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# Justice in Times of Violence

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## Abstract

*The question of who should judge the terrorists is an intriguing one. This article seeks to understand why this is so by putting it into historical perspective. International law has a long history of dealing with terrorism, but was seemingly caught unprepared by the kind of nihilistic destructiveness implied by September 11. The challenge of 'hyperterrorism' can be seen as provoking a reorganization of the field. On the one hand, a brief cosmopolitan revival may be witnessed as several authors have urged the trial of major terrorists before an international criminal court. The argument, however, is unlikely to convince many and probably has more to do with liberalism's need to revitalize its programmatic promise in times that seem to profoundly challenge its globalizing logic. On the other hand is the notion, implemented in the United States, that terrorists should be judged by military commissions. This idea betrays a regression of international law and can only be properly understood if viewed in the larger context of a crisis of judicial liberalism. One intriguing element, however, is the way in which, beyond all the fuss generated by the international criminal court/military commissions debate, a great deal of what is wrong with the way that suspected terrorists have been dealt with has assumed decidedly more insidious forms.*

## 1 Introduction

The question of 'who should judge the terrorists?' would seem to be intrinsically linked to the aftermath of September 11. It is an odder question than one might think. Ordinarily one might have viewed this as a classical issue of conflict of jurisdiction, involving some quite straightforward issues of *locus delicti*, to be dealt with by private international law. 'Raising' the issue to the framework of public international law may indeed indicate a renewed willingness to critically examine some elements of the old international order.

The question inevitably raises questions as to its status. Is it purely a question of law? A mixed question of law and policy? What does it *mean* for international lawyers to ask the question of which jurisdiction should judge the terrorists after an event of such proportions as the destruction of the World Trade Center?

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At the heart of the complex of arguments emerging from September 11 is, I would contend, an attempt to use the rhetoric of justice to overturn the laws of war, and to use the rhetoric of war to subvert the rendering of justice. In a previous article I examined the ‘justicialization’ of war;<sup>1</sup> I now turn to examine the ‘militarization’ of justice.

The issue is, I believe, a profoundly historical one and I will thus begin by outlining what in my view has been international law’s traditional approach to terrorism. I will then try to show how ‘millenarian’ or ‘hyper’terrorism has changed the equation. From there, I will chart the international legal profession’s response as expressed through the issue of choice of jurisdiction. Finally, I will seek to give an idea of the extent to which the practice of states since September 11 has or has not replicated debates in the legal world.

## 2 The Age of International Cooperation

Terrorism was considered a relatively major threat to international order throughout the twentieth century. It was a single act of terrorism that sparked the First World War. And it was the assassination of Yugoslav King Alexander and French foreign minister Louis Barthou on the Cannebière which prompted the League of Nations to take up the issue of an international criminal jurisdiction.

For most of the twentieth century, however, terrorism was seen as something requiring a strengthening of international cooperation, not an overthrowing and complete redrafting of the rules of international law. Because of its often transnational character, terrorism seemed naturally suited to an international response. Although very different views could be heard regarding who exactly was a terrorist, there seemed to be an almost complete consensus about terrorism’s nefarious character so that at least a certain sectoral coordination of national policies could be achieved.

In fact, the fight against terrorism could be seen as a classical case of international cooperation. Attempts to deal with the problem were bounded on one side by the intrinsic limitations of a pure sovereignist approach and, on the other, by state reluctance vis-à-vis anything too explicitly cosmopolitan.

A pure sovereignist attitude would have fallen short of the goals of the system since traditional titles of jurisdiction were of little use when terrorists, as they often did, fled to other countries to seek refuge (or, occasionally, committed their deeds in international areas). Implicit in many efforts to combat terrorism internationally in fact was the idea that leaving sovereigns to their own devices might turn out to be as devastating as terrorism itself. In that sense, all international efforts at combating terrorism were also efforts to prevent and contain states’ attempts to deal with terrorism in their own separate ways, be it by extending ‘protective’ jurisdiction, kidnapping terrorists or striking safe havens militarily. All along, the international legal order may have had more to lose from terrorist attacks than just the attacks: a

<sup>1</sup> See Mégret, ‘“War”? Legal Semantics and the Move to Violence’, 13 *EJIL* (2002) 361.

subversion of the international legal order by the states themselves, lest international law be seen as not providing appropriate solutions.

On the other hand, a pure cosmopolitan solution would not have done the trick either. Not all terrorism was international. More importantly, states would clearly have been wary of having to defer to international jurisdictions for every act of terrorism. This was partly because terrorism often threatened to expose a number of embarrassing secrets, and partly because to admit an inability to deal with terrorism would have been interpreted as an inexcusable sign of weakness from the state. When cosmopolitan solutions were suggested, even such modest proposals as the 1937 ICC project, gained very little support. The exclusion of terrorism from the ICC's jurisdiction seems to have struck a death blow to attempts to approach terrorism from anything like a centralized, supranational vantage point.<sup>2</sup>

Thus it is that attempts to deal with terrorism have been mainly of a cooperative nature: sufficiently progressive to avoid the pitfalls of self-help, but not so revolutionary as to alter the basic state structure. The goal of most international conventions against terrorism has been to foster a sense of responsibility among states about acts of terrorism, to make terrorism a 'global' problem requiring coordinated solutions. The main focus of such conventions has been the ordinary jurisdictions of states: typically states have been required to either try or extradite persons suspected of terrorist acts.

The cooperative approach certainly did not eradicate terrorism, as so obviously evidenced in past years, but nor was it necessarily meant to, at least in the sense that any penal response to terrorism is only ever likely to be a small part of what might be an overall anti-terrorist strategy. Ironically, however, it may be just when, with initiatives such as the International Convention for the Suppression of Terrorist Bombings,<sup>3</sup> the cooperative trend seemed to have reached its peak, it may turn out to have been most in danger.

