



## The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts

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## AGORA: MILITARY COMMISSIONS

International law has not resolved the question of how free societies under assault can accommodate the requirements of the international law of human rights with the need to protect their populations. The military order issued by President George W. Bush on November 13, 2001,<sup>1</sup> providing for the creation of special military commissions to try members of Al Qaeda, has raised many of these questions in the most acute way. Because of the international legal importance of the development, the *American Journal of International Law* invited members of the Board of Editors to express their views as to the international lawfulness of the president's initiative, even while it was still evolving. The *Journal* was on the eve of publication when the United States issued the long-awaited regulations<sup>2</sup> for implementing the president's order. The contributions to this *Agora* could therefore not take account of those regulations.

J. I. C.  
W. M. R.

### THE USE OF MILITARY COMMISSIONS TO PROSECUTE INDIVIDUALS ACCUSED OF TERRORIST ACTS

In the wake of the terrorist attacks in the United States on September 11, 2001, a variety of proposals emerged for bringing the perpetrators to justice. These proposals included the use of courts-martial, the creation of a special tribunal (whether under the auspices of the United Nations or otherwise), and prosecution in U.S. federal courts.<sup>1</sup> On November 13, 2001, President George W. Bush issued a military order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (Military Order).<sup>2</sup> Pursuant to the Military Order, the United States may establish military commissions to prosecute terrorists for violations of the laws of war and "other applicable laws."<sup>3</sup>

The United States began flying captured Taliban and Al Qaeda detainees—designated "unlawful combatants" by the Pentagon—to the U.S. Naval Station at Guantánamo Bay, Cuba, on January 10, 2002, and within a week, the population grew to 110.<sup>4</sup> Owing to the lack of secure space, the flights were suspended on January 23, 2002, when the population of 158 nearly filled the base's capacity for 160 cages eight feet square.<sup>5</sup> Ultimately, prison space for

<sup>1</sup> Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>2</sup> U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), at <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>.

<sup>3</sup> See, e.g., Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39; Elizabeth Neuffer, *Justice in a Changed World*, BOSTON GLOBE, Oct. 28, 2001, at A17. See also the various options set forth in Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, in the current *Agora*, 96 AJIL 354 (2002).

<sup>2</sup> 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

<sup>3</sup> *Id.* §1(e).

<sup>4</sup> James Dao, *U.S. Is Taking War Captives to Cuba Base*, N.Y. TIMES, Jan. 11, 2002, at A1; Katharine Q. Seelye, *Red Cross Team Will Examine Prisoners from Afghanistan*, N.Y. TIMES, Jan. 18, 2002, at A10.

<sup>5</sup> Katharine Q. Seelye with Steven Erlanger, *U.S. Suspends the Transport of Terror Suspects to Cuba*, N.Y. TIMES, Jan. 24, 2002, at A1.

2000 detainees was projected for Guantánamo.<sup>6</sup> It is unclear how many, if any, of these individuals may eventually be tried by military commissions. In mid-January 2002, Bush administration officials announced that such tribunals will be used primarily to prosecute the senior leadership of the Taliban and Al Qaeda.<sup>7</sup>

## I. THE MILITARY ORDER

Courts-martial are one permissible forum for prosecuting prisoners of war, although the Uniform Code of Military Justice (U.C.M.J.)<sup>8</sup> limits the personal jurisdiction of courts-martial to members of the U.S. military,<sup>9</sup> prisoners of war,<sup>10</sup> and certain specified categories of civilians.<sup>11</sup> Because unlawful combatants, saboteurs, and spies, among others, are not subject to the jurisdiction of courts-martial, such persons have historically been prosecuted by military commissions, which have been utilized to close the gap that might otherwise preclude trial of these categories of alleged offenders. Although the legal basis for military commissions derives from the constitutional provisions conferring the power to wage war on Congress, it has historically left the establishment of such tribunals to the executive branch.<sup>12</sup> Trial by military commission was used in World War II<sup>13</sup> and authorized (though not used) during the Korean War.<sup>14</sup>

