

# A Judicial Response to Terrorism: The Status of Military Commissions Under Domestic and International Law

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*They hold fast to their evil purpose; they talk of laying snares secretly, thinking, “Who can see us? Who can search out our crimes? We have thought out a cunningly conceived plot.” For the inward mind and heart of a man are deep!*<sup>1</sup>

*The trial must not be protracted in duration by anything that is obstructive or dilatory, but we must see that it is fair and deliberative and not discredited in times to come by any mob spirit. Those who have regard for the good name of the United States as a symbol of justice under law would not have me proceed otherwise.*<sup>2</sup>

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1. *Psalm* 64:5-6.

2. ROBERT JACKSON, U.S. DEP’T OF STATE, REPORT OF ROBERT H. JACKSON, U.S. REP. TO THE INT’L CONFERENCE ON MILITARY TRIALS 54 (U.S. Gov’t Printing Office 1949) [hereinafter JACKSON].

## I. INTRODUCTION

Shortly after President George W. Bush issued his Executive Order of November 13, 2001 (the Executive Order), in which he indicated that noncitizen suspects apprehended in connection with terrorist activities would be tried before special military tribunals, a robust debate evidencing a wide variety of opinions began.<sup>3</sup> One critique suggests that “secret military commissions” are analogous to the infamous Court of the Star Chamber and would erode civil liberties and human rights.<sup>4</sup> Others note that these tribunals are inconsistent with the American legal value that even persons responsible for the most heinous crimes are entitled to due process that is fair, open, and impartial.<sup>5</sup> However, one defense of the Executive Order is that persons accused of actions that display no respect for the lives of innocent bystanders have removed themselves from the procedural safeguards of traditionally accepted due process mechanisms.<sup>6</sup> Another supportive voice could argue that military tribunals constitute a proper medium to ensure protection of sensitive data about national security that should not be divulged in a public forum.<sup>7</sup>

Regardless of one’s perspective, the need for civilized people to address terrorist activities in a responsible and effective manner is essential. As the first quotation at the beginning of this essay suggests, those who have robbed others of their humanity have been around for thousands of years.<sup>8</sup> A challenge to the important and necessary task of confronting terrorism is to ensure that the rule of law is upheld.

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3. Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Section 1(a) of the Executive Order states that “[i]nternational terrorists . . . [who] have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States” are the subject of the order. *Id.* Section 1(e) notes that these individuals could be “tried for violations of the laws of war and other applicable laws by military tribunals.” *Id.* Section 2 of the Executive Order further elaborates that the “individuals subject to this order” do not include U.S. citizens. *Id.* at 57,834.

4. See Bryan Robinson, *Due Process or Star Chamber? Critics Worry Military Tribunals Will Violate Terror Suspects’ Rights* (Nov. 15, 2001), at [http://abcnews.go.com/sections/us/DailyNews/military\\_tribunals011115.html](http://abcnews.go.com/sections/us/DailyNews/military_tribunals011115.html); see also Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337, 338 n.10 (2002).

5. See Dennis J. Hutchinson, *Tribunals of War: A History Lesson in Mass Crimes*, CHI. TRIB., Nov. 18, 2001, available at [http://www.law.uchicago.edu/news/hutchinson\\_wartribunals.html](http://www.law.uchicago.edu/news/hutchinson_wartribunals.html).

6. See Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18, available at 2002 WL-WSJ 29679560.

7. See *Military Tribunals, The Right Way*, CHI. TRIB., Jan. 2, 2002, at 14, available at 2002 WL 2607997.

8. See *Psalm* 64:5-6.

One might ask what the rule of law is and why it is relevant to a discussion on the propriety of the Executive Order. While this explanation is incomplete, the rule of law may be understood as those principles, rules, or norms that enable all to live together peacefully in an ordered society. The rule of law possesses a strong sense of justice, equity, forgiveness, and firmness through advanced, fair warning. The rule of law simultaneously takes into consideration the protection of the individual and the promotion of the common good. Justice Jackson's report to President Franklin Roosevelt quoted at the beginning of this essay makes the point nicely.

In order to advance the thesis of this paper that the maintenance of the rule of law is essential to the method by which those accused of terrorist activities are to be meted justice, Part II provides the current legal context in which military tribunals would operate. In particular, it briefly analyzes the international and domestic law that addresses terrorism. This section also discusses the legal history of the substitution of military tribunals for conventional civilian courts. Part III compares and contrasts the components of the military commissions that would be established under the Executive Order with those of the International Military Tribunal for Germany (Nuremberg) and the International Criminal Court created by the Rome Statute. Finally, Part IV concludes, with some suggestions, that safeguards should be included in any judicial tribunal that may be established by the United States to try nonnationals accused of committing terrorist attacks against this nation.

This essay is admittedly succinct, but several factors justify its brevity. First, the causes of terrorism still elude a disciplined explanation. Second, the legal mechanisms for responsibly addressing terrorism are still under study or are in the process of being formulated. Consequently, it is premature to comment definitively on the legality of all aspects of military commissions. Nonetheless, with the acknowledgment of these limitations, there remain a few thoughts that can, and should, be expressed at this time.

## II. THE LEGAL CONTEXT IN WHICH MILITARY TRIBUNALS OPERATE

### A. *The United Nations Context*

After the terrorist attacks in the United States on September 11, 2001, the United Nations responded with renewed efforts by the Ad Hoc Committee on Terrorism to pursue legal actions against terrorism.<sup>9</sup> The

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9. One of the U.N.'s earlier activities of recent years was the General Assembly's Resolution of January 16, 1997, on measures to eliminate international terrorism. *Measures to*

General Assembly established the Ad Hoc Committee in 1997 to promulgate a comprehensive treaty on terrorism.<sup>10</sup> This comprehensive treaty would fill gaps left by existing sectoral treaties dealing with terrorism.<sup>11</sup> The Ad Hoc Committee has also recommended that the Sixth [Legal] Committee of the General Assembly establish a working group that will convene at the 57th Session to continue the work of the Ad Hoc Committee.<sup>12</sup> The Ad Hoc Committee has noted the urgency for proceeding with the elaboration of a comprehensive treaty.<sup>13</sup>

Several sectoral treaties currently address particular practices of terrorism.<sup>14</sup> Other recent attempts to deal with international terrorism emerged from negotiations for the establishment of an International Criminal Court (ICC).<sup>15</sup> Discussions to include terrorist offenses within the ICC's competence began as early as 1996.<sup>16</sup> The subsequent work of the Preparatory Committee for the ICC, from 1996 to 1998, also addressed the issue of terrorism.<sup>17</sup> Some States supported the inclusion of terrorism as one of the crimes over which the ICC would have jurisdiction.<sup>18</sup> A consensus emerged, however, during the Preparatory

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*Eliminate International Terrorism*, G.A. Res. 51/210, U.N. GAOR, 51st Sess., at 1, U.N. Doc. A/RES/51/210 (1997).

