

# The U.S. Military Tribunals to Try Terrorists

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## I. Introduction

The U.S. decision<sup>1</sup> to set up military tribunals to detain and try some non-citizens captured in its war against terrorism has occasioned debate in the media and the academic community. An influential section of the media<sup>2</sup> found the Order's breadth astonishing,<sup>3</sup> and voiced the apprehension that it fell into the tapestry of draconian measures the Bush administration had adopted in recent times, building a parallel, shadowy criminal justice system in which people can be rounded up by the government and held at undisclosed locations for indefinite periods of time.<sup>4</sup> It is a system, in this view, that allows the government to conduct warrant-less wiretaps of conversations between prisoners and their lawyers, a system by which defendants can be tried and condemned to death by secret military tribunals run according to procedural rules that bear scant resemblance to normal military justice. The Order, it was noted, trespassed the separation of powers, allowed for the abuse of laws, and undermined America's standing as a defender of international human rights and global justice. The United States which constantly criticised other countries for holding secret trials, and for refusing to guarantee political prisoners due process, it was argued, was breaking faith with its own standard.<sup>5</sup>

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<sup>1</sup> See Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, White House Press Release, 13 November 2001. Cited henceforth as "The Order". Tribunals and commissions have been used interchangeably in the article.

<sup>2</sup> For example, see editorial, War and Justice, *The New York Times* (NYT, hereafter), 3 December 2001. Also see, Anthony Lewis, *Wake Up, America*, NYT, 30 November 2001. In a subsequent note, Anthony Lewis found the President's Order "extraordinarily ill drafted", and accused its defenders of "running away from the language of the order, spinning the text to make it seem more reasonable": *Dust in Our Eyes*, NYT, 4 December 2001.

<sup>3</sup> Anthony Lewis pointed out in the note first cited above, the Order's application to non-citizens actually swept in its ambit about 20 million non-citizens, including immigrants working toward citizenship, visitors and the like.

<sup>4</sup> Detailing the specifics of actual victims of the 11 September attacks, Dan Eggen noted that in the "secretive dragnet" launched by the U.S. administration after the 11 September attacks; approximately 725 immigrants were detained for weeks before they were charged with immigration violations. Of those, 370 were suspected of ties to terrorists; a hundred were charged with criminal offences; and only one was linked directly to the 11 September attacks. See, Dan Eggen, *Delays Cited in Charging Detainees*, *The Washington Post*, 15 January 2002.

<sup>5</sup> Pointing to an inconsistency in the U.S. position, a commentator noted that in 1996, when U.S. citizen Lori Berenson was convicted of terrorist-related treason before a military tribunal in Peru, U.S. authorities had "deeply regret[ted] that Ms. Berenson was not tried in an open civilian court with full rights of legal defense, in accordance with international juridical norms" and called for the

An interesting feature of the media critique was the wrangling among the conservative columnists. The argument against the military commissions was seen by a prominent one of them (George F. Will) as starkly unrealistic, a foolishness sponsored by “professional hysterics, such as New York Times editorialists [who] have reacted with the theatricality of antebellum southern belles suffering the vapors over a breach of etiquette”. The opposition to military commissions, according to Will, emanated from those who considered “civil liberties so sacrosanct that the war against terrorism must ‘accommodate itself to them’”. International terrorism, guided by someone characterised as “the Ford Foundation of terrorism ... making grants to terrorist cells but disconnected from operational matters”, was a huge military problem, for which military tribunals were a traditional, lawful part of the solution.<sup>6</sup> Another commentator of the New York Times, (William Safire), however, was appalled by the Bush administration’s “dismaying departure from due process” and chastised “his gung-ho advisers” that setting up the military commissions was consistent with the Uniform Code of Military Justice (UCMJ). George Will’s derisive description of Safire and his ilk as “professional hysterics” akin to “antebellum Southern belles suffering the vapors” got a classic rejoinder: “Frankly Scarlett, I don’t give a damn – I’ve always been pro-bellum.”<sup>7</sup> Standing out in these linguistic fireworks is the Safire castigation of the much-cited precedent of the military commissions of Franklin D. Roosevelt as an effort to hide the embarrassment of a bungled enforcement ploy of the F.B.I.

The academia found the Order equally odious. More than 300 law professors from around the country protested against the Order on military commissions. They argued that such tribunals were legally deficient, unnecessary and unwise. The plan outlined by the administration would, according to those professors, violate the separation of powers; would not comport with constitutional standards of due process; and would allow the president to violate binding treaties.<sup>8</sup> The joint initiative preceded a lively debate among usually reticent academics from leading law schools who took public positions and offered alternatives. The debate took an occasional cynical twist, as when someone proposed that the military tribunals to try terrorists be located at The Hague to avoid threats of retaliatory attacks by terrorists in the United States, and that Bin Laden and his associates be tried by a non-American judge. It may make life in the Netherlands more precarious and that

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case to be retried in an “open judicial proceeding in a civilian court”. Throughout the 1990’s, in its annual report on the condition of human rights, the U.S. State Department had criticised Peru, Egypt, Nigeria, Russia, and other countries for making secret arrests and proceeding against alleged terrorists in military tribunals. See, Joanne Mariner, O.J. and Osama: The Fear of a Highly Publicized Bin Laden Trial, And the Problem With Military Commissions, [wysiwyg://80/http://writ.news.findlaw.com/mariner/20011126.html](http://writ.news.findlaw.com/mariner/20011126.html).

<sup>6</sup> George F. Will, *Trials and Terrorists*, The Washington Post, 22 November 2001.

<sup>7</sup> William Safire, *Kangaroo Courts*, NYT, 26 November 2001.

<sup>8</sup> See Katharine Q. Seelye, *In Letter, 300 Law Professors Oppose Tribunals Plan*, NYT, 8 December 2001.

of the judges too; but then, the argument rationalised with candour, why should the U.S. single-handedly share the cost of the war against terrorism!<sup>9</sup>

More seriously, the concerns expressed in the academic world were similar to those voiced in the media. But the solutions differed. Professor Anne-Marie Slaughter of Harvard suggested setting up an ad hoc international tribunal with jurisdiction over all terrorist acts on or after 11 September, wherever committed. It would uphold global values; and work on the basis of agreed international standards. It should be composed of, Slaughter suggested, justices from high courts around the world and co-chaired by a U.S. Supreme Court Justice and a distinguished Islamic jurist of similar rank. For Slaughter, the war against terrorism was not America's fight, but the world's fight. Composed as proposed, Slaughter argued, Islamic nations faced with fundamental forces would find it easier to surrender terrorists to an international tribunal rather than to the U.S. courts.<sup>10</sup> In a companion piece, Slaughter condemned the administration's move to set up military commissions to try terrorists. The move, in particular, to present sensitive evidence in secret, Slaughter protested, would prove disastrous, for it would dignify terrorists as soldiers in Islam's war against America. Al Qaeda members, Slaughter noted, were international outlaws, like pirates, slave traders or torturers. The article maintained that secret trials by military commissions used but rarely to hang spies caught behind enemy lines, was an inferior alternative to an international tribunal, which alone would lend sanction and legitimacy of the global community.<sup>11</sup>

Slaughter's colleagues at Harvard joined her. Philip Heymann viewed the possibility under the Order to detain suspects without trial for long periods as particularly troublesome. The Order, said Lawrence Tribe, professor of constitutional law at Harvard, was "rife with constitutional problems and riddled with flaws".<sup>12</sup>

The argument against civil courts trying the alleged terrorists was advanced on the apprehension that it would jeopardise the safety of people in and around courtrooms, including judges, juries and court employees. Further, the enormous resources needed to protect potentially hundreds, if not thousands, of the terrorists

<sup>9</sup> See Robert Wright, ... Or a Court Case?, *The Washington Post*, 5 October 2001.