### 3 Hyperterrorism

Something changed with September 11. At first and despite the obvious, intended immensity of the event, the nature of the change is not absolutely clear. Magnitude has something to do with it. It certainly makes a difference whether one is targeting one individual or thousands. But it seems that there is something more about the destruction of the World Trade Center. One thing is the sheer randomness of that particular magnitude. We are not speaking, for example, of one passenger being selected among many hundreds due to his or her Jewish confession (as, say, in the hijacking of the *Achille Lauro*), but of the utter devastation that we witnessed.

One question that arises is why did nothing of the kind occur earlier? Surely the idea

<sup>2</sup> On the old and vexed efforts to have terrorism included in an international criminal court's jurisdiction, see generally Sailer, 'The International Criminal Court: an Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections', 13 *Temple International and Comparative Law Journal* (1999) 311.

<sup>3</sup> See Witten, 'The International Convention for the Suppression of Terrorist Bombings', 92 *AJIL* (1998) 774.

of using a civilian plane as a flying bomb is not so sinisterly ‘inventive’ that terrorists could not have thought up such a scheme earlier. Nor do the attacks seem such a logistical feat that a handful of determined individuals could not have worked out something similar earlier.

Rather, *there seems to be something about the epoch*. Earlier acts of terrorism, however murderous, seem to have been designed to achieve certain clear political goals: not so much to overthrow the international legal order as to carve themselves a niche within it. In a way, as history has amply shown, all terrorists were aspiring statesmen: not prone to overthrow all the thrones on which they aspired to sit one day.

A certain grammar of political terror flowed from this set of assumptions. Fairly clear goals, for example: demands for the release of political prisoners, cessation of a particular policy, perhaps a homeland. For all its horror, a certain restraint in tactics was apparent: from a long ‘tradition’ of anarchist bombings in Europe and North America to some of the PLO hijackings in the 1960s and 1970s, the goal was either to target certain individuals or to put maximum pressure on authorities by threatening them with certain consequences. However horrendous, an element always seemed to be calculated into the acts themselves that would make their authors, or at least their supporters, acceptable candidates for reintegration into the normal political fray.

Conversely, one aspect of the attacks on the WTC is how flimsily they seem to be related to some overall coherent, rational plan. It is trivial to say that the attacks must have had political causes, and to say so simply reflects our intuitive commitment to a minimally causally determined world.

It does not necessarily follow, however, that the bombings were themselves political, in the terrestrial, secular sense of the term; that is as an act (be it an act of war) designed to produce a specific political outcome. I know nothing of Bin Laden’s frustrated temporal ambitions, but my impression is that he is not, or was not, particularly aspiring to become the leader of any kind of territorialized *Umma*. Rather, at least some of the perpetrators of the attacks seem to have operated under the spell of a most apocalyptic kind of mixture: a sort of transcendental nihilism, in which the elements of fanatical faith were matched only by an aspiration to destruction.<sup>4</sup>

In truth, it is difficult to see what political outcome could have been sought from the bombings and, apart from a gross miscalculation based on a glaring lack of foresight, how the terrorists could have expected that the attacks would lead to anything other than the overthrow of the only regime that was willing to provide them with sanctuary, thus inaugurating a vast wave of repression against them throughout the world. In fact, in many ways the bombing may have been profoundly suicidal, the expression of a pure death wish — not only for those who piloted the planes but, in retrospect, for the entire movement that backed them.

Now one might think that this is a bit remote from international law, except that it is not. The liberal project of a global rule of law was founded on certain minimal

<sup>4</sup> On the decline of political Islamism and the rise of various millenarian movements operating on its margins see, G. Kepel, *Jihad: Expansion et déclin de l’islamisme* (2001) and *Chroniques d’une guerre d’Orient* (2002).

assumptions about the rationality of actors. It is trivial to say that law presupposes normalcy, even a certain normalcy in terrorism. Laws are not made for the odd, singular, unforeseeable event, but are established precisely on the basis of patterned recurrences. That is the basic precondition for the law's general character. This, at any rate, is what underlay previous attempts to deal with the problem of terrorism: namely that terrorism should stay, however paradoxical this may seem, within the bounds of the 'reasonable', that it should be at least minimally 'political'. We expect even terrorism to fit within a certain preordained vision of what terrorism is.

But 'hyperterrorism', as it is sometimes called by political analysts, challenges all these assumptions by introducing an element of absolute urgency into the Law's response. Urgency here can be defined as the elimination of the time between the norm's enunciation and its application to a given case, i.e., the collapsing of law's constitutive categories. Because of the morbid sense of vulnerability it inspires, because it re-actualizes the possibility — otherwise merely a strategist's working hypothesis — that the worst may happen at any time, because it constructs the other in its own image, terrorism threatens to unleash liberal societies' own potential for self-destructiveness. The question, then, is how can Law avoid, in falling into pure decisionism, becoming one with violence.

## 4 Hyperterrorism and the Reorganization of the International Legal Field

The thrust of September 11 from the point of view of international lawyers is that it creates an irresistible pressure to rise to the event. If one sees international lawyers as suffering from a chronic complex about the unreality of their discipline, then the destruction of the towers, in all its shattering brutality, seems to be the one event they cannot afford to miss, at the risk of otherwise being exiled to the labour camps of dreamers and utopians for decades to come.

From here, it is interesting to examine the complex game of doctrinal redistribution that occurs as lawyers seek to take positions on what promises to be one if not the defining event of the age. The important insight is that it is not simply legal doctrine that takes its cue from the event, but also, to a large extent, the doctrine that constructs 'its' event through a complex dialectical process. At the centre of such constructions lies a revival of the cosmopolitan and sovereignist strands of international law, which, as we have seen, had been more or less effectively muted in the international order's earlier response to the question of 'who should judge the terrorists'.<sup>5</sup>

<sup>5</sup> On the return of the past as a theme in political theory writings concerning September 11, see Campbell, 'Time Is Broken: The Return of the Past in the Response to September 11', 5 *Theory & Event* (2002).

## *A Terrorism as a Crime against Humanity: Judgment before an International Court*

For the liberal internationalist's brand of historical optimism, the 1990s seemed to usher in a new era of international liberal legal order. The foundations of that order were deeply ensconced in globalization. Globalization might have its downsides, but it was perceived and presented as an overwhelmingly positive phenomenon.