10. *See id.* ¶ 9.

11. *See id.*

12. *Measures to Eliminate International Terrorism: Report of the Working Group*, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 166, ¶ 1 (2001).

13. *See id.* ¶¶ 19-20.

14. *See* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, T.I.A.S. 11,081; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GAOR, 52nd Sess., Annex, Agenda Item 152, U.N. Doc. A/RES/52/164 (1998), *reprinted in* 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/09 (1999), *reprinted in* 39 I.L.M. 270 (2000); Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 220, 2 I.L.M. 1042; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 125, 18 I.L.M. 1419; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222, 27 I.L.M. 668; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991).

15. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. 1 (Mar.-Apr., Aug., 1996), *reprinted in* M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 385, 401 (Transnational Publishers, 1998).

16. *See id.* at 401.

17. *See* Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 86 (Roy S. Lee ed., Kluwer L. Int'l 1999).

18. *Id.* at 86-87.

Committee meetings and the 1998 Rome Diplomatic Conference, that although terrorism posed a great concern to the international community, it was not a core crime.<sup>19</sup> Additionally, several instruments already covered terrorism.<sup>20</sup> Moreover, it was generally agreed that effective systems of international cooperation for responding to terrorist activities were already in place.<sup>21</sup>

At the conclusion of the Rome Diplomatic Conference, several States insisted that the Final Act of the Conference provide for a future Review Conference in which amendments to the Statute, particularly regarding terrorism, would be considered.<sup>22</sup> Accordingly, the Final Act included a recommendation to “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”<sup>23</sup>

At the Eighth Session of the Preparatory Commission of the ICC, held shortly after September 11, 2001, the Turkish delegation reiterated its concerns about terrorism and renewed efforts to include terrorism as a crime within the jurisdiction of the ICC.<sup>24</sup> The Turkish delegation noted the necessary exigency for addressing terrorism and observed that it would be at least a decade before a Review Conference could tackle such a matter.<sup>25</sup> To overcome this delay, the Turkish delegation suggested a number of pragmatic methods for addressing terrorism more expeditiously.<sup>26</sup> These suggestions included looking for ways in which the Preparatory Commission might search for vehicles of including terrorism in the Rome Statute prior to a Review Conference, as well as convening an international conference with the mandate of amending the ICC’s jurisdiction “so that terrorist crimes take their place as a separate crime category along with the existing crimes within the Statute.”<sup>27</sup>

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19. *See id.* at 80-81.

20. *See id.* at 81.

21. *Id.*

22. *See id.* at 87.

23. *Id.* (quoting Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10 (1998) (reissued for technical reasons)).

24. *See United Nations Preparatory Commission of the International Criminal Court, Comments by Turkey with Regard to the Terrorist Crimes*, 8th Sess., PCNICC/2001/DP.1 (Oct. 2, 2001) (on file with author).

25. *Id.*

26. *Id.*

27. *Id.*

*B. The United States Context*

The fundamental aim of the discussion up to this point has been to alert the reader to one possible body of substantive law, namely, international law and treaties, that could affect the military commissions established by the Executive Order. As sections 1(e) and 2(a)(1)(ii) of the Executive Order indicate, individuals subject to the commissions' jurisdiction would "be tried for violations of the laws of war and other applicable laws" or for "acts of international terrorism."<sup>28</sup> Another body of law to consider, then, is that of the United States.

The President plainly has the legal authority to issue executive orders in the exercise of his constitutional and other legal powers.<sup>29</sup> However, one must also take account of the constitutional authority of the other coordinate branches of government, especially Congress, that have a bearing on the establishment and operation of these commissions.<sup>30</sup> A principal reason for this analysis arises out of the separation of powers doctrine, which may well have a role in assessing the lawfulness of the military commissions proposed by President Bush.<sup>31</sup> Although the President relied upon constitutional authority, principally his authority as holder of the executive power and Commander in Chief of the Armed Forces, he also invoked congressional legislation and provisions of the Uniform Code of Military Justice, which acknowledge the lawfulness of military commissions and tribunals.<sup>32</sup>

Section 2 of the Authorization for Use of Military Force states, "[T]he President is authorized to use *all necessary and appropriate force*" against those responsible for the terrorist acts of September 11, 2001.<sup>33</sup> The Authorization, which cleared Congress on September 14,

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28. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

29. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 25-28 (1942).

30. See *id.* at 25-26.

By the Articles of War . . . Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

*Id.* at 28.

31. See *id.* at 25-30.

32. Exec. Order No. 222, 66 Fed. Reg. at 57,833. In addition to the authority vested in him as President and Commander in Chief, President Bush relied upon the Authorization for Use of Military Force and 10 U.S.C. §§ 821, 836 (1998). *Id.*

33. Authorization for Use of Military Force, 50 U.S.C.A. § 1541 (West Supp. 2002) (to be published at 50 U.S.C. § 1541) (emphasis added).

2001, and was signed by the President on September 18, 2001, did not elaborate on the meaning of “all necessary and appropriate force.”<sup>34</sup> By relying on the two cited provisions of the Uniform Code of Military Justice, the President could have concluded that military commissions fall within the Authorization’s broad grant of authority.<sup>35</sup>

The recitation of legislative authority in the Executive Order also suggests that the President has acknowledged the role that the separation of powers doctrine plays in the exercise of his legal authority to address terrorism.<sup>36</sup> According to Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>37</sup> the President operates at his highest level of authority when he combines his own Article II powers with legislative authorization.<sup>38</sup> The President enters the “zone of twilight” when he relies solely upon his own authority in the absence of congressional action.<sup>39</sup> Finally, he is at the “lowest ebb” of his authority when he relies solely on his constitutional power and contravening legislation addressing the subject exists.<sup>40</sup> Neither the final category of the “lowest ebb” nor the middle “zone of twilight” category applies to the action contemplated under the Executive Order because the President recited legislative authority in the order.<sup>41</sup> Arguably, under Justice Jackson’s categories, President Bush exercised his highest level of authority when he issued the Executive Order proposing the military commissions.<sup>42</sup>

Shortly after the President issued the Executive Order, both Houses of Congress responded with legislative proposals regarding the use of military commissions to bring alleged terrorists to justice.<sup>43</sup> The first proposed legislation, the Foreign Terrorist Military Tribunal Authorization Act of 2001, was introduced in the House of Representatives.<sup>44</sup> Under this proposal, military tribunals were granted a very limited scope of authority.<sup>45</sup> Section 2(b) specifies that the military tribunals authorized by the Act “may only be held at a location outside the United

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34. *See id.*

35. *See* 10 U.S.C. §§ 821, 836 (1998).