<sup>10</sup> Anne-Marie Slaughter, *Terrorism and Justice: An International Tribunal Comprising US and Islamic Judiciary Should Be Set Up to Try Terrorists*, *Financial Times*, 16 October 2001. Slaughter's suggestion amused a John Barchillon who, in a letter to the editor of *Financial Times*, wrote that he felt relieved that "she's been confined to Harvard as a harmless schoolmistress and not let loose in the real world"! For the bemused commentator, there was "time for war and a time for legal wrangling ... this is the time for war" and for "instant 'justice' in the form of deadly retaliation". *Letters to the Editor: This is the time for war, not for lawyers' wrangling*, *Financial Times*, 16 October 2001. Slaughter's suggestion received an endorsement from the seasoned *New York Times* columnist, Anthony Lewis: *Cooperation Instead of Unilateralism: Bush Changes His Spots*, *NYT*, 15 October 2001.

<sup>11</sup> Anne-Marie Slaughter, *Secret Trial by Military Commission Is Not Justice*, *IHT*, 19 November 2001.

<sup>12</sup> See George Lardner Jr., *Bush Order is Faulted on Detention Period*, *IHT*, 4 December 2001.

would strain an overloaded justice system, and the courtrooms would be turned into forums for propagandising and encouraging further terrorist acts. Professor Harold Hongju Koh of Yale University questioned the assumption that the U.S. federal courts would not give full, fair and swift justice in such cases. For him international adjudication of alleged terrorists made no sense, as recent attempts to try international crimes in Cambodia and Sierra Leone showed. Koh argued that building new tribunals from scratch was slow and expensive; and that geopolitical concerns in their composition would raise credibility questions. American courts, said Koh, were quite equipped to try terror suspects; and had done so in several cases in the past, including those accused of planning the 1998 bombings of the American embassies in Tanzania and Kenya, not to mention the case of *Timothy McVeigh* who was tried, convicted and sentenced for a comparable act. Koh argued that American courts could give universal justice whatever the number of casualties in question – 4 or 400 or 4,000.<sup>13</sup>

The concerns voiced in the media and the academic world over President Bush's Order on the establishment of military tribunals to try alleged terrorists warrant closer scrutiny. That is proposed to be done here by (1) analysing the Order, and testing it primarily in terms of (2) the U.S. law and practice, and (3) international law, focusing essentially on the Geneva Conventions. The contemporary character and the evolving position of the U.S. administration on the subject, preclude definitive conclusions.

## II. The Order

On 13 November 2001, United States President George W. Bush issued an Order authorising the Defence Secretary to set up military tribunals to try terrorists for violations of the laws of war and other applicable law.<sup>14</sup> The Order was issued by the President as Commander in Chief of the Armed Forces of the United States, and cited in support the Constitution and other laws, including the Authorisation for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224). It was a response to the terrorist acts committed against the Pentagon and the World Trade Centre in New York on 11 September 2001. The grave acts of terrorism, the Order affirmed, had given rise to an extraordinary emergency, which necessitated the detention and trial of the terrorists for violations of the laws of war and other applicable laws by military tribunals. The Order authorised the military commissions to sit at any time and any place, hold "a full and fair trial" and punish individuals found guilty in accordance with the penalties provided under applicable law, including life imprisonment or death. The Secretary of Defence was empowered to issue rules for the conduct of the proceedings of the military commissions, includ-

<sup>13</sup> Harold Hongju Koh, We Have the Right Courts for Bin Laden, NYT, 23 November 2001.

<sup>14</sup> See Military Order – Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, White House Press Release, 13 November 2001.

ing pre-trial procedures, modes of proof, issuance of process and qualifications of attorneys, etc.

The military commissions, according to the Order, are required to conduct proceedings in a manner consistent with the requirements of protecting classified information; and admit such evidence, as would have probative value to a reasonable person. The Secretary of Defence, under the Order, prescribes the rules governing the conduct of prosecution by one or more attorneys designated by him. The conviction and sentencing of terrorists is to be done by two-thirds of the members of the commission present at the time of the vote, a majority being present. The President or the Secretary of Defence would make review of the conviction and sentence. Also, the Order does not limit the authority of the President to grant reprieves and pardons. The convicted individual, according to the Order, "shall not be privileged to seek any remedy or maintain any proceeding ... in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal". The Order applies only to non-citizens; and covers individuals who the President determines "is or was a member of the organisation known as al Qaeda"; had engaged in, aided, or abetted, or conspired to commit acts of international terrorism; or had knowingly harboured one or more of such individuals.

Defending the setting up of military commissions, President Bush characterised terror suspects as "combatants", and added: "They are unlawful combatants who seek to destroy our country and our way of life." "The enemy has declared war on us", he said. "And we must not let foreign enemies use the forums of liberty to destroy liberty itself."<sup>15</sup> At the Senate Judiciary Committee hearings Senator Charles E. Schumer took the position that suspected terrorists "don't deserve the same panoply of due process that was available to American suspects".<sup>16</sup> Arguably the worst defence of President Bush's Order was put up by the Attorney General, John Ashcroft, who pleaded for an honest and reasoned debate, but not fear-mongering and added gratuitously: "To those ... who scare peace-loving people with phantoms of lost liberty my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of goodwill to remain silent in the face of evil." Predictably, there was a storm of protest over the Attorney General's remarks. Ashcroft's concern about America's friends and enemies, noted *The New York Times*, had that one completely backward: "Our country's enemies only have to spread the word that the United States government has issued plans that ostensibly permit trying non-citizens suspected of terrorism in secret military tribunals and that it is refusing to release the names of hundreds of people it rounded up as possible suspects after September 11. Those

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<sup>15</sup> See David E. Sanger, *President Defends Secret Tribunals in Terrorist Cases*, *NYT*, 30 November 2001.

<sup>16</sup> See Elisabeth Bumiller with Katharine Q. Seelye, *Bush Defends Wartime Call for Tribunals*, *NYT*, 5 December 2001.

accurate reports alone are enough to give pause to many of our friends, and to stoke anti-Americanism.”<sup>17</sup>

President Bush’s counsel, Alberto R. Gonzales, offered a spirited defence of the Order saying that there were precedents to the move to establish military tribunals, like those set up by Abraham Lincoln and Franklin Roosevelt. The precedents and the President’s power will be discussed in a moment. For here, it is appropriate to record the avowed advantages cited in support of the measure. Military commissions, it was argued by Gonzales, would spare American jurors, judges and courts<sup>18</sup> the grave risks associated with terrorist trials. They allow the government to use classified information as evidence without compromising intelligence or military efforts. They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals. Gonzales added that the specter of secret trials depicted by critics was not an accurate reflection of the President’s intent; that the trials would be “as open as possible, consistent with the urgent needs of national security;” they would be “full and fair” as the Order specified; and, in clear contravention of the Order, the counsel to the President, said that the Order “preserves judicial review in civilian courts” including challenge to the lawfulness of the commission’s jurisdiction through a habeas corpus proceeding in a federal court. In any case, argued Gonzales, the Order covered only foreign enemy war criminals that “are not entitled to the same procedural protections as people who violate our domestic laws”.<sup>19</sup>

A former counsel to the President, John Dean, argued that turning enemy belligerents over to civilian law enforcement authorities “would not only be unprecedented, but would set a horrifically bad precedent”. “Wars, including this war”, added Dean, “are fought under well-understood rules. They don’t include providing Miranda warnings when capturing an enemy, nor employing the legal niceties of the Federal Rules of Criminal Procedure when punishing them.”<sup>20</sup> Dean did not find anything wrong in Secretary of Defence Rumsfeld’s alleged “take no prisoners policy”,<sup>21</sup> and in House Judiciary Committee member and former U.S. Attorney Bob Barr’s advocacy of taking the terrorists out, “lock, stock, barrel, root, and limb”. It was “an inevitable by-product”, according to Dean, “of our having

<sup>17</sup> See editorial, John Ashcroft Misses the Point, NYT, 7 December 2001.

<sup>18</sup> Also at risk are the designated attorneys that defend the alleged terrorists. But some may consider it a badge of honour. See, Katherine Q. Seelye, Just Who Would Want to Defend Suspects Before a Tribunal? Probably Plenty, NYT, 28 December 2001.