September 11, on the contrary, seems to reveal the dark side of globalization. As has been amply noted, the terrorists were themselves pure products of a technologically driven world, skilled at surfing its networks and exploiting its gaps. They specifically exposed the weaknesses of the state in an era of absolute interconnectedness: its incapacity to monitor its borders, its vulnerability to far-flung movements, the inadequacy of its huge industrial-military apparatus. Finally, September 11 also revealed some of globalization's own acquaintances with and vulnerability to violence, most notoriously the dubious value-neutrality of the money conduits used to channel funds to the cause of destruction.

What this adds up to is that, at least superficially, the 'globalizers' have something to answer for. From there, however, there are not all that many places to which international lawyers can go.

### *1 The Case for International Tribunals*

The reaction that comes most naturally to international lawyers, in fact, is what might be described as the '*fuite en avant*/told you so' attitude. If the project did not work, it is because it was not taken far enough. Far from upsetting the liberal internationalist blueprint, the terrorist attacks in fact merely confirm what had already been said, namely that more rather than fewer international institutions is the solution to international problems.<sup>6</sup>

Hence the talk about an 'international constitutional moment',<sup>7</sup> which is made no less interesting merely by virtue of being slightly out of place, somewhere between daring timing and vaguely indecent optimism in the face of catastrophic destruction. Hence also, and more specifically, a string of articles urging that more attention be devoted to the possibility that at least some of the terrorists be judged by an international criminal tribunal,<sup>8</sup> be it the ICC, some ad hoc structure created for the occasion, or even a new international jurisdiction devoted to the suppression of terrorism. In a sense, this is international liberalism at its best, when it is most needed (i.e., when it is threatened). The suggestion has the merit of coherence and does not

<sup>6</sup> See Slaughter, 'The Future of International Law: Ending the US-Europe Divide', *Crimes of War Project*, September 2002, <http://www.crimesofwar.org/sept-mag/sept-slaughter.html>.

<sup>7</sup> Slaughter and Burke-White, 'Legal Response to Terror: An International Constitutional Moment', 43 *Harvard International Law Journal* (2002) 1.

<sup>8</sup> Robertson, 'There Is a Legal Way Out of This . . .', *The Guardian*, 14 Sept. 2001; Robertson, 'The Stark Choice between Revenge and Justice', *The Times*, 17 Sept. 2001; Cassel Jr, 'Try bin Laden — But Where?', *Chicago Daily Law Bulletin*, 11 Oct. 2001; Slaughter, 'Terrorism and Justice', *Financial Times*, 11 Oct. 2001; Slaughter, 'Al Qaeda Should Be Tried before the World', *New York Times*, 17 Nov. 2001.

lack a certain panache in the face of what is likely to be a markedly hostile public and professional mood.

Perhaps one of the most emblematic ideas to emerge in the context of September 11 is that the terrorist acts should be judged by an international tribunal because they were committed against the world at large and thus amounted to crimes against humanity. Apart from the slightly unnerving tendency to reopen the issue for debate when states had made a clear and conscious decision not to include terrorism in Rome (and as if the ICC did not have enough going against it without having to cope with creative interpretations), this seems right. Positivists will draw comfort from the fact that the ICC definition of a crime against humanity focuses on a systematic or generalized attack against a civilian population. One might have qualms about recognizing the possibility that non-state actors commit crimes against humanity but, apart from a certain history, there is nothing in the crime's definition that would rigorously limit its scope in such a way.

## 2 A Critique

At the same time, the idea of the terrorists being judged by an international tribunal is clearly an odd one, and not simply because of the unwelcome reception it is likely to receive. Whatever one thinks of the substance of that qualification, the problem is that there is simply no obvious logical link between the idea that crimes against humanity have been committed and the idea that an international criminal court should judge them. Clearly, nothing prevents most domestic courts from judging crimes against humanity, *a fortiori*, if they were committed within their territorial jurisdiction.

In fact, the argument runs into an even greater stumbling block. After all, have we not been told time and time again in the past years that an ICC is only justified to the extent that national jurisdictions are 'unwilling or unable' to judge international criminals?<sup>9</sup> So why the eagerness to abandon deference to sovereign jurisdiction? It is not exactly as if the US is a banana republic, so one would expect that its jurisdictions would be able to handle the caseload.

There might be a compelling argument for the very impossibility of fair trial in US courts. Perhaps the point could be made regarding terrorist attacks such as those that left the Twin Towers a pile of rubble that they are so wide in scope and so resounding in their effects that any sense of externality simply disappears, and thus no US court could possibly find in itself the necessary objectivity. Still, one would be wrong to underestimate the potency of domestic liberal safeguards, and their capacity to insulate the system precisely against such dangers. At any rate, these are allegations that would be better tried and proved than assumed, and the onus is clearly on those who would suggest some kind of structural inability in domestic judicial systems.

Short of such a decisive argument, the defence of international criminal tribunals for terrorist offences is soon left with little except a series of policy considerations. We

<sup>9</sup> One might want to argue that 'complementarity', as it is known, is merely a local, regime-specific standard, but the tacit understanding was that it was always more than that, namely the underlying philosophy of international criminal justice.

are told, for example, that judging the terrorists by an ICC will simply ‘work better’ because it is more deterrent, will facilitate extradition, will be perceived less as a Western imposition, will sustain the anti-terrorist coalition longer, and so on. Apart from the fact that a great many of these arguments are only likely to convince the already-believers, there is a sense that principled liberal idealism, for all its concessions to the dominant policy-oriented pragmatism (indeed, its occasional identification with it), is not on its strongest ground with such purely utilitarian arguments, and can easily be outflanked by those of a more realist persuasion who profess to specialize in such reasoning. To put things simply: Who needs ‘human rights types’ to say what will guarantee security, when almost everyone these days wants to be a ‘security expert’?

