

## TRYING A BIN LADEN AND OTHERS: EVALUATING THE OPTIONS FOR TERRORIST TRIALS

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I.	TERRORIST TRIALS BEFORE MILITARY COMMISSIONS .....	478
	A. <i>The Executive Order Calling for Military Commissions</i> .....	478
	B. <i>Past Use of Military Commissions</i> .....	481
	C. <i>Past U.S. Terrorism Trials</i> .....	484
	D. <i>Concerns as to the Propriety of the Executive Order</i>	485
	E. <i>Absence of Standard Trial Procedures</i> .....	491
	F. <i>Questions as to the Appearance of Legitimacy</i> .....	494
II.	TRIALS IN U.S. DISTRICT COURT .....	496
	A. <i>Trial Procedures in Federal District Court</i> .....	497
	B. <i>Benefits of an Established Trial Mechanism</i> .....	497
	C. <i>The Appearance of Legitimacy</i> .....	498
III.	TRIALS BEFORE AN INTERNATIONAL TRIBUNAL.....	498
	A. <i>Procedural Mechanism Before an International Tribunal</i> .....	499
	B. <i>Defining the Crimes to be Adjudicated by an International Tribunal</i> .....	500
	C. <i>The Appearance of Legitimacy</i> .....	504
	D. <i>Whether the ICTY/ICTR or ICC Would Be a Preferable Model</i> .....	506

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## IV. CONCLUSION ..... 507

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”<sup>1</sup>

On November 13, 2001, in the wake of the September 11, 2001 tragedy and ensuing manhunt inside Afghanistan for al-Qaeda leader and alleged mastermind of the September 11 plot, Osama Bin Laden, President Bush signed a military order allowing non-citizens to be tried for international terrorism before military commissions (the “Executive Order”). While the recently promulgated rules improve how such commissions will function, the use of military commissions for terrorism trials does not seem sound. Alternative and preferable options include trying terrorists in U.S. federal court—as the United States has done successfully, and is doing for the trial of Zacarias Moussaoui—or creating an ad hoc international terrorism tribunal. Trial before an international tribunal could create the strongest statement that terrorism is universally condemned, and would be the most likely to result in widely accepted judgments.

Part I of this article examines the use of military commissions to try suspected terrorists. Specifically, Part I.A examines the President’s Executive Order authorizing military commissions and the recently promulgated rules for such commissions. Part I.B examines past use of military commissions in contexts such as the Revolutionary War, the Civil War, and World War II. Part I.C briefly examines past terrorist trials in U.S. and foreign courts. Part I.D raises questions about the scope of the Executive Order and whether there is precedent for trying terrorists using military commissions. Part I.E examines how trial procedures will be curtailed under the Executive Order and evaluates whether such abbreviated trial practices are necessary. Part I.F

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1. Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement (Nov. 21, 1945).

examines the perception that using such tribunals could create and how that perception may impact U.S. relations, future terrorism, and the trials.

Part II examines the alternative option of trying terrorists in a U.S. federal district court. Specifically, Part II.A examines some procedures available in federal district court trials. Part II.B examines the benefits of using an established trial mechanism. Part II.C examines the appearance of legitimacy of such domestic trials.

Part III examines another alternative, the creation of an international tribunal to adjudicate the crime of terrorism. Specifically, Part III.A examines some procedural mechanisms employed by international tribunals. Part III.B examines the crimes over which such a tribunal might have jurisdiction. Part III.C examines the appearance of legitimacy of an international tribunal. Finally, Part III.D examines whether such a tribunal should be modeled on (a) the International Tribunal for the Former Yugoslavia ("ICTY")<sup>2</sup>, the International Criminal Tribunal for Rwanda ("ICTR")<sup>3</sup> or (b) the International Criminal Court ("ICC"), which soon will come into existence.<sup>4</sup>

This article concludes that suspected terrorists should be tried before a federal district court or an international tribunal

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2. The full name of the ICTY is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." *Statute of the International Tribunal*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, pmbl., U.N. Doc. S/RES/827 (1993), available at [http://www.un.org/icty/basic/statut/stat2000\\_con.htm](http://www.un.org/icty/basic/statut/stat2000_con.htm) (May 25, 1993) [hereinafter ICTY Statute].

3. The full name of the ICTR is "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994." *Statute of the International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, pmbl., U.N. Doc. S/RES/955 (1994), available at <http://www.ictcr.org/wwwroot/ENGLISH/Resolutions/955e.htm> [hereinafter ICTR Statute].

4. The International Criminal Court will be established by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, see *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), available at <http://www.un.org/law/icc/index.htm> [hereinafter ICC Statute], when the ICC Statute enters into force on July 1, 2002. *Rome Statute of the International Criminal Court*, at <http://www.un.org/law/icc/> (last updated Apr. 25, 2002).

created for that purpose, rather than a military commission.

I.    TERRORIST TRIALS BEFORE MILITARY COMMISSIONS

A.   *The Executive Order Calling for Military Commissions*

The Executive Order<sup>5</sup> signed by President Bush on November 13, 2001 states that “individuals subject to this order” shall be tried by military commissions for “violations of the laws of war and other applicable laws.”<sup>6</sup> Section 2(a) of the Executive Order defines any “individual subject to this order” to include non-citizens whom the President determines “from time to time in writing” that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known

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5. The Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001)[hereinafter Executive Order]. The Executive Order states that it is promulgated pursuant to the U.S. Constitution and laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001), and sections 821 and 836 of title 10 of the U.S. Code. *Id.*

10 U.S.C. § 821 provides that:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000).

10 U.S.C. § 836 provides that:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military 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 U.S.C. § 836 (2000).

6. Executive Order §§ 1(e), 2, 66 Fed. Reg. at 57,833–34; *see also* Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism, Department of Defense, Military Commission Order No. 1, § 3(B) (Mar. 21, 2002), <http://www.news.findlaw.com/hdocs/dod/dod032102milcomord1.pdf> (providing that military commissions may try “violations of the laws of war and all other offenses triable by military commission”) [hereinafter Rules].

as al-Qaeda;

- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.<sup>7</sup>

Thus, the Executive Order broadly covers (a) al-Qaeda members, (b) persons who have engaged in international terrorism against the United States, and (c) persons who harbor individuals described in (a) or (b). The Executive Order also gives the President flexibility in determining whether persons will be subject to the Executive Order by allowing the President to determine “from time to time in writing” that “it is in the interests of the United States that such individual[s] be subject to this order.”<sup>8</sup>

While the Executive Order is silent on many details of how the commissions will function, more recently promulgated rules address these details.<sup>9</sup> The commission will consist of three to

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7. Executive Order § 2, 66 Fed. Reg. at 57,834. The Rules additionally provide for jurisdiction over persons “alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.” Rules, *supra* note 6, § 3(A)(2). This language presumably does not expand the jurisdiction of the commissions since “[in] the event of any inconsistency between the President’s Military Order and [the Rules] . . . the provisions of the President’s Military Order shall govern.” *Id.* § 7(B).

8. Executive Order § 2(a), 66 Fed. Reg. at 57,834.

9. *See supra* note 6. Various commentators have criticized the decision to use military commissions, and especially the lack of fair trial protections in the Executive Order. *See, e.g.*, Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Leila Sadat, *International Court Should Try Defendants*, ST. LOUIS POST-DISPATCH, Nov. 18, 2001, at B3; William Safire, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A17. For example, the Executive Order does not address: (a) whether the defendant will be informed of the nature of the charges against him; (b) whether the defendant will have a right to counsel; (c) whether, if there is a right to counsel, the defendant can select his counsel; (d) whether the presumption of innocence

seven commissioned officers of the U.S. Armed Forces appointed by the Secretary of Defense or his designee.<sup>10</sup> Convictions and sentencing must be supported by two-thirds of the commission,<sup>11</sup> although death sentences require unanimity of all seven members of a commission.<sup>12</sup> The accused will be assigned a military lawyer<sup>13</sup> and may select a different military lawyer<sup>14</sup> or retain a civilian lawyer at the accused's expense.<sup>15</sup>

Although proceedings generally will be open to the public, the Presiding Officer<sup>16</sup> may close the proceedings for a number of reasons, including the protection of: "information classified or classifiable . . . [;] information protected by law or rule from unauthorized disclosure; the physical safety of participants . . . including . . . witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests."<sup>17</sup> The Presiding Officer may also close proceedings "for any other reason necessary for the conduct of a full and fair trial."<sup>18</sup> A decision to close the proceedings may entail exclusion of the accused and any civilian defense counsel.<sup>19</sup>

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will apply; or (e) whether the defendant will be given adequate time to prepare a defense. See Elisabeth Bumiller & Katharine Q. Seelye, *Bush Defends Wartime Call for Tribunals*, N.Y. TIMES, Dec. 5, 2001, at A1 (reporting the observations of Professor Cass Sunstein of the University of Chicago and Timothy Lynch, Director of the Criminal Justice Project at the Cato Institute).

10. Rules, *supra* note 6, § 4(A)(1)–(3).

11. *Id.* § 6(F).

12. *Id.*

13. *Id.* § 4(C)(2).