<sup>19</sup> Alberto R. Gonzales, Martial Justice, Full and Fair, NYT, 30 November 2001; also, FindLaw Website: [wysiwyg://71/http://news.findlaw.com/cnn/docs/terrorism/gonzales.11301.html](http://wysiwyg://71/http://news.findlaw.com/cnn/docs/terrorism/gonzales.11301.html).

<sup>20</sup> John Dean, The Critics Are Wrong: Why President Bush’s Decision to Bring Foreign Terrorists to Justice Before Military Tribunals Should Not Offend Civil Libertarians, FindLaw Website: [wysiwyg://74/http://writ.news.findlaw.com/dean/20011123.html](http://wysiwyg://74/http://writ.news.findlaw.com/dean/20011123.html).

<sup>21</sup> Some saw Donald Rumsfeld’s policy as an overly vengeful war of extermination, which could find itself accused of war crimes. See Thomas E. Ricks, Defining the Objective of U.S. Fury: To Defeat or to Annihilate Qaeda? IHT, 14 December 2001. Reporting an alleged U.S. effort to stall surrender of the Qaeda fighters, Ricks raised the possibility of the refusal itself being considered as a war crime.

limited numbers of Special Forces troops in Afghanistan, who are not equipped to handle POWs, and the fact that we are dealing with Taliban and al Qaeda members who have a suicide ethic and will take others with them if they can". Arguing that the ordinary criminal justice system was not appropriate to trials of individuals accused of terrorist war crimes, John Dean maintained that if they were provided with the right to counsel, to confront witnesses, dispute evidence, and present evidence in their defence, the due process requirements was met: "Those accused of terrorist activities are due no more." The lack of a requirement for unanimity in death penalty cases, conceded John Dean, was the only serious flaw in the President's Order.

As noted, the Order occasioned a storm of protest in the media.<sup>22</sup> In addition, the move, as feared, threatened to undercut United States' international credibility and hinder its effort to mount an international alliance against terrorism. Spanish prosecutors expressed opposition to extraditing eight men detained on charges of involvement in the 11 September attacks. Explaining the Spanish position, a senior prosecutor said: "No country in Europe could extradite detainees to the United States if there were any chance they would be put before these military tribunals."<sup>23</sup> Besides Spain, it was noted, detainees in Britain, Belgium, France and Germany were quite likely to raise similar objections to avoid extradition. Europeans view the U.S. death penalty as barbaric. The European Human Rights Convention to which 34 governments are parties prohibits the death penalty for any crime. True, over the years, the European rules have not acted as a complete bar to extradition to the United States. Suspects are often turned over if the U.S. Attorney General provides a written declaration to the country holding the defendant saying that the Justice Department does not "expect" prosecutors to seek the death penalty. But, Europeans dislike the circumvention of the law. M. Robert Badinter, a French senator and former justice minister put it bluntly: "Because of the Texas experience, President Bush is known as the world champion executioner. So Europeans were already wary about Bush's military commissions with few protections. Under the European Convention on Human Rights, it would be illegal for a government here to extradite under those conditions," added Badinter.<sup>24</sup>

The misgivings about President Bush's Order setting up military tribunals to try alleged terrorists get strengthened when it is seen in the framework of the U.S.'s own law and practice on the issue.

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<sup>22</sup> In a stinging editorial, The Washington Post reminded the Attorney General "his job is to defend dissent, not to use the moral authority of his office to discourage people from participating in one of the most fundamental obligations of citizenship. See The Ashcroft Smear, The Washington Post, 7 December 2001.

<sup>23</sup> See Joanne Mariner, O.J. and Osama: The Fear of a Highly Publicized Bin Laden Trial, and the Problem with Military Commissions, [wysiwyg://80/http://writ.news.findlaw.com/mariner/20011126.html](http://writ.news.findlaw.com/mariner/20011126.html).

<sup>24</sup> See T.R. Reid, Europeans Reluctant to Send Terror Suspects to U.S. – Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals, The Washington Post, 29 November 2001.

### III. The U.S. Law and Practice

U.S. practice and law on the subject can at best be described as equivocal.

Discussion on the precedents of military commissions usually commences with the notorious trial and conviction in 1946 of General Tomoyuki Yamashita of Japan for war crimes committed in the Philippines.<sup>25</sup> General Yamashita was not charged with personally participating in acts of atrocity or with ordering or condoning their commission, or for having any knowledge of the commission of those acts. The atrocities that he was accused of were in fact committed in and around Manila by naval personnel commanded by Vice Admiral Sanji Iwabuchi over whom General Yamashita had little or no control from his virtually isolated military headquarters in northern Luzon. The charge was that he failed to take affirmative action to prevent criminal conduct by Japanese soldiers and sailors and was thus personally responsible. His trial was summary and unjust. He was given only three weeks to prepare his defence on 64 charges of criminal conduct, and on the opening day of the trial he was handed another 59 accusations. His plea for more time was denied, as was his request to confront witnesses. A military commission appointed by the victorious commander, General Douglas MacArthur, who handpicked the judges, the defence and the prosecution attorneys, and determined the evidence, to be presented to the commission, tried General Yamashita.

The U.S. Supreme Court turned down the review petition of General Yamashita on the ground that the military had the authority to conduct the trial and the court had no jurisdiction to question the fairness of the trial. In a strong dissent, Justice Frank Murphy noted that Yamashita “was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged”. Justice Murphy added that in no recorded instance could he find a case “where the mere inability to control troops under fire or attack by superior forces was held a basis for a charge of violation of the laws of war”. His concluding remarks made more than a half-century back will find resonance in the legal community today: “If we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.”<sup>26</sup>

Yet another case of questionable legal validity is the internment of nearly 120,000 people of Japanese ancestry, including 70,000 U.S. citizens in World War II, which many consider as an outrage.<sup>27</sup> On 19 February 1942, President Franklin Roosevelt signed an executive order authorising the secretary of war or military commanders designated by him to establish “military areas” from which “any or

<sup>25</sup> For a recent popular narrative of the Yamashita trial, see Kevin McGrath, the United Nations development co-ordinator in Kosovo, *When Military Trial Was Unfair*, IHT, 23 November 2001.

<sup>26</sup> *Ibid.*

<sup>27</sup> See Rush Limbaugh, *Bush's FDR Example*, *The Washington Post*, 28 November 2001.

all persons” could be removed. Barely one month after the order was issued, Japanese Americans and Japanese in America were involuntarily removed from their homes on the West Coast and transported to incarceration centres in remote areas. As is well known, decades after the internment of U.S. citizens and others of Japanese ancestry, the government apologised and paid reparations.<sup>28</sup>

Another feature of mass detentions needs to be noted. In World War II, when 435,000 captured German military personnel were held as prisoners of war in the U.S., 2,222 escaped. Some blended into the population and were not located for years, an unacceptable risk when it comes to al Qaeda fighters, U.S. officials believe.<sup>29</sup> Extended detention, importantly, raises the question: is it permitted under international law? For Tom Malinowski, a Washington representative for Human Rights Watch, it was “a basic principle of law” that people shouldn’t be jailed indefinitely without charges. Amnesty International’s report released on 14 March 2002, makes a searing attack on the treatment of the 11 September detainees. It says that the detainees were being held in a disturbing level of secrecy; that some of them, charged with minor immigration violations had been held in solitary confinement for up to 23 hours a day in conditions that were unnecessarily harsh, which constituted cruel, inhuman and degrading treatment.<sup>30</sup> Yet it could be argued that under international law, detainees such as these could be held for the duration of a war, he added. “The question is, which war?” he said. “Is it the war in Afghanistan, the one against al Qaeda or the one against terrorism? That could be 50 years.”<sup>31</sup> For Pakistan’s President Pervez Musharraf, the war in Afghanistan was “absolutely over” when the Taliban government was defeated and “the legitimate government” returned to Kabul. Pakistan’s perception is of course inconsistent with that of the U.S., which considers the war on terrorism as open-ended.<sup>32</sup>

The detention and punishment of persons of enemy extraction was extended during national emergencies to saboteurs and sundry individuals during and before World War II, which were similarly questioned. American judiciary in such cases was put into confrontational mode with the executive. The outcome, as the following instances show, was not entirely gratifying.<sup>33</sup>

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<sup>28</sup> See Arlen Specter, *Questioning the President’s Authority*, NYT, 28 November 2001.

