Afghanistan, *Quirin*, and *Uchiyama*: Does the Sauce Suit the Gander?

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Following the terrorist attacks of 11 September 2001, President Bush issued a military order providing for trials of captured members of al Qaeda and their Taliban supporters by military tribunals[2] under evidentiary and appellate rules similar to those used in military commissions during and after World War II. The thesis of this article is that these rules violate the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) because they do not provide an accused with the same rights accorded a U.S. service member charged with a similar offense.[3] Also, the proposed rules do not meet current international law standards for trials of war criminals. As a result, any participant in a military commission trial of a person protected by the GPW would, in turn, be guilty of a breach of the GPW, a war crime under U.S. law.[4]

With this background, Section II traces the history of military commissions. The article then emphasizes the evidentiary and procedural problems associated with the post-World War II military commission rules derived from *Ex parte Quirin*,[5] upon which President Bush's proposed commissions are based. Next, Section III discusses the legality of military tribunals under current international law. Section IV then argues that *Quirin*-based military commissions fail to meet current standards for trying POWs and that they fail to satisfy the procedural and evidentiary requirements of the Uniform Code of Military Justice (UCMJ). Finally, based upon the precedent of *United States v. Uchiyama*,[6] the article concludes that participating in such a commission, when it tries a POW, violates the law of war.

I. Introduction

This article examines the structure and history of applicable sections of GPW and their application to the proposed defendants. Section I outlines the promulgation of President Bush's military order, concluding that the system fails to provide adequately for those accorded Prisoner of War (POW) status. This article then argues that members of the Taliban and possibly certain al Qaeda members qualify for POW status under the GPW as detainees of an international conflict. In this context, Section I then identifies the issues raised by America's current proposed use of military commissions.

A. Background

On 11 September 2001, thousands of civilians were murdered when armed conspirators hijacked three airliners and used them as flying bombs to attack the World Trade Center complex in New York City and the Pentagon in Washington, D.C. The passengers of a fourth hijacked aircraft foiled an additional attack, but that flight ended in the deaths of the passengers, crew, and hijackers. The President of the United States immediately characterized those attacks as "an act of war."[7] Shortly thereafter, he announced that credible evidence pointed to Osama bin Laden, the leader of the al Qaeda terrorist group, and members of bin Laden's organization.[8]

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2. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html; U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter MCO No. 1]; Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17).

3. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II (2002) [hereinafter MCM].

4. MCM, *supra* note 3, art. 130; *see* secs. I.B-I.C, *infra* (analyzing who is entitled to prisoner of war (POW) status, and when and how this status is determined).

5. 317 U.S. 1 (1942).

6. Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July 1947) (on file with author).

As al Qaeda members planned and carried out the attacks in America, bin Laden and his terrorist network were living in sanctuary in Afghanistan. President Bush, characterizing the U.S. response to those attacks as a "war on terror,"[9] demanded that Afghanistan's ruling party, the Taliban, end that sanctuary and turn the members of al Qaeda over to American custody.[10] On 18 September 2001, in a joint resolution, Congress, without declaring war, authorized military action against the Taliban.[11] By the end of September, the United Nations Security Council had also adopted two resolutions which (1) identified the attacks on the United States as a threat to international peace and security; and (2) mandated that states "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts."[12]

While the Taliban equivocated, the United States engaged in extensive diplomacy. On 7 October, with the consent of countries surrounding Afghanistan, the United States began extensive air attacks on the Taliban military infrastructures and the al Qaeda terrorist organization.[13] By 21 December 2001, the allied coalition held in custody about seven thousand suspected al Qaeda and Taliban members in Afghanistan.[14]

On 13 November 2001, President Bush issued a military order providing for the trial of non-U.S. citizens who were members or culpable supporters of al Qaeda before military tribunals.[15] That order, and subsequent statements by the President,[16] Vice President,[17] Attorney General,[18] Secretary of Defense,[19] the White House Counsel,[20] and others,[21] made it

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7. BBC News Online, *Bush Calls Attacks "Acts of War"* (Sept. 12, 2001), *at* http://news.bbc.co.uk/hi/english/world/americas/newsid_1537000/1537534.stm (last visited Nov. 17, 2003).

8. *See, e.g.*, President George W. Bush, Speech to the Joint Session of Congress, Washington, D.C. (Sept. 20, 2001) ("The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda.").

9. *Id.*

10. *Id.*

11. S.J. Res. 23, 107th Cong. (2001) (enacted as Pub. L. No. 1-7-40, 115 Stat. 224). In a further response to the attacks, on 26 October 2001, Congress adopted the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, which addresses domestic national security issues.