36. *See* Exec. Order No. 222, 66 Fed. Reg., at 57,833.

37. 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

38. *Id.* at 635-37.

39. *Id.* at 637.

40. *Id.* at 637-38.

41. *See* Exec. Order No. 222, 66 Fed. Reg. at 57,833.

42. *See Youngstown Sheet & Tube*, 343 U.S. at 635-37.

43. *See* Foreign Terrorist Military Tribunal Authorization Act of 2001, H.R. 3468, 107th Cong. (2001); Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

44. H.R. 3468.

45. *See id.* §§ 2(b), 2(d), 3-4.

States.”<sup>46</sup> The proposal thus suggests that any domestic trial for terrorist activities must be convened before an existing civil tribunal. The duration of military tribunals would also be subject to a sunset provision, which provides that “[n]o military tribunal may be convened under this Act after December 31, 2005.”<sup>47</sup> The House bill further limits the scope of military commissions by requiring the President to submit periodic reports to Congress about any military commissions actually convened.<sup>48</sup>

This House bill would impose additional limitations on military commissions. For example, only *noncitizens* apprehended outside of the United States would be subject to the commissions’ jurisdiction.<sup>49</sup> This provision is partially consistent with the Executive Order, which specifies that only noncitizens would be tried under the jurisdiction of the military commissions.<sup>50</sup> The only offenses over which tribunals convened under the provisions of this bill would have jurisdiction arise out of the Authorization for Use of Military Force.<sup>51</sup> The proposed bill also reflects the constitutional constraint of Article I, Section 9, that habeas corpus “may only be suspended in cases of rebellion or invasion and only by law.”<sup>52</sup> Finally, the bill limits the term “military tribunal” to a “military commission or other tribunal referred to in section[s] 821 and 836 of title 10, United States Code.”<sup>53</sup>

The proposed legislation filed in the Senate appears more ambitious than the House proposal and develops the legal issues surrounding military commissions in greater detail.<sup>54</sup> On February 13, 2002, Senators Specter and Durbin introduced the Military Commission Procedure Act of 2002.<sup>55</sup> Their bipartisan proposal indicated Congress’ interest and concern in having a role in the execution of the President’s proposal for establishing military commissions.<sup>56</sup> The Senate proposal raises

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46. *Id.* § 2(b).

47. *Id.* § 2(d).

48. *Id.* § 2(c).

49. *Id.* § 3.

50. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

51. *See* H.R. 3468 § 4; Authorization for Use of Military Force, 50 U.S.C.A. § 1541 (West Supp. 2002) (to be published at 50 U.S.C. § 1541). The Joint Resolution passed by Congress authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”

52. H.R. 3468 § 5; U.S. CONST. art. I, § 9.

53. H.R. 3468 § 6(1).

54. *See* Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002).

55. 148 CONG. REC. S733-34 (daily ed. Feb. 13, 2002) (statement of Sen. Specter).

56. *See id.*



important separation of powers concerns reflected in its reference to Congress's constitutional powers under Article I, Section 8.<sup>57</sup>

Like the House bill, the Senate proposal provides that only non-citizens accused of terrorist activities shall be subject to the jurisdiction of the military commissions.<sup>58</sup> Again, this provision reflects the jurisdictional limitation specified in the Executive Order.<sup>59</sup> However, the Senate proposal limits the jurisdiction of the military commissions to violations of "the international law of war."<sup>60</sup>

Although the Executive Order provides for free military defense counsel and further specifies the right of the defendant to retain private counsel who meet certain security clearance requirements, the Senate bill mandates that defendants shall have the same right of representation as would an accused facing a general court martial under chapter 47 of title 10 of the United States Code.<sup>61</sup> In addition, certain travel expenses of privately retained counsel would be paid by the Secretary of Defense.<sup>62</sup>

Other important provisions of the Senate proposal include: (1) the right to confront and cross-examine witnesses,<sup>63</sup> (2) the presumption of innocence,<sup>64</sup> (3) the prosecutor's burden of proof beyond a reasonable doubt,<sup>65</sup> (4) the need for a two-thirds majority vote for conviction of noncapital offenses,<sup>66</sup> and (5) the mandate for a unanimous vote for conviction of capital offenses.<sup>67</sup> Moreover, the Senate bill provides that, although statements made by the defendant are generally admissible, compelled testimony is prohibited, and commissions are forbidden from drawing any evidentiary inference from a defendant's failure to testify.<sup>68</sup>

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57. See S. 1937 § 2.

58. *Id.* § 3; see H.R. 3468 § 3.

59. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

60. S. 1937 § 4.

61. *Id.* § 6(a).

62. *Id.* § 6(b)(2).

63. *Id.* § 7(b)(1).

64. *Id.* § 7(d)(1).

65. *Id.* § 7(d)(2).

66. *Id.* § 7(e)(1)(B).

67. *Id.* § 7(e)(1)(A).

68. *Id.* § 8(a). As Senator Specter noted in his statement introducing this bill:

[W]e have provided that there would be no "Miranda" rights for suspects who are interrogated. I candidly concede that in abrogating "Miranda" rights, that will be a source of some contention, which can be the subject of hearings. But it is our view that we should not give al-Qaida or Taliban prisoners access to counsel before they are questioned, first, for the safety of the soldiers who are doing the questioning, and, second, because of the importance, potentially, that eliciting information would stop further terrorist attacks.

Classified information tendered by the prosecution can be received and considered by the commission *ex parte* and *in camera*.<sup>69</sup>

Section 9 of the proposed Senate bill addresses the right of a defendant to appeal from a conviction by a military commission.<sup>70</sup> Unlike the President's Executive Order and the Department of Defense's Military Commission Order No. 1, which limit appellate review to the President or the Secretary of Defense,<sup>71</sup> this Bill establishes a civilian "Court of Appeals for Military Commissions."<sup>72</sup> This court would consist of three judges from the United States Courts of Appeals appointed by the Chief Justice of the United States Supreme Court.<sup>73</sup> Decisions of this court would be subject to review by the Supreme Court through writs of certiorari.<sup>74</sup>

### C. Potential Applicability of the Geneva Convention

Although the Executive Order, the Department of Defense's Military Commission Order No. 1, and the congressional bills contain safeguards for those who may be prosecuted before military commissions, the role of international instruments applicable to the United States may bear on the legality of the military commissions.<sup>75</sup> In particular, the question arises whether the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention (III)) plays a role in determining the legality of these commissions under international law.<sup>76</sup> Consequently, a brief word must be offered about the application of Geneva Convention (III).

