Military Commissions at a Crossroads: Defining the “Law of War” on Terrorism. By Sara Aronchick Solow

The meaning of “terrorism” under U.S. domestic law and under international law differs significantly. This became strikingly clear in January 2010, when the military commission system put in place by the Military Commissions Act of 2009 wrestled with its first two cases on appeal. As the government argued before the Court of Military Commissions Review, U.S. law has a relatively low bar for what constitutes terrorism. Acts of conspiracy, “material support,” and the circulation of propaganda all qualify and are punishable by harsh sentences. Under international law, meanwhile, there is a substantially higher bar for what constitutes a terrorist act. As the defendants in the proceedings of early 2010 demonstrated, conspiracy and “material support” are not terrorism under international law, and such acts would not give rise to harsh penalties under an international or domestic court applying the international law doctrines.

Given that U.S. and international law diverge on the substance of terrorism, military commissions convened in the United States for the purpose of trying alien combatants will be forced to pick among these varying legal standards. Under the Military Commissions Acts of 2006 and 2009, Congress erected a system of Article I courts for prosecuting “unprivileged enemy belligerents,” and it directed the commissions to adjudicate alleged violations of the “law of war.” As cases before the commissions increase, the judges will be forced to resolve a yet unsettled question: what “law of war” should they apply? This Recent Development argues that in the interest of constitutional law and international comity, military commissions should draw solely from international authorities when adjudicating and defining the “law of war” on terrorism.

I. “TERRORISM” UNDER INTERNATIONAL AND DOMESTIC LAW

Under international law, terrorism (or as the report puts it, the “direct participation in hostilities” by civilians) was defined by the International

2. Brief on Behalf of Appellee at 17-18, United States v. al Bahlul, CMCR Case No. 09-001 (U.S. Court of Military Comm’n Review Oct. 21, 2009).
3. Id.
Committee on the Red Cross (ICRC) in a report released in May 2009. The ICRC is a body whose “special position” in the field of armed conflict is recognized under the Geneva Conventions of 1949, and while its legal opinions are not directly binding on any international actor, they are routinely relied upon by drafting committees for treaties as well as by courts applying international law. In 2003, the ICRC sponsored a working group whose mandate would be to publish “interpretive guidance” on what activities amount to terrorism. Such a report was critical, the ICRC believed, because the international community needed clarification on who, in modern-day warfare, should be afforded civilian protections, given the range of ways that persons participate in hostilities. The ICRC group met with practitioners and scholars for five years. It surveyed Common Article 3 of the Geneva Conventions, Additional Protocol II, and a multitude of other international law authorities. In May 2009, the working group arrived at its conclusion: under international law, there are civilians, privileged combatants, and unprivileged combatants. To fall into the latter group and thus be deemed a terrorist, “the decisive criterion . . . is whether a person assumes a continuous function for [an organized armed] group involving his or her direct participation in hostilities.” Persons who contribute to armed groups “on a merely spontaneous, sporadic, or unorganized basis” do not qualify. These persons retain civilian protections, “similar to private contractors and civilian employees accompanying State armed forces.”

The United States has several terrorism statutes that sweep much broader than the ICRC’s interpretive guidance. In 1994 and 1996, Congress made it a crime to provide “material support” either to the commission of...
terrorist attacks\textsuperscript{14} or to terrorist organizations.\textsuperscript{15} These provisions are codified at § 2339A and § 2339B of title 18, respectively. One U.S. court has interpreted “material support” to include an act as small as contributing binoculars to a resistance movement,\textsuperscript{16} and the Obama administration has argued that providing a Kurdish separatist group training in international law also qualifies.\textsuperscript{17} In 2001 and 2004, Congress made both “material support” statutes extraterritorial in reach.\textsuperscript{18}