### *3 International Criminal Tribunals and Liberalism’s Search for a ‘Second Souffle’*

Some may wonder, therefore, whether international liberalism’s proverbial flair for the *zeitgeist* have not finally flickered out. The argument in favour of recourse to an international criminal tribunal can nonetheless be understood if one sees it as a product of the specific predicament created by September 11 or international liberalism. To simply repeat the mantras of the past would expose one as being irresistibly *passé*. But to backtrack in the face of danger would be seen as admitting helplessness. As a result, the way ahead can only be more of the same. International liberalism may be cornered into taking a bigger step towards its more or less repressed cosmopolitan/utopian strand (namely, the extent to which it likes international tribunals for their own sake rather than as more fundamental palliatives to sovereign failure) than it would have thought wise under ordinary circumstances. But this is not the moment for indecision, and the move gains it time while at least deflecting some of the more immediate criticism, perhaps till better times may come. Only in transcending itself in such fashion, can liberalism affirm the ‘historicalness’ of its ideas, namely the extent to which they are adapted to their time, flexible, policy-oriented, and so on.

## **B Terrorism as a War Crime: Judgment by Military Commissions**

Whether in the process the international liberal project may not lose a great deal of its real world relevance is of course another issue. But the affirmation of the project’s actuality is made all the more necessary because, at the other end of the spectrum, the more or less declared enemies of liberalism had already begun to push their priorities in the immediate aftermath of September 11. In truth, all sorts of ideas about how to judge terrorists had been simmering ever since the Oklahoma bombings.<sup>10</sup> But these had largely been kept at the periphery of academic debate, and were almost off limits

<sup>10</sup> See, particularly, Crona and Richardson, ‘Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism’, 21 *Oklahoma City University Law Review* (1996) 349.



as far as international lawyers were concerned. September 11, on the contrary, has given these ideas a renewed veneer of legitimacy.<sup>11</sup>

Many of the more enthusiastic partisans of the use of military commissions have, as is apparent from the very structure of their argument, an agenda. That agenda, to put things simply, reflects a conservative impatience with the ordinary judicial system, characterized as overly meek, effete and incapable of fulfilling the goals of a criminal system which are, putting it bluntly, to send people to prison and occasionally to the gas chamber efficiently. These commentators' worst fear, as illustrated by a spate of popular cartoons whose importance in crystallizing a certain public mood cannot be underestimated, is a vision of Bin Laden being acquitted on a technicality by an ordinary court.<sup>12</sup>

### 1 *The Case for Military Commissions*

Where the liberal case for recourse to an international tribunal started from legal arguments and only half-heartedly tried to show that these also made for sound policy, the conservative argument is happier to start with its gut feeling for the right prescription and move on from there to cloak it in law. Since doing away with the ordinary judicial system cannot be a goal for its own sake, however, one has to show what is specific about terrorists that makes trial by ordinary jurisdictions undesirable.

We are told, therefore, that federal courts might divulge important confidential information or that it would be difficult to ensure jury security. But these are hardly categorical arguments. It is doubtful that there is something intrinsically impossible about conducting normal domestic trials for terrorists (as the trial of the first WTC attacks showed).

The supposed benefits of military commissions, moreover, have to offset the cost of parting ways with a long tradition and the usual arguments about a Pandora's box, etc. Finally it is not obvious that, on their own purported pragmatic grounds, military commissions would achieve some of the objectives they set. The very distrust they inspire abroad, for example, quickly became a reason for a number of European states to declare that they would refuse extradition if they did not receive guarantees that the suspects would be tried before civilian jurisdictions.

All of these policy arguments can be endlessly debated. But, perhaps, in a society that values adherence to the rule of law, the most decisive arguments are those that can claim to derive from the law itself. The crucial point here seems to be that one cannot simply re-engineer a judicial system as one goes along simply because that would make policy sense. Something more distinctly legal is needed to justify that shift (although admittedly some may be happy with and come perilously close to doing away with the law altogether).

The argument is made with a domestic constituency in mind — obsessively so in

<sup>11</sup> See Anderson, 'What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base', 25 *Harvard Journal of Law and Public Policy* (2002) 591. Oddly enough, the latter does not mention the Crona and Richardson article, *supra* note 10, despite clearly relying on the same foundations.

<sup>12</sup> Several of the cartoons are available at <http://cagle.slate.msn.com/news/OJTribunal/main.asp>.

fact — but nor can it dispense entirely with international considerations, especially if the international gives it some semblance of legitimacy. So the campaign is waged on two fronts at the same time, one constitutional and the other international. I leave aside the details of the constitutional issue as such, as they are irrelevant for the purposes of international law and have been abundantly treated elsewhere.<sup>13</sup> I only note that mobility is essential to the argument, which involves a sophisticated *pas de deux* between the two levels, so that at any one time one can be seen to derive legitimacy from each without committing all one's resources to either.

The argument unfolds, put simply, by attempting to subsume the law of terrorism into the laws of war. The reasoning can only proceed in largely imaginative and metaphorical strides to link these two branches of the law, though, since such a link was hardly ever anticipated. Historically, the bodies of international law concerning war and terrorism have (apart from the odd reference in Protocol II) largely proceeded quite separately with different sponsors and with different goals: most acts of terrorism occurred outside the direct framework of specific armed conflict and those acts of 'terrorism' that did occur during war might just as well have been re-qualified with a better label. The same was by and large true at the domestic level.

Central to the proposal that terrorists should be tried by military commissions, on the contrary, is the idea — which clearly has captured the imagination of those who have defended it — that beyond a certain point the criminal is no longer simply a criminal but 'an enemy', because he is specifically and primarily targeting the state and society rather than pursuing 'private' interests.<sup>14</sup> From there, a distinction is generally drawn between the domestic and the foreign terrorist. The domestic terrorist presumably is part of the society that he is targeting, which implies a number of rights and duties. His position is more akin to that of one who has committed treason. There is a certain indulgence for the enemy from within that is unlikely to be extended to the enemy from beyond.<sup>15</sup> The foreign terrorist, in contrast, is more readily identified with 'the enemy' in that fewer previously existing links bind him to the targeted society.