12. S. Con. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

13. Ian Christopher McCaleb, *Bush Announces Opening of Attacks*, CNN.com (Oct. 7, 2001), *available at* http://www.cnn.com/2001/US/10/07/ret.attack.bush/

14. *US Questions 7,000 Taliban and al-Qaeda Soldiers*, GUARDIAN (Dec. 21, 2001), *available at* http://www.guardian.co.uk/afghanistan/story/0,1284,623701,00.html.

15. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html [hereinafter Bush Order]. The Bush Order provides, in part, that individuals subject to the order include: (1) current or past members of al Qaeda; (2) individuals who "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore" that adversely affected wide United States interests; and (3) individuals who "knowingly harbored one or more individuals" described above. *Id.* sec. 2(A).

16. On 19 November 2001, President Bush said that the nation was fighting "against the most evil kinds of people, and I need to have that extraordinary option at my fingertips." Elisabeth Bumiller, *Military Tribunals Needed in Difficult Time, Bush Says*, N.Y. TIMES, Nov. 20, 2001, at B5.

17. Vice President Dick Cheney, responding to questions following his speech to the U.S. Chamber of Commerce on 14 November 2001,

> [S]poke favorably of World War II saboteurs being "executed in relatively rapid order" under military tribunals set up by President Franklin D. Roosevelt . . . . A military tribunal, he said, "guarantees that we'll have the kind of treatment of these individuals that we believe they deserve" . . . The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans[,] . . . is not a lawful combatant . . . . They don't deserve to be treated as prisoners of war.

Elisabeth Bumiller & Steven Lee Myers, *A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

This statement raises a serious question—can a terrorist operating under civilian cover in the United States claim POW status? Under the Hague Regulations, a spy falls outside the protection of the Geneva Convention and may be subject to the death penalty depending on the domestic law of the state where he was caught. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 29, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

18. According to the Attorney General, John Ashcroft,

> Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protections of the American Constitution, particularly when there could be very serious and important reasons related to not bringing them back to the United States for justice. I think it's important to understand that we are at war now.

Robin Toner & Neil A. Lewis, *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1.

clear that the tribunals were intended to follow procedural and evidentiary rules similar to those used to try spies and war criminals during and after the Second World War.[22]

Those rules, as applied between 1942 and 1947, do not meet the current international law standards for trials of prisoners of war.[23] Moreover, they are insufficient under the requirements of GPW.[24] The U.S. Army teaches that "treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category of cases."[25]

On 21 March 2002, the Secretary of Defense promulgated Military Commission Order No. 1 (MCO No.1),[26] which prescribes procedures for tribunals under the President's military order. While it appears that MCO No. 1 made some advances towards fairness, including finessing the Presidential order's two-third's sentencing requirement,[27] it retained the World War II evidentiary rules and failed to provide a system of independent appeals. Therefore, MCO No.1 confirms the Bush Administration's intention to *deny* defendants the *evidentiary rules and procedural safeguards*, provided under the Uniform Code of Military Justice (UCMJ). Thus, even though MCO No.1 "made concession to critics who worried that President Bush's original order . . . had codified a secret rigged system,"[28] the system created *still fails* to provide the trial rights guaranteed to a prisoner of war (POW) under GPW.

On 1 July 2003, the Department of Defense (DOD) issued a series of rules and regulations concerning military tribunals.[29]

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19. Secretary of Defense Donald Rumsfeld recognized

> that the rules for military tribunals would be decidedly differently [sic] from those for civilian trials. And Pentagon officials said today that they were devising regulations that were likely to include a more flexible standard for evidence than civilian trials would accept. They said the tribunals would probably allow a conviction of a suspected terrorist on a two-thirds vote of the officers on the panel.

Steven Lee Myers & Neil A. Lewis, *Assurances Offered About Military Courts*, N.Y. Times, Nov. 16, 2001, at B10. The military order itself provides for "sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present." Bush Order, *supra* note 15, sec. 4(c)(7).

20. At a meeting of the American Bar Association's Standing Committee on Law and National Security, White House Counsel Alberto Gonzales acknowledged nearly identical provisions in the two orders. Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, Inter Arma Silent Leges: In Times of Armed Conflict *Should* the Laws Be Silent? A Report on the President's Military Order of November 13, 2001 Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (2001), *available at* http://www.abcny.org/pdf/should_the_laws.pdf.