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Of course, we could provide no "Miranda" warnings in advance but not allow admissions to be used at trial, but it is our view, subject to hearings and further consideration, that "Miranda" rights ought not to be required.

148 CONG. REC. S733 (daily ed. Feb. 13, 2002) (statement of Sen. Specter).

69. S. 1937 § 8(c)(1). The Additional Protocol I of 1977 to the Geneva Conventions of 1949 also addresses *in camera* proceedings designed to protect matters of state security. Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Dec. 12, 1977, art. 45(2), 1125 U.N.T.S. 3, 24, 16 I.L.M. 1391, 1411 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

70. S. 1937 § 9.

71. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,835 (Nov. 16, 2001); U.S. Dep't of Defense: Military Commission Order No. 1, Mar. 21, 2002, 41 I.L.M. 725, 735 [hereinafter Military Commission Order No. 1].

72. S. 1937 § 9(b).

73. *Id.*

74. *Id.* § 9(c)(1).

75. See Exec. Order No. 222, 66 Fed. Reg. at 57,833; Military Commission Order No. 1, *supra* note 71; Foreign Terrorist Military Tribunal Authorization Act of 2001, H.R. 3468, 107th Cong. (2001); S. 1937.

76. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

Valid concerns have been raised about whether those persons detained and tried before military commissions under the Executive Order will be afforded the protections granted to prisoners of war under Geneva Convention (III).<sup>77</sup> This presents a fundamental question about who is eligible for the protections of prisoner of war status under Geneva Convention (III).<sup>78</sup> A review of this Convention, as amplified by Additional Protocol I of 1977, demonstrates that persons involved with terrorist activities do not fall within the protection of the Geneva Convention and Additional Protocol I.<sup>79</sup>

First, article 1 of Geneva Convention (III) speaks to the responsibilities of the “High Contracting Parties” and their personnel to whom the Convention’s protections are to be accorded.<sup>80</sup> The term “High Contracting Parties” refers to the parties to the Convention, and it is unlikely that terrorist organizations and their members fall into this category.<sup>81</sup> Additionally, article 3 states in relevant part that “each Party to the conflict shall be bound to apply, as a minimum” certain provisions.<sup>82</sup> Among these provisions, articles 3(1)(a) and (b) prohibit violence against the lives of those “taking no active part in the hostilities,” murder, and the taking of hostages.<sup>83</sup> Without doubt, the terrorists of September 11, 2001, violated these prohibitions.<sup>84</sup> Even if terrorists might otherwise be protected under the provisions of Geneva Convention (III), they extinguish their eligibility for these safeguards by taking innocent civilians hostage and flying them to their deaths in hijacked airliners.<sup>85</sup>

Article 4 also implies that members of terrorist organizations cannot avail themselves of the protections of Geneva Convention (III).<sup>86</sup> Provision A(1) of article 4 confers prisoner of war status on “[m]embers of the armed forces of a Party to the conflict.”<sup>87</sup> Article 4(A)(2) extends

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77. *See id.*

78. *See id.*

79. *See id.* art. 4; Protocol I, *supra* note 69, art. 44. Article 4 of Geneva Convention (III) grants prisoner of war status to the armed forces, militia, volunteer corps, civilians accompanying the armed forces, crew members, and inhabitants of nonoccupied territory only. Geneva Convention (III), *supra* note 76, art. 4. Protocol I specifically excludes spies and mercenaries from prisoner of war status. Protocol I, *supra* note 69, arts. 46-47.

80. Geneva Convention (III), *supra* note 76, arts. 1-11.

81. *See id.*

82. *Id.* art. 3.

83. *Id.*

84. *See id.*

85. *See id.*

86. *See id.* art. 4.

87. *Id.* art. 4(A)(1).

that status to irregular military operatives who fulfill certain conditions.<sup>88</sup> Even if the Taliban or al-Qaeda associates could be characterized as irregular military operatives, they do not employ “a fixed distinctive sign recognizable at a distance”<sup>89</sup> nor do they carry “arms openly”<sup>90</sup> or conduct “their operations in accordance with the laws and customs of war.”<sup>91</sup> These persons therefore remain outside the protections provided to prisoners of war under Geneva Convention (III).<sup>92</sup>

Additional Protocol I elaborates on the standing of those persons entitled to prisoner of war status.<sup>93</sup> Again, it appears that terrorists would not be entitled to the Protocol’s shelter. For example, article 44(3) dictates that “combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack” in order to “promote the protection of the civilian population from the effects of hostilities.”<sup>94</sup> A combatant who fails to carry his arms openly shall, under article 44(4), “forfeit his right to be a prisoner of war.”<sup>95</sup> Additionally, under article 46(1), those who engage in espionage forfeit the right to prisoner of war status and shall be treated as spies.<sup>96</sup> The terrorists who entered the United States and committed the September 11, 2001, acts violated most of these provisions.<sup>97</sup> Accordingly, the President could sensibly apply the term

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88. *Id.* art. 4(A)(2). The military operatives, in order to qualify for prisoner of war status, must: (1) be commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognizable at a distance, (3) carry their arms openly, and (4) conduct their operations in accordance with the laws of war. *Id.* art. 4(A)(2)(a)-(d).

89. *Id.* art. 4(A)(2)(b).

90. *Id.* art. 4(A)(2)(c).

91. *Id.* art. 4(A)(2)(d).

92. *See id.*

93. Protocol I, *supra* note 69, arts. 43-47.

94. *Id.* art. 44(3).

95. *Id.* art. 44(4).

96. *Id.* art. 46(1). The United States Supreme Court has also upheld the notion that spies relinquish their prisoner of war status. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 35-36 (1942). The Court observed:

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of *unlawful combatants* punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

*Id.* (emphasis added) (citations omitted).

97. *See* Protocol I, *supra* note 69, arts. 43-46.

“unlawful combatants” to members of terrorist organizations who do not abide by the law of war and the law of nations.<sup>98</sup>

The United States Supreme Court, in *Ex parte Quirin*, provided support for this proposition through its reliance on the term “unlawful combatants.”<sup>99</sup> In discussing Nazi operatives who were clandestinely inserted into the United States with missions to attack both military and civilian targets, the Court stated:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and *unlawful combatants*. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.<sup>100</sup>

Although the *Quirin* case was decided seven years before the finalization of the Geneva Conventions of 1949, it emerged from the experience of the Second World War, which supplied the historical context that provided the catalyst for the Geneva Convention (III). This history raises the question whether precedent existed for the military tribunals and commissions mentioned by the *Quirin* Court.