<sup>29</sup> See John Mintz, *Extended Detention in Cuba Mulled*, The Washington Post, 13 February 2002.

<sup>30</sup> Amnesty International – USA: *Post 11 September Detainees Deprived of Their Basic Rights*, AI Index: AMR 51/045/2002.

<sup>31</sup> See John Mintz, note 29.

<sup>32</sup> See Doug Struck, *Musharraf Says Afghan War ‘Is Over’*, IHT, 15 March 2002.

<sup>33</sup> The narrative of case law relies heavily on the masterly exposition of U.S. Chief Justice Rhenquist in his address to the Norfolk and Portsmouth Bar Association delivered on 3 May 2000: [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-03-00.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html).

## The Merryman Case

In the throes of the Civil War, President Abraham Lincoln had called for the defence of Washington D.C. by a volunteer force of 75,000. Numerous Confederate sympathisers blocked the defence efforts of the volunteers en route, especially in Baltimore which was 40 miles from the capital. The obstructers included the chief of police of Baltimore, who spearheaded a group of them and blew up the railroad bridges leading into Baltimore from the north. In response to the situation in Baltimore, President Lincoln took some steps curtailing civil liberty and suspended the writ of habeas corpus. Several weeks later, federal troops arrested a man called Merryman, whom authorities suspected of being a major actor in the dynamiting of railroad bridges. Merryman sued out a writ of habeas corpus, a remedy rightly regarded as a safeguard against executive tyranny, and an essential safeguard to individual liberty. Under the U.S. Constitution, the writ of habeas corpus can be suspended only in time of war to protect public safety. The circuit court judge of Baltimore declared that the President alone did not have the authority to suspend the writ of habeas corpus – only Congress could do that – and held Merryman's detention illegal. The question whether Congress alone had the prerogative has not been authoritatively answered to this day; Lincoln's administration, however, ignored the circuit court's opinion and proceeded to arrest and detain persons suspected of disloyal activities, including the mayor of Baltimore and the police chief.

## Ex Parte Milligan

The draconian measures were taken also against members of the press, the clergy, and the saboteurs. Some of the last-mentioned were caught in the summer of 1864 with a cache of arms allegedly in an attempt to assassinate the Governor of Indiana. Lincoln's Secretary of War, Edwin Stanton, decided that the suspects in this conspiracy should be tried, not in a regular civil court by a jury, but by a military commission, composed of senior army officers. The suspects were duly tried before such a commission in Indianapolis, and several of them were sentenced to be hanged. They appealed to the Supreme Court, which in a case called *Ex Parte Milligan* decided in 1866 – more than a year after the Civil War was over, by a vote of 5 to 4 that civilians not in the military – and that was who those defendants were – could not be tried by a military commission so long as the civil courts were open for business. Questions were raised against the legality of the military commissions, especially about the denial of the right to jury trial guaranteed by the Bill of Rights, but were ignored. The courts thought it prudent to delay decisions until after the end of the war.

## The Quirin Case

President Franklin Roosevelt resorted to the questioned device of military commissions during World War II. In June 1942, Richard Quirin and seven other members of the German armed forces were secretly landed in the United States, four at Amagansett Beach on Long Island, and four others on Ponte Vedra Beach, Florida. Transported by submarines, the saboteurs were caught carrying a supply of explosive and incendiary devices with a mission to destroy war industries in the United States. Roosevelt appointed a military commission to try Quirin and his associates. The military commission sentenced all of them to death. They petitioned the Supreme Court arguing that setting up the commissions when civil courts were open throughout the country was a contravention of the *Milligan* ruling. The Court sharply cut back on the *dicta* in the *Milligan* case, saying that even though civilian courts were open, the defendants could be properly tried and sentenced to death by a court martial.

The petitioners argued that even if the offences with which they were charged were offences against the law of war, their trial was subject to the requirements of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, 2 of Article III had provided: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury" and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed". The Supreme Court had held that 2 of Article III and the Fifth and Sixth Amendments could not be taken to have extended the right to demand a jury to trials by military commissions.

The reviewed precedents suggest the following formulation: 1. That the President and the Congress can suspend the writ of habeas corpus in time of war, but neither of them acting alone may do so (*Merryman*)<sup>34</sup>; 2. That military commissions cannot try civilians when civil courts were open for business (*Milligan*); and 3. That even when civilian courts were open, the defendants could be properly tried and sentenced to death by a court martial (*Quirin*).

Chief Justice Rhenquist explained the inconsistencies inherent in the rulings in terms of the necessity to preserve the Union. During calamitous wars like the Civil War and World War II, civil liberties were not high on anyone's agenda, including that of judges, said Rhenquist. Given the choice between preserving the Union and upholding the Constitution, great leaders like Lincoln and Roosevelt opted for the former. As for the judges, even those who resisted some sort of patriotic hysteria

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<sup>34</sup> The requirement of joint action was emphasised later in the famous Wartime Resolution of the Congress, which declared: "It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed forces into hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." [50 U.S.C. # 1541 (c)].

were evidently loath to strike down wartime measures. Citing the Latin maxim, *inter arma silent leges* (in times of war, laws are silent), Rhenquist said that though the laws were not silent in wartime, they spoke with a muted voice.

The above history of executive fiats, compounded with the admittedly unsatisfactory judicial responses, aggravated the attacks on the Order setting up the military commissions. The impression gained currency that the Order “had codified a secret rigged system that could simply shuttle defendants to hasty deaths”.<sup>35</sup> No administration could stand such a smear. On 20 March 2002, the administration issued the rules envisaged in the Order that virtually revoked many of the most draconian features of the Order. The new rules require a unanimous vote of judges to impose the death penalty on convicted criminals – as against the two-thirds vote suggested originally. The new rules provide for the possibility of review by military officers, which did not exist in the Order. The members are to be drawn from the ranks of military officers who are retired, reservists or on active duty. The right to representation by a counsel of the detainee’s own choice is now conceded; so also the right to cross-examine witnesses. Open trials are now accepted, except when sensitive intelligence is involved. On the whole, the proposed tribunals look now like military court-martial in composition, with 3 to 7 members. The new rules protect the identities of the witnesses, the judges and other participants in the proceedings before the tribunals. Assurances were also given that the trials would involve only high-ranking leaders of al Qaeda and the Taliban. The condition of the detainees held in Guantanamo casts doubts over such assurances.

The effort to set right “a deeply flawed executive order”<sup>36</sup> nevertheless left much room for dissatisfaction. The jury-less court-martial procedure was noted by critics with concern; so also the acceptance of hearsay as evidence. The absence of civilian review and the possibility of indefinite detention were found “deeply troubling” by Amnesty International, Human Rights Watch and other groups. Even so, the milder rules “will help the Bush administration climb out of the deep hole it dug for itself last fall”, was the comment of Tom Malinowski of the Human Rights Watch.<sup>37</sup> Amnesty International said that the lack of civil appeals gave “unfettered and unchallengeable discretionary power to the executive to decide who will be prosecuted and under what rules, as well as to review convictions and sentences”.<sup>38</sup> Expressing concern over the possibility of holding captives for an indefinite period of time, Amnesty International’s spokesperson said that it was an unacceptable “stretch” of the rules of international law. “Those in custody should be charged or released”, said Vienna Colucci.<sup>39</sup>

<sup>35</sup> Katharine Q. Seelye, Rules Set on Afghan War Prosecutions, NYT, 21 March 2002.

<sup>36</sup> William Safire, Military Tribunals Modified, NYT, 21 March 2002.

<sup>37</sup> See John Mintz, U.S. Adds Legal Rights in Tribunals, The Washington Post, 21 March 2002.

<sup>38</sup> See Katherine Q. Seelye, Rules Set on Afghan War Prosecutions, NYT, 21 March 2002.