The Military Order authorizes the contemplated military commissions to sit at any time and place, including within the United States,<sup>15</sup> and gives them subject matter jurisdiction to prosecute individuals for violations of “the laws of war and other applicable laws” concerning acts of international terrorism.<sup>16</sup> This jurisdiction is exclusive with respect to any such offenses allegedly committed by the accused.<sup>17</sup> The Military Order does not apply to U.S. citizens<sup>18</sup> and entitles the military commission to assert jurisdiction over an alleged offender only after the president has made a written finding (1) that the individual is or was a member of the Al Qaeda organization;<sup>19</sup> (2) that the individual engaged in, aided and abetted, or conspired to commit acts of international terrorism or preparatory acts thereof that have as their aim injury or adverse effects on the United States, or its citizens, national security, foreign policy, or economy;<sup>20</sup> or (3) that the individual knowingly harbored one or more individuals falling into the above categories.<sup>21</sup> Moreover, it must be in the interest of the United States that the alleged offender be subject to trial by a military commission.<sup>22</sup>

<sup>6</sup> Katharine Q. Seelye, *On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A16.

<sup>7</sup> Bryan Bender & Wayne Washington, *U.S. Is Fine-tuning Plans for Tribunals*, BOSTON GLOBE, Jan. 18, 2002, at A1.

<sup>8</sup> 10 U.S.C. §§801–946 (2000) [hereinafter U.C.M.J.]. The articles of the U.C.M.J. correspond directly to the subsections of the statute (e.g., 10 U.S.C. §801 is U.C.M.J. Art. 1). U.C.M.J. Article 2 contains the personal jurisdiction provisions of the code. The U.C.M.J. is reprinted in the MANUAL FOR COURTS-MARTIAL UNITED STATES (2000) [hereinafter MCM], available at <<http://www.jag.navy.mil/documents/mcm2000.pdf>>.

<sup>9</sup> U.C.M.J., *supra* note 8, Art. 2(1).

<sup>10</sup> *Id.*, Art. 2(9).

<sup>11</sup> *Id.*, Art. 2(10)–(11); Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§3261–3267 (2000); Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AJIL 446 (2001).

<sup>12</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d rev. ed. 1920). For detailed analysis of military commissions during the nineteenth century, see *id.* at 831–46.

<sup>13</sup> See 7 Fed. Reg. 5101 (July 7, 1942); 7 Fed. Reg. 5103 (July 7, 1942) [hereinafter FDR Order].

<sup>14</sup> General Headquarters United Nations Command, Tokyo, Japan, AG 000.5 (28 October 50) JA (Oct. 28, 1950), reprinted in JORDAN J. PAUST, M. CHERIF BASSIOUNI, SHARON A. WILLIAMS, MICHAEL SCHARF, JIMMY GURULÉ, & BRUCE ZAGARIS, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 724 (1996); Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command (rev. through Mar. 17, 1953), *excerpts reprinted in id.* at 725–32.

<sup>15</sup> Military Order, *supra* note 2, §4(c)(1).

<sup>16</sup> *Id.* §§1(e), (2)(a)(1)(ii).

<sup>17</sup> *Id.* §7(b)(1).

<sup>18</sup> *Id.* §2(a).

<sup>19</sup> *Id.* §2(a)(1)(i).

<sup>20</sup> *Id.* §2(a)(1)(ii).

<sup>21</sup> *Id.* §2(a)(1)(iii).

<sup>22</sup> *Id.* §2(a)(2).