21. *See* Bumiller & Myers, *supra* note 17, at 6. Former Attorney General William P. Barr is credited with bringing the idea of military tribunals to the attention of the White House. He stated, "What I don't understand about civil libertarians is, if our boys did something wrong in this conflict, they'd be tried in a military court. An al Qaeda terrorist shouldn't have any claim to different procedures." Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, N.Y. Times, Nov. 18, 2001, at A1. A member of the U.S. military charged with war crimes would, of course, be tried under the UCMJ and its Military Rules of Evidence (MRE). As discussed below, the UCMJ and the MRE provide substantial guarantees of a fair and impartial trial. *See infra* sec. IV.

In his 14 November 2001 statement, *see supra* note 17, Vice President Cheney said that "[t]he basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans[,] . . . is not a lawful combatant . . . . They don't deserve to be treated as prisoners of war." Bumiller & Myers, *supra* note 17, at 6. The Vice President's statement raises a serious question. Can a terrorist operating under civilian cover in the United States claim POW status? The question may be somewhat mooted, however, by the fact that any claim of status necessarily implies the claimant is a combatant captured while engaged in hostilities, but not in uniform; to wit, a spy. Under the Hague Regulations, a spy falls outside the protection of the Geneva Convention and is subject to the death penalty. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 29, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

22. The *New York Times* reported that "[a] Bush administration official with knowledge of the planning said officials had been studying the World War II cases." William Glaberson, *Closer Look at New Plan for Trying Terrorists*, N.Y. Times, Nov. 15, 2001, at B6. "[A]s one White House official put it, 'it's a new reality.' The old rules, the old legal and law enforcement cultures, have to change . . . ." Toner, *supra* note 21, at 1. Thus, something more effective than civilian law enforcement is necessary. According to the *New York Times*, "The incident that was uppermost on the minds of Bush administration officials in setting up tribunals took place in June 1942, when Nazi Germany dispatched eight saboteurs to this country to blow up war industries . . . ." *Id.* That incident resulted in the military commission procedures used in *Ex parte Quirin*, 317 U.S. 1 (1942). "'The commission itself is going to be unique,' said one military officer involved in the discussions. 'It will be separate and distinct from a civilian criminal trial. It will be separate and distinct from a court-martial.'" Matthew Purdy, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. Times, Nov. 25, 2001, at A1.

23. *See* the discussion related to the application of these rules *infra* notes 164-187 and accompanying text. *See also* the discussion related to current international standards *infra* notes 198-231.

24. *See id.* arts. 85 ("Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."), 102. Article 102 states the following:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Id.

These trial procedure regulations retain the World War II evidence rule which states:

> (d) *Evidence*—(1) *Admissibility.* Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.[30]

The regulations also fail to provide for a system of independent appeals, instead tracking the procedure of MCO No.1.[31] As a result, they *still fail* to meet the essential requirements for trying POWs.

B. The POW Status of Captured Members of the Taliban and Al Qaeda

If the conflict in Afghanistan is in fact an international armed conflict,[32] then the coalition forces may have to treat the detained Taliban and possibly al Qaeda members as POWs.[33] The GPW was drafted, in part, to address conflicts in which one state does not recognize the legitimacy of the government of another. [34] It covers "all cases of declared war or any other armed conflict, which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[35] Article 4(3) of GPW includes as

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25. Int'l & Operational Law Dep't, The Judge Advocate General's School, U.S. Army, Law of War Workshop Deskbook ch. 8, at 216 (2000), *available at* http://www.jagcnet.army.mil/TJAGLCS. The deskbook notes the following:

> In theory, [military commissions] could provide very limited evidentiary and procedural formality, *see, e.g*, *Yamashita*, 327 U.S. [1,] 18 [(1946)] and a very streamlined appeal process. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961 (1949) (finding that German nationals, confined in custody of the U.S. Army in Germany following conviction by military commission of having engaged in military activity against the United States after the surrender of Germany, had substantive right to writ of *habeas corpus* to test legality of their detention) . . . . But treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category [cases where the accused has POW status] of cases.

Id. Eisentrager was, of course, reversed in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

26. MCO No.1, *supra* note 2.

27. *Id.*, sec. 6(F) (providing that "[a]n affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all the members").

28. Katherine Q. Seelye, *Government Sets Rules for Military on War Tribunals*, N.Y. Times, Mar. 21, 2002, at A1.

29. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17).

30. *Id.* § 9.6(h)(1).

31. *See id.*; MCO No. 1, *supra* note 2.

32. The invasion by armed forces of one state into the territory of another, supported by massive air strikes against command, control, and communications targets equals an Article 2, international armed conflict. Thus, it activates the remainder of the GPW. This is true, even if a de facto government rules the invaded state. *See* Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) ("[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities . . . .").