By this stage, it is only a small step to extending the regime of the laws of war to terrorists. And by the time the argument has been relayed by columnists and the right opinion makers,<sup>16</sup> enough confidence has been inspired to prompt the Bush

<sup>13</sup> See, for example, Bradley and Goldsmith, 'The Constitutional Validity of Military Commissions', 5 *Green Bag* (2002) 249; Torruella, 'On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power', 4 *U. Pa. J. Const. L.* (2002) 648.

<sup>14</sup> Anderson, *supra* note 11.

<sup>15</sup> According to Vice President Richard Cheney, for example, those responsible for September 11 'don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process'. See Slevin and Lardner, Jr., 'Bush Plan for Terrorism Trials Defended', *Washington Post*, 15 Nov. 2001.

<sup>16</sup> Lacovara, 'How We Punish Saboteurs', *Legal Times*, 15 Oct. 2001. Also, Dean, 'Appropriate Justice for Terrorists: Using Military Tribunals Rather Than Criminal Courts', *Findlaw's Legal Commentary*, 28 Sept. 2001.

Administration to issue an Executive Order<sup>17</sup> resuscitating an old Second World War case law that one might have otherwise considered was better relegated to the textbooks.

The important thing to understand is that, if one follows the Bush Administration's case, it is the same act that makes the terrorist a participant in a war (meaning that they do not fall under the jurisdiction of the normal civil system), a war criminal (meaning that they can be tried), and an unlawful combatant (meaning that they are entitled to only minimal due process guarantees). The reasoning is fairly foolproof: since terrorists presumably participate in war only to commit war crimes, they enter the category of military justice only to be immediately relegated to its darker recess. The terrorist, in other words, is sufficiently a combatant that they can be judged by a military commission, but not enough of one that they can be afforded the higher due process protection associated with POW status.

The benefit gained by the US executive is not huge (and, unlike what is sometimes said, military commissions need not necessarily be kangaroo courts). In the process, however, the regime of repression of terrorism by ordinary civilian courts is short-circuited, with the apparent blessing and the prestige of the laws of war. The state is left with a considerably freer hand than it would have had otherwise.

## 2 A Critique

Clearly, the argument raises many questions, some of detail, others of principle. It is far from obvious, for example, why one would want to consider that war in the full sense of the term was being waged against the US after September 11 but not after the Lockerbie bombing; or why drug dealers should not also be dealt with by military commissions, since presumably the war against drugs has been going on for a decade and has produced a far greater number of casualties than those of September 11; or whether all criminal acts are not, at least according to one view, anti-social acts and all acts of war are criminal acts, so that the purported distinction between 'criminal and enemy' is slightly specious; or why one status should necessarily take precedence over the other.

But let us assume, for the sake of argument, that terrorists, or at least some types of terrorists, are enemies in the war-like sense of the term. There is indeed an air of plausibility to the Executive Order because so many of the terrorists that are detained were caught in combat in Afghanistan in the midst of what looked very much like a traditional war, of one state against another. Furthermore, it is not unlikely that some Al Qaeda members, who were 'opportunisticly' taking a shot at US troops rather than being engaged in anything like a systematic defence of Afghan territory, do not fit the quite rigorous threshold of a combatant as stipulated by Article 4 of the Third Geneva Convention.

Aside from the point that their status should be determined by a competent court *in case of doubt*, I do not have serious problems in the absolute with the possibility that

<sup>17</sup> Executive Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 Nov. 2001.

some of the latter might be illegal combatants not entitled to POW status under the Third Geneva Convention. It is not as if the international community did not have a very real vested interest in maintaining a proper distinction between regular and irregular troops, which could conceivably and defensibly translate into different regimes.

In fact, supporters of military commissions have seized upon the fact that neither the Third Geneva Convention nor Protocol I explicitly come out against the use of military commissions for unlawful combatants,<sup>18</sup> so that at first glance the international does seem to provide a margin for a measure of domestic creativity. This is true strictly speaking, but it involves a highly selective and arbitrary reading of international law. International humanitarian law is not particularly concerned with the issue of whether those organs that try unlawful belligerents are called military commissions or courts martial, or the New York district court for that matter. But that is because international humanitarian law is not particularly formalistic, not for the reasons and with the consequences that supporters of military commissions think.

What Common Article 3 and Article 75 of Protocol I do lay out, however, is a substantive threshold that any organ judging someone not benefiting from POW status must meet in all circumstances. The argument, therefore, should not be construed as one about the legality of military commissions *per se* — and in that respect the problem has often been unhelpfully framed — but about the legality of such or such commission, depending on its precise regime. On that count, although the Executive Order itself might have been ambiguous, the Department of Defence (DOD) rules<sup>19</sup> that are meant to implement it seem to fail the test by any measure.<sup>20</sup> To claim that Protocol I is a ‘sharply contested instrument’<sup>21</sup> and thus cannot bind the US customarily in all its parts, in this context, especially when it comes to some of its least sharply contested bits, is really a trifle disingenuous.

The real problem, however, lies elsewhere. It is the fact that the Executive Order, which is open-ended in time and space,<sup>22</sup> is bound to encompass people who are not unlawful combatants by any stretch of the imagination, either because they are entitled to POW status<sup>23</sup> or, more strikingly, because they have no link to a war in any normal sense of the term. It is this second possibility that indicates a turn from bad to worse. Except in the limited context of the campaign in Afghanistan — where the

<sup>18</sup> See, for example, Wedgwood, ‘Al Qaida, Terrorism and Military Commissions’, 96 *AJIL* (2002) 328, at 335.

<sup>19</sup> Department of Defence Military Commission Order No. 1 (21 Mar. 2002).

<sup>20</sup> See Paust, ‘Antiterrorism Military Commissions: Courting Illegality’, 23 *Mich. J. Int’l L.* (2001) 1; Paust, ‘Postscript: Antiterrorism Military Commissions: The Ad Hoc Dod Rules of Procedure’, 23 *Mich. J. Int’l L.* (2002) 677; Orentlicher and Goldman, ‘The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists before Military Commissions’, 25 *Harv. J.L. & Pub. Pol’y* (2002) 653.

<sup>21</sup> Wedgwood, *supra* note 18, at 336.

<sup>22</sup> The Order, in particular, speaks of ‘individuals acting alone and in concert involved in international terrorism’.