<sup>39</sup> See John Mintz, Tribunal Rules Aim to Shield Witnesses, The Washington Post, 22 March 2002. The prospect of holding some detainees forever without charge or trial was found “unacceptable and contrary to American values”, by The Washington Post. See, editorial, Are Tribunal Rules Fair? 25 March 2002.

#### IV. POWs, War Crimes, Non-Combatants

There are thousands of “non-combatant detainees”, in Afghanistan. Barring some 400, described as “incredibly dangerous ... who are willing to blow themselves up or do anything possible to hurt and kill others”,<sup>40</sup> most of them are reported to be in the custody of General Abdurrashid Dostum, a warlord from northern Afghanistan who is deputy defence minister in Afghanistan’s interim government. Officials from the International Committee of the Red Cross have expressed alarm about the treatment of some of the 3,000 Taliban and al Qaeda prisoners held in Afghanistan.

Among those detained by the U.S., some have been transported to a U.S. facility in Guantanamo Army base in Cuba. They are being housed<sup>41</sup>, in temporary 6-by-8-foot pens exposed to the elements, with metal roofs and chain-link fencing as walls. The floors are concrete, but the prisoners are given mats and blankets on which to sleep and pray. “We’re concerned about the conditions, the open cages, the chain-link fence enclosures”, said Jamie Fellner, director of U.S. programs of the Human Rights Watch. “We believe this doesn’t meet international norms.” A sharper reaction to the treatment of the captives related to the way they were transported to the U.S. facility, described as a “penal colony”.<sup>42</sup> The suspects were made to wear blacked out goggles and earmuffs, coverings over mouths and noses, a process that was described as “sensory deprivation to soften suspects to interrogation”.<sup>43</sup>

U.S. military officials denied their treatment of the detainees was inhumane. “Each day, the detainees are given three culturally appropriate meals”, Pentagon spokesman Victoria Clarke said. “They have daily opportunities to shower, exercise and receive medical attention. So in accordance with the Geneva Convention, they are receiving very humane treatment.” Mr. Rumsfeld defended, with occasional flashes of exasperation, the treatment of the detainees at the Guantanamo. “What’s taking place down there is responsible, it’s humane, it’s legal, it’s proper, it’s consistent with the Geneva Conventions”, he said. “And after a period, that will sink in.” But he said again that “these men are extremely dangerous, particularly when being moved”, and that only the most careful treatment could be expected. One detainee had bitten a guard in Cuba, he said; another had threatened to kill Americans.<sup>44</sup>

The administration had some support from the conservative section of the press. For instance, Charles Krauthammer, endorsed the U.S. administration’s label-

<sup>40</sup> See John Mintz, Treatment of Detainees in Cuba Questioned, The Washington Post, 16 January 2002.

<sup>41</sup> Ibid.

<sup>42</sup> News Services report, titled “Britain Questions Treatment of Prisoners by U.S.”, The Washington Post, 21 January 2002.

<sup>43</sup> Ibid.

<sup>44</sup> The issue was reported to have created a split in the U.S. administration, significantly between the Defence Secretary and the Secretary of State, Colin Powell. See Brian Knowlton, Powell and Bush Split on Detainees’ Status, IHT, 28 January 2002.

ling of the al Qaeda and Taliban detainees as “unlawful combatants”. In his view, those detainees “by self-definition, (were) unlawful combatants, meaning people who fight outside the recognized rules of war. ... They deliberately attack civilians, and they deliberately infiltrate among civilians by not wearing an insignia or uniform. ... You join al Qaeda, you join an outlaw army. You explicitly violate – and thus forfeit the protection of – the Geneva Convention. Indeed, denying such murderers POW rights vindicates the Geneva Convention and encourages others to adhere to it, by reserving its protection for those who observe its strictures.”<sup>45</sup>

The contrary view is that all Taliban forces and perhaps also al Qaeda’s “Arab Brigade” in the Taliban army are entitled to POW status whether or not they wear uniforms or obey the rules of war. In case of doubt, the Geneva Conventions prescribe a presumption that the detainees are POWs; suggest convening a tribunal to sift among them and exclude those who did not fight in the army. There is no practical downside to granting POW status; but there are huge advantages to recognise the detainees as POWs, the argument goes.<sup>46</sup> As a New York Times editorial noted, following the standards set by the Geneva Conventions “does not require coddling violent enemies of the United States. It simply requires applying America’s proud standards of justice to them.”<sup>47</sup> William Pfaff pointed out that from the beginning the rhetoric of the Bush administration had identified the enemy in terms of absolute evil, the war as a metaphysical combat between good and evil and al Qaeda fighters and their Taliban allies as people not to be defeated, but destroyed. The resultant demonisation and dehumanisation, said Pfaff, reminded one of the Nazi’s attitudes towards the Jews. In a democracy, added Pfaff, if leaders do not “govern their language” and “treat even enemies with dispassion democracy betrays itself”.<sup>48</sup>

The key issue, as Adam Roberts noted was not whether the category of “unlawful combatants”, as the Bush administration calls the detainees, exists; evidence suggests, Roberts conceded, that it does. The key issue was what that actually meant for their treatment, interrogation and trial. Reviewing the relevant provisions of the Geneva Convention on POWs, Roberts noted that POW status was granted to the organised armed forces of the state, as well as other militias and volunteer corps, including those of organised resistance movements provided that they meet certain criteria, identified above. Those that fulfil the criteria cannot be punished for the mere fact of having participated directly in hostilities, but they can potentially be tried for international offences (including violations of the laws of war) they may have committed. And at the end of hostilities they are entitled to be repatriated. Pending judicial determination of doubtful cases, prisoners are entitled to humane treatment. Roberts suggested that Article 75 of the 1977 Geneva Protocol, which provides basic protection for arrested and detained people who

<sup>45</sup> Charles Krauthammer, *The Jackals Are Wrong*, *The Washington Post*, 25 January 2002.

<sup>46</sup> See Nicholas D. Kristof, *Let Them Be P.O.W.’s*, *NYT*, 29 January 2002.

<sup>47</sup> Editorial, *Justice at Guantanamo*, *NYT*, 29 January 2002.

<sup>48</sup> William Pfaff, *As Captor, U.S. Risks Dehumanizing Itself*, *IHT*, 31 January 2002.

do not qualify for POW status, should be invoked and applied by the U.S. to avoid giving “propaganda gifts to its adversaries”.<sup>49</sup>

On 8 February, the International Committee of the Red Cross (ICRC) announced that President Bush’s decision to reject POW status to the al Qaeda detainees as falling short of the requirements of international law. ICRC declared that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise. The International Commission of Jurists backed ICRC, calling President Bush’s decision “incorrect in law”. It added that only a U.S. court, and not the administration, has the legal authority to make such a determination.<sup>50</sup>

The distinction will prove vital to the way the detainees are treated in captivity. Explaining the distinction, Defence Secretary Donald Rumsfeld said that the decision had been made to establish a precedent, to ensure that Americans in future held prisoner were well treated; and that the U.S. administration’s decision did not mean a change in the treatment of Taliban and al Qaeda prisoners who, Rumsfeld claimed, were already being treated humanely.<sup>51</sup> Soon after this gratuitous defence, there were reports that Afghan prisoners captured by American forces were reportedly beaten and abused by American soldiers, despite their protests that they supported the leader of the interim government, Hamid Karzai.<sup>52</sup> The stories alleged brutal treatment of people wrongly suspected of allegiance to al Qaeda. In a sharp rebuke to the administration over the incident, Richard Cohen, wrote: “The imprisonment was a mistake. The torture, if true, was a crime.”<sup>53</sup> Rumsfeld refuted reports of torture, but acknowledged the killing of civilians, which, according to him, was unavoidable in the “untidy conditions of wartime Afghanistan”.<sup>54</sup>

In response to the sharp criticism of the opinion makers in the media and the allies President Bush decided on 7 February that the United States would grant the protections of the Geneva Conventions to detainees who had fought for Afghanistan’s Taliban but not to members of the al Qaeda. The administration’s decision, according to the White House spokesman, offered “a just, principled and practical solution to a difficult issue”. The distinction made between Taliban and al Qaeda was defended on the ground that Afghanistan was a party to the Geneva Conventions, and as such its combatants were entitled to the protection of the Geneva Conventions, irrespective of the fact that the Taliban government was not recog-

<sup>49</sup> Adam Roberts, *The Prisoner Question*, *The Washington Post*, 3 February 2002.