33. *See* GPW, *supra* note 3, art. 2.

34. This point was made clear during the discussions relating to the drafting of Article 2. As the Official Commentary to Article 2 notes:

> The Preliminary Conference of National Red Cross Societies, which the International Committee of the Red Cross convened in 1946, fell in with the views of the Committee and recommended that a new Article, worded as follows, should be introduced at the beginning of the Convention: "The present Convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take." The Conference of Government Experts recommended in its turn that the Convention should be applicable to "any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned," and also to "cases of occupation of territories in the absence of any state of war." Taking into account these recommendations, the International Committee of the Red Cross drew up a draft text, which was adopted by the XVIIth International Red Cross Conference and subsequently became Article 2 of the Convention . . . .

Commentary to GPW, *available at* http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/07b4dad7719e37e4c12563cd00424d17?OpenDocument [hereinafter Official Commentary to GPW].

35. GPW, *supra* note 3, art. 2.

POWs "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."[36]

Even if the Taliban was not recognized as a de facto government, Article 4(3) deems members of the Taliban as protected combatants.[37] Various U.N. Security Council resolutions directed at the Taliban before its defeat make that government's de facto status clear. For example, in demanding that the Taliban cease providing sanctuary for international terrorists, U.N. Security Council Resolution 1267 specifically references "the territory under its control."[38] Because Afghanistan is a signatory of GPW,[39] any interpretation of article 4(3) includes members of the Taliban as protected combatants even if the Taliban is not recognized as a de facto government.[40] Furthermore, before 11 September 2001, the United Arab Emirates, Saudi Arabia, and Pakistan had formally recognized the Taliban as the *de jure* government of Afghanistan and entered into diplomatic relations.[41]

The more interesting question is whether those members of al Qaeda captured in combat in Afghanistan and fighting as auxiliaries to the Taliban are entitled to treatment as POWs. The al Qaeda member could be entitled to POW treatment under the following theories: (1) as a member of the Taliban armed forces; (2) an irregular adjunct to the Taliban armed forces; or (3) part of a *levee en masse* or popular uprising.

1. The Taliban and Possibly al Qaeda Are Entitled to POW *Status Even Without Application of the Four-Part Test As Set Forth in Article 4 of the GPW*

In determining the legal status of the Taliban and al Qaeda detainees, the preliminary question often asked is whether those detainees qualify as legal combatants.[42] The Bush administration argues that to qualify as legal combatants, the detainees[43] must meet the requirements of GPW Article 4(A)(2), which

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36. *Id.* art. 4(3).

37. *Id*.

38. U.N. SCOR, 54th Sess., 4051st mtg., at 1, U.N. Doc. S/RES/1267 (1999).

39. *Id.*; *see* International Committee of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols*, *at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList444/77EA1BDEE20B4CCDC1256B6600595596 (last visited Nov. 19, 2003).

40. The President has apparently recognized this point. In a White House briefing, Presidential Press Secretary Ari Fleischer said: "Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the Treaty because Afghanistan is a party to the Convention." Press Release, Statement by White House Press Secretary Ari Fleischer (Feb. 7, 2002), *available at* http://www.us-mission.ch/press2002/0802fleischerdetainees.htm [hereinafter Fleisher Statement].

In a later expansion of that discussion Mr. Fleischer said:

> Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention.
>
> Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

See Statement by the Press Secretary on the Geneva Convention, May 7, 2003, *at* http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

41. *See* CNN, *UAE Withdraws Recognition from the Taliban* (Sept. 22, 2001), *at* http://www.cnn.com/2001/US/09/21/gen.america.under.attack.

42. *See, e.g.*, Ruth Wedgewood, *Prisoners of a Different War*, FIN. TIMES, Jan. 30, 2002. Professor Wedgewood states,

> The convention's premise is that both parties to the conflict will obey the fundamental rules for lawful belligerency: that any fighting force must refrain from terrorizing innocent civilians and avoid masking soldiers in civilian dress, lest an adversary target innocent civilians in response.
>
> The test is put in four parts. Lawful combatants must have a responsible commander (to ensure accountability for violations); wear a fixed distinctive sign visible at a distance; carry their arms openly; and fight in accordance with the laws and customs of war.
>
> These requirements apply as much to regular armies as to militia forces. It is thus fallacious to suppose that the Taliban should be allowed any exemption.

