all that was sought.

Assuming that ordinary procedural and evidentiary rules are unsuitable for the task, it will likely be necessary to adapt or develop a more fitting set. The necessity to protect civil liberties will be seen to require balancing with the need to protect vital national security information and the public safety.

Possible Challenges. Although federal courts do not have jurisdiction to review the decisions of legislative courts, a defendant sentenced by a military commission may file a writ of *habeas corpus* claiming a violation of the law of war, the Constitution, relevant statutes, or military regulations. A challenge based on an interpretation of the law of war is not likely to succeed. Because of Congress’ power to define and punish violations of international law, and due to national security implication, courts are likely to defer to the political branches. Due process claims are also unlikely to succeed. Case law demonstrates the difficulties such a challenge would face.³⁷ A U.S. citizen charged with aiding and abetting the foreign terrorists might be able to argue that the charges against him amount to treason, for which the Constitution contains explicit limitations. Aiding and abetting a hostile (but lawful) force, however, may be distinguishable from conspiring to commit a war crime.

The broad delegation of authority to convene military commissions makes a statutory claim unlikely to succeed. A defendant could argue that Congress, by passing comprehensive anti-terrorism legislation that does not authorize trial by military commission,³⁸ implicitly withholds such authority. A similar argument failed in *Ex Parte Quirin*. However, the Supreme Court noted that the Espionage Act of 1917 and the Articles of War explicitly kept open concurrent jurisdiction with military tribunals.³⁹

A last option would be to argue that the military commission violated its own rules. For such a challenge to succeed, the court would have to find that the military reviewing authority committed an error which probably affected the verdict. If the appeal were successful, the court would likely remand the case to the military authorities for retrial.

³³ See Wallach, *supra* note 30, at 860.

³⁴ See *id.* at 871-72.

³⁵ See *id.* at 852 (citing VIRGINIA MORRIS & MICHAEL SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9-10 (1995)).

³⁶ See Wallach, *supra* note 30, at 869; Application of Homma, 327 U.S. 759, 760 (1946) (Murphy, J. dissenting).

³⁷ See, e.g., Burns v. Wilson, 346 U.S. 137 (1953) (declining to review merits of *habeas corpus* challenges to convictions by court-martial).

³⁸ See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. 107-56, (2001).

³⁹ *Ex Parte Quirin*, 317 U.S. 1, 27 (1942) (citing 50 U.S.C. §38, which has since been repealed).