<sup>23</sup> In that case, use of military commissions would clearly be in violation of Article 102 of the Third Geneva Convention, which prescribes that trial should be by the same courts and according to the same procedures as for the detaining state’s own forces.

attack prompted a kind of desperate fusional resistance of all fundamentalist forces — it was always slightly straining things to say that Al Qaeda was a militia of the Taliban. In fact, it was probably much more than that and certainly had a life of its own that preceded its seeking abode in Afghanistan, and most probably has gone on beyond it.

At any rate, it should be uncontentious that one cannot go on calling Al Qaeda members a militia of the Taliban long after that regime fell. As to the existence of a ‘war’ outside the context of the specific armed conflict opposing US forces to the Taliban Government, support is sometimes drawn from Chief Justice John Marshall’s opinion in 1801 that the power to declare war inherently includes the power to define war.<sup>24</sup> Even if that is a proper interpretation of what the honourable justice said, it is simply not the case that it is open to any state to define what it considers to be war for the purposes of applying the laws of war, any more, if I am correct, than it is for the purposes of waging one.

One need not even find a rule of explicit international law to that effect (in fact, the point may be so obvious that no such rule exists on paper). If states cannot determine of their own accord whether they are dealing with a conflict of an international or non-international character, then *a fortiori* they cannot ‘invent’ armed conflicts that do not fall within the pre-agreed definition of armed conflict. To allow for such a subjective determination would simply be an invitation to empty international law of its content under the guise of ever more derogatory regimes.

As it happens, under *jus in bello* as well as under *jus ad bellum*, a war is necessarily an armed conflict that opposes one state to another state, or at best to a national liberation movement. And this is not merely a conservative point made by Europeans seeking to exorcise their feeling of helplessness: the granting of the ‘privilege’ to wage war is the strenuous product of centuries of attempts to grapple with the use of violence and, essentially, a device for order. Paradoxically, recognizing terrorist groups as belligerents in a global war also elevates them to a distinction which one might not want to grant them under any account.<sup>25</sup>

Thus, in the end, the only thing that links terrorists with a war is the sense that one is at war with terrorism, so that all terrorists everywhere are war criminals. It should

<sup>24</sup> Crona and Richardson, ‘Terrorism and International Law’, *Denver Rocky Mountain News*, 1 Dec. 2001.

<sup>25</sup> This is an issue that cannot be pursued in any great depth in this article, but which would warrant more analysis. One generally thinks of the *jus ad bellum* as prescribing under what conditions force may be used in international relations. The focus is generally on what one might call the ‘secondary’ rules of *jus ad bellum*, i.e., essentially issues of self-defence and collective security. But there is of course a deeper level of latent ‘primary’ rules, which describe who the legitimate ‘players’ in that game are. For centuries, the sole legitimate players were states. Because international humanitarian law posits a radical distinction from the law of recourse to force, there is theoretically no insuperable difficulty in considering that someone is a prisoner of war *and*, simultaneously, that he is not allowed to wage war in the first place. In the real world, however, the recognition of POW status to non-state actors operating outside any recognizable interstate framework, could only be interpreted as a recognition of the fundamental legitimacy of these actors’ ‘war claim’ and, consequently, a challenge of states’ monopoly. In that respect, a too precipitated rush to treat terrorists as belligerents might signal a fundamental retrogression to a concept of private war unheard of since the Middle Ages, and potentially dangerously destabilizing.

be clear that this is little more than a masquerade, based on a fundamentally circuitous reasoning. It installs a button on the sovereign's desk, which links it directly to every individual case.<sup>26</sup>

### 3 *Military Commissions and the Crisis of Human Rights*

But there is a more deeply disturbing suggestion about the proposed use of military commissions. The idea seems to rely on the assumption that due process is somehow antithetical to the goal of efficiently combating terrorism. Thus a dichotomy is suggested, and little by little internalized within public discourse, between constitutional guarantees, perceived as 'luxurious' on the one hand, and the diligent, no-nonsense conduct of a military campaign on the other. Essentially, the state is presented as doing the individual a favour by respecting his rights.

Seen from Europe, it is not the least of paradoxes that this posture reveals a startling lack of faith in the American judicial system, precisely by those who would present themselves as arch-defenders of certain American values. I would probably not go so far as those who have told us, in the wake of September 11, that human rights and security *always* go hand in hand: that sounds like asking us to believe a bit too much. But there is a lightness of heart with which proponents of military commissions dismiss civil libertarian concerns, which suggests that they have not even given any thought to the idea that due process might be more than simply a institution designed to allow the guilty to walk away scot-free.

In this respect, the suggestion that terrorists should be judged expeditiously misses the rather central point that we do not know who the terrorists are and that presumably this is what trials are there for. One is reminded of the words that Kafka, always the *visionnaire* of our societies' propensity for the absurd, put in the mouth of the Officer in his *In the Penal Colony*, on the eve of (truly) another kind of war:

The principle behind my decisions is: Guilt is always beyond doubt. Other courts can't adhere to this principle, because they consist of several judges and have even higher courts over them. . . . You wanted an explanation of this case; it's just as simple as all of them [The officer goes on to sum up the facts of the case to the explorer]. Those are the facts of the matter. An hour ago the captain came to me. I wrote down his declaration and followed it up with the sentence. Then I had the man put in chains. All that was very simple. *If I had first summoned the man and interrogated him, that would only have led to confusion. He would have lied; if I had succeeded in disproving those lies, he would have replaced them with new lies, and so on.* But, as it is, I've got him and I won't let go of him again.<sup>27</sup>

How the likelihood of miscarriages of justice could possibly help the fight against terrorism is obscure at best. On the grounds of protecting democratic society and the rule of law, the military commissions argument often ends up reflecting a profound misunderstanding of what liberalism stands for.

Again, however, the argument can only be understood if one sees it as not really an argument about protecting the rule of law at all in the first place. The important thing to understand is that the case for judgment of terrorists by military commissions starts

<sup>26</sup> See Human Rights Watch, *U.S.: New Military Commissions Threaten Rights, Credibility*, 15 Nov. 2001.