Id.

require that a "[m]ember[ ] of the armed forces [of an opposing Party],"[44] as well as "[m]embers of . . . militias [or] volunteer corps" forming part of those armed forces[45] must "(a) . . . be[ ] commanded by a person responsible for his subordinates; (b) . . . have[ ] a fixed distinctive sign recognizable at a distance; (c) . . . carry[ ] arms openly; [and] . . . conduct[ ] their operations in accordance with the laws and customs of war,"[46] requirements otherwise known as GPW's four-part test.

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43. In a news conference on 27 January 2002, Secretary of Defense Rumsfeld was quite clear on this issue:

> These are detainees.
>
> The Convention in certain situations raises the possibility if there are ambiguities that you can have a three-person panel or tribunal to sort out those ambiguities. There are not ambiguities in this case. The al Qaeda is not a country. They did not behave as an army. They did not wear uniforms. They did not have insignia. They did not carry their weapons openly. They are a terrorist network. It would be a total misunderstanding of the Geneva Convention if one considers al Qaeda, a terrorist network, to be an army and therefore ambiguous and requiring the kind of sort that you've suggested.
>
> With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their weapons openly, and they were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition, and there isn't any question in my mind—I'm not a lawyer, but there isn't any question in my mind but that they are not, they would not rise to the standard of a prisoner of war.

Secretary of Defense Donald H. Rumsfeld, Remarks on Ferry from Air Terminal to Main Base, Guantanamo Bay, Cuba (Jan. 27, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html; *see also* Secretary of Defense Donald H. Rumsfeld & General Richard Myers, Chairman, Joint Chiefs of Staff, Department of Defense News Brief, Washington, D.C. (Feb. 8, 2002), *available at* http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html. On that same day Secretary Rumsfeld also said that:

> There is a definition of what a lawful combatant is and there are four or five criteria that people look to historically. There's precedent to this, and there is a reasonable understanding of what an unlawful combatant is.
>
> The characteristics of the individuals that have been captured is that they are unlawful combatants, not lawful combatants. That is why they are characterized as detainees and not prisoners of war. The al Qaeda are so obviously a part of a terrorist network as opposed to being part of an army -- they didn't go around with uniforms with their weapons in public display, with insignia and behave in a manner that an army behaves in; they went around like terrorists, and that's a very different thing.
>
> It's important for people to recognize that this is a different circumstance, the war on terrorism. It requires a different template in our thinking. All of the normal ways that we think about things simply don't work.
>
> For example, there were no armies or navies or air forces for us to go after in Afghanistan. We're going after terrorists.

See Rumsfeld, U.S. Senators Brief Media at Guantanamo Bay, United States Mission to the European Union, Jan 27, 2002, *at* http://www.useu.be/Terrorism/USResponse/Jan2702RumsfeldSenatorsGuantanamo.html.

In the press briefing of 8 February 2002, Secretary Rumsfeld said:

> The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.
>
> A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and non-combatants. This is why the convention requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.

Id. In addition, Presidential Press Secretary Ari Fleischer stated that

> [u]nder Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Talilban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.
>
> The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.

Fleischer Statement, *supra* note 40.

44. GPW, *supra* note 3, art. 4(A)(1).

45. *Id.* art. 4(A)(2).

a. The Parties to GPW Did Not Intend to Subject Regular Armed Forces and Constituent Militia and Volunteer Units to the Four-Part Test

According to the *traveaux preparitoires* of Article 4, the four qualifying requirements for POW status under Article 4(A)(2) apply *only* to militias, volunteer corps, and organized resistance groups which do not form part of the armed forces of a party to the conflict.[47] To make this distinction clear, the drafters split Article 4(A) [48] into two subparagraphs, Article 4(A)(1) and Article 4(A)(2).[49] Following extensive debate on Article 4,[50] the *Rapporteur* and the Secretariat proposed a working text that defined prisoners of war as "[m]embers of armed forces who are in the service of an adverse belligerent, as well as members of militia or volunteer corps, belonging to such belligerent, and fulfilling [the conditions of Hague Convention IV."[51]

In discussing this proposed language, the Soviet Union representative said that "the working text would appear [to require] members of the Armed forces . . . to fulfill the four traditional requirements . . . in order to obtain prisoner of war status, which was contrary to the Hague Regulations."[52] The Chair proposed splitting the draft text of Article 4 into subparagraphs that divided "members of the armed forces" and "militias and volunteer corps" in order "to overcome the drafting difficulty."[53] The Soviet response was that it was necessary to distinguish between "(a) The militia or volunteer corps which constituted or were part of the army; [and] (b) The militia or volunteer corps which were not part of the army. *Only those groups to which (b) related should fulfill all four conditions*."[54] The reason was "that even with the suggested wording, the new subparagraphs (1) and (2) would not correspond to the Hague Regulation."[55] After further discussion, *the Committee* "*deemed it desirable*" *to* "*draft a text as close as possible to that of the Hague Regulation of 1907*."[56] The resulting draft contained the

46. *Id*. art. 4(A)(2(a)-(d).