14. *Id.* § 4(C)(3)(a).

15. *Id.* § 4(C)(3)(b). To represent a defendant, a civilian defense lawyer must: (i) be a U.S. citizen; (ii) be admitted to practice; (iii) not be the subject of sanctions or a disciplinary action; (iv) be eligible for access to information "classified at the level SECRET"; and (v) be willing to sign a written agreement to comply with all applicable regulations or instructions for counsel. *Id.* Representation by a civilian lawyer will not relieve military defense counsel. *Id.* In addition, the Chief Defense Counsel will be a judge advocate of the U.S. Armed Forces and will "supervise the overall defense efforts[,] . . . preclude conflicts of interest, and facilitate proper representation of all [a]ccused." *Id.* § 4(C)(1).

16. The "Presiding Officer" will be a judge advocate in the U.S. Armed Forces designated by the Secretary of Defense or his designee. *Id.* § 4(A)(4).

17. *Id.* § 6(B)(3).

18. *Id.* § 4(A)(5)(a).

19. *Id.* § 6(B)(3). In those instances, military defense counsel, who would still be

The Rules provide for admission of evidence that “would have probative value to a reasonable person.”<sup>20</sup> Additionally the accused will enjoy a presumption of innocence and must be found guilty beyond a reasonable doubt.<sup>21</sup> The Rules also address witness protection and methods for allowing protected witnesses to testify.<sup>22</sup> Certain materials may be classified as Protected Information;<sup>23</sup> these materials would not be disclosed to the accused or any civilian lawyer, but could be admitted into evidence if disclosed to military defense counsel.<sup>24</sup>

The Rules still provide for no independent appellate review by a court. Commissions’ decisions will be reviewed by a panel of three military officers, at least one of whom has experience as a judge.<sup>25</sup> Civilians may be temporarily commissioned as military officers for the purpose of serving on the panels.<sup>26</sup> The President or the Secretary of Defense, if so designated by the President, will make the final decision as to whether to accept a commission decision and sentence.<sup>27</sup> Defendants will have no recourse to any other court.<sup>28</sup>

### B. Past Use of Military Commissions

Military commissions have been used in the past, but almost exclusively in situations when the United States was either clearly engaged in a conventional war or following such a war.

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assigned to represent the accused even if replaced by civilian defense counsel, could not be excluded. *Id.* §§ 6(B)(3), 4(C)(3)(b).

20. *Id.* § 6(D)(1).

21. *Id.* § 5(B)-(C).

22. *Id.* § 6(D)(2)(d).

23. *See id.* § 6(D)(5)(a).

24. *See id.* § 6(D)(5)(b). The Presiding Officer may delete protected information before the documents are made available to the accused, military defense council, or civilian defense counsel; substitute a portion or summary of the information in place of protected information; or substitute a statement of the relevant facts that the protected information would tend to prove. *Id.*

25. *Id.* § 6(H)(4). Interlocutory questions will be decided by the Secretary of Defense or his designee. *Id.* § 4(A)(5)(d).

26. *Id.* § 6(H)(4).

27. *Id.* § 6(H)(2), (6). The President or Secretary of Defense is not authorized to change a not guilty finding to guilty. *Id.* § 6(H)(2).

28. Executive Order § 7(b)(2), 66 Fed. Reg. at 57,835-36.

Military tribunals (as opposed to courts martial, used to try members of one's own armed forces)<sup>29</sup> have been used in the Revolutionary War,<sup>30</sup> the Mexican-American War,<sup>31</sup> the War of 1812,<sup>32</sup> the Civil War,<sup>33</sup> and World War II.<sup>34</sup> Military commissions were first used extensively during the Civil War when terrorist saboteurs from the Confederate Army were tried "for seizure, arson or destruction of transportation, communication or other systems of infrastructure[,] and frequently received capital sentences."<sup>35</sup>

During the Second World War, a military commission sitting in Washington D.C. tried eight German saboteurs who landed by submarine on the Atlantic Coast, armed with explosives.<sup>36</sup> Despite the fact that one of the saboteurs was an American citizen, the U.S. Supreme Court upheld the jurisdiction of that commission in *Ex parte Quirin*.<sup>37</sup> The Court found that under the Articles of War,<sup>38</sup> the predecessor to the Uniform Code of Military Justice,<sup>39</sup> Congress had empowered the President to create military commissions to try violations of the laws of war, such as espionage or sabotage.<sup>40</sup> The petitioners met the first requirement for qualification as lawful belligerents, because

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29. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U.L. REV. 349, 367-368 (1996). Courts martial apply the Uniform Code of Military Justice, which uses a form of due process "almost as elaborate as the civilian criminal justice system." *Id.* at 375.

30. *Ex parte Quirin*, 317 U.S. 1, 42 n.14 (1942).

31. *Id.* at 31 n.10.

32. *Id.* at 42 n.14.

33. *Id.*

34. *See id.*

35. Crona & Richardson, *supra* note 29, at 368.

36. *See* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 513 n.26 (1994).

37. *Quirin*, 317 U.S. at 20, 46.

38. *Id.* at 26 (citing 10 U.S.C. §§1471-1593 (2000)).

39. *See* *Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (explaining that the Uniform Code of Military Justice and the Articles of War preceeding it "regulate aspects of the conduct of members of the military").

40. *Quirin*, 317 U.S. at 27 ("[T]he Articles [of War] recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial.").

they carried their arms openly.<sup>41</sup> However, because they buried their uniforms on the beach after landing, they failed to meet the requirement of wearing a “fixed distinctive emblem,” and were classified as “unlawful belligerents.”<sup>42</sup> The Court held: “It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.”<sup>43</sup>

The United States also used military commissions after World War II, for instance, to try General Yamashita, former Japanese commander in the Philippines.<sup>44</sup> In *In re Yamashita*, the Supreme Court again upheld the jurisdiction of military commissions to try war crimes.<sup>45</sup> Yamashita argued that the military commission, created by order of Lieutenant General Wilhelm D. Styer,<sup>46</sup> lacked jurisdiction to try him after the cessation of hostilities.<sup>47</sup> However, the Court upheld the power to try enemy combatants by military commission after hostilities had ceased, at least until peace was officially recognized by treaty or proclamation.<sup>48</sup>

In addition to the International Military Tribunals convened at Nuremberg and Tokyo—which were international, or semi-international, military tribunals<sup>49</sup>—military tribunals were also

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41. *Id.* at 35-36.

42. *Id.*

43. *Id.* at 37. The remainder of the opinion was devoted to the issue whether it was constitutional to try the defendants without a jury. *See id.* at 37-48. The Court held that it was constitutional. *Id.* at 40.

44. *In re Yamashita*, 327 U.S. 1, 5 (1946).

45. *Id.* at 25.

46. Styer was Commanding General of the U.S. Army Forces in the Western Pacific. *Id.* at 9. He acted under orders from General MacArthur, Commander of the U.S. Army Forces in the Pacific, who, in turn, acted under orders from the Joint Chiefs of Staff and the President. *Id.* at 10-11.

47. *Id.* at 5-6.

48. *Id.* at 12-13. A subsequent case, *Madsen v. Kinsella*, 343 U.S. 341 (1952), recognized the propriety of using military commissions “even after peace has been declared, pending complete establishment of civil government [in an occupied territory].” *Id.* at 348 n.12.

49. The International Military Tribunal at Nuremberg was created by the four Allied Powers and only judges from those nations heard the cases. *See* MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* 51-52

employed by the United States after World War II for trials in the American-occupied portion of West Germany.<sup>50</sup> Countries such as Egypt and Peru have also used military tribunals in recent years to try terrorists.<sup>51</sup>

### C. Past U.S. Terrorism Trials

Various prior terrorist trials by the United States have occurred in federal district court. Prominent examples include trials for the 1993 bombing of the World Trade Center,<sup>52</sup> the additional trial of Ramzi Yousef,<sup>53</sup> the trials for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City,<sup>54</sup> and the trial for the 1998 bombing of the U.S. embassies

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(1997). The International Military Tribunal for the Far East, with judges from eleven different countries, was created by Special Proclamation of General MacArthur. R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 27 (1995). At least one scholar argues that the Yamashita case provides poor precedent because under the then-governing Geneva Convention of 1929, prisoners of war, including Yamashita, could be convicted and sentenced "only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power"—i.e., courts martial; yet, Yamashita was tried by military commission. See George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, at 26, 28.

50. Everett & Silliman, *supra* note 36, at 514-15. Two hundred and fifty-eight lesser officials of the Third Reich were sentenced to death by such American military tribunals. Crona & Richardson, *supra* note 29, at 388-89; see also *Madsen*, 343 U.S. at 341 (upholding military commission trial of a military spouse for murdering her husband while he was stationed in U.S.-occupied Germany following World War II where civilian courts not functioning).

51. Crona & Richardson, *supra* note 29, at 396 ("Even though military trials for terrorists have been used with success in Peru and Egypt, those societies are viewed by some as less developed democracies than our own, and not as models to which we should aspire.").