<sup>27</sup> F. Kafka, *In the Penal Colony* (1914) (emphasis added).

no less from scratch than did the liberal internationalist argument. Rather, it finds its place within a larger crisis of the American judicial system,<sup>28</sup> particularly in its criminal repression dimension, as illustrated most visibly by the O. J. Simpson and Rodney King decisions. This larger crisis (which is above all a crisis of faith) in turn feeds into and is fed by various illiberal trends present within all Western societies, but which at times seem particularly virulent in American society. The use of military commissions is not merely or even essentially about September 11, as much as a complex encounter of September 11 *and* a crisis of the judicial system *and* the way this crisis is being manipulated by various political interests. In that respect, September 11 is less a cause than a revealing element, providing conservative sectors of Western society with an unexpected outlet to air an agenda of rights curtailment.<sup>29</sup>

## 5 Much Ado about Nothing, and the Need to Get on with What Is Really Happening

The military commission argument, however, may itself simply prepare the ground for — just as it provides a diversion from — more insidious trampling of rights. Indeed, despite the considerable discussion about both the use of international criminal tribunals and military commissions, it is remarkable that to date no one has been judged by either. In fact, as it becomes clear that the Bush Administration is operating something like a long-term preventive detention facility in Guantánamo, the startling possibility emerges that the worst thing that may await the beleaguered cohorts of orange suits is not judgment by military commissions, but no judgement at all.

The paradox does invite a few passing thoughts: as if the debate had been a pure doctrinal creation, a figment of a few lawyers' imagination, existing only in some kind of parallel dimension where ideas are exchanged less for the purpose of making real points than as part of a negotiated struggle for places, visibility and identity.<sup>30</sup>

It was not *just* that, of course, and at least the military commissions have an Executive Order that testifies to the possibility that they be used at any time. But one of the interesting points about the aftermath of the response to September 11 may be less whether suspects should be tried by international courts or military commissions than the large-scale redrawing of international cooperation that is occurring behind the scenes, and how that may eventually affect the question of who gets judged where, how, or at all.

<sup>28</sup> For an illuminating analysis of this problem, see Maechling, Jr. 'The Crisis of American Criminal Justice', *Cosmos Journal* (1996).

<sup>29</sup> This theory of September 11 as providing the background for a conservative 'coup' has been defended most notoriously by Jimmy Carter. See Carter, 'The Troubling New Face of America', *International Herald Tribune*, 6 Sept. 2002.

<sup>30</sup> I have already tried to suggest that much in a slightly different post-September 11 context (Mégret, 'Guantanamo is not the Problem', 3 *German LJ* (2002)), to the apparent annoyance of some (Meltzer, 'A Response to Frédéric Mégret: Guantanamo is not the Problem', 3 *German LJ* (2002)). See, however, the response suggested in Mégret and Pinto, 'Prisoners' Dilemmas: The Potemkin Villages of International Law?' (forthcoming, 2003).

On first analysis, not using military commissions or international courts leaves only ordinary courts and the more or less well-trained channels of international cooperation. Here we seem to have all the potential of a true Grotian *via media*, with at least some of the prospects of liberal internationalism. In a sense, judgment by the jurisdictions of several states would give a concrete embodiment to the liberal internationalist claim that the terrorist attacks should have an international response. Of course, humanity is more than the sum of the states whose nationals were killed or whose nationals participated in the terrorist acts. But judgment in a variety of states might still give a sense of shared suffering and responsibility. Use of third-party jurisdictions could also help to cut numbers, making less convincing the argument that some kind of expedited justice is imperatively required in the US.

There has certainly been a great deal of rhetorical talk about the need for increased cooperation and some progress will probably continue to be made towards improving some parts of the international regime against terrorism. Still, despite initial suggestions that some of the Guantánamo detainees be extradited to a number of other states, what we have is a somewhat more sinister picture. Three situations seem to require urgent attention.

First, individuals are being extradited to the US in dubious circumstances only to reappear in Guantánamo. This is the case, for example, of the Bosnian authorities 'extraditing' five Algerians and a Yemeni, despite the fact that the Bosnian Constitution and the European Convention on Human Rights prohibit extradition to countries that practise the death penalty, and notwithstanding an order by the Bosnian human rights chamber that four of the detainees be allowed to remain in the country.<sup>31</sup> This phenomenon suggests a willingness by those fighting the war against terrorism to lean against allies in a way that forces them to abandon the very human rights safeguards they insisted be adopted in the first place.<sup>32</sup>

Second, suspects are being detained and/or judged in national jurisdictions in conditions that raise serious human rights concerns without liberal states making as much as a move to urge that due process be respected, even less demand that they be extradited. Here, we have an implicit outsourcing of repression in countries that are likely to dispense with what liberal states otherwise consider as essential safeguards. This shortfall in condemnation of human rights abuses is only one of the less palpable but no less dramatic consequences of the 'war against terrorism'.

Third, a number of suspects are being shuttled across borders to foreign states that 'habitually practise torture', under the catch-all neologism of 'rendition'. Several instances have been reported, for example, of unmarked jetliners handled by the CIA picking up suspects in one country and transporting them to Egypt, Jordan or Syria.<sup>33</sup> Here, we see a willingness to maximize the use of treatment differentials in a way that

<sup>31</sup> Sito and Loza, 'Bosnia's Divisive Deportations', *Time Europe*, 21 Feb. 2002.

<sup>32</sup> See Amnesty International, *Pakistan: Transfers to US Custody without Human Rights Guarantees* (2002).

<sup>33</sup> See Chandrasekaran and Finn, 'U.S. Behind Secret Transfer of Terror Suspects', *Washington Post*, 11 March 2002.



systematically submits suspected terrorists to the lowest available human rights standards.

Together, these new patterns, which are so many instances of the 'secret war on all fronts' once announced by President Bush, threaten to subvert what decades of patient work intended to achieve. What we seem to be witnessing, therefore, is the emergence of a global network of loosely interconnected security *apparati* which are profoundly redrawing the boundaries of the law of deportation and extradition, with the blessing of panic-stricken liberal states and only-too-happy-to-oblige illiberal ones.