To properly understand the role and legality of military commissions, there is need to appreciate the historical context regarding their use. During the American Civil War, the Union used military commissions or tribunals extensively for the trial of offenses against the law of war.<sup>101</sup> However, in *Ex parte Milligan*, the Supreme Court held that U.S. civilian citizens may not be tried before military commissions, but must be tried before civilian courts, in accordance with the right to trial by jury guaranteed by the Sixth Amendment, if those courts are open and functioning.<sup>102</sup> The constitutional provision for a right to trial by jury

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98. See *Ex parte Quirin*, 317 U.S. at 30-31.

99. See *id.* at 31.

100. *Id.* at 30-31 (emphasis added) (citations omitted).

101. *Id.* at 32 n.10.

102. *Ex parte Milligan*, 71 U.S. 281, 296 (1866).

for a variety of offenses has been reemphasized in more recent times.<sup>103</sup> However, it remains clear that “the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission” against aliens.<sup>104</sup>

### III. A COMPARISON AND CONTRAST—FROM THE PERSPECTIVE OF NUREMBERG AND THE INTERNATIONAL CRIMINAL COURT (ICC)

In order to assess the legality of the military commissions provided for by the President’s Executive Order under international law, it is useful to look at the principal models of international tribunals, namely, the Nuremberg tribunal after the Second World War and the new International Criminal Court.<sup>105</sup> As the President’s proposal is still subject to some modification due to the legislation recently introduced into Congress and discussed above, the following analysis is merely preliminary.

#### A. *Nuremberg*

The use of military tribunals and commissions to provide due process of law in unconventional situations, while uncommon, is not without precedent. During the Second World War, the Allied Forces examined the use of military tribunals to try the leaders of the Axis countries responsible for crimes against peace and security of mankind, war crimes, and genocide.<sup>106</sup> A similar tribunal was proposed and established for international crimes committed by officials of Imperial Japan.<sup>107</sup> While the International Military Tribunal for Germany (IMT) has been accused of applying “victor’s justice,” the allies were generally careful, given the times, to ensure that defendants were afforded due process of law.<sup>108</sup> In some cases, defendants were acquitted of certain

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103. See, e.g., *Reid v. Covert*, 354 U.S. 1, 10 (1957); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960); *United States v. Averette*, 41 C.M.R. 363, 364-65 (1970); *United States v. Grossman*, 42 C.M.R. 529, 530 (1970).

104. *Ex parte Quirin*, 317 U.S. at 45.

105. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Charter of the IMT]; Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

106. Adriaan Bos, *The International Criminal Court: A Perspective*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS, *supra* note 17, at 465.

107. See *id.* at 465.

108. *Id.* at 466. See generally *Rules of Procedure*, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 19-23 (Int’l Military Tribunal, Nuremberg 1947) [hereinafter *Rules of Procedure*]. The defendants had the right to receive copies of the indictment, the charter of the IMT, and any other documents lodged with the

charges.<sup>109</sup> In others, they were found guilty, and several paid the ultimate penalty by forfeiting their lives under capital punishment.<sup>110</sup>

While the realities of the atrocities perpetrated by the Axis powers were just beginning to be registered, those responsible for the administration of the Nuremberg trials were mindful that the world was watching.<sup>111</sup> As a consequence, careful measures were taken to ensure that the justice administered was fair and not inspired by revenge.<sup>112</sup> Similarly, the President's Executive Order satisfies the safeguards given the defendants accused and tried by the Nuremberg tribunals.<sup>113</sup>

The IMT shares a background with the military commissions proposed by President Bush. When atrocities occur and awaken the conscience, the question of what the law—both domestic and international—can do about such things has been and is still asked. In the aftermath of the Second World War, the victorious allies agreed upon the need to bring those responsible for heinous crimes to justice.<sup>114</sup> A comparison between the IMT and the military commissions called for under the Executive Order proves useful in assessing how the international legal community would evaluate those military commissions.

The London Agreement, signed by the United States, the Provisional Government of the French Republic, the United Kingdom, and the Soviet Union, established the IMT for “the just and prompt trial and punishment of the major war criminals of the European Axis.”<sup>115</sup> One of the crimes over which the IMT had jurisdiction was war crimes, “namely, violations of the laws or customs of war.”<sup>116</sup> Likewise, section 1(e) of the Executive Order would establish military commissions that would try suspected terrorists “for violations of the laws of war and other applicable laws.”<sup>117</sup>

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indictment, translated into a language understandable to each individual defendant. *Id.* at 19. Defendants also had the right to counsel and to production of evidence. *Id.* at 19-20.

109. See *Sentences*, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 108, at 366-67.

110. *Id.*

111. Letter from Justice Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, to President Franklin Roosevelt, Parts III, IV (June 6, 1945), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm> (last visited Apr. 8, 2003).

112. See *Rules of Procedure*, *supra* note 108, at 19-23.

113. See Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001).

114. *London Agreement of 8 August 1945*, in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 108, at 8.

115. Charter of the IMT, *supra* note 105, art. 1.

116. *Id.* art. 6.

117. Exec. Order No. 222, 66 Fed. Reg. at 57,833.

Normally, when a person accused of a criminal offense is brought to trial, he or she may have grounds for challenging a judge and, in the common law systems, a juror.<sup>118</sup> However, under article 3 of the Charter for the IMT, neither the prosecutor nor the defense counsel could challenge the tribunal or any of its members.<sup>119</sup> The Executive Order, on the other hand, does not address judge or jury challenges.<sup>120</sup> Arguably, a defendant who stands trial before a military commission would not be contravening Military Commission Order No. 1 by challenging a member or members of the commission.<sup>121</sup> In such a case the commission would presumably have the discretion to hear and consider the defendant's request challenging any member.<sup>122</sup>

The IMT was obliged under article 16 of its Charter to "ensure [a] fair trial" for each defendant.<sup>123</sup> Likewise, any noncitizen subject to trial before military commissions established under the Executive Order would similarly be entitled to "a full and fair trial."<sup>124</sup> Both the IMT and the military commissions have further, more specific, obligations regarding what constitutes a "fair trial."<sup>125</sup> Under article 16(a) of the IMT Charter, each defendant subject to an indictment must be provided with the full particulars and details of the charge(s) and furnished with translations of the charge(s) in a language understood by the defendant.<sup>126</sup> The military commissions, in accordance with Military Commission Order No. 1, are to provide the accused, "sufficiently in advance of trial