52. *Muslim Radicals Threaten Attacks on U.S. Targets*, BALT. SUN, Jan. 22, 1996, at 8A. Sheik Omar Abdel Rahman and nine of his followers were convicted of conspiracy to commit terrorism. Crona & Richardson, *supra* note 29, at 350.

53. Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1. Yousef was convicted for both a plot to blow up American jetliners and involvement in the 1993 World Trade Center bombing. Crona & Richardson, *supra* note 29, at 353.

54. Jo Thomas, *Oklahoma Prosecutor to Seek Death for Bombing*, N.Y. TIMES, Sept. 6, 2001, at A14. Timothy McVeigh, since executed, *id.*, and Terry Nichols were convicted of the crime. Carl Nolte, *September 11 Death Toll Tops Most Other Horrific Dates*, S.F. CHRON., Sept. 22, 2001, at A3.

in Kenya and Tanzania.<sup>55</sup> Zacarias Moussaoui, the suspected “twentieth” terrorist scheduled to participate in the September 11 attack, will be tried in a federal district court in Virginia.<sup>56</sup>

Terrorists have also been tried abroad in foreign courts. For instance, after the midair bombing of Pan Am Flight 103 over Lockerbie, Scotland,<sup>57</sup> Libya refused to extradite two of its citizens to stand trial in either the United States or the United Kingdom despite more than seven years of U.N. Security Council sanctions imposed upon Libya.<sup>58</sup> A special arrangement was used where the defendants were tried before Scottish judges, applying Scottish law and sitting by special designation in the Netherlands.<sup>59</sup>

#### *D. Concerns as to the Propriety of the Executive Order*

The use of military commissions to try terrorists seems problematic for several reasons, including: (a) such trials are not clearly supported by any precedent, because past military tribunals have occurred in the context of traditional war;<sup>60</sup> (b) the Executive Order appears overbroad because it covers terrorist acts unrelated to the September 11 attack or the

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55. Benjamin Weiser, *Embassy Bombers Sentenced*, N.Y. TIMES, Oct. 21, 2001, § 4, at 2. Four bin Laden followers were convicted of that crime in October 2001 and sentenced to life in prison without parole. *Id.* Bin Laden is under indictment in that case, and if he had been apprehended in connection with those bombings, he presumably would have been tried in a U.S. district court. See Benjamin Weiser, *Trial Poked Holes in Image of bin Laden's Terror Group*, N.Y. TIMES, May 31, 2001, at A1.

56. Indictment, United States v. Moussaoui, Criminal No. 01-455-A (E.D. Va. 2001), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/64329/0.pdf> (posting Moussaoui's indictment).

57. In December of 1988 a Pan American 747 bound from Frankfurt to New York exploded in midair over Lockerbie, Scotland, killing 259 on board and 11 on the ground. Nolte, *supra* note 54.

58. See DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* 107-21 (2000) (discussing the imposition of sanctions against Libya).

59. Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT'L & COMP. L. 355, 357-58 (2000). One of the suspects was convicted and the other acquitted. Nolte, *supra* note 54.

60. See *infra* notes 64-67 and accompanying text.

conflict in Afghanistan;<sup>61</sup> (c) it is unclear whether military commissions were properly created by presidential order, or if congressional authorization is required;<sup>62</sup> and (d) the Executive Order is overbroad because it appears to apply for an indefinite duration.<sup>63</sup>

Use of military commissions to try terrorists is somewhat novel. While *Ex parte Quirin* provides some support for using such commissions to try unlawful belligerents, that case arose in the context of World War II.<sup>64</sup> Other precedent for using military commissions occurred in similar contexts.<sup>65</sup> Yet, the current “war on terrorism” is not a traditional war.<sup>66</sup> Therefore, the use of

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61. See *infra* notes 68-70 and accompanying text.

62. See *infra* notes 71-73 and accompanying text.

63. See *infra* notes 74-76 and accompanying text.

64. See *supra* notes 36-43 and accompanying text.

65. See *supra* notes 44-50 and accompanying text.

66. The September 11 attack does not neatly fit the Geneva Conventions' criteria for defining war. The four 1949 Geneva Conventions apply to a “declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties,” or a situation “of partial or total occupation of the territory of a High Contracting Party.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32 [hereinafter First 1949 Geneva Convention]; Geneva Convention Relative to Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3218, 3220, 75 U.N.T.S. 85, 86 [hereinafter Second 1949 Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [hereinafter Third 1949 Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [hereinafter Fourth 1949 Geneva Convention]. Protocol I to the Geneva Conventions—to which the United States is not a party—additionally covers persons “fighting against colonial domination and alien occupation and against racist regimes.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 7. Common Article 3 of the four 1949 Geneva Conventions—which covers situations “not of an international character”—requires “armed conflict.” First 1949 Geneva Convention, *supra*, art. 3, 6 U.S.T. at 3116, 3118, 75 U.N.T.S. at 32-34; Second 1949 Geneva Convention, *supra*, art. 3, 6 U.S.T. at 3220, 3222, 75 U.N.T.S. at 86-88; Third 1949 Geneva Convention, *supra*, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136-38; Fourth 1949 Geneva Convention, *supra*, art. 3, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288-90. Protocol II—to which the United States is also not a party—defines armed conflict as taking place

in the territory of a [state party] between its armed forces and dissident armed forces or other organized armed groups which, under responsible

military commissions to try terrorism cases in the present context is not clearly supported by past precedent.<sup>67</sup>

Even assuming that the September 11 attack and subsequent conflict in Afghanistan provide grounds for establishing military commissions, the Executive Order seems overbroad because it covers terrorism unrelated to the attack and subsequent conflict. The Executive Order also covers any persons who have

engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy, or individuals who have knowingly harbored such persons.<sup>68</sup>

For instance, the Executive Order may apply to: (a) a German citizen who, motivated by residual anger over the Branch Davidian compound fire in Waco, Texas, explodes a bomb near a U.S. embassy in Germany, or (b) a Basque terrorist and Spanish national who is traveling through the United States, but had previously committed terrorist acts in Spain targeting both Spanish and American diplomats. While both situations may fall within the scope of the Executive Order, such

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command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art 1(1), *adopted* June 8, 1977, 1125 U.N.T.S. 609, 611.

67. See COMMITTEE ON MILITARY AFFAIRS AND JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *INTER ARMA SILENT LEGES: IN TIMES OF ARMED CONFLICT, SHOULD THE LAWS BE SILENT?* 7, 16, *available at* <http://www.abcny.org/pdf/Should%20the%20Laws%20be%20Silent%204.pdf> (last visited Apr. 15, 2002) [hereinafter ABCNY Report] (arguing that precedent supports use of military commissions within “prototypical declared war between nations involving members of the armed forces of an enemy state” but that less clear is any support for trying “an act of mass murder by eighteen individuals neither members of the armed forces of any nation state nor, even, organized in a conventional military or even para-military formation”; also urging “the greatest caution in extending the laws of war to situations not traditionally contemplated.”).

68. Executive Order § 2(a)(1)(ii)-(iii), 66 Fed. Reg. at 57,834.

acts are not part of any “war” started by al-Qaeda. Although the President may certify that it was not “in the interest of the United States that such individual[s] be subject” to the Executive Order,<sup>69</sup> the fact that such situations fall within the scope of the Executive Order indicates that the Order is overbroad.<sup>70</sup>

Additionally, while there is support for the President’s ability to create military commissions without Congressional authorization, at least in times of war and in occupied territory,<sup>71</sup> the present situation is particularly troubling. The Executive Order explicitly invokes Congress’ authorization to use force, but exceeds the scope of that authorization.<sup>72</sup> Yet it is Congress that has the original constitutional authority to create tribunals and declare war.<sup>73</sup>

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69. See Executive Order § 2(a), 66 Fed. Reg. at 57,834.

70. See ABCNY Report, *supra* note 67 (arguing that the Executive Order is defective because it “does not confine its scope to either offenders or offenses traditionally tried by the law of war”). The Executive Order states that the President has “determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.” Executive Order § 1(g), 66 Fed. Reg. at 57,833-34. While there could be an “urgent and compelling government interest” to combat al-Qaeda, at minimum, there is no “extraordinary emergency” or “urgent and compelling government interest” to combat isolated and unrelated acts of terrorism, and the use of military commissions to try persons who commit such acts is not “necessary.”

71. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (“In the absence of attempts by Congress to limit the President’s power, it appears that as Commander-in-Chief of the Army and Navy of the United States, [the President] may, *in time of war*, establish and prescribe the jurisdiction and procedure of military commissions . . . in territory occupied by Armed Forces of the United States.”) (emphasis added).

72. Congress authorized the President to use “all necessary and appropriate force against those nations, organizations, or persons [that] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Authorization for Use of Military Force Joint Resolution, Public Law 107-40, § 2(a), 115 Stat. 224 (2001). Yet, the Executive Order is not limited to those with a role in the September 11 attack, or those who harbor such persons.