II. MILITARY COMMISSIONS AT A CROSSROADS: DEFINING THE “LAW OF WAR” ON TERRORISM

The United States’s present system of military commissions for prosecuting terrorist aliens is the product of two statutes. First, following the Supreme Court’s holding in \textit{Hamdan v. Rumsfeld},\textsuperscript{19} Congress passed the Military Commission Act of 2006, creating a set of Article I courts to try “unlawful enemy combatants” for “violations of law of war and other offenses triable by military commission.”\textsuperscript{20} Second, in the Military Commissions Act of 2009, Congress preserved the tribunals created by the 2006 Act but made several procedural improvements at the urging of President Obama.\textsuperscript{21} To date, the congressionally chartered military commissions have convicted in only three cases, two of which are now on appeal (the cases of Mr. al Bahlul and of Mr. Hamdan).\textsuperscript{22} Even after being reconstituted under the 2009 Act, the commissions are yet to adjudicate over a substantive trial; instead, their work to date has been adjudicating over motions regarding trial procedure, evidence, etc.\textsuperscript{23} However, the Obama administration has announced that it intends to use military commissions more frequently in combating terrorism.\textsuperscript{24}

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  \item\textsuperscript{17} Brief for Respondents at 27-30, Humanitarian Law Project v. Holder, No. 08-1498 (U.S. Dec. 22, 2009).
  \item\textsuperscript{19} 548 U.S. 557 (2006) (invalidating the system of military commissions that had been created pursuant Bush’s executive order in 2001).
  \item\textsuperscript{21} Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190.
  \item \textsuperscript{22} According to State Department Legal Adviser Harold Koh, these improvements—which range from making forced statements inadmissible, to restricting hearsay evidence, to requiring mandatory disclosure of exculpatory evidence—allow for the commissions’ inclusion in the administration’s “policy of prosecutions.” Harold Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama administration and International Law (Mar. 25, 2010) [hereinafter Koh Address].
  \item\textsuperscript{23} See U.S. Dep’t of Defense, Office of Military Comm’ns, \textit{supra} note 1.
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and should it try the 9/11 plotters in such commissions rather than in civilian courts, this would be a profound step in such a direction.

As the number of prosecutions before military commissions increases, the judges will face a yet-unanswered dilemma. What acts of terrorism constitute “violations of [the] law of war”—law which the commissions have been directed to apply?

The military commission judges will inevitably wrestle with the meaning of the “law of war” for two underlying reasons. First, although the MCA of 2009 empowers the commissions to convict “unprivileged enemy belligerents” for thirty enumerated offenses in addition to “violations of [the] law of war,” many of the enumerated offense provisions did not apply extraterritorially before 2001, the time at which many alien detainees were captured. For instance, providing “material support” to terrorist groups, a triable offense in a military commission under § 950(t) of the MCA of 2009, was only given extraterritorial effect in 2004. As the petitioners in the January 2010 proceedings argued, directly convicting combatants captured in 2001 for violating a statute not applicable extraterritorially at the time would run afoul of the Ex Post Facto Clause. Second, the shared wisdom in both the U.S. Supreme Court and the executive branch is that under U.S. common law and historical practice, domestic military commissions should only try aliens for “law of war” crimes, whatever that term entails. In the three leading Supreme Court cases involving U.S. military commissions and foreign combatants—Ex parte Quirin, In re Yamashita, and Hamdan—the Court directed the commissions to apply the “law of war.” Assistant Attorney General David Kris told Congress in July 2009 that “[t]he President has made clear that military commissions are to be used only to prosecute law of war offenses.” U.S. Department of State Legal Adviser Harold Koh in a March 2010 speech defended the commissions, but was careful to describe them only as “appropriate venues for trying persons for violations of the laws of war.”

25. For the enumerated offenses, see Military Commissions Act of 2009, Pub. L. No. 111-84, § 950(t)(1)-(32), 123 Stat. 2190; for the “law of war” authorization to the commissions, see id. § 948b(a).


27. Brief on Behalf of Appellant, supra note 4, at 8 (“Material support for a terrorist organization . . . was not an extraterritorial crime until 2004. Because he could not be charged with this offense at the time of his capture in 2001, he could not be charged with it in 2008. His conviction on this charge must therefore be reversed . . . .”).

28. 317 U.S. 1, 11 (1942) (holding that Congress had acted properly in establishing “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”).

29. 327 U.S. 1, 7 (1946) (reaffirming that Congress has constitutional authority under the Define and Punish Clause to “create military commissions for the trial of enemy combatants for offenses against the law of war”).

30. 548 U.S. 557, 597 n.27 (2006) (plurality opinion) (“[A]s we recognized in Quirin . . . and as further discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.”).