Because international lawyers often subscribe to a principally procedural concept of international law, they are often somewhat oblivious to the substantive outcome of the international regulation they promote. That makes it all the more worth remembering, despite international lawyers' totemic calls for ever greater 'international cooperation', what has been known at least since Operation Condor: namely, that international cooperation can be as much a way of entrenching human rights guarantees as it can be one to profoundly undermine them.

## 6 Conclusion

September 11 has confronted international lawyers with a challenge. At the heart of that challenge seems to be the need to take a large dose of 'reality' on board in an attempt to rescue what can still be rescued of the liberal project of international law. A debate follows that is a reflection of all the professional anxieties and ambitions steered by September 11. On the one hand, liberal internationalism seeks to rise to the occasion by calling for judgment by an international criminal tribunal, a call that seems to be out of touch with the political reality of the day; on the other hand, others with markedly more conservative inclinations try to harness the relatively more permissive regime of the law of armed conflict to endeavours that have little to do with it.

Somewhere in between the war of words, a discreet reality that seems to bear little relation to the broad brush of that general debate is unfolding, involving a systematic, albeit remarkably stealthy, attack on human liberties. At the heart of that campaign lies not so much the primacy of the constitutional over the international or of dualism over monism as, vertically and cutting across the internal/external spectrum so to speak, the displacement of peace by war, of the rule of law by the state of exception, and of human rights by international humanitarian law.

One argument that is often heard in this context is that criminal sanction implies that one share minimally in a moral community, so that the terrorist-as-enemy has put himself 'beyond the pale', as it were, and forfeited his right to civilized treatment. But what community are we talking about exactly? This sounds as though badly understood moral theories of retribution are being manipulated to overturn one of the basic tenets of international law (i.e., equal treatment of aliens). Certainly, membership in the national community has long ceased to be a prerequisite for qualifying for due process; the only membership needed to be entitled to respect for one's dignity is

that of Humanity, something that not even the commission of a crime *against* humanity can disqualify one from.

If it is the case that there is no ‘war against terrorism’, other than metaphorically, then most terrorists are not war criminals but criminals *tout court* and their apprehension and judgment the world over through methods tailored to curtailing their rights involves a denial of their humanity, whilst, paradoxically, even severe treatment by the ordinary civilian system would reinstate them within their fundamental prerogatives as members of the family of mankind. The consequences for the future are not negligible since our coming to terms with September 11 probably also involves accepting that, whether we like it or not, it is also something specifically and radically *human* that led to the bombing of the towers. Transcendental nihilism, need it be said, is neither an animal nor an extra-terrestrial phenomenon, but one rooted in the persistent *malaise* created by the competing forces of modernization, globalization and religion.

Behind that reality lies the more general question of how democracies should deal with terrorism. Here it seems that the rhetoric is always at risk of taking one further than would be wise. We can blame the terrorists with everything, but not with confronting our judicial systems with a challenge they cannot confront. That has to be a problem of our own political and institutional making, for which others should not have to bear the consequences. It is only the US’s own high standards — but also, it should be said, the occasional transformation of the adversarial system into its caricature — that makes recourse to ordinary courts problematic.

In fact, it is remarkable how many (although not all) of the powers that are sought for both international tribunals and military commissions (such as the capacity to consider evidence even when obtained illegally, or to admit hearsay) are ordinary features of many criminal systems outside the US, for example in civil law countries. Perhaps some will find it opportune, preferably when some more dust from September 11 has settled, to nudge the system away from some of its more litigating extremes. The bottom line, though, is that attempts to drive a wedge between the judicial treatment of citizens and barbarians, especially when it comes to the gravest crimes, are probably far more anathema to the liberal tradition than any guarded reform along more inquisitorial lines.

Perhaps one conclusion is that if one does not want to judge terrorists before ordinary courts because of fear of one’s own judicial system, the solution should be to try and fix that system rather than create a largely derogatory one from scratch.

But there seems to be a more general point involved. Central to the question of who should judge the terrorists is how one defines terrorism itself. Whether one characterizes September 11 as a war crime or a crime against humanity seems to determine, if not as a matter of strict legal deduction at least in fact, whether one favours judgment by a military commission or an international court. The really interesting question, however, given the substantial overlap of international criminal offences, is often going to be less whether the acts of terrorism might fit under some conceivable definition of crimes against humanity or war crimes (I am convinced that some could also make the case that September 11 should be qualified as hijacking or

genocide<sup>34</sup>); rather, it is almost always going to be the more complex and socially responsible question of what is gained by doing so from the various standpoints that can be adopted when confronting terrorism.

If *that* is the question, then international law seems to offer but poor guidance as to which one should choose from the various possible, but formally equally valid, qualifications. There would seem to be a case, however, that no two equally meaningful qualifications can ever be given to the same act so that, confronted with a choice, one should always opt for the most specific description available, in accordance with the principles of sound conceptual economy. Most importantly, subsuming narrower categories (terrorism or, for the sake of argument, torture) under some overall label (e.g. crimes against humanity or war crimes) should be avoided, at the risk otherwise of a dilution of (what would then become) the *lex specialis* into the *lex generalis*.

Only in such a way, it is submitted, can one hope to maximize international criminal law's social functions, unleash its pedagogical potential, and avoid irremediably dissolving the system's capacity to draw meaningful hierarchies. The alternative seems to be a dangerous concentration of the content of international proscription into one or two all-encompassing offences, under ever more general and illegitimate appropriations of what constitutes 'Humanity' or 'War'.

I otherwise fail to see in what way calling terrorists 'terrorists' and judging them as criminals before the ordinary courts of the land minimizes the horror of their deeds; or how such judgment would, if liberal societies are truly what they say they are, rob them of an opportunity to show what impervious mettle they are made of in the face of terror.

These are times to be sparing with our words.

<sup>34</sup> Indeed, predictably enough (although to this author's disbelief), it was not long before the case for qualifying September 11 as genocide was made. See Fry, 'Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction', 7 *UCLA J. Int'l L. & For. Aff.* (2002) 169.