<sup>50</sup> See *Bush Decision on Detainees Fails to Satisfy Red Cross*, IHT staff compilation, 9 February 2002.

<sup>51</sup> *Ibid.*

<sup>52</sup> See Carlotta Gall, *Released Afghans Tell of Beatings*, *NYT*, 11 February 2002; Molly Moore, *Villagers Released by American Troops Say They Were Beaten, Kept in ‘Cage’*, *The Washington Post*, 11 February 2002.

<sup>53</sup> Richard Cohen, *Under the Fog of War*, *The Washington Post*, 12 February 2002.

<sup>54</sup> See Alan Sippres and Walter Pincus, *Pentagon Acknowledges 16 Were Killed*, *The Washington Post*, 22 February 2002. There were also reports of malnutrition and unhealthy conditions in which the Afghan detainees were held: see, Susan B. Glasser, *Malnutrition, Disease Rampant at Prison for Taliban*, *Washington Post*, 19 April 2002.

nised by the U.S. Al Qaeda was denied that status on the ground that it was a terrorist group owing no allegiance to any state, and did not conduct its operations in accordance with the laws and customs of war. Al Qaeda members wore no uniforms, carried their arms concealed, observed no military hierarchy, and did not distinguish themselves from the civilian population of Afghanistan, it was argued.<sup>55</sup>

But protests persisted over the shackling, sedating and hooding of them during the flight to Cuba and the shaving of beards. Britain's Foreign Secretary, Jack Straw, asked for an explanation of the U.S. treatment. The UN High Commissioner for Human Rights, Mary Robinson, warned that "we risk the values that we fought to preserve"<sup>56</sup> if the captives were denied the legal rights of prisoners of war. The International Federation of Human Rights Leagues warned that the treatment of prisoners could turn into "a mere parody of justice". Amnesty International, Human Rights Watch and other organisations protested the denial of POW status to the captives. In case of doubt over the status of the detainees, the Geneva Convention gave them the right to a formal determination by a tribunal. Absent a formal judicial pronouncement to that effect, an executive determination by the Secretary of Defence was considered arbitrary and contrary to the Geneva Conventions. As a *New York Times*<sup>57</sup> editorial put it, the status of the captives cannot be left to the whim of the Pentagon.

The treatment of the captives at Guantanamo – like the proposal to set up military tribunals – attracted special notice because it was the first detention of war captives since World War II. In Korea, the American military handed over captured soldiers to their South Korean allies. In Vietnam, prisoners were given to the South Vietnamese. In the Persian Gulf War, they were turned over to Kuwait or other coalition members.<sup>58</sup>

Bush's administration refusal to treat the detainees as POWs was seen as going against the nation's own practice.<sup>59</sup> The United States had always recognised its obligations under the Geneva Conventions, and had demanded similar treatment from others. As recently as 1999, shortly after the start of NATO's air war against Yugoslavia, three American soldiers were ambushed and apprehended near the border between Macedonia and Yugoslavia. They were working for the UN peace-keeping mission in Macedonia, which had just ended, and their legal status was unclear. Their faces were badly battered from beatings by their captors, and the sol-

<sup>55</sup> See Mike Allen and John Mintz, Geneva Rules Apply to Captive Taliban, IHT, 8 February 2002; Katherine Q. Seelye, In Shift, Bush Says Geneva Rules Fit Captives but Not Qaeda Members, NYT, 8 February 2002.

<sup>56</sup> See T.R. Reid, U.S. Criticized Over Prisoners, IHT, 18 January 2002. The article also cited the view of the French daily newspaper *Le Monde* to the effect: "The difference between Al Qaeda and democratic civilization is the respect of fundamental values, as set forth in the U.S. Constitution. Without that, there will be doubt about the very legitimacy of the treatment of detainees."

<sup>57</sup> The Prisoners at Guantanamo, NYT, 22 January 2002.

<sup>58</sup> See Elizabeth Becker, Red Cross Man in Guantanamo: A 'Busybody', but not Unwelcome, NYT, 20 February 2002.

<sup>59</sup> Lee Dembart, A Law-Abiding America is Safer, IHT, 30 January 2002.

diers were paraded on television – all in violation of the Geneva Conventions. President Slobodan Milosevic announced that the men would be put on trial for participating in the war against Yugoslavia. The United States called the capture a kidnapping and demanded that the soldiers be recognised as prisoners of war. President Bill Clinton said Mr. Milosevic would be held “personally responsible” for their safety. Intense diplomatic pressure was brought to bear. No trial was held, and the men were released after 32 days.

In 1989, the United States invaded Panama to remove Manuel Noriega from power. He was brought to Miami and put on trial on drug trafficking charges. He asserted that as a military officer seized during an armed conflict, he was a prisoner of war. Rather than ruling on its own, as it insists on doing in the current situation, the government followed the requirements of the Geneva Conventions and asked Judge William Hoeweler, the federal judge who was conducting the trial, to rule on General Noriega’s claim. The judge held that the Panamanian strongman was indeed a prisoner of war, even though Washington had never recognised his government, just as it never recognised the Taliban as the government of Afghanistan.

Because of his POW status, General Noriega was allowed to wear his military uniform in jail and at his trial. He was convicted on the drug charges and sentenced to 40 years (since reduced by 10 years). He is not serving his time in a federal penitentiary – the Geneva Conventions bar holding prisoners of war in regular prisons – but in a special two-room prison suite attached to the Metropolitan Correctional Centre in Miami, where he has an exercise bicycle, a colour television, a computer and a shower. In compliance with the conventions, he is entitled to regular exercise and sunlight. He is today the only prisoner of war on U.S. soil.

Given this background, it is interesting to note the response of the American judiciary to the challenge made against the U.S. treatment of the Guantanamo detainees.

### The Guantanamo Detainees Cases

The Coalition of Clergy, et al., filed a case<sup>60</sup> challenging the detention of the POWs in Guantanamo in the U.S. federal district court, central district of California. The petition sought the writ of habeas corpus on behalf of the Guantanamo detainees. In substance, the petition alleged that the detainees were being kept in custody in violation of the Constitution or the laws or treaties of the U.S. in that they (1) had been deprived of their liberty without due process; (2) had not been informed of the nature and cause of the accusation against them; and (3) had not been afforded the assistance of counsel. The relief sought was a court order directing the respondents to (1) identify the detainees; (2) show the true cause of deten-

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<sup>60</sup> Accessed from [news.FindLaw.com/hdocs/docs/terrorism/cltnbush0221020rd.pdf](http://news.FindLaw.com/hdocs/docs/terrorism/cltnbush0221020rd.pdf). The Coalition included at least 2 journalists, 10 lawyers, 3 rabbis, and a Christian pastor. Some of the lawyers were professors at distinguished law schools or schools of journalism. One was a former Attorney General of the U.S.

tion; and (3) to produce the detainees at a hearing in that court. President Bush, Defence Secretary Rumsfeld and numerous others, including the 1,000-odd military personnel holding the captives in detention at the Cuban naval base, were named as respondents.