47. 2 Final Record of the Diplomatic Conference of Geneva of 1949, at 465-67 [hereinafter Final Record] (reprinting the *traveaux preparitoires*).

48. In the initial draft (the Stockholm Draft), what became Article 4 was Article 3. For clarity, this article refers to Article 3 in the Stockholm Draft as Article 4. For numerical comparison of the 1929 Convention, the Stockholm Draft, the working draft and the final GPW Convention *see*, 3 Final Record, *supra* note 47, at 217.

49. During negotiations, a Special Committee was formed to draft Article 4. The Special Committee's *Rapporteur* described Article 4 as "the keystone of the Convention." 2 Final Record, *supra* note 47, at 386 (Committee II, 30th mtg.).

> He explained, among other things, that in order to coordinate the Convention with the Hague Regulations of 1907 respecting the Laws and Customs of War on Land, the Special Committee had first of all decided to insert the four conditions with which militias or volunteer corps *not* forming part of the regular armed forces must comply immediately after the end of sub-paragraph I of the first paragraph of Article [4]. In order to avoid any possibility of misunderstanding, it was subsequently decided to subdivide sub-paragraph I into two separate sub-paragraphs, a new subparagraph 1 relating to members of the armed forces *and* members of militias or volunteer corps forming part of those armed forces and a new sub-paragraph 2 relating to *members of other militias and volunteer corps which were required to fulfill the four conditions* laid down in the Hague Regulations.

Id. at 387 (emphasis added).

50. 3 Final Record, *supra* note 47, at 465-467. This debate took place at the 21st meeting of the Special Committee. *Id.*

51. Hague Regulations, *supra* note 17, art. 1. To satisfy the requirements of the four-part test, the conditions of the Convention required the following:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> [1] To be commanded by a person responsible for his subordinates;
>
> [2] To have a fixed distinctive emblem recognizable at a distance;
>
> [3] To carry arms openly; and
>
> [4] To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Id. art. 1 (emphasis added).

The emphasized language makes clear the intent of Article 1, which distinguishes between militias and volunteer corps that form part of the regular armed forces from those that do not. If the intention had been to apply the four conditions to all combatants, the last sentence of Article 1 would be superfluous.

52. *Id*. at 466. The proposed definition differed slightly from Article 1 of the Hague Regulations Concerning the Laws and Customs of War, 1907.

53. 2 Final Record, *supra* note 47, at 467.

54. *Id.* (emphasis added).

language that eventually became GPW Article 4, subparagraphs (A)(1) and (2).[57] One further point about GPW eliminates any remaining doubt regarding the drafters' intent to apply the Hague four conditions to Article 4(A)(2) and not to Article 4(A)(1)—the final form of Article 4 includes organized resistance movements in subparagraph (A)(2) and excludes them from subparagraph (A)(1).[58]

b. The Drafters' Treatment of Organized Resistance Movements Demonstrates Their Intent to Distinguish Regular Armed Forces, and Their Constituent Militia and Volunteer Units, from Independent Forces

In the initial draft of GPW (the Stockholm Draft), POWs were those persons "belonging to a military organization or to an organized resistance movement constituted in occupied territory," provided they met the four Hague conditions, and that they "notified the occupying Power of [their] participation in the conflict."[59] This language caused such controversy that a Special Committee was appointed to consider it.[60] The drafters eventually resolved the argument by including resistance movements in Article 4(A)(2) only, demonstrating a stark distinction between Article 4(A)'s two subparagraphs.[61]

The Special Committee reported that "to avoid any possibility of misunderstanding, . . . sub-paragraphs (A)(1) and (A)(2) were created to divide regular armed forces and their constituent volunteer corps and militias from independent forces[,] including resistance movements[,] and to apply the Hague conditions to the latter."[62] That decision must be analyzed in light of the considerable opposition to permitting resistance movements to claim POW status,[63] and the ultimate compromise that included them in the newly devolved subparagraph (A)(2).

The debate on this issue is found in the discussion of proposed amendments to the Stockholm Draft. Particularly informative is a United Kingdom proposal[64] to apply the Hague conditions to "partisans" and to "members of armed forces including militia or volunteer corps," which the other delegations unanimously rejected.[65] The principal concern seems to have been command and control. The United Kingdom then

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55. *Id.*

56. *Id.* (emphasis added).