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118. In the United States, a criminal defendant has the right to challenge a juror either peremptorily or for cause during *voir dire*. See *Swain v. Alabama*, 380 U.S. 202, 217 (1965). Under the cause requirement, the challenging party must satisfy the judge that there is a sufficient likelihood that the prospective juror is biased in some way. *Id.* at 220 (stating "challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality"). When a defendant makes a peremptory challenge, it may be exercised in specified numbers without giving any reason and without control of the court. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3 (West Group 2d ed. 1999). Like jurors, trial judges are also subject to challenge for cause if the defendant can show that the judge suffers from personal bias or prejudice, normally through the filing of an affidavit stating these facts. *Id.* § 22.4. In about one-third of the states, a defendant can also challenge an assigned judge peremptorily, meaning that the defendant does not have to allege or prove the precise facts that lead him to believe he cannot get a fair trial. *Id.*

119. Charter of the IMT, *supra* note 105, art. 3.

120. See Exec. Order No. 222, 66 Fed. Reg. at 57,833-36.

121. See Military Commission Order No. 1, *supra* note 71, at 726. Section 4 A(3) of Military Commission Order No. 1 specifies that a member of the Commission may be removed "for good cause" by the Appointing Authority (the Secretary of Defense). *Id.*

122. See *id.*

123. Charter of the IMT, *supra* note 105, art. 16.

124. Exec. Order No. 222, 66 Fed. Reg. at 57,835.

125. Charter of the IMT, *supra* note 105, art. 16; Military Commission Order No. 1, *supra* note 71, at 728-30.

126. Charter of the IMT, *supra* note 105, art. 16.



to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the [a]ccused understands.”<sup>127</sup>

Under the IMT Charter, no defendant had the right to remain silent.<sup>128</sup> The Tribunal could “interrogate any [d]efendant” and “put any question . . . to any [d]efendant, at any time.”<sup>129</sup> During the proceedings of the military commissions established by the Executive Order, however, an accused has the right to remain silent without any adverse inference to be made from the accused’s choosing not to testify in self-defense.<sup>130</sup> Although neither the Charter of the IMT nor the Executive Order speaks to the presumed innocence of a defendant,<sup>131</sup> Military Commission Order No. 1 specifies that the “[a]ccused shall be presumed innocent until proven guilty.”<sup>132</sup>

An important right of a criminal defendant is the right to be represented by counsel. The IMT Charter, in article 16(d), recognized this right; however, no provision was initially made regarding the tribunal’s obligation to provide counsel if the defendant did not have a lawyer.<sup>133</sup> Subsequently, the IMT, in its rules of procedure adopted October 29, 1945, made provisions for defense counsel for the accused.<sup>134</sup> In contrast, the military commissions provide a Chief Defense Counsel, a judge advocate of any U.S. armed force, to conduct the defense for each case.<sup>135</sup> These counsel must be members of any judge advocate staff and are obliged to “defend the [a]ccused zealously within the bounds of the law without regard to personal opinion as to the guilt of the [a]ccused.”<sup>136</sup> The accused may also have, at his or her own expense, civilian defense counsel who meets certain professional and security criteria.<sup>137</sup> However, civilian defense counsel may be barred from closed commission proceedings or denied access to protected information.<sup>138</sup>

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127. Military Commission Order No. 1, *supra* note 71, at 728.

128. *See* Charter of the IMT, *supra* note 105, arts. 16-24.

129. *Id.* arts. 16, 24.

130. Military Commission Order No. 1, *supra* note 71, at 729.

131. *See* Charter of the IMT, *supra* note 105; Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

132. Military Commission Order No. 1, *supra* note 71, at 728.

133. *See* Charter of the IMT, *supra* note 105, art. 16(d).

134. *Rules of Procedure*, *supra* note 108, at 19. The revised rules of January 8, 1948, elaborated upon the rights of the accused either to conduct his own defense or to have counsel provided for him under Rule 7(c). *See Uniform Rules of Procedure, Military Tribunals, Nürnberg, Revised to 8 January 1948*, Rule 7, available at <http://www.yale.edu/lawweb/avalon/imt/rules5.htm> (last visited Apr. 8, 2003).

135. Military Commission Order No. 1, *supra* note 71, at 727.

136. *Id.* at 727-28.

137. *Id.* at 728.

138. *Id.*

The IMT rules of procedure provided the accused the right to confront and cross-examine witnesses called by the prosecution.<sup>139</sup> The Military Commission Order provides the same right.<sup>140</sup> The deliberations of both the IMT and the military commissions were or are completed without juries.<sup>141</sup> This is the custom of criminal trials in the civil law tradition.<sup>142</sup>

The standard of proof needed for conviction before the IMT was not addressed in the Charter or the Rules of Procedure.<sup>143</sup> However, the Charter states that the IMT “shall not be bound by technical rules of evidence”; moreover, it would “admit any evidence which it deems to have probative value.”<sup>144</sup> The Executive Order is also silent concerning the prosecution’s burden of proof, although Military Commission Order No. 1 mandates that each commission member, in order to vote for a guilty finding for each offense, must be convinced of guilt “beyond a reasonable doubt.”<sup>145</sup> The Military Commission Order also specifies that evidence is admissible when it has “probative value to a reasonable person.”<sup>146</sup> In addition, the Executive Order states that “the rules of evidence generally recognized in the trial of criminal cases” in federal district courts would not apply to the military commissions.<sup>147</sup>

The IMT Charter did not address the matter of public trials.<sup>148</sup> The Executive Order is similarly silent on whether trials conducted by military commissions are to be public.<sup>149</sup> However, the Military Commission Order grants the accused “a trial open to the public.”<sup>150</sup> Nonetheless, the presiding officer of any military commission may close certain proceedings to the public and hold them *in camera*.<sup>151</sup>

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139. Charter of the IMT, *supra* note 105, art. 16(e).

140. Military Commission Order No. 1, *supra* note 71, at 729.

141. *Id.* at 734; Charter of the IMT, *supra* note 105, arts. 26-28.

142. *See generally* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 124-32 (Stanford Univ. Press, 2d ed. 1985).

143. *See* Charter of the IMT, *supra* note 105; *Rules of Procedure*, *supra* note 108.

144. Charter of the IMT, *supra* note 105, art. 19.

145. Military Commission Order No. 1, *supra* note 71, at 728.

146. *Id.* at 731.

147. Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

148. Charter of the IMT, *supra* note 105.

149. *See* Exec. Order No. 222, 66 Fed. Reg. at 57,833.