73. U.S. CONST. art I, § 8 (“The Congress shall have the [p]ower . . . [t]o constitute [t]ribunals inferior to the Supreme Court; [and] . . . [t]o declare [w]ar.”). While the *Yamashita* and *Quirin* Courts held that Congress had empowered the executive to create military commissions, *see, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942), and the President may commit troops without congressional declaration when “imminent

The Executive Order also seems overbroad in another way: there will most likely be no clear ending date of the “war on terrorism.”<sup>74</sup> In the *Yamashita* case, the Supreme Court held that military commissions could appropriately be used to try enemy combatants even after hostilities ceased, but only “until peace ha[d] been officially recognized by treaty or proclamation.”<sup>75</sup> In the current situation, a proclamation of peace regarding any “war on terrorism” is unlikely. This raises the issue of whether such military commissions will exist indefinitely. For that reason as well, the Executive Order seems overbroad.<sup>76</sup>

The Executive Order also raises additional problems:

- whether U.S. use of military commissions to try former members of the Taliban armed forces for war crimes violates the Geneva Convention Relative to the Treatment of Prisoners of War (Third 1949 Geneva Convention), which requires such persons be treated as prisoners of war<sup>77</sup> and tried before U.S.

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involvement in hostilities is clearly indicated by the circumstances" and there is "a national emergency created by attack upon the United States," 50 U.S.C. § 1541 (2000), the present situation is one in which Congress *has* acted, *see* 115 Stat. 224, and therefore the President's actions should be in line with those of Congress.

74. *See, e.g.,* Katharine Q. Seelye, *Rumsfeld Backs Plan to Hold Captives Even if Acquitted*, N.Y. TIMES, Mar. 29, 2002, at A18 (quoting Donald Rumsfeld, “[t]he way I would characterize the ‘end of the conflict’ is when we feel that there are no effective global terrorist networks functioning in the world . . .”); *see also* *War on Terror May Last 50 Years*, Oct. 27, 2001, [http://news.bbc.co.uk/hi/english/uk/newsid\\_1623000/1623036.stm](http://news.bbc.co.uk/hi/english/uk/newsid_1623000/1623036.stm) (statement by UK Chief of the Defense Staff).

75. *In re Yamashita*, 327 U.S. 1, 12-13 (1946). While *Madsen*, 343 U.S. at 348 n.12, recognizes the propriety of using military commissions in an occupied territory until “complete establishment of civil government,” if military commissions are held outside Afghanistan, that standard may be inapplicable.

76. Laurence Tribe has raised two arguments that the Executive Order is unconstitutional. Laurence H. Tribe, Letter to the Editor, *Military Tribunals: Too Broad a Power*, N.Y. TIMES, Dec. 7, 2001, at A30. First, he argues that authorization from Congress is required to implement such tribunals. *Id.* Second, he argues “not 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.” *Id.*

77. *See* Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, Jan. 29, 2002, available at <http://www.hrw.org/backgrounder/usa/pow-bck.htm>. The Third 1949 Geneva Convention grants prisoners of

courts martial;<sup>78</sup>

- whether, by providing no independent appellate review,<sup>79</sup> the Executive Order violates the Third 1949 Geneva Convention,<sup>80</sup> or even the Executive Order itself, which requires a “full and fair trial”;<sup>81</sup> and
- whether using military commissions violates the Supreme Court’s decision, *Ex parte Milligan*,<sup>82</sup>

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war the same status as “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” and irregular fighters meeting certain criteria. *See* Third 1949 Geneva Convention, *supra* note 66, art. 4(A), 6 U.S.T. at 3320, 3322, 75 U.N.T.S. at 138-40. Thus, members of the Taliban armed forces should be treated as prisoners of war. Most al-Qaeda members probably do not meet the criteria for irregular fighters to qualify as prisoners of war. *See id.* art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (requiring a command structure, uniforms with a “fixed distinctive sign,” arms, openly carried, and operations conducted in accordance with the laws and customs of war). If doubt exists whether persons qualify as prisoners of war, such persons “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” *Id.* art. 5, 6 U.S.T. at 3322, 3324, 75 U.N.T.S. at 140-42.

78. The Third 1949 Geneva Convention provides that prisoners of war “can be validly sentenced only . . . by the same courts according to the same procedure as [are] . . . members of the armed forces of the Detaining Power.” Third 1949 Geneva Convention, *supra* note 66, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212. The Third 1949 Geneva Convention also states that prisoners of war may not be tried by a court “of any kind which does not offer the essential guarantees of independence and impartiality as [are] generally recognized.” *Id.* art. 84, 6 U.S.T. at 3382, 3384, 75 U.N.T.S. at 200-02.

79. *See supra* notes 25-28 and accompanying text.

80. The Third 1949 Geneva Convention requires every prisoner of war to have the right of appeal “in the same manner as the members of the armed forces of the Detaining Power.” Third 1949 Geneva Convention, *supra* note 66, art. 106, 6 U.S.T. at 3398, 75 U.N.T.S. at 216. In more serious cases, members of the U.S. Armed Forces have the right to appeal to, *inter alia*, the U.S. Court of Appeals for the Armed Forces. *See* Administrative Office of the U.S. Courts, *U.S. Court of Appeals for the Armed Forces*, at [http://www.uscourts.gov/understanding\\_courts/89919.htm](http://www.uscourts.gov/understanding_courts/89919.htm) (last visited Apr. 6, 2002).

81. Executive Order § 4(c)(2), 66 Fed. Reg. at 57,835; *see also* Rules, *supra* note 6, § 1.

82. *Ex parte Milligan*, 71 U.S. 2 (1866). *See also* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (granting habeas petitions of civilians tried by military tribunal in Hawaii after World War II where civilian courts were exercising their normal functions); *Fletcher*, *supra* note 49, at 29 (arguing that under a faithful reading of *Ex Parte Milligan* the conviction of anyone who could have been tried in federal court should be struck down; suspects who allegedly participated in a conspiracy to commit the crimes of September 11 are liable for a crime on American soil and are therefore subject to

holding that military courts should not supersede civilian courts in areas where the civilian courts remain open and operational.<sup>83</sup>

*E. Absence of Standard Trial Procedures*

Aside from questioning the legality of using military commissions, another issue is whether, as a policy matter, the circumstances justify subjecting foreign defendants accused of terrorism to trials lacking certain safeguards provided in federal district courts (or, for that matter, most likely in trials before international tribunals).<sup>84</sup> Military commission trials will (a) not afford the accused a jury trial; (b) not be governed by the Federal Rules of Evidence; (c) not be open to the public in certain circumstances; (d) not require unanimous support for convictions, except for death sentences; and (e) not permit appellate review to an independent court.<sup>85</sup>

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prosecution in federal court).

83. Some have also argued that the Executive Order improperly attempts to foreclose habeas corpus review. *See, e.g.,* Jordan J. Paust, *Military Commissions: Some Perhaps Legal, but Most Unwise*, JURIST, Nov. 14, 2001, at <http://www.jurist.law.pitt.edu/forum/forumnew38.htm>; Lawyers Committee for Human Rights, *Lawyers Committee Statement on Military Commission Rules, Which Will Soon Be Released by The Department of Defense*, Jan. 9, 2002, at <http://www.lchr.org/media/dod.htm>. However, the Executive Order does not address U.S. citizens. As to non-citizens who are held outside the United States, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), suggests that, at least regarding “enemy aliens” held outside U.S. sovereign territory, there is no right to petition for habeas corpus review. *See also* Coalition of Clergy v. Bush, No. CV 02-570, 2002 U.S. Dist. LEXIS 2748 (C.D. Cal. Feb. 21, 2002) (denying habeas petitions filed on behalf of Guantanamo Bay detainees for lack of standing and because no detainees were within the territorial jurisdiction of the court).

84. *See* Executive Order § 1(f), 66 Fed. Reg. at 57,833 (“[I]t is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”); *see also* discussion *infra* Part III.A (examining procedural mechanisms before an international tribunal).

85. *See supra* Part I.A. Two other troubling aspects of the Rules are that the accused and any civilian defense counsel may be excluded from closed proceedings and prevented from seeing protected information. Rules, *supra* note 6, § 4(C)(3)(b), 6(B)(3). If the accused has retained a civilian lawyer, the military lawyer assigned to the accused may be the only person on the defense side with access to closed proceedings and protected information entered into evidence. *See id.* §§ 6(B)(3), (D)(5). Given that a defendant who has *replaced* his military lawyer with a civilian lawyer may no longer even be in contact with the military lawyer, permitting the military lawyer access to

Such procedures obviously facilitate obtaining convictions and, arguably, would be particularly appropriate *during* war, when the application of admissibility rules might be a luxury, or when large numbers of enemy soldiers might need to be tried in the field. However, in the present situation, trials may occur long after the fighting in Afghanistan ends and could take place in a location well removed from Afghanistan, such as the U.S. Naval Base at Guantanamo Bay, Cuba. Therefore the necessity of abbreviated trial mechanisms (or regarding persons who should be classified as prisoners of war, the need to avoid the established mechanisms of U.S. courts martial) is questionable.<sup>86</sup>

Some of the abbreviated procedures seem more “necessary” than others. For instance, the United States has a legitimate interest in protecting national security information.<sup>87</sup> Yet, procedures could be employed to protect such materials if terrorism trials were in federal district courts.<sup>88</sup>

While using military commissioners in place of jurors to hear cases before a military commission has been upheld as constitutional,<sup>89</sup> the replacement of the jury seems unnecessary in terrorism trials. The United States may have at least two reasons not to use jurors: (a) concerns with juror safety and (b) concerns that juries may inappropriately acquit.<sup>90</sup> Neither

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such materials and proceedings may do the defendant little good.