Although the evidentiary and procedural rules governing trials by military commissions will be promulgated by the secretary of defense (secretary),<sup>23</sup> the Military Order also addresses certain fundamental matters relating to, inter alia, voting on conviction and sentencing by the military commission's members, appeals, detention, and legal counsel. Conviction and sentencing require the concurrence of two-thirds of the members of the military commission who are present and such decisions may be rendered when a majority of the members are present, provided that two-thirds of them agree.<sup>24</sup> The Military Order authorizes the death penalty for individuals convicted by military commissions.<sup>25</sup>

Once the trial has been completed, the secretary (or the secretary's designate) reviews the record of the proceedings and renders a final decision on the case,<sup>26</sup> without prejudice to the president's authority concerning the granting of pardons or reprieves.<sup>27</sup> Neither a right of appeal from the judgments of the military commission nor any form of habeas corpus relief is available.<sup>28</sup> In *Ex parte Quirin*,<sup>29</sup> the Supreme Court dismissed a petition for a writ of habeas corpus after hearing from the parties, notwithstanding similar language in President Franklin D. Roosevelt's order purporting to prohibit such petitions. The Bush administration cites *Quirin* as indicating that, despite the language of section 7(b)(2) of the Military Order, the accused will be able to petition courts for relief in the form of a habeas corpus proceeding.<sup>30</sup>

Individuals detained pursuant to the Military Order may be held at a location either within or outside the United States, as designated by the secretary,<sup>31</sup> and such persons are to be treated humanely and must not be discriminated against.<sup>32</sup> They are to be provided with adequate food, water, shelter, clothing, and medical treatment.<sup>33</sup> The Military Order stipulates that detained individuals are to be "allowed the free exercise of religion consistent with the requirements of . . . detention."<sup>34</sup> The secretary has the authority to designate the prosecuting attorneys and regulate the conduct of both prosecutors and defense attorneys.<sup>35</sup>

## II. THE SECRETARY'S RULES

More than a dozen references to military commissions are contained in the final version of the Articles of War,<sup>36</sup> the precursor to the U.C.M.J., while the U.C.M.J. itself contains two relevant statutory provisions.<sup>37</sup> U.C.M.J. Article 21 provides that court-martial jurisdiction is not exclusive. Therefore, the fact that Congress has conferred jurisdiction upon courts-martial to adjudicate certain offenses does not deprive military commissions of concurrent jurisdiction with respect to either the offender or offenses that they are entitled to prosecute.<sup>38</sup>

<sup>23</sup> *Id.* §4(b).

<sup>24</sup> *Id.* §4(c)(6)–(7).

<sup>25</sup> *Id.* §4(a).

<sup>26</sup> *Id.* §4(c)(8).

<sup>27</sup> *Id.* §7(a)(2).

<sup>28</sup> *Id.* §7(b)(2).

<sup>29</sup> 317 U.S. 1 (1942). For a thoughtful discussion of *Quirin*, see Harold Hongju Koh, *The Case Against Military Commissions* in the present *Agora*, 96 AJIL 337, 339–40 (2002).

<sup>30</sup> Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

<sup>31</sup> Military Order, *supra* note 2, §3(a).

<sup>32</sup> *Id.* §3(b).

<sup>33</sup> *Id.* §3(c).

<sup>34</sup> *Id.* §3(d).

<sup>35</sup> *Id.* §4(c)(5).

<sup>36</sup> A. Wigfall Green, *The Military Commission*, 42 AJIL 832, 836–37 (1948).

<sup>37</sup> U.C.M.J., *supra* note 8, Arts. 21, 36; see also *id.*, Arts. 104, 106.

<sup>38</sup> *Id.*, Art. 21.

In addition, Article 36 of the U.C.M.J. specifically authorizes the president to prescribe the pretrial, trial, and post-trial procedures, including the “modes of proof,” to be used by military commissions. Those procedures, insofar as the president considers it practicable, must apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in U.S. district courts. Moreover, they should take the form of regulations, be uniform insofar as practicable, and not conflict or be inconsistent with the procedures set forth in the U.C.M.J.<sup>39</sup>

Section 1 of the Military Order sets forth seven findings that President Bush made to justify employing military commissions, the most significant of which relies on U.C.M.J. Article 36. In conformity with that article, and in light of the “danger to the safety of the United States and the nature of international terrorism,” President Bush determined that, in cases tried by military commissions, it would not be practicable to apply “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>40</sup> In lieu of applying these principles of law and evidentiary rules, the president delegated the authority set forth in U.C.M.J. Article 21 to the secretary of defense.<sup>41</sup>