57. GPW, *supra* note 3, art. 4, subpara.(A)(1) and (2). Those subparagraphs read as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the hands of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

Id. art. 4(A)(1)-(2).

58. *Id.* As noted by the Representative of the International Committee of the Red Cross in discussing a subsection of draft Article 4, which was eventually incorporated into subparagraph (A)(2):

> The Conference of Government Experts had also . . . come to the conclusion that strict rules should be laid down governing the conditions in which civilian combatants captured by the enemy should fulfill in order to be treated as prisoners of war. Certain of those conditions had been accepted by all the Government experts without difficulty; they were the traditional contained in the 1907 Hague Convention . . .

2 FINAL RECORD, *supra* note 47, at 240.

59. *Id.* at 465.

60. *Id.* at 255; *see infra* text accompanying notes 47-58.

61. *See* GPW, *supra* note 3, art.4.

62. *See* 2 FINAL RECORD, *supra* note 47, at 387.

63. The discussion in the Special Committee of proposed subparagraph 6 of the Stockholm Draft reflects this debate. *See id.* at 422.

64. *Id.* annex 90, at 60-61.

offered a proposal to apply the Hague conditions only to military organizations or organized resistance movements in occupied territories, provided they maintained "effective command of lower formations and units," and that the Occupying Power had been given certain notices.[66] The other delegations rejected this provision also.[67]

Given the desire of the majority of GPW delegates to ensure that the Hague conditions apply to resistance fighters and that the GPW POW provisions follow the Hague Regulations as closely as possible, the drafters' eventual inclusion of resistance fighters in subparagraph (A)(2) signifies that the Hague conditions do not apply to regular armed forces and their constituent militias and volunteer corps. Thus, since the Taliban detainees were members of the regular armed forces of the de facto government of Afghanistan, they are entitled to POW status. In addition, to the extent any al Qaeda detainees were acting as militia or volunteer corps members which formed part of the Taliban armed forces, those detainees are also entitled to POW status. Whether they are entitled to POW status is determined by their organizational structure[68] and status at the time of capture. It is possible that international law requires nations to treat different al Qaeda units differently. For instance, certain al Qaeda units could have been subsumed within the Taliban while others acted independently. Indeed, given the Taliban's nature to include relatively independent units, which constituted the "armies" of individual "warlords,"[69] cross-structural status is an evident possibility.

2. Other Classifications Could Entitle al Qaeda Members to POW Status

Even if al Qaeda members do not qualify as members of the Taliban armed forces or as members of its integral volunteer corps or militia, they may still qualify for POW status. This would be the case if they were part of an independent volunteer corps or militia that fulfills the four Hague conditions. That status would depend on the facts, as demonstrated below,[70] and requires findings by a competent tribunal before an al Qaeda member could be deprived of POW status. In addition, some al Qaeda members could conceivably qualify as members of a *levee en masse.*

a. Members of al Qaeda Could Qualify as Members of Militias or Volunteer Corps Not Forming Part of the Taliban Armed Forces

As discussed above,[71] members of militias and volunteer corps may qualify as prisoners of war if they satisfy a two-part factual inquiry. First, an examining tribunal must determine whether a particular al Qaeda unit was fighting on behalf of the Taliban,[72] but not as part of its armed forces. If the first hurdle is cleared, the trier of fact must then determine whether the member satisfies the four Hague conditions:[73] (1) a responsible command; (2) an easily distinguishable identifying sign;[74] (3) the open carrying of arms; and (4) general conduct of operations in accordance with the laws and customs of war. Although, the determination whether these conditions are met depends upon specific facts, two issues should be highlighted.

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65. *Id.* at 425. According to the *Rapporteur*, "[a]ll the Delegations except the United Kingdom had expressed themselves in favor of the Stockholm text, if necessarily amended." *Id*.

66. *Id.* annex 92, at 62.

67. *See id*.

68. The Nuremberg Tribunal's application of organizational guilt to the Nazi SS provides an interesting analogy. *See generally* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 41-42, 584-86 (1992) (outlining the problems inherent in such charges).

69. Thom Shanker & Steven Lee Myers, *U.S. Special Forces Step Up Campaign in Afghan Areas*, N.Y. TIMES, Oct. 19, 2001, at A1 (discussing swapping the sides of warlords "in alliances of convenience"); R.W. Apple Jr., *Pondering the Mystery of the Taliban's Collapse*, N.Y. TIMES, Nov. 30, 2001, at B2 (discussing the shifting allegiances of the Taliban militia).

70. *See infra* sec. I.C.

71. *See infra* sec. I.A(1).