86. See Anne-Marie Slaughter, *Tougher than Terror: To Fight Criminal Terrorism, We Need to Strengthen our Domestic and Global System of Criminal Justice, Not Militarize It*, AM. PROSPECT, Jan. 28, 2002, at 23-24 (“Simply to try all suspected terrorists before U.S. military tribunals intended for emergency battlefield conditions would put America at odds not only with its own domestic constitutional safeguards but with international conventions on the treatment of prisoners of war.”).

87. See Bumiller & Seelye, *supra* note 9 (quoting President Bush on the possibility that information necessary to try terrorists would comprise national security).

88. See Burt Neuborne, *Tribunals Without the Military*, N.Y. TIMES, Dec. 16, 2001, § 4, at 13 (arguing that “[a]ny decision to proceed in secret or to seal records should be immediately reviewable by a federal judge,” and that sensitive intelligence material could be protected during a trial in federal district court by handling the materials in closed court).

89. See *supra* notes 36-43 and accompanying text (discussing *Ex parte Quirin*).

90. See Robert H. Bork, *At War: Having Their Day in (a Military) Court; How Best to Prosecute Terrorists*, NAT’L REV., Dec. 17, 2001, at 18 (“Jurors often respond to emotional appeals, and, in any event, would have good reason to fear for their and their families’ safety if they convicted.”).

argument is persuasive. While security would obviously need to be stringent for a jury trial of suspected al-Qaeda terrorists, similar trials have successfully occurred in the past, and the United States apparently is willing to try Zacarias Moussaoui in federal district court.<sup>91</sup> Although fears of additional terrorism are legitimate, they should not drive U.S. decisions regarding the administration of justice. Moreover, it is unclear that terrorism concerns would be greater for a federal court trial as opposed to a trial by military commission.<sup>92</sup> The argument of inappropriate acquittal by juries should be afforded little weight given the enormity of crimes committed on September 11.<sup>93</sup>

Military commission trials may be simplified by not following evidentiary rules of admissibility, such as the rule forbidding hearsay.<sup>94</sup> However, past terrorism convictions have been obtained despite strict adherence to the Federal Rules of Evidence.<sup>95</sup> Furthermore, the harshness of the hearsay exclusion<sup>96</sup> is alleviated by the “residual hearsay rule,” which

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91. See *supra* note 56 and accompanying text. Mob figures have been tried before juries, even though such trials also could have posed a risk to juror safety. See, e.g., James P. Levine, Letter to the Editor, *A Secret Trial: It's Not Our Way*, N.Y. TIMES, Nov. 28, 2001, at A24 (“American juries have not hesitated over the years to convict those deemed guilty, even when there was legitimate concern about retaliation against the jurors, as in the cases of mobsters.”).

92. While federal court proceedings may take longer, thus providing more opportunity to commit terrorism, military commission trials would appear less legitimate, and thus could create greater incentive for terrorist activity.

93. While one commentator argues that “[i]t is difficult for the government to select a jury of twelve ordinary persons who will not have at least one juror who . . . will vote against the death penalty, vitiating the unanimity necessary for a death sentence,” Crona & Richardson, *supra* note 29, at 391, in light of the events of September 11, it seems doubtful U.S. jurors would be lenient regarding sentencing, see Levine, *supra* note 91. Similarly, because terrorism is a problem confronting most countries, it is also unlikely that an international panel of judges—who could, for instance, include a Spanish judge (cognizant of Spain’s problem with Basque terrorists) or a U.K. judge (cognizant of the history of IRA terrorism)—would be inappropriately inclined to acquit.

94. FED. R. EVID. 801(d)(2).

95. See, e.g., Adam Cohen, *Rough Justice: The Attorney General Has Powerful New Tools to Fight Terrorism. Has He Gone Too Far?*, TIME, Dec. 10, 2001, at 33 (discussing the convictions of the terrorists charged with the 1993 World Trade Center bombing).

96. See Crona & Richardson, *supra* note 29, at 383 (arguing the importance of relaxing the hearsay rule).

allows admission of certain hearsay evidence.<sup>97</sup>

The other significant procedural changes—such as eliminating the requirement of unanimity for conviction and sentencing (at least in non-death penalty cases) and eliminating normal appellate review—seem designed only to facilitate quick guilty convictions. While there is a legitimate national interest in convicting guilty terrorists, that interest should be weighed against damage to the rule of law and concerns about convicting innocent persons. Obviously, it is difficult to answer the question of whether convicting terrorists is such a high priority that the United States should abandon due process protections, normally considered central to our justice system.

*F. Questions as to the Appearance of Legitimacy*

When considering the propriety of using military commissions one should consider: the effect on the international community's view of the United States; the effect on U.S. foreign relations; and the potential of fueling additional terrorism. One must also consider the impact of the use of military commissions on the trials themselves.

Using military commissions to try the crime of terrorism sends at least two inappropriate messages: (a) the world's only superpower, which should promote the rule of law, can dispense with due process protections for foreign nationals (at least if they remain outside the U.S.); and (b) it is acceptable for other countries to do the same. The former message is not only problematic in and of itself, but it undermines any moral high ground.<sup>98</sup> For instance, it would seem hypocritical for the United

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97. See FED. R. EVID. 807 (allowing introduction of hearsay evidence where (a) the statement is offered as evidence of a material fact; (b) the statement is more probative than other evidence available; and (c) the interests of justice will best be served by admission of the statement into evidence). Evidence such as bin Laden's statements on videotapes would be admissible against him as admissions of a party opponent. See FED. R. EVID. 801(d)(2).

98. As Anne-Marie Slaughter argued:

Imagine how this looks to the rest of the world: Timothy McVeigh killed 168 of his fellow citizens. Yet he was entitled to all the constitutional protections and safeguards of a federal criminal trial—held in the United States, in public. Now, when the defendants are foreigners, most likely Muslims, the administration of justice is left to an ad hoc military commission acting in

States to use these military commissions and then criticize other countries, such as China, for their inadequate due process protections.<sup>99</sup> The use of military commissions to try foreign nationals in situations short of traditional war also establishes problematic precedent that could be used by other countries to (a) crack down on dissidents who perpetrate domestic violence, or (b) try U.S. servicemen apprehended abroad during a peacekeeping mission or humanitarian intervention.<sup>100</sup>

To the extent that trials appear less than legitimate, the appearance of “victors’ justice,” or what some may characterize as “anti-Muslim justice,” is strengthened.<sup>101</sup> Such an appearance could in turn undermine the Administration’s efforts to

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secret.

Slaughter, *Al Qaeda*, *supra* note 9. See also George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 645, 646 (2002) (“Not only does the lumping together of all foreigners vastly exceed standards of relevance, but it also invokes a method of classification—citizen versus foreigner—that has no reasonable bearing on the supposed objective of protecting the United States against international terrorism.”). Cf. *Madsen v. Kinsella*, 343 U.S. 341, 359-60 (1952) (subjecting both “German and United States civilians to the same procedures”).

99. As William Safire argued: “[O]n what leg does the U.S now stand when China sentences an American to death after a military trial devoid of counsel chosen by the defendant?” Safire, *supra* note 9. The United States has condemned the use of military commissions in a variety of settings:

the conviction of U.S. citizen Lori Berenson for terrorism by a military court in Peru; the conviction and execution of author Ken Saro-Wiwa after a trial by a special military court in Nigeria; the use of military courts to convict suspected terrorists in Egypt without due process; and trials of foreigners, including U.S. citizens, for espionage before closed tribunals in Russia.

Press Release, Human Rights Watch, *New Military Commissions Threaten Rights, Credibility* (Nov. 15, 2001), at <http://www.hrw.org/press/2001/11/miltribs1115.htm> (last visited Mar. 22, 2002).

100. See Slaughter, *Tougher*, *supra* note 86, at 23 (“[O]ther nations will be watching how we interpret and apply the Geneva Conventions. . . . Deviations from those provisions now, when our soldiers are in the field in substantial numbers, are likely to come back to haunt us.”). The United States periodically claims that one of the reasons it opposes the ICC is concern that U.S. servicemen could be prosecuted before it. Roseann M. Latore, Note, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT’L & COMP. L. REV. 159, 160 (2002). Not only does that argument ignore the ICC’s complementarity regime, see discussion *infra* Part III.D, but also the United States should be more concerned about precedent that may allow other countries to try U.S. servicemen before military tribunals (making the alternative of ICC prosecution look comparatively good).

101. See Slaughter, *Al Qaeda*, *supra* note 9.

maintain a coalition against terrorism<sup>102</sup> and potentially incite additional terrorism.<sup>103</sup> Numerous European countries have already expressed concern about the use of military commissions.<sup>104</sup> If U.S. allies are concerned about military commissions, the perception of those already hostile toward the United States is undoubtedly worse.