In formulating these rules, which shall govern, but not be limited to, pretrial, trial, and appellate procedure, standards of evidence, and qualifications of attorneys,<sup>42</sup> the Military Order prescribes certain guidelines for the secretary to follow.<sup>43</sup> Military commissions must provide a “full and fair trial” and will sit as trier of both fact and law.<sup>44</sup> The standards for the admissibility of evidence are to be formulated on the basis of what a “reasonable person” would find to have probative value, in the opinion of the presiding officer.<sup>45</sup> Any commission member may request that the full panel render a decision (agreed to by a majority of the commission) on whether a reasonable person would find the evidence to have probative value.<sup>46</sup>

The relevant provisions of statutes and executive orders are to govern the use of classified information as evidence, such as accessing such information, handling and tendering it into evidence, and conducting the hearings, including instructions on access to and closure of the proceedings.<sup>47</sup> Under no circumstances are state secrets to be disclosed to any person who is not otherwise entitled to have access to them.<sup>48</sup>

As of February 6, 2002, the secretary had not promulgated the rules to govern the conduct of trials by the military commissions. However, a draft was leaked to the media in late December 2001.<sup>49</sup> As the promulgation of the Military Order drew “fierce criticism,”<sup>50</sup> the secretary may alleviate some of this criticism by issuing rules that uphold international standards

<sup>39</sup> *Id.*, Art. 36.

<sup>40</sup> Military Order, *supra* note 2, §1(f).

<sup>41</sup> *Id.* §4(b).

<sup>42</sup> *Id.* §4(c).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* §4(c)(2).

<sup>45</sup> *Id.* §4(c)(3).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* §4(c)(4).

<sup>48</sup> *Id.* §7(a)(1).

<sup>49</sup> Charles Lane, *Terrorism Tribunal Rights Are Expanded; Draft Specifies Appeals, Unanimity on Death Penalty*, WASH. POST, Dec. 28, 2001, at A1; Neil A. Lewis, *Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. TIMES, Dec. 28, 2001, at A1.

The secretary promulgated the rules on March 21, 2002 (U.S. Dep’t of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), at <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>), during the production of this issue of the *Journal*, and they alleviate some of the concerns raised in this essay. However, pursuant to paragraph 7(B) of the rules, in the event of an inconsistency between the rules and the Military Order, the latter prevails.

<sup>50</sup> Bender & Washington, *supra* note 7.

of due process. Moreover, Sen. Patrick Leahy, chairman of the Senate Committee on the Judiciary, intends to introduce legislation that would guarantee certain legal protections for individuals brought before such tribunals.<sup>51</sup>

The draft rules will bring the trial procedures into closer alignment with rules governing trial by civilian courts or courts-martial and will clearly surpass the Military Order in terms of protecting the rights of the accused. For example, the rules will require unanimity on imposing the death penalty and will provide for a separate military review panel to deal with appeals.<sup>52</sup> The commissions will be composed of five officers, and the review panel of three officers.<sup>53</sup> Moreover, the accused will be entitled to a military attorney at no expense and may hire civilian lawyers at their own expense.<sup>54</sup> The latter will require government clearances to handle classified material.<sup>55</sup> The proceedings will be open to the public and the media, unless closed proceedings are warranted to prevent the disclosure of national security information.<sup>56</sup> The standard of proof will be beyond a reasonable doubt, but hearsay and other types of evidence that would be inadmissible in civilian courts or before courts-martial will be admissible before the military commissions.<sup>57</sup>

### III. INTERNATIONAL LEGAL ISSUES

#### *International Human Rights Law*

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup> is the most important human rights treaty provision governing due process rights. The treaty entered into force for the United States on September 8, 1992.<sup>59</sup> Although states may derogate from the terms of the ICCPR,<sup>60</sup> the United States has not formally announced the intention to do so. Additionally, on December 10, 1998, President Clinton ordered that the provisions of the ICCPR be observed by all federal departments and agencies of the United States.<sup>61</sup> Thus, unless President Bush cancels this order, the Department of Defense is bound to respect the terms of the ICCPR.