32. See Koh Address, supra note 21 (emphasis added).
Accordingly, out of ex post facto concerns, and out of deference to historical practice, military commission judges will have trouble escaping the “law of war.” But to adjudicate under that body of law, the judges will need to reconcile—or choose between—the contrasting notions of terrorism under U.S. and international law.

III. THE PROPOSAL FOR THE COMMISSIONS: STICK TO THE INTERNATIONAL LAW DEFINITION OF TERRORISM

This Recent Development proposes that when trying aliens for law of war offenses, military commissions should apply international law doctrines on terrorism, not U.S. domestic laws. This recommendation is informed both by constitutional considerations and by international comity considerations.

First, under Article I of the U.S. Constitution, the jurisdiction of non-martial law military commissions is rightly understood as limited to applying the law of war that is embraced by the international community. The constitutional license for the government to erect military commissions in the first place traces back to the Define and Punish Clause, under which Congress may “define and punish . . . Offenses against the Law of Nations.” Congress invoked the Define and Punish Clause in 2006 when it enacted the Military Commissions Act, and the Clause has been cited in the past as the source of authority for other non-martial law commissions. But as the text of the Define and Punish Clause makes clear, Congress’s authority—which it can surely delegate to judges in military commissions if it chooses—is to define the “Law of Nations,” not to create it.

The Supreme Court has repeatedly held that the Define and Punish Clause limits the jurisdiction of “Law of Nations” military commissions to conduct tribunals according to the international law of war. In Ex parte Quirin, for instance, the Supreme Court sustained the convictions of eight German nationals by a military commission because it held that the defendants were rightly found guilty of war crimes according to “universal agreement and practice.” The Court surveyed the Hague Convention, war manuals from Great Britain and Germany, and even treatises from Italy to confirm that first, “combatants [who] do not wear ‘fixed and distinctive emblems’” lose prisoner-of-war privileges, and second, that plotting to “destroy certain war industries” is a substantive war crime, punishable by

33. The term “martial law military commissions” refers to tribunals established during periods of military occupation or military government for the purposes of imposing law and order. As the Supreme Court explained in Hamdan v. Rumsfeld, these military commissions are created to replace the traditional court system, and the executive’s authority to convene them traces to constitutional sources other than the Define and Punish Clause. 548 U.S. at 596-98 (plurality opinion). This Recent Development is concerned with non-martial law military commissions, namely, commissions established pursuant to the Define and Punish Clause.
34. U.S. CONST. art. I, § 8, cl. 10.
36. See supra notes 28, 29.
37. See In re Yamashita, 327 U.S. 1, 16-17 (1946) (“We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.”).
38. 317 U.S. 1, 29-31 (1942).
death under international law. 39 In *In re Yamashita*, the Court similarly surveyed international law authorities to confirm that a military commission’s jurisdiction over a Japanese commander had been proper. 40 In *Hamdan*, a plurality of the Supreme Court invalidated the jurisdiction of a military commission over a foreign combatant precisely because it found that “conspiracy,” the crime for which the combatant was to be tried in the commission, was not a “plain and ambiguous” offense under the international law of war. 41

Not only the Supreme Court but also Congress, at least until recently, had always acknowledged the constitutional limitations that the Define and Punish Clause placed on “Law of Nations” military commissions. The Uniform Code of Military Justice from its passage in 1950 through 2006 had authorized the President to convene military commissions, but only insofar as those commissions complied with the international law of war and with the four Geneva Conventions. 42 It was deeply unsettling to many international lawyers when the Bush administration proposed, in 2001, to create a system of military commissions for prosecuting foreign terrorists that departed significantly from the international law of war. 43

Beyond the constitutional limitations laid out in Article I, the second reason why “Law of Nations” military commissions should remain faithful to the international law of terrorism is to preserve comity. If the United States expects other states to respect the Geneva Conventions, the Hague Conventions, and other international norms when dealing with U.S. detainees, then the United States should afford foreign detainees the same treatment. Mr. Hamdan’s lawyers invoked this reasoning in their oral argument before the