Problems concerning legitimacy may also impact on the trials themselves. For instance, Spain initially took the position that it would not extradite eight men charged with complicity in the September 11 attacks unless the United States agreed to try them in a civilian court.<sup>105</sup> If countries are unwilling to extradite suspects, they may also be unwilling to assist in obtaining key witnesses and evidence.<sup>106</sup> As a result, the United States' ability to conduct the actual trials could be hampered.

Thus, even if (a) military trials are conducted under well-planned, fairly neutral rules prescribed by the Secretary of Defense, (b) defendants are represented by able defense counsel, and (c) the proof is solid, it would be exceedingly difficult to counter allegations that the proceedings were illegitimate, especially if parts of the proceedings are closed to the public.

## II. TRIALS IN U.S. DISTRICT COURT

In comparison with military trials, U.S. district courts have not only been used successfully for terrorism trials in the past, but also would ameliorate most concerns about unfair trial procedures. While trying terrorists in U.S. district courts would not necessarily eliminate all concerns regarding the appearance of legitimacy, they certainly would carry more legitimacy than

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102. See, e.g., Safire, *supra* note 9 (suggesting that the Administration's use of military tribunals "undermined the antiterrorist coalition").

103. As one author warns: "military executions of convicted terrorists after such trials will create a new generation of martyrs." Slaughter, *Al Qaeda*, *supra* note 9.

104. Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 29, 2001, at B4.

105. While initial reports suggested Spain would refuse to extradite, see Sam Dillon & Donald G. McNeil, Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1, Spain later moderated its position, see Bumiller, *supra* note 104.

106. See Dillon & McNeil, Jr., *supra* note 105 (discussing U.S. need for foreign assistance in its terrorist investigation and European reluctance to cooperate when the death penalty may be imposed).

trials before military commissions.

#### A. *Trial Procedures in Federal District Court*

Trials in U.S. federal district courts have obvious merit in terms of procedural mechanisms. Trials would occur before a jury.<sup>107</sup> The Federal Rules of Criminal Procedure and the Federal Rules of Evidence would regulate the conduct at the trial<sup>108</sup> and normal avenues of appellate review would be available.<sup>109</sup>

While there may be difficulty finding impartial jurors, that challenge should not be insurmountable. For instance, although the Oklahoma City bombing (at the time, the single largest terrorism attack on U.S. soil)<sup>110</sup> received widespread publicity, a jury was impaneled for that trial after it was removed to Denver, Colorado.<sup>111</sup>

#### B. *Benefits of an Established Trial Mechanism*

Another factor favoring the use of U.S. federal district courts to try terrorism is that no new forum would need to be created.<sup>112</sup> This would eliminate any argument that the forum was improperly constituted<sup>113</sup>—an argument that could be leveled against either military commissions or an international tribunal created to adjudicate the crime of terrorism.

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107. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .”).

108. FED. R. CRIM. P. 1; FED. R. EVID. 101.

109. See FED. R. APP. P. 3.

110. Nolte, *supra* note 54.

111. Crona & Richardson, *supra* note 29, at 379. Due to concerns of impaneling an impartial jury, it is unlikely that any terrorism trials will be conducted in New York City or Washington D.C. See *id.*

112. If persons accused of terrorism were tried before U.S. federal courts, prisoners of war accused of war crimes could be tried by U.S. courts martial. See Uniform Code of Military Justice, 10 U.S.C. § 802(2)(a)(9) (2000) (covering jurisdiction of courts martial, “[p]risoners of war in custody of the armed forces”). Persons who fail to qualify for prisoner of war status—i.e., members of al-Qaeda—presumably could be tried for war crimes before courts martial if for the purposes of trial they were deemed to be prisoners of war.

113. See *supra* Part I.D.

### C. *The Appearance of Legitimacy*

Even with trials in federal district court, one lingering concern is whether that forum is as capable of providing a fair trial as an international tribunal.<sup>114</sup> Certain foreign states and citizens may still view U.S. courts as inherently hostile venues to try non-citizens for terrorism. As a result, these countries may still be hesitant to extradite suspects<sup>115</sup> or cooperate in providing witnesses and information. Thus, while trials in U.S. federal court may not solve all questions regarding legitimacy, such trials would clearly have more legitimacy than trials held before military commissions.

In sum, trials of terrorists in U.S. district courts would appear far more legitimate than trials before military commissions due to the procedural mechanisms governing the conduct of the trials.<sup>116</sup> While it will be more difficult to obtain convictions, at minimum, the United States could not be accused of abandoning due process protections and creating an inferior system of justice.<sup>117</sup>

### III. TRIALS BEFORE AN INTERNATIONAL TRIBUNAL

Another method for trying bin Laden, al-Qaeda members, or other terrorists is trial before an international tribunal. Such trials could not occur before either of the two current ad hoc tribunals, because of limited jurisdiction,<sup>118</sup> or the ICC, which

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114. Sadat, *supra* note 9 (arguing for the use of an international tribunal because trials in American courts will be viewed with suspicion by the international community).

115. *Id.* Countries also may be unwilling to extradite suspects to either a federal court or a military commission because either of those venues would be capable of imposing the death penalty. Bumiller, *supra* note 104.

116. See *How to Try a Terrorist*, N.Y. TIMES, Dec. 29, 2001, at A32.

117. See *id.*

118. The jurisdiction of the ICTY and ICTR is limited to crimes in the former Yugoslavia, and Rwanda and its neighboring states. ICTY Statute, *supra* note 2, art. 8 ("The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia. . . ."); ICTR Statute, *supra* note 3, art. 7 ("The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda . . . as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens."). The ICTR's temporal jurisdiction extends only to crimes committed during

lacks retroactive jurisdiction.<sup>119</sup> However, another ad hoc or permanent tribunal could be created, or future acts of terrorism might be tried before the ICC.<sup>120</sup>

#### A. *Procedural Mechanism Before an International Tribunal*

In terms of the procedural mechanisms that would apply before an international tribunal, the evidentiary rules would likely be an amalgamation of common and civil law rules. However, if modeled on the rules used by the existing tribunals or the ICC, most of the fair trial protections afforded in U.S. courts would be present, except trial by jury.<sup>121</sup>

Another significant difference—and it is entirely a matter of opinion whether one views it as favorable or not—is that an international tribunal would be unlikely to have the power to impose the death penalty,<sup>122</sup> whereas a military commission or U.S. federal court may impose a capital sentence.<sup>123</sup> There have

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1994. *Id.* But see ICTY Statute, *supra* note 2, art. 8 (temporal jurisdiction commences January 1, 1991, but no ending date given).

119. See *infra* note 132 and accompanying text.

120. Two other proposals are (a) for the Security Council to expand the ICTY's jurisdiction to include the September 11 attacks and crisis in Afghanistan, see Paul R. Williams & Michael Scharf, *Prosecute Terrorist on a World Stage*, L.A. TIMES, Nov. 18, 2001, at M5, and (b) for the Security Council to mandate that the September 11 crimes be tried retroactively by the ICC once it comes into force, see Geoffrey Robertson, *A Just Conflict Must Be Fought In Court Too*, TIMES (London), Nov. 7, 2001, at 16. The first suggestion is possible because the ICTY was created by a Security Council resolution and could be modified by a Security Council resolution. The second approach is less sound. The ICC will not have retroactive jurisdiction. ICC Statute, *supra* note 4, art. 11. If the Security Council declares retroactive ICC jurisdiction for the events of September 11th, it would be ordering the ICC to violate the statute by which it was created. See *id.*

121. See *The International Criminal Court: Hearing Before the House Comm. on International Relations*, 106<sup>th</sup> Cong. 99-101 (2000) (statement of Monroe Leigh on behalf of the American Bar Association) (demonstrating the compatibility of the U.S. Constitution and the Rome Statute of the International Criminal Court and including a chart comparing the rights afforded within the two systems). The chart comparing the two systems is also available at <http://www.endgenocide.org/ceg-icc/iccusconst.pdf> (last viewed May 2, 2002).

122. See, e.g., ICC Statute, *supra* note 4, art. 77 (describing available penalties in ICC proceedings).

123. Executive Order § 4(a), 66 Fed. Reg. 57,833-34 (Nov. 16, 2001) (providing for imposition of the death penalty in military commissions constituted to try terrorists); Antiterrorism and Effective Death Penalty Act, 18 U.S.C. § 2332b(c)(1) (2000) (federal terrorism statute allowing imposition of the death penalty for terrorist acts transcending national boundaries).

been serious concerns raised in recent years about the propriety of capital punishment,<sup>124</sup> including the risk of erroneous convictions and/or discriminatory bias, and popular support for the death penalty has decreased in America.<sup>125</sup> One might argue that if there were ever a crime that merited the death penalty, it would be involvement in terrorist crimes such as those committed on September 11. However, if an international tribunal is created, it will in all likelihood lack the authority to impose the death penalty.<sup>126</sup>

*B. Defining the Crimes to be Adjudicated by an International Tribunal*

At least three options exist for defining the crimes over which an international terrorism tribunal could have jurisdiction. Such a tribunal could have jurisdiction over: (a) "crimes against humanity";<sup>127</sup> (b) various terrorist acts, such as terrorist hijackings and bombings, which are criminalized under existing multilateral terrorism conventions;<sup>128</sup> or (c) terrorism generally, requiring the adoption of a universal definition.<sup>129</sup> The first two options would be easiest to implement,<sup>130</sup> and if done in conjunction, could be fairly satisfactory. The third option would be more difficult given the current lack of consensus on a definition of terrorism.<sup>131</sup>

The first option would be to try terrorism as a "crime against humanity." Such trials could occur before either a new terrorism tribunal or the ICC, but the latter is limited to crimes committed after the ICC Statute enters into force.<sup>132</sup> The ICTY, ICTR and

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124. *The Death Penalty Re-examined*, N.Y. TIMES, Feb. 23, 2002, at A14; Bumiller, *supra* note 104.