Pursuant to ICCPR Article 14, states must ensure that all persons are equal before the courts and tribunals, guaranteeing nondiscrimination during the legal process.<sup>62</sup> In addition, the minimum standards guaranteed by Article 14 include a fair and public hearing before a "competent, independent and impartial tribunal established by law";<sup>63</sup> the presumption of innocence;<sup>64</sup> due process rights;<sup>65</sup> and the right to appeal a conviction to a "higher tribunal according to law."<sup>66</sup>

<sup>51</sup> *Id.*

<sup>52</sup> Lane, *supra* note 49; Lewis, *supra* note 49.

<sup>53</sup> Lewis, *supra* note 49.

<sup>54</sup> Lane, *supra* note 49.

<sup>55</sup> *Id.*

<sup>56</sup> Lewis, *supra* note 49.

<sup>57</sup> *Id.*

<sup>58</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

<sup>59</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, tbl. 1, at 886, 889 (1993).

<sup>60</sup> ICCPR, *supra* note 58, Art. 4. On military commissions as a derogation from human rights treaties in general, see Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, in the current *Agora*, 96 AJIL 345, 350-52 (2002).

<sup>61</sup> Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 15, 1998).

<sup>62</sup> ICCPR, *supra* note 58, Art. 14(1).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, Art. 14(2).

<sup>65</sup> *Id.*, Art. 14(3).

<sup>66</sup> *Id.*, Art. 14(5).

The UN Human Rights Committee has specifically considered whether Article 14 permits trial of civilians by special military courts. After noting that many countries permit such trials, the Committee concluded that, although the ICCPR does not prohibit military tribunals, “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”<sup>67</sup>

In addition to the due process rights of the detainees, other international human rights norms may have been violated by the pretrial conditions imposed upon them. For example, hooding the detainees, even temporarily, might violate the 1984 Torture Convention,<sup>68</sup> and forcibly shaving them might breach the right to human dignity under ICCPR Article 10.

### *International Humanitarian Law*

The first finding made by President Bush in the Military Order states that international terrorists have carried out attacks on the United States “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”<sup>69</sup> This armed conflict is arguably of an international nature, triggering certain U.S. duties pursuant to treaty obligations under international humanitarian law, specifically the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III).<sup>70</sup> Similar treaty obligations could arise from the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), if civilians should come into the hands of the United States.<sup>71</sup>

The threshold issue is whether the category of “[i]nternational terrorists, including members of al Qaeda,” falls within the ambit of Article 4 of Geneva Convention No. III, which defines prisoners of war (POWs) under the Convention. President Bush has apparently concluded that the individuals responsible for the terrorist attacks are unlawful combatants and thus may be tried by military commissions.<sup>72</sup> On February 7, 2002, he decided that Geneva Convention No. III applies to the Taliban but not to members of the Al Qaeda network.<sup>73</sup> At the same time, the president’s spokesman was careful to state that the Taliban detainees were not entitled to POW status.<sup>74</sup> Thus, the Bush administration’s position is that, although Geneva Convention No. III applies to the Taliban forces, these individuals are not entitled to the protections afforded by that treaty. Article 5 of the Convention provides that persons captured during an international armed conflict are entitled to the protections of the treaty even if their identity as POWs as defined by Article 4 is in doubt, until a competent tribunal has determined their status. Thus, the text of the treaty leads to the conclusion that a competent tribunal—and not the president of the United States acting unilaterally—must determine whether or not anyone captured is a lawful combatant.

<sup>67</sup> Human Rights Committee, General Comment 13/21, para. 4 (Apr. 12, 1984), *reprinted in* NOWAK, *supra* note 59, at 858.

<sup>68</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85.

<sup>69</sup> Military Order, *supra* note 2, §1(a) (emphasis added).