150. Military Commission Order No. 1, *supra* note 71, at 729.

151. *Id.* Under section 6(B)(3), the grounds for closing certain proceedings include: the protection of classified information or information otherwise protected under law; the safety of witnesses and other participants; and intelligence, law enforcement, and national security interests. *Id.* at 731. This same provision notes that “[p]roceedings should be open to the maximum extent practicable.” *Id.*

Upon conviction of the defendant, the IMT could impose the death sentence.<sup>152</sup> The military commissions subject to the Executive Order can also enforce the death sentence.<sup>153</sup> However, the commission can only impose the death sentence by a unanimous vote of all members of the commission.<sup>154</sup> The IMT decisions were final; hence, there was no appeal.<sup>155</sup> In contrast, the Executive Order indicates the opportunity for review of conviction by the President or Secretary of Defense.<sup>156</sup>

Finally, the IMT Charter did not address the treatment to be accorded to those individuals in its custody.<sup>157</sup> The Executive Order, in contrast, specifies that individuals detained under it are to be accorded humane treatment “without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria.”<sup>158</sup> In addition, detainees are to be “afforded adequate food, drinking water, shelter, clothing, and medical treatment” and “allowed the free exercise of religion consistent with the requirements” of detention.<sup>159</sup> Although these detainees arguably do not hold the status of prisoners of war, they nonetheless receive many of the same protections accorded to prisoners of war under Geneva Convention (III) and Additional Protocol I.<sup>160</sup>

### B. *The ICC*

A second, contemporary standard for evaluating the military commissions may be found in the context of the provisions for the International Criminal Court.<sup>161</sup> The ICC provides another international framework in which to evaluate the military commissions proposed by President Bush. The ICC is the most recent international effort to address the due process of law accorded to those accused of committing the “most serious crimes of international concern.”<sup>162</sup> The ICC will have jurisdiction over such atrocities as genocide, crimes against humanity,

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152. Charter of the IMT, *supra* note 105, art. 27.

153. Exec. Order No. 222, 66 Fed. Reg. at 57,834.

154. Military Commission Order No. 1, *supra* note 71, at 734. Military Commission Order No. 1 elaborates upon this review mechanism. *Id.* at 734-35.

155. Charter of the IMT, *supra* note 105, art. 26.

156. Exec. Order No. 222, 66 Fed. Reg. at 57,835.

157. *See* Charter of the IMT, *supra* note 105.

158. Exec. Order No. 222, 66 Fed. Reg. at 57,834.

159. *Id.*

160. *See* Geneva Convention (III), *supra* note 76; Protocol I, *supra* note 69.

161. Rome Statute, *supra* note 105. On April 11, 2002, the ICC received the sixty ratifications required for the Statute to enter into force. Coalition for the International Criminal Court, *Country Information*, at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (last visited Mar. 10, 2003).

162. Rome Statute, *supra* note 105, art. 1.

war crimes, and the crime of aggression.<sup>163</sup> As previously discussed, earlier efforts to include international terrorism as a crime under the Rome Statute have so far proved unsuccessful.<sup>164</sup>

The Rome Statute does address certain specific crimes that have ties with the unlawful actions taken by some terrorists. For example, the Statute includes provisions for: prosecuting those responsible for murder, torture, or inhuman treatment; taking hostages; intentionally directing attacks against civilian populations or civilian objects; attacking or bombing places and buildings which are not military objectives; employing weapons and methods of warfare which cause superfluous injury or unnecessary suffering; and committing outrages upon personal dignity.<sup>165</sup> The President's proposal for military commissions would also try individuals "for violations of the laws of war and other applicable laws."<sup>166</sup>

As previously mentioned, when a person is brought to trial for alleged misconduct under international law, this individual may have grounds for challenging a judge and, in the common law systems, a juror.<sup>167</sup> Unlike the case with the IMT, an accused brought before the ICC could arguably challenge the judges of the ICC.<sup>168</sup> The Military Commission Order No. 1 does not specifically address a defendant's ability to challenge a judge, but a defendant is not barred from challenging a member, or members, of the commission.<sup>169</sup> Presumably, the commission would have the discretion to hear and consider the defendant's request challenging any member, as members of any commission may be removed for "good cause."<sup>170</sup>

The ICC must "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused."<sup>171</sup> Any noncitizen subject to trial before military commissions would similarly be entitled to "a full and fair trial."<sup>172</sup> Both the ICC and the military commissions have further obligations under the definition of a "fair trial."<sup>173</sup> Before the ICC, each defendant is to be "informed promptly and

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163. *Id.* art. 5.

164. *See* discussion *infra* Part II.A.

165. Rome Statute, *supra* note 105, arts. 7-8.

166. Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

167. *See* discussion *infra* note 128.

168. *See* Rome Statute, *supra* note 105, art. 46.

169. *See* Military Commission Order No. 1, *supra* note 71, at 726.

170. *Id.*; *see* discussion *infra* note 121.

171. Rome Statute, *supra* note 105, art. 64(2).

172. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,835 (Nov. 16, 2001).

173. *See* Rome Statute, *supra* note 105, arts. 53-85; Military Commission Order No. 1, *supra* note 71, at 726-35.

in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.”<sup>174</sup> The military commissions similarly are to provide the accused, “sufficiently in advance of trial . . . a copy of the charges in English and, if appropriate, in another language that the [a]ccused understands.”<sup>175</sup>

Under the ICC, the accused has the right to remain silent both during investigations and at the trial, without having that silence considered in ascertaining guilt or innocence.<sup>176</sup> Under the proceedings of the military commissions, an accused also has the right to remain silent without any adverse inference drawn from the accused’s choosing not to testify in self-defense.<sup>177</sup> The Rome Statute presumes the innocence of the accused.<sup>178</sup> Although the Executive Order is silent on the matter, Military Commission Order No. 1 specifies that the accused “shall be presumed innocent until proven guilty.”<sup>179</sup>

A crucial right of a criminal defendant is the right to be represented by counsel. The Rome Statute provides for the appointment of counsel during the investigation and trial.<sup>180</sup> The military commissions subject to the Executive Order are obliged to assign military defense counsel who must “defend the [a]ccused zealously within the bounds of the law without regard to personal opinion as to the guilt of the [a]ccused.”<sup>181</sup> Under the Military Commission Order, the accused may also have, at his or her own expense, civilian defense counsel who meets certain professional and security criteria.<sup>182</sup> However, it is possible that civilian defense counsel may be barred from closed commission proceedings or denied access to protected information.<sup>183</sup> The Rome Statute provides that the accused shall have counsel of his or her own choosing, and the ICC will appoint counsel if the accused is not capable of paying for counsel.<sup>184</sup>

The Rome Statute also provides for the right of the accused to confront and cross-examine witnesses called by the prosecution.<sup>185</sup> The

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174. Rome Statute, *supra* note 105, art. 67(1)(a).

175. Military Commission Order No. 1, *supra* note 71, at 728.

176. Rome Statute, *supra* note 105, art. 67(1)(g).

177. Military Commission Order No. 1, *supra* note 71, at 729.

178. Rome Statute, *supra* note 105, art. 66(1).

179. *See* Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 16, 2001); Military Commission Order No. 1, *supra* note 71, at 728.