125. *The Death Penalty Re-examined*, *supra* note 124.

126. *See, e.g.*, ICTY Statute *supra* note 2, art. 24 ("The penalty imposed by the Trial Chamber shall be limited to imprisonment.").

127. *See infra* notes 132-37 and accompanying text.

128. *See infra* notes 138-42 and accompanying text.

129. *See infra* notes 143-48 and accompanying text.

130. The ease of implementation would be greatly facilitated by the pre-existing legal framework defining these offenses. *See infra* notes 132, 137 and accompanying text.

131. *See infra* notes 143-44 and accompanying text.

132. The ICC will only have jurisdiction regarding crimes committed after the date its statute enters into force, which will be July 1, 2002. *See* ICC Statute, *supra* note

ICC Statutes all include “crimes against humanity” within their respective jurisdictions.<sup>133</sup> For example, the ICTR Statute defines crimes against humanity as “the following crimes[,] when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) Murder. . . .”<sup>134</sup>

The September 11 attacks would likely meet that definition when viewed alone<sup>135</sup> or as part of a larger attack by al-Qaeda against American civilians, including, for example, the 1993 World Trade Center bombing and the 1998 bombings of the U.S. embassies in Kenya and Tanzania.<sup>136</sup> Although adjudicating terrorism as a “crime against humanity” would not include acts not “part of a widespread or systematic attack,” such as the unrelated hijacking of a single aircraft, it would have the advantage of using a crime with a widely accepted definition.<sup>137</sup>

The second option (which could be combined with the first option) would be to include within a new terrorism tribunal’s

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4, art. 11 (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”); art. 126 (entry into force occurs on the first day of the month after the sixtieth day following ratification by sixty states); Press Release, Coalition for the International Criminal Court, 60th Ratification of the International Criminal Court Treaty to Be Achieved at UN Ceremony (Apr. 2, 2002), available at <http://www.igc.org/icc/html/pressrelease20020404.pdf> (the required sixty ratifications were obtained on April 11, 2002).

133. ICC Statute, *supra* note 4, art. 7; ICTR Statute, *supra* note 3, art. 3; ICTY Statute, *supra* note 2, art. 5.

134. ICTR Statute, *supra* note 3, art. 3. The formulation in the ICTR or ICC Statutes would be preferable to that in the ICTY Statute, which requires that the crime be “committed in armed conflict.” Compare ICC Statute, *supra* note 4, art. 7, and ICTR Statute, *supra* note 3, art. 3, with ICTY Statute, *supra* note 2, art. 5.

135. Robertson, *supra* note 120. Arguably, hijacking four civilian aircraft with the intent of crashing at least some of them into civilian buildings could constitute murder committed as part of a “widespread or systematic attack against any civilian population” for political and/or religious reasons. *See id.*

136. *Id.* (“The September 11 atrocities, like the US Embassy bombings in Kenya and Tanzania in 1998, precisely fit the definition [of crimes against humanity].”). Any new tribunal addressing acts of terrorism could also criminalize aiding and abetting, ordering or otherwise assisting the crime, or even “command responsibility.” *See, e.g.*, ICC Statute, *supra* note 4, art. 25, 28; ICTR Statute, *supra* note 3, art. 6; ICTY Statute, *supra* note 2, art. 7.

137. ICTR Statute, *supra* note 3, art. 3; ICC Statute, *supra* note 4, art. 7. *But see* ICTY Statute, *supra* note 2, art. 5 (requiring “armed conflict”).

jurisdiction the various terrorism-related crimes already defined in the twelve multilateral terrorism conventions.<sup>138</sup> While obviously not covering every type of terrorist activity,<sup>139</sup> the conventions cover a variety of topics such as: airplane hijackings, terrorist bombings, maritime attacks, attacks upon civilian airports, theft of nuclear materials, attacks against “protected persons,” and financing terrorism.<sup>140</sup> In most of the twelve conventions, attempting to commit the crimes or acting as an accomplice are also proscribed.<sup>141</sup> Some of the conventions

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138. The twelve multilateral conventions that define terrorism-related crimes are: Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 27 I.L.M. 627; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, Int'l Maritime Doc. SUA/CON/16; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 30 I.L.M. 726; International Convention for the Suppression of Terrorist Bombing, Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 39 I.L.M. 268.

139. These and other existing terrorism conventions fail to provide a general definition of terrorism. See Walter Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37 (2000).

[The international community] has never been able to agree on a definition of international terrorism. Consequently, the international community has taken a piecemeal approach. . . . The result has been the adoption of a number of global treaties, regional conventions, and bilateral agreements which are relevant to the suppression of international terrorism, and corresponding domestic laws which implement those arrangements.

*Id.* at 39.

140. See *supra* note 138.

141. See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 138, art. 1, 24 U.S.T. at 568, 974 U.N.T.S. at 178-79 (covering attempts and accomplices).

also apply to a person who organizes or directs others to commit the offense or intentionally contributes to the commission of the offense.<sup>142</sup> If a tribunal had jurisdiction over both crimes against humanity and the terrorist acts covered by existing terrorism conventions, both “widespread and systematic” as well as isolated terrorist acts would be covered.

The third alternative would be for the Security Council to adopt a statute defining the crime of terrorism and create a new terrorism tribunal with jurisdiction over that crime. This approach would be preferable because it would cover terrorism not addressed by existing conventions and acts that are not “widespread or systematic,” but the approach would not be free from complications. States have been trying to define the crime of terrorism for purposes of implementing a new multilateral terrorism convention, but no agreement has been reached.<sup>143</sup> The main problem revolves around whether acts perpetrated “during an armed conflict, including in situations of foreign occupation” should be excluded from the definition, as urged by Member States of the Organization of the Islamic Conference.<sup>144</sup> If that issue is resolved—hopefully concluding that terrorist acts perpetrated in such a context are to be considered terrorist in nature<sup>145</sup>—the Security Council could adopt such a definition.<sup>146</sup>

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142. See, e.g., International Convention for the Suppression of Terrorist Bombing, *supra* note 138, art. 2, S. TREATY DOC. NO. 106-6, at 4-5, 37 I.L.M. at 253.

143. Some of the latest work on the topic can be found in the Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996. G.A. Res. 51/210, U.N. GAOR, 9th Sess., U.N. Doc. A/57/37 (2002) [hereinafter Ad Hoc Committee Report].

144. See *id.*, Annex IV, art. 18(2) (Member States of the Organization of the Islamic Conference proposing the following provision: “The activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.”).

145. Although terrorism against civilians is forbidden under international humanitarian law and “terrorism” against military targets is governed by that law, it would still send the wrong message to exempt terrorism committed in “situations of foreign occupation.” It should be clear that foreign occupation does not justify terrorism.

146. See U.N. CHARTER, art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”).

The Security Council could also adopt a definition even if the issue is unresolved<sup>147</sup> or unsatisfactorily resolved, although that approach could be subject to criticism.<sup>148</sup>

### C. *The Appearance of Legitimacy*

The strongest argument in favor of an international tribunal, rather than a military tribunal or U.S. district court is that an international tribunal would have the greatest appearance of legitimacy. Trial before an international tribunal could occur before a diverse panel of judges—even judges from Muslim countries—selected by both U.N. Member States and the Security Council.<sup>149</sup> Such diversity could be important in avoiding potential accusations of “victor’s justice”—or countering

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147. See *id.* arts. 41, 42 (granting the Security Council the discretion to implement its decisions, and if peaceful measures are inadequate, allowing authorization for the use of military force).

148. If the Security Council were to adopt a new general definition of terrorism, concern might also exist as to whether retroactive application of that definition to the events of September 11 would violate the principle *nullum crimen sine lege*. See Leading Case, 115 HARV. L. REV. 316, 326 n.10 (2001) (defining the principle *nullem crimen sine lege* as requiring that “no one may be convicted of or punished for an offense unless the conduct constituting the offense has been authoritatively defined by an institution having the duly allocated competence to do so.”); see also James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J., 257, 267-70 (2001) (criticizing the General Assembly for taking action “without a clear and comprehensive international legal definition”).