<sup>70</sup> Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention No. III]. As Joan Fitzpatrick notes in her article in the current *Agora*, *supra* note 60, at 347–49, “The War on Al Qaeda,” the Geneva Conventions of 1949 and the 1977 Additional Protocols make no provision for an international armed conflict between a state and an organized transnational criminal network of the Al Qaeda type.

<sup>71</sup> Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention No. IV].

<sup>72</sup> See, e.g., David E. Sanger, *President Defends Military Tribunals in Terrorist Cases*, N.Y. TIMES, Nov. 30, 2001, at A1.

<sup>73</sup> Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

<sup>74</sup> Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), *available in* LEXIS, Legis Library, Fednew File; *see also* White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <<http://www.whitehouse.gov/news/releases/2002/02/>>.

The U.S. Army regulations concerning the law of war, set forth in Field Manual 27-10, provide that a "competent tribunal" for determining whether a detained individual falls within the scope of Geneva Convention No. III is a "board of not less than three officers acting according to such procedures as may be prescribed."<sup>75</sup> During the Vietnam War, the United States developed considerable experience with so-called Article 5 tribunals.<sup>76</sup> During that war, POW status was initially conferred upon the North Vietnamese regular forces but not the Vietcong, a policy that was subsequently reversed when both categories of combatants were granted such status.<sup>77</sup> Notwithstanding the position taken by the Bush administration, Article 5 clearly requires a case-by-case evaluation of the status of detained persons. The following analysis assumes that any person detained by the U.S. Armed Forces during the campaign in Afghanistan and made subject to trial by a military commission is a prisoner of war for purposes of Geneva Convention No. III.

Section VI, chapter 3 of Geneva Convention No. III governs penal and disciplinary sanctions that may be imposed on POWs.<sup>78</sup> Articles 84 and 99–108 guarantee certain due process rights to POWs, Article 102 being particularly important for present purposes. That provision states that the sentence imposed on a prisoner of war is valid only if it was pronounced by the same courts in accordance with the same procedure as for members of the detaining power's armed forces and the due process provisions of the treaty were observed.<sup>79</sup> In the same spirit, Article 106 requires the detaining power to provide the same rights of appeal to prisoners as to members of its own armed forces.<sup>80</sup> Moreover, Article 85 extends the protection of Geneva Convention No. III to POWs prosecuted and convicted for acts committed prior to their capture, which would apply to anyone charged with crimes occurring on September 11, 2001. Article 85 "aims to prevent a repetition of the practice followed by the Allied Powers after the Second World War with respect to war criminals of the Axis Powers."<sup>81</sup>

In a series of cases culminating with *Johnson v. Eisentrager*,<sup>82</sup> however, the Supreme Court ruled that the similar provisions in section V, chapter 3, part III of the 1929 Geneva POW Convention<sup>83</sup> do not apply to individuals prosecuted by military commissions, holding that these provisions cover offenses committed by the accused only during their confinement as POWs.<sup>84</sup> The Court offered a paucity of reasoning for this proposition and it seems to be incorrect as a matter of interpretation, since section V, chapter 3, part II, "Disciplinary Punishments," of the 1929 Convention can reasonably be construed as dealing with what the Supreme Court characterizes as "disciplinary offenses during captivity," and part III of the same chapter, "Judicial Proceedings," as applying to offenses occurring prior to detention.

With respect to judicial proceedings, POWs are entitled to the rights set forth in Articles 99–108 of Geneva Convention No. III. Article 99 reflects the principle *nullum crimen sine lege*, and limits prosecutions to those offenses that are crimes either under the laws of the detain-

<sup>75</sup> U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 71 (c) (Field Manual 27-10, 1956).

<sup>76</sup> HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 57 (Naval War College Int'l Law Stud. No. 59, 1977). For a sample directive concerning the procedures to be employed, see Headquarters, U.S. Military Assistance Command, Vietnam, Directive 20-5 (Mar. 15, 1968), reprinted in 62 AJIL 768 (1968).

<sup>77</sup> Seelye, *supra* note 73.

<sup>78</sup> These provisions are virtually identical to the provisions set forth in section V, chapter 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 LNTS 343 [hereinafter 1929 Geneva POW Convention].