180. Rome Statute, *supra* note 105, arts. 55(2)(c), 67(1)(d).

181. Military Commission Order No. 1, *supra* note 71, at 728.

182. *Id.*

183. *Id.*

184. Rome Statute, *supra* note 105, arts. 55(2)(c), 67(1)(d).

185. *Id.* art. 67(1)(e).

military commissions provide the same right.<sup>186</sup> The deliberations of both the ICC and the military commissions are made without juries.<sup>187</sup> The standard of proof needed for conviction before both the ICC and the military commissions established by the Executive Order is “beyond a reasonable doubt.”<sup>188</sup> The Rome Statute provides that the relevance or admissibility of evidence shall be based on its probative value balanced against its potential for prejudice.<sup>189</sup> Moreover, the ICC is not to rely on national law in determining the admissibility of evidence.<sup>190</sup> The ICC Rules of Procedure and Evidence give further guidance for ruling on the admissibility of evidence.<sup>191</sup> Although the Executive Order did not provide the prosecution’s burden of proof, Military Commission Order No. 1 specifies that each member, in voting for conviction, must be convinced of guilt “beyond a reasonable doubt.”<sup>192</sup> The Order also specifies that, to be admissible, evidence must have “probative value to a reasonable person.”<sup>193</sup>

The Rome Statute mandates that trials are to be conducted in public.<sup>194</sup> Military Commission Order No. 1 also states that the accused “shall be afforded a trial open to the public.”<sup>195</sup> However, both the ICC and the presiding officer of any military commission may exercise discretion to close certain proceedings and hold them *in camera*.<sup>196</sup> In both tribunals, concerns about witness and victim protection and national security may be grounds for closing the proceedings.<sup>197</sup>

Upon conviction of the accused, which requires a majority vote, the ICC can impose a maximum sentence of life imprisonment.<sup>198</sup> The death sentence is not permitted in any conviction by the ICC.<sup>199</sup> The military commissions subject to the Executive Order may impose either

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186. Military Commission Order No. 1, *supra* note 71, at 729.

187. See Rome Statute, *supra* note 105, art. 74; Military Commission Order No. 1, *supra* note 71, at 734.

188. Rome Statute, *supra* note 105, art. 66(3); Military Commission Order No. 1, *supra* note 71, at 728.

189. Rome Statute, *supra* note 105, art. 69(4).

190. *Id.* art. 69(8).

191. See THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 773-843 (Roy S. Lee ed., Transnational Publishers, Inc. 2001).

192. Military Commission Order No. 1, *supra* note 71, at 728.

193. *Id.* at 731.

194. Rome Statute, *supra* note 105, art. 64(7).

195. Military Commission Order No. 1, *supra* note 71, at 729.

196. Rome Statute, *supra* note 105, art. 64(7); Military Commission Order No. 1, *supra* note 71, at 729, 731; see discussion *infra* note 151.

197. Rome Statute, *supra* note 105, art. 64(7); Military Commission Order No. 1, *supra* note 71, at 731.

198. Rome Statute, *supra* note 105, art. 77(1)(b).

199. See *id.* art. 77.

imprisonment or the death sentence.<sup>200</sup> However, the death sentence can only be imposed with a unanimous vote of all members of the commission.<sup>201</sup> Unlike the simple majority rule for the ICC, sentences of imprisonment must meet the approval of at least two thirds of the commission's membership.<sup>202</sup> The ICC decisions of the Trial Panel for either *acquittal* or *conviction* can be appealed by the prosecutor or the accused.<sup>203</sup> The Executive Order only provides for the opportunity for review of conviction or sentence by the President or Secretary of Defense.<sup>204</sup>

#### IV. CONCLUSION—SUGGESTIONS AND EVALUATION

The rule of law is vital to combat terrorism and to preserve a society in which each person enjoys the protection of the law. The rule of law simultaneously takes into consideration the protection of the individual and the promotion of the common good. In an attempt to demonstrate these points, this essay has provided a brief overview of the historical and current legal contexts in which the President's proposal for military commissions would operate. In particular, this essay presents a concise overview of the international and domestic law that addresses terrorism. It also examines the legal history of noteworthy cases, in which military tribunals have been chosen over conventional civilian courts. This essay then compares and contrasts the components of President Bush's Executive Order with those of the Charter for the IMT and the Rome Statute of the ICC.

It must be remembered that this essay presents only a preliminary reflection on the proposal for military commissions to try noncitizens for terrorist and related acts. As the reflection continues and the proposals filed in Congress make their way through the legislative process, several other issues must be kept in mind. These matters, like the comparison with the IMT and the ICC, arise out of the world of international law. A major source of testing the due process afforded by the military commissions will undoubtedly come from members of the international legal community. Consequently, it would be advisable to test the substantive content of the Executive Order, Military Commission Order No. 1, and the pending legislation against fundamental requirements of due

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200. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

201. Military Commission Order No. 1, *supra* note 71, at 734.

202. Exec. Order No. 222, 66 Fed. Reg. at 57,835.

203. Rome Statute, *supra* note 105, art. 81(2)(a).

204. Exec. Order No. 222, 66 Fed. Reg. at 57,835.

process of law, such as those mentioned in the Universal Declaration of Human Rights (UDHR).<sup>205</sup>

A first principle concerns those individuals presently in detention from the Afghan conflict. The UDHR states that no one is to be subject to arbitrary arrest.<sup>206</sup> This is not to say that those who have been involved with, or who have likely been involved with, terrorist activities should not be held in custody. However, in order to justify detention, there must be reasonable grounds so that any detention is not criticized as being arbitrary.

Article 10 of the UDHR also mandates that any person criminally charged, either for terrorism or other violations of international law, be entitled to a “fair and public hearing.”<sup>207</sup> The procedures outlined for the military commissions seem to suggest fairness. However, concerns remain regarding the extent to which the proceedings are to remain open. On the other hand, if the military commissions are subject to criticism for reserving the right to hold certain proceedings *in camera*, other international tribunals such as the International Criminal Court may be subjected to the same censure. It is also essential that the presumption of innocence be maintained and never be the subject of compromise.<sup>208</sup>

With a sense of what international law requires for criminal due process, Americans, as members of a nation and of the human family, might be better equipped to address terrorists and terrorism by providing those individuals with the guarantees we would require for ourselves. In any event, there seems to be some reasonable basis for raising questions about the legality of military commissions. At the same time, there also appears to be credible legal standing justifying the President’s proposal for military commissions. In this regard, the advice given by Justice Jackson a half-century ago should still guide us today. In this way, a stronger sense of justice—for them, for us, and for posterity—is assured.

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205. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948).

206. *Id.* art. 9.

207. *Id.* art. 10.

208. *Id.* art. 11.