The court dismissed the petition saying that (1) the petitioners did not have standing to assert claims on behalf of the detainees; (2) even if the petitioners had standing, the court lacked jurisdiction to entertain the claims; and (3) as no federal court would have jurisdiction, the case could not be transferred to another federal district court. The last ruling was occasioned by the fact that a similar petition lays in the federal district court in Washington D.C. made by families of the detainees. The case hinged on the court's perception of the nature and ambit of the writ of habeas corpus of immemorial antiquity and perhaps the most important of the writ known to the Common Law countries. When a court issues the said writ, the authorities responsible for the detention are required to show that the person(s) concerned was being detained lawfully. The writ aims at protecting individuals from wrongful restraints upon their liberty. Courts have entertained applications for the writ of habeas corpus by the detainee or someone acting on his behalf, usually designated as the "next friend". The 9<sup>th</sup> Circuit Court summarised the tests laid down by the Supreme Court to qualify as the next friend: "In order to establish next friend standing, the putative next friend must show (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, petitioner."<sup>61</sup>

The petition, described by the court "as hastily prepared far from a model of precision or clarity", was dismissed on the ground that the tests of next friend standing were not met. The court was not persuaded by the contention that the detainees, being held incommunicado, had no access to the court. It found that the detainees were in correspondence with their families; had met with diplomats of their respective countries and with members of ICRC. The court desisted from dubbing the petitioners as "uninvited meddlers" – another test prescribed by *Whitmore* – but ruled that they had failed to prove "significant relationship" with the detainees to lay a claim of next friends.

As concerns jurisdiction, the court held that the writ of habeas corpus was issued by courts only "within their respective jurisdiction", which restraint reflected the conclusion of the Congress that it was "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with the authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat", as the Supreme Court explained in *Carbo v. United States*.<sup>62</sup> Applying the *Johnson v. Eisentrager* ruling, the court held that at no relevant point of time or stage were the detainees within the territo-

<sup>61</sup> *Massie ex. rel. Krollv. Woodford*, 244 F. 3rd 1192, 1194 (9<sup>th</sup> Cir. 2001). The tests were drawn from *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 1727 (1990).

<sup>62</sup> 364 U.S. 611, 617, 81 S.Ct. 338, 342 (1961).

rial limits of the United States; and that they were aliens, enemy combatants, captured in combat, and had not stepped foot on American soil since capture. Lack of judicial precedents and legitimate security concerns precluded the court from issuing a habeas corpus in favour of detainees, the court argued.

Petitioners had argued that the jurisdiction bar did not apply to the case because Guantanamo was factually and legally within the sovereign jurisdiction of U.S. The court dismissed this contention too by drawing a distinction between territorial jurisdiction and control and sovereignty. Reviewing the 1903 treaty between the U.S. and Cuba, which controlled its legal status, the court held that the naval base in Guantanamo was within the exclusive sovereignty of Cuba and was not within the sovereign territory of the United States.

The court's response to the petition falls into the pattern of self-abnegation of the American judiciary to claims of jurisdiction with respect to terrorist activities initiated abroad but directed at the territorial United States or U.S. installations. In *Smith v. Libya*,<sup>63</sup> for example, suit was brought against Libya by the husband of a victim of Pan Am 103 which was destroyed over Lockerbie, Scotland. Libya argued absence of jurisdiction as the destruction had occurred outside the United States. The court agreed. Similarly, in *Tel Oren*,<sup>64</sup> the D.C. Circuit Court refused to permit the families of victims of a terrorist attack sponsored allegedly by Libya to pursue civil remedies in United States courts.

Given this framework of national judicial responses to alleged acts of terrorism, one must see if the perpetrators receive better or worse treatment under international law. The case of the *Guantanamo detainees* warrants special consideration.

## V. The Guantanamo Detainees and International Law

The basic premise that the status of the Guantanamo detainees is to be determined by reference to the international legal norms as formulated in the Geneva Conventions is spelt out in this section. The U.S. administration denies them the benefit of the conventions on the ground that the al Qaeda and Taliban detainees are terrorists operating outside the legal framework, and as such do not deserve the privilege. Before focusing on the Geneva Conventions, one may wish to find out if there is any special normative order dealing exclusively with terrorists and terrorism.

Rosalyn Higgins says that the term terrorism has no specific legal meaning. The term, observes Higgins, is at once shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned. It covers compendiously numerous offences, including:

<sup>63</sup> *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3rd 239 (2d Cir. 1997).

<sup>64</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

1. Offences by states against diplomats.
2. Offences by states against other protected persons (e.g. civilians in times of war).
3. Offences by states, or those in the service of states, against aircraft or vessels.
4. The offence of state hostage taking.
5. The offence by states of allowing their territory to be used by non-state groups for military action against other states, if that action clearly includes prohibited targeting (i.e. against civilians), or prohibited means of force.
6. Action by non-state actors entailing either prohibited targets or prohibited means.
7. Connivance in, or a failure to control, such non-state action. This engages the indirect responsibility of the state, and is subsumed under 'state terrorism'.

Higgins holds the view that, except for war crimes and crimes against humanity, all acts associated with and identified as terrorism do not give rise to universal jurisdiction.<sup>65</sup>

Michael Reisman voices similar views. Illicitly targeted terrorism, Reisman notes, is unlawful under the law of armed conflict. Civilians, hospitals and the like are considered prohibited targets. Terrorist attacks so targeted will be similarly construed even during peacetime. The consensus over terrorism ends with that generality. What constitutes terrorism in specific terms is a divisive question. For the non-aligned nations, terrorism is a poor man's response to oppressive regimes – a tool in the national liberation struggle. For others, it is an unacceptable use of force. Because of this "fundamental fault-line in the political topography",<sup>66</sup> "no single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty".<sup>67</sup> An ad hoc committee established by the UN produced a number of non-binding recommendations admonishing states, in general terms, to "refrain from terrorist acts in another State" but the effort "produced a great deal of paper, but not a great deal of useful law", concludes Reisman.<sup>68</sup>

Consequently, what we have is a series of conventions produced for specific crimes: the Diplomats and Internationally Protected Persons Convention of 1973, the Hostage Convention of 1979, the Protection of Nuclear Materials Convention of 1980, the Protocol to the Montreal Convention of 1988, the Navigation Security Convention of 1988, the Protocol on Platforms on the Continental Shelf, and the Terrorists Explosives Convention of 1997. Each, as Reisman notes, addressed a particular type of terrorist action, but none essayed a more general definition of terrorism. "As for mode of implementation", Reisman notes, "each was essentially an extradition treaty".<sup>69</sup>

<sup>65</sup> Rosalyn Higgins, *The General International Law of Terrorism*, in: *Terrorism and International Law*, Rosalyn Higgins and Maurice Flory, eds., (1997), 13, at 27-28.

<sup>66</sup> W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *Houston Journal of International Law* (1999), 3 at 24.

<sup>67</sup> Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 *Houston Journal of International Law* (1989), 309.

<sup>68</sup> Reisman, note 66, at 22.

<sup>69</sup> *Ibid.*, at 25.

Absent specific regime to deal with terrorist acts and actors, one is forced to look elsewhere for redress. Happily, the law of armed conflict as codified in the Geneva Conventions comes handy for the purpose.

## VI. Geneva Conventions

The Geneva Conventions constitute the high point of the evolution of humanitarian law governing the conduct of hostilities between states. Barring occasional display of what would now be regarded humane, the conduct of war in ancient times was largely unfettered. Combatants felt free to kill and maim each other. The vanquished and captured enemy soldiers were considered property of the victor, who could either put them to death or make slaves of them. Slavery was deemed Nature-ordained even by the architects of modern democracy – Plato and Aristotle. The Stoics injected an element of humanity in the way slaves were treated. So did Christianity and the concept of chivalry. The Stoic philosophers proclaimed the equality of men and denounced slavery. The Judaeo-Christian religion cast men as brothers. To kill them was a crime. And slavery was unethical. The gains of these revolutionary developments, however, were nearly wiped out in the early 4<sup>th</sup> century when the alliance of Church and State induced the ecclesiastical authorities to legalise war. In the early 5<sup>th</sup> century, St Augustine provided the doctrinal gloss to the effort with his “famous and deadly doctrine of the ‘just war’ which was destined to delay the progress of humanitarian law for centuries”, as Jean Pictet notes.<sup>70</sup>

The “just war” doctrine sought to legitimise the bloody wars of the period; exonerated the atrocities not as crimes, but as well-deserved punishment inflicted on the guilty. It posed the Crusades as “just wars” par excellence, even when the Crusaders “perpetrated atrocities that beggar description”, quoting Pictet again.<sup>71</sup> The Christian concept of “just war” produced matching Islamic counter claims of “jihad”, incorrectly translated as “holy war”. Counsels of moderation given in the Koran and acts of clemency shown by some individual rulers (Saladin, for instance) did lead to the humanisation of the Muslim version of the “just war”; but the over-all impact on the combatants remained marginal. Jihad did not save prisoners of war from execution and slavery. The options of conversion or ransom were, of course, unattractive to the non-believers. The concept of the holy war was not confined to the Christian and Islamic civilisation. Other ancient cultures too used the idea to introduce human values in warfare. “Dharm Yudh” (a close, literal approximation of the just war) is one example of the phenomenon in India. The ancient lawgiver, Manu, and the epic poem, Mahabharata proclaimed the principle of respect for a disarmed enemy, and pleaded for a principled and just war.<sup>72</sup>

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<sup>70</sup> Jean Pictet, *The Development of Humanitarian Ideas and State Practice*, International Committee of Red Cross Document, October 1976, 2.