<sup>79</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 102, with 1929 Geneva POW Convention, *supra* note 78, Art. 63, and Geneva Convention No. IV, *supra* note 71, Art. 71.

<sup>80</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 106, with Geneva Convention No. IV, *supra* note 71, Art. 73.

<sup>81</sup> FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 61 (3d ed. 2001).

<sup>82</sup> 339 U.S. 763 (1950).

<sup>83</sup> 1929 Geneva POW Convention, *supra* note 78, sec. V, ch. 3, pt. III, Arts. 60–67.

<sup>84</sup> 339 U.S. at 790.



ing power or under international law at the time the offense was committed.<sup>85</sup> This provision would not pose a hurdle to the military commissions since the terrorist acts in question could be prosecuted under the U.S. Antiterrorist Act of 1990<sup>86</sup> or under international law as a crime against humanity (murder). Article 99 also requires the detaining power to permit prisoners to have access to defense counsel<sup>87</sup> and the opportunity to present their case,<sup>88</sup> and it forbids the use of “moral or physical coercion” to induce a guilty plea.<sup>89</sup> As for the rights and means of defense available to prisoners, Article 105 sets forth rather detailed provisions governing the assistance of counsel and the particulars of the charge(s) on which accused are arraigned; it also requires the charges to be presented to the accused in a language they understand and with adequate time to prepare a defense. Article 101 governs the application of the death penalty.<sup>90</sup> Other provisions of Geneva Convention No. III cover pretrial confinement;<sup>91</sup> notification of the proceedings, findings, and sentence to the protecting power;<sup>92</sup> and the execution of sentences imposed.<sup>93</sup>

These provisions may be problematic as regards the proposed military commissions, since if they are applicable, they would require the United States to try prisoners by court-martial, employing the applicable procedural and evidentiary rules.<sup>94</sup> Several examples will demonstrate this point, and may be contributing factors to any expansion of the rights of the accused by way of the secretary’s rules. First, Court-Martial Rule 1004 sets forth the prerequisites for the death penalty to be adjudged. This rule requires, *inter alia*, the concurrence of all members of the court-martial present at the time of voting.<sup>95</sup> Second, RCM 921(c)(2)(B) sets forth the applicable rules with respect to voting on guilt or innocence and provides that *at least* two-thirds of the court-martial members present must vote to convict in order to make the verdict lawful.<sup>96</sup> Moreover, if the sentence to be imposed exceeds ten years’ imprisonment, three-fourths of the court-martial members present must vote for that sentence.<sup>97</sup> Third, members of the U.S. Armed Forces are guaranteed the right of appeal, up to and including review by the Supreme Court.<sup>98</sup> Fourth, trial by court-martial is generally an open proceeding, subject to very limited exceptions.<sup>99</sup> Fifth, the accused before a court-martial have the right to select civilian defense counsel of their choice.<sup>100</sup>

<sup>85</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 99, with Geneva Convention No. IV, *supra* note 71, Art. 67.

<sup>86</sup> 18 U.S.C. §2331 (2000), amended by Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, tit. VIII, §802(a), 115 Stat. 272, 376.

<sup>87</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 99, with Geneva Convention No. IV, *supra* note 71, Art. 72.

<sup>88</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 99, with Geneva Convention No. IV, *supra* note 71, Art. 72.

<sup>89</sup> Geneva Convention No. III, *supra* note 71, Art. 99. With respect to the rights and means of defense available to the prisoner, see *id.*, Art. 105.

<sup>90</sup> Compare Geneva Convention No. III, *supra* note 70, Art. 101, with Geneva Convention No. IV, *supra* note 71, Art. 75.

<sup>91</sup> Geneva Convention No. III, *supra* note 70, Article 103, limits such confinement to three months.

<sup>92</sup> *Id.*, Arts. 104, 107.

<sup>93</sup> *Id.*, Art. 108.

<sup>94</sup> Court-martial procedure is governed by the Rules for Courts-Martial [hereinafter RCM], whereas the Military Rules of Evidence (MRE) govern evidentiary issues. The RCM and MRE are reprinted in the MCM, *supra* note 8.