149. For instance, the ICTY Statute contains elaborate procedures for judicial selection. See ICTY Statute, *supra* note 2, art. 13. First, the Secretary-General invites U.N. Member States to nominate judges. *Id.* Within sixty days, each State may nominate up to two qualified candidates, “no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the [ICTY].” *Id.* The Secretary-General then forwards the nominations to the Security Council, from which the Security Council establishes a list of not less than 28 and not more than 42 candidates “taking due account of the adequate representation of the principal legal systems of the world.” *Id.* Finally, the General Assembly elects fourteen permanent judges from that list. *Id.* Elections require a majority of votes, and if two candidates of the same nationality obtain the required majority vote, the one who receives the higher number of votes is elected. *Id.* Additional procedures govern the selection of *ad litem* judges and the filling of vacancies. *Id.*; see also *Conditions of Service for the Ad Litem Judges of the International Tribunal for the Former Yugoslavia: Report of the Advisory Committee on Administrative and Budgetary Questions*, U.N. GAOR 55th Sess., Agenda Item 127, U.N. Doc. A/55/806 (2001).

any accusations of “anti-Muslim justice” in light of September 11<sup>150</sup>—and in creating a widely accepted verdict.<sup>151</sup>

Use of an international tribunal might positively impact U.S. foreign relations, or at minimum, not harm U.S. relations by creating a tribunal of questionable legitimacy; minimize future terrorism; and facilitate the trials themselves because states may be more willing to cooperate with such a tribunal.<sup>152</sup> An international tribunal could also emphasize that (a) the crimes committed are truly international crimes condemned by all civilized nations<sup>153</sup> and (b) terrorism is not an ordinary crime,<sup>154</sup> but rather deserves treatment similar to genocide and crimes against humanity, which are prosecuted before

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150. The Nuremberg Tribunal has been criticized for seating judges from only the four victorious allied countries. See Pritchard, *supra* note 49, at 27 (“The fact that a number of the powers who sat in judgment were minor powers, that some were non-Western, gives the Tokyo Trial a special authority which the Nuremberg Tribunal may be said to have lacked. . .”). Although the Tokyo Tribunal was more diverse, there are nonetheless accusations that the judges did not represent a fair distribution of countries. See Elizabeth S. Kopelman, *Ideology & International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT’L L. & POL. 373, 428-29 (1991) (discussing the dissenting opinion of Justice Pal, who “saw the ‘international community’ in whose name this litigation had been conducted as a Eurocentric club, not as a true community”).

151. See Robertson, *supra* note 120 (“[T]he only authority which can pronounce a verdict that will be widely accepted beyond the US is not ‘12 angry men’ in New York, but a panel of distinguished jurists, some from Muslim countries, at an international criminal court.”); ABCNY Report, *supra* note 67, at 39 (“to avoid the spectacle of Judeo-Christian civilization sitting combined in judgment on the Muslim civilization—an image some say Bin Laden seeks to foster—participation by Islamic judges would be necessary.”).

152. Had there been an international tribunal with jurisdiction over terrorism, a special adjudicatory mechanism to try terrorists responsible for the Pan Am 103 bombing would have been unnecessary. See Steven W. Krohne, Comment, *The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT’L & COMP. L. REV. 159, 181 (1997); see also Scharf, *supra* note 59, at 357-58.

153. See, e.g., Krohne, *supra* note 152, at 182 (“[A] verdict against the [Pan Am Flight 103] suspects from an international court would hurt Libya far more than would a guilty verdict from an American court. . .”).

154. See Crona & Richardson, *supra* note 29, at 356 (“As long as nations continue to prosecute terrorism as a class of crime similar to murder or rape, rather than a class of war crime more like ethnic genocide or the execution of civilian hostages, they will fail to eradicate it.”).

international tribunals.<sup>155</sup>

*D. Whether the ICTY/ICTR or ICC Would Be a Preferable Model*

At least two considerations favor modeling an international terrorism tribunal on the ICTY and ICTR rather than the ICC.

First, it would be more expeditious to have a terrorism tribunal created by the Security Council, as were the ICTY and ICTR.<sup>156</sup> By contrast, the ICC is about to come into existence as the result of a treaty.<sup>157</sup> While treaty creation is preferable, it can be extremely time-consuming. Considering that some potential defendants are in detention, keeping them in pretrial detention during a lengthy drafting, signing, and ratification process would raise questions of due process violations.<sup>158</sup> Furthermore, reaching a consensus on a terrorism tribunal could be difficult, considering the struggles in defining terrorism for the purpose of a multilateral convention.<sup>159</sup>

Second, any international terrorism tribunal arguably should have primacy over national court prosecutions, as opposed to complementarity.<sup>160</sup> The ICTY and ICTR utilize the

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155. See ICTY Statute, *supra* note 2, arts. 2-5 (granting the ICTY power to prosecute violations of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity); ICTR Statute, *supra* note 3, arts. 2-4 (granting the ICTR power to prosecute genocide, crimes against humanity, and select provisions of the Geneva Conventions); ICC Statute, *supra* note 4, art. 5, 121, 123 (granting the ICC power to prosecute genocide, crimes against humanity, war crimes and aggression, however, aggression may not be prosecuted until the ICC Statute has been amended to define the crime).

156. The ICTY Statute was adopted on May 25, 1993 by resolution of the Security Council, ICTY Statute, *supra* note 2, amended by U.N. Doc. S/RES/1165 (1998); U.N. Doc. S/RES/1329 (2000). The ICTR Statute was adopted on April 30, 1994, ICTR Statute, *supra* note 3, amended by U.N. Doc. S/RES/978 (1995); U.N. Doc. S/RES/1329 (2000).

157. See ICC Statute, *supra* note 4.

158. See, e.g., Katty Kay, *Families of Camp X-Ray Britons Sue America for Their Freedom*, TIMES (London), Feb. 20, 2002, at 3 ("The key issue, the lawyers say, is that detaining people indefinitely without due process of law violates the US Constitution and international law.").

159. See discussion *supra* Part III.B.

160. Bartram Brown, in examining primacy and complementarity, observed that complementary jurisdiction

primacy approach—meaning those tribunals can request that national prosecutions defer to proceedings before the tribunals.<sup>161</sup> The ICC’s jurisdiction, by contrast, will be complementary to that of national courts—if a state court has jurisdiction and wants to assume jurisdiction, then the ICC could not hear the case.<sup>162</sup> There are reasons favoring the primacy approach. Under the ICC approach, countries with jurisdiction over the September 11 events would be the countries where the crimes occurred or the countries of which the defendant is a national.<sup>163</sup> However, the ICC could preempt national prosecutions by showing that the country attempting to assume jurisdiction is not legitimately “willing” or “able” to prosecute.<sup>164</sup> For instance, giving Saudi Arabia or U.A.E. the first chance of prosecuting terrorism seems unnecessarily deferential to legal systems, where such prosecutions could face significant impediments.<sup>165</sup>

#### IV. CONCLUSION

The use of military commissions for trying terrorists is problematic for several reasons. First, persons detained by the United States who meet the criteria for classification as prisoners of war should be tried by U.S. courts martial. Second, trying terrorists before military commissions lacks clear support

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can effectively vindicate international interests only if certain essential conditions are met . . . [such as] an impartial, reliable, and depoliticized process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases, and triggering the jurisdiction of the ICC when it is truly necessary.

Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 386-90 (1998).

161. ICTY Statute, *supra* note 2, art. 9; ICTR Statute, *supra* note 3, art. 8.

162. ICC Statute, *supra* note 4, art. 17.

163. The ICC will be able to exercise jurisdiction if either (a) the state of which the defendant is a national or where the crime occurred has either ratified the ICC Statute or accepted the ICC’s jurisdiction with respect to the case at issue or (b) the Security Council has referred the case to the ICC prosecutor. *Id.* arts. 12-13.

164. *Id.* art. 17.

165. On the other hand, deferring to countries such as the United States or Germany, on the other hand, would obviate the reasons for creating an international tribunal.

in precedent because past military commissions have been used in the context of traditional war. Third, the Executive Order is overbroad because it covers acts of terrorism not linked to any conflict and appears to apply indefinitely. Fourth, even under the recently promulgated Rules, military commissions will lack certain basic fair trial protections. Finally, the lack of fair trial protections calls the legitimacy of the military commissions into question.

Trials of terrorists before a U.S. district court or an international tribunal would be preferable. Either forum could hold fair trials with adequate safeguards for defense rights. The additional advantages of holding trials in federal district court include (a) the prior successful use of the venue; (b) the existence of the courts, obviating the creation of a new adjudicatory framework; and (c) the possibility of imposing the death penalty, to the extent one favors the imposition of such a sentence.

In comparison, trials before an international tribunal would have the advantage of adjudication by an international panel of judges. An international panel would increase the international legitimacy of the tribunal, thereby facilitating the surrender of suspects, evidence gathering, and positive international relations. Trials before an international tribunal would also send the right signal that the type of terrorism committed on September 11 is similar to genocide and crimes against humanity. Accordingly, the President should refrain from utilizing the military commissions to try persons accused of terrorism, or utilize them sparingly. Persons suspected of having committed terrorism should be tried before federal district courts or an international tribunal.