<sup>71</sup> *Ibid.*, 3.

Reverting to the treatment of POWs, the appearance of the artillery, the evolution of the Law of Nations, and the dawn of the "Century of Enlightenment" brought about a qualitative change in the conduct of hostilities, and the treatment of the prisoners of war and the non-combatants. The savagery of the unrestricted war with the help of the artillery and conscripted armies led to the abandonment of the sophism of just war. Soldiers hors de combat and the civilian population came to be considered humanely. Hospitals were held immune from attack; so were doctors and chaplains. A corpus of customary law developed in the second half of the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century. Codified for the first time in 1864 as the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, this body of rules was further developed in 1899, 1907, 1929 and 1949 at the Hague and Geneva conferences. Besides the provisions dealing with POWs and civilians, this body of rules prohibited the use of explosive bullets, the launching of projectiles from balloons, the use of poisonous gases, etc. The Geneva Convention dealing with POWs regulated the condition of millions of prisoners during World War II, although its application in the Far East was limited because of the fact that the Soviet Union and Japan were not parties to the Convention.

A provision common to all the Geneva Conventions states that the conventions "apply to all cases of declared war or of any other armed conflict" whether or not all parties to the conflict are signatories to the conventions (Article 2). The conventions ordain a set of minimum standards to armed conflicts not of an international character, the principal purpose of which is to ensure that persons taking no active part in the hostilities, including those who have laid down their arms, or are rendered hors de combat by sickness, injury etc., be treated humanely. To that end, the POW Convention prohibits violence against POWs, hostage taking of them, and forbids outrages upon their personal dignity, humiliating and degrading treatment and torture (Article 3). Article 4 of this Convention extends its protection to members of the armed forces of a party to the conflict "as well as members of militias or voluntary corps" forming part of such armed forces, including those of organized resistance movements operating in or outside their own territory, provided:

- (a) They are commanded by a person responsible for his subordinates;
- (b) They display a fixed distinctive sign recognizable at a distance;
- (c) They carry arms openly; and
- (d) Conduct their operations in accordance with the laws and customs of war.

Article 5 of the Convention states that the POW status is conferred on the persons described in the preceding Article from the time they fall into the power of the enemy until their final repatriation. Should any doubt arise as to whether a particular individual or group of persons caught conducting hostile acts qualify for the POW status, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal".

POWs, under Article 13, are to be guarded against unlawful acts committed by members of the Detaining Power resulting in death or seriously endangering their

<sup>72</sup> See Jean S. Pictet, *Red Cross Principles* (ICRC, 1956), 31, n. 1.

health. The article further prohibits subjecting POWs to physical mutilation, scientific or medical experiments, or intimidation, insults, or exposure to public curiosity. "Prisoners of war are entitled in all circumstances to respect for their persons and their honour", states Article 14. The Power detaining them is bound by Article 15 to provide free of charge for their maintenance and for medical attention required by their state of health. Article 17 prescribes the rules of interrogation of POWs. When questioned, the article states, a POW is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. "No physical or mental torture", adds the Article, "nor any other form of coercion", may be inflicted on prisoners of war to secure from them information of any kind whatever. POWs must be evacuated to safe areas, kept out of harms way, and transferred under humane conditions similar to those accorded to the Detaining Power's own armed forces.

Another set of detailed provisions in Section II lays down permissible conditions of internment of POWs, including security, housing, food, clothing, canteens, health and hygiene, recreation, study, sports and games. A provision of particular interest in the present context is Article 84, which states that a prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try POWs for the particular offence alleged to have been committed by him. The punishment meted out shall not be "inhuman, brutal or dangerous to the health of the prisoner of war" (Article 89). Before the punishment is awarded, the accused shall be given precise information regarding the offences of which he is accused, and be given an opportunity of explaining his conduct and of defending himself. He shall be permitted; in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter (Article 96). Article 99 prohibits forced confessions, and ensures for POWs an opportunity to present their defence with the assistance of qualified advocates or counsel. The accused are required to be given the benefit of proper trial and defence "in all circumstances" (Article 129); and the following are declared as grave breaches of the Convention: "wilful killing, torture and inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention" (Article 130).

Prisoners of war, according to Article 118, shall be released and repatriated without delay after the cessation of active hostilities. And, to repeat, the Geneva Conventions apply to irregular forces fighting an undeclared war – *de facto* hostilities.

## VII. Concluding Remarks

The preceding discussion shows that the U.S. administration's decision to set up military tribunals to try terrorists allegedly involved in planning and executing the attacks on the World Trade Centre and the Pentagon on 11 September 2001, and in

collaborating with the Taliban regime in Afghanistan for the purpose of conducting similar acts the world over was a mis-judged measure. Critics of the measure convincingly exposed its draconian character. The effort to rescind some of its objectionable features by the rules announced later did not fully satisfy the critics. Obviously, the measure cost the administration much of the goodwill it had garnered after the terrorist attacks on 11 September. The initial positive response to the administration's prompt and effective moves to meet the challenge was dissipated over the manner in which it went about meeting that challenge. The critics viewed, in particular, the decision to set up military tribunals as an overreaction to a genuine menace. The impression got around that someone (perhaps the group of Cold War veterans that seem to dominate the decision-making apparatus in the administration) was cynically exploiting the situation to usurp greater power to deal with the national emergency by stifling civil liberties.

Besides being politically imprudent, the measure sat ill with the domestic and international legal regimes. U.S. demands of fair and civilian trials of its citizens found on the wrong side of law in other countries flew in the face of its current insistence on summary procedures to deal with the al Qaeda and Taliban detainees held in Guantanamo. The measure was also found contravening customary principles of international law and the Geneva Conventions that prescribe humane and decent treatment to POWs for the duration of the war, and repatriation thereafter. The requirement of judicial determination of the status of detainees in case of doubt was also found flouted by the U.S. administration. Compounding the administration's position further was Rumsfeld's announcement on 28 March 2002 of a plan to hold captives even if they are acquitted in military tribunals.<sup>73</sup>

Despite these and other deficiencies noted above, one should not ignore the positive side of the U.S. administration's response, especially its readiness to reverse highly objectionable features of the Order; its referral of the one or two detainees held elsewhere to civilian courts; and its inability or unwillingness to sift the "incredibly dangerous" from the insignificant foot soldiers among the Guantanamo detainees. The episode, one hopes, would remind the U.S. administration of Napoleon's rueful remark over the calamitous retreat from Russia, to wit, from the sublime to the ridiculous it was but a step. The British government showed better judgment, when it announced on 30 April 2002 that it would treat both Taliban and al Qaeda fighters captured by the British soldiers in Afghanistan as prisoners of war and turn them over to the interim Afghan government. An appropriate denouement, indeed, if emulated by its closest ally – the United States of America.<sup>74</sup>

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<sup>73</sup> See, Katharine Q. Seelye, Rumsfeld Backs Plan to Hold Captives Even if Acquitted, *NYT*, 29 March 2002.

<sup>74</sup> See, Bradley Graham, British to Turn Over Prisoners to Afghans, *Washington Post*, 30 April 2002.