<sup>95</sup> See also RCM 921(c)(2)(A), *supra* note 94, which requires a unanimous vote of all members present to convict in cases in which the death penalty is mandatory. Compare *id.* with Military Order, *supra* note 2, §§4(a), 4(c)(6)–(7).

<sup>96</sup> Compare RCM 921(c)(2)(B), *supra* note 94, with Military Order, *supra* note 2, §4(c)(6).

<sup>97</sup> RCM 1006(d)(4)(B), *supra* note 94. Compare *id.* with Military Order, *supra* note 2, §4(c)(7).

<sup>98</sup> In general, see RCM, *supra* note 94, ch. XII.

<sup>99</sup> RCM 806, *supra* note 94. Compare *id.* with Military Order, *supra* note 2, §4(c)(4)(B).

<sup>100</sup> RCM 506, *supra* note 94. Compare *id.* with Military Order, *supra* note 2, §4(c)(5).

Pursuant to Article 130 of Geneva Convention No. III, "wilfully depriving a prisoner of war of the rights of fair and regular trial" is a grave breach,<sup>101</sup> punishable under international law. Grave breaches are also punishable under the U.S. War Crimes Act of 1996.<sup>102</sup> Thus, on the basis of the above analysis and the assumption that Article 5 applies, the use of military commissions will be difficult to reconcile with the U.S. obligations under the Geneva Convention, and if the accused is not afforded the minimum protections guaranteed by that treaty, U.S. officials may be subject to allegations of grave breaches. Moreover, if a detained individual is executed following a trial that does not conform to the provisions of Geneva Convention No. III, the result would be a war crime as defined by 18 U.S.C. §2441, and the offender could consequently face the death penalty as a matter of U.S. law.

#### IV. CONCLUSION

The perpetrators of the terrorist attacks on the United States must be brought to justice. Questions linger, however, about whether military commissions are the correct venues for trying the alleged perpetrators. The United States, as a party to a variety of human rights and humanitarian law treaties, is bound to respect its legal obligations. The Bush administration has taken the position that it cannot be doubted that the detainees are unlawful combatants, and are thus not entitled to the protection of Geneva Convention No. III. This position, however, is difficult to reconcile with the terms of Article 5 of that treaty. Moreover, if that Convention does apply, then the use of military commissions would seem to violate its terms, since such commissions are not the same courts as would have jurisdiction to prosecute members of the U.S. Armed Forces. The provisions of the Military Order concerning due process rights of the accused fall far short of those that would apply to U.S. citizens or military members tried by court-martial. Nevertheless, initial press reports indicate that the rules for the military commissions to be promulgated by the secretary may significantly close the gap. At a bare minimum, such changes should ensure that the United States does not run afoul of its obligations under the ICCPR, even if it fails to meet the stringent requirements set down by Article 5 of Geneva Convention No. III.

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### AL QAEDA, TERRORISM, AND MILITARY COMMISSIONS

It is now more than an academic question whether one should regard terrorism as crime or as war. The attacks mounted by the Al Qaeda organization on September 11, 2001, were of unprecedented scale, heretofore seen only in wartime, killing three thousand people in a few hours' time. Most victims were civilians, and most were Americans, yet the dead included people from eighty-seven countries. Had the emergency evacuation of the World Trade Center towers not run efficiently, as many as twenty-five thousand more might have died.

The psychological sense that this was an act of war is founded on the extraordinary destructiveness of the act. In the past, even terrorism has evinced an implicit set of expectations—using violence to intimidate or gain publicity, targeting civilians so as to undermine the confidence placed in organized authority, but generally stopping short of this irrational magnitude of destruction. Only nihilism might seem to explain a scale of wreckage that serves no programmatic demands or political ambition.

<sup>101</sup> Geneva Convention No. IV, *supra* note 71, Art. 147, leads to the same result.

<sup>102</sup> 18 U.S.C. §2441 (2000).

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