39.  *Id.* at 35-37.
40.  327 U.S. at 17-18. The charge against the Japanese commander had been failure “to take such appropriate measures as [were] within his power to control the troops under his command.” *Id.* at 14-15. The Supreme Court concluded that this charge was grounded in the international law of war “by any reasonable standard.” *Id.* at 17-18.
41.  548 U.S. 557, 600-02 (2006) (plurality opinion). The *Hamdan* plurality held that unless the Define and Punish Clause was read in conformity with international law, military commissions would be granted a “degree of adjudicative and punitive power in excess of that contemplated . . . by the Constitution.” *Id.* at 602; see also Transcript of Oral Argument at 22, *Hamdan*, 548 U.S. 557 (No. 05-184) (Neal Katyal) (“What you can’t do is use the standoff offense of conspiracy. And here’s why. Because the standoff offense of conspiracy is rejected by international law . . . . And this Court has said that the test for a violation of the laws of war is when universal agreement and practice make it a violation.”).
42.  10 U.S.C. § 821 (2000) (stating that military commissions may try offenses under “the law of war”); *Hamdan*, 548 U.S. at 613 (holding that the UCMJ “conditions the President’s use of military commissions on compliance . . . with ‘the rules and precedents of the law of nations,’ including, inter alia, the four Geneva Conventions signed in 1949” (emphasis added)).
43.  See Nat’l Assoc. of Criminal Defense Lawyers, Position of the National Association of Criminal Defense Lawyers on the Draft Military Commission Instruction, in 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSIONS INSTRUCTIONS SOURCEBOOK 30, 30 (2003), http://www.wcl.american.edu/nimj/documents/NIMJVOL1.pdf (arguing that the Bush administration’s instructions for the newly convened military commissions should be rejected because they were not anchored in customary international law nor in “any of the Geneva or other Conventions on War”); Jordan J. Paust, Antiterritorism Military Commissions: Courting Illegality, 23 MICH. J. INT’L L. 1, 2 (2001) (“In its present form and without appropriate congressional intervention, the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges.”); *id.* at 26-27 (arguing that one of the problems with President Bush’s order is that the commissions would not be limited to trying offenses under the international law of war).
Supreme Court in 2006. Citing Thomas Paine, they concluded their testimony: “He who—that would make his own liberty secure must guard even his enemy from oppression, for if he violates that duty, he establishes a precedent that will reach unto himself.” Here too, should U.S. military commissions define and apply the law of war with reference solely to domestic doctrines, Paine’s prophetic warning could be realized.45

In the two cases on appeal before the Court of Military Commissions Review, the federal government rejected the notion that the commission need adhere to international law doctrines. The government did not refer to the ICRC’s May 2009 report as a relevant legal authority, nor did it limit its arguments to international law precedents. Rather, the government urged the commission to first apply U.S. statutes governing terrorism,46 and second, apply precedents established in martial-law tribunals during the Civil War, regardless of whether those precedents have been adopted by international law or jurisprudence.47 Because these authorities deem conspiracy, solicitation, and “material support” to violate the law of war, the government claims, the appellate review tribunal should sustain the convictions below. The problem, of course, is that the government’s argument ignores the directives of the Define and Punish Clause and forgets the importance of international comity. Should the commissions follow the federal government’s suggestion in forthcoming cases, the consequences for U.S. constitutional order, for relationships between the U.S. and foreign states, and for the international rule of law, would be grave.

44. Transcript of Oral Argument, supra note 21, at 83.
46. See Brief on Behalf of Appellee, supra note 2, at 17-18.
47. Id. at 25-30 (urging the commissions to apply precedents from martial-law tribunals established during the Civil War). The government does also invoke the work of Francis Lieber, id. at 22-24, whose treatises have unquestionably influenced international law, to argue that “systematic terrorism” is a war crime. Here, the government’s arguments are on firmer footing with respect to international law. However, the key question before the commissions is not whether al Qaeda as an organization has offended the international law of war. Rather, the question is which individual activities in conjunction with terrorist groups render a combatant in violation of the law of war—for example, does material support, conspiracy, or solicitation for terrorist groups qualify? In the sections of the brief where the federal government addressed those questions regarding individual acts, it referred not to Francis Lieber’s treatises but to decisions by Civil War military commissions. Id. at 25-30. Those decisions are not reflected in contemporary international law; they are miles away from the ICRC’s Interpretive Guidance.