72. *See, e.g.*, S.C. Res. 1267, *supra* note 38. Because al Qaeda is a terrorist organization that directly caused the conflict between the United States, its allies and the Taliban, al Qaeda units may have been fighting as independent terrorist entities. It is conceivable, however, that after the United States intervened, al Qaeda units placed themselves in the Taliban's service. The apparent intervention of al Qaeda in the Taliban's civil war with the Northern Alliance makes that possibility more likely. On any given day, an al Qaeda unit might have been training for independent activities; serving as the Taliban's "shock troops" in an internal conflict; or coordinating its activities against American and Allied forces. Dexter Filkins, *The Legacy of the Taliban Is a Sad and Broken Land*, N.Y. TIMES, Dec. 31, 2001, at A1.

73. GPW, *supra* note 3, art. 4(A)(2).

First, the four-part Hague requirement applies to a unit as a whole, rather than to individuals. That is, Article 4(A)(2) requires that a person seeking POW treatment is a member of a militia or other volunteer corps that meets the requirements.[75] It would be difficult for a person to qualify for POW status if that person was the only member of his unit who abided by the laws and customs of war. The corollary, however, is also true. The observation of such laws and customs by most members of a body fulfils the condition of compliance, notwithstanding individual commission of war crimes by unit personnel.[76]

Second, if a unit satisfied the four-part Hague requirements, it seems reasonable that an individual belonging to the complying unit would be initially treated as a POW, even if, as an individual, he did not meet the standard. That is not to say the individual soldier could, for example, disregard the requirements to carry arms openly, but rather that a competent tribunal would determine on an individual basis if he disqualified himself from POW status. The distinction is important, for it affords the individual due process in the determination of a status which implicates extremely important procedural rights.[77]

b. Some al Qaeda Members Could Qualify for Treatment as Members of a Levee en Masse

Article 4(6) of GPW provides protections for participants in popular uprisings that constitute a special category—*levee en masse*. "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."[78] That provision may be uniquely applicable to some of the persons captured in Afghanistan, especially given the nation's tribal and thoroughly xenophobic history.[79] It is certainly possible that a previously uninvolved group of individuals, upon finding armed foreigners at the gate, might spontaneously resist. Several post-invasion clashes between Allied forces and "non-Taliban" fighters[80] indicate at least the existence of that possibility.

Thus, members of the Taliban have a colorable claim to POW status under the GPW. Members of al Qaeda captured in Afghanistan also may fall into one of several classifications which provide them with POW status. Allowing these members to claim POW status impacts the United States' ability to try them before military tribunals.

C. The Determination of Who Is Entitled to POW Status Is Subject to a Presumption of Coverage

The GPW *only* covers those persons with a colorable claim to POW status. Article 5, *however*, provides that the "[c]onvention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release," and that "*[s]hould any doubt arise as to whether . . . someone is a prisoner of war, that individual . . . shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal*."[81] The intention of the Convention drafters is unmistakable.

> [W]here, for instance, large numbers of prisoners had been taken, doubts had sometimes arisen as to whether it was practicable to apply the Convention without delay. Certain delegates at the Conference of Government

74. The argument whether various colored turbans constitute an identifying sign is one of fact to be determined by a competent tribunal. If available evidence indicated that the various Afghan factions relied solely upon colors, (a distinct possibility in armies where soldiers may be illiterate), or that common religious beliefs precluded the use of symbols, the use of colored turbans might suffice as the necessary identifying sign. But the adversary must understand the symbol to qualify as distinctive identifying sign. If the United States could not distinguish the combatant wearing a green turban from a non-combatant wearing a green turban, it would not suffice. It is the perception of the adversary that is at issue. The U.S. Army field manual on the law of land warfare gives an example of a fixed distinctive sign as "[a] helmet or headdress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 64(d) (18 July 1956) [hereinafter FM 27-10].

75. *See id.* art. 4(A)(2).

76. FM 27-10, *supra* note 74, at 28.

77. *See infra* notes 192-197 and accompanying text.

78. GPW, *supra* note 3, art. 4(6). Although some members of al Qaeda may be mercenaries, that distinction has little relevance to this analysis. By definition, mercenaries are motivated by a desire for private gain. The Mercenary Convention and Protocol I suggest that customary international law is moving to exclude mercenaries from POW protective status. Because the al Qaeda members' decision to fight, however, was based on religious convictions or cultural fervor, they arguably do not qualify as mercenaries. *See* International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 1, § 1(b), U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3.

79. *See generally* PETER HOPKIRK, GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA (1992).

80. *See, e.g.*, *U.S. Troops Comb Afghan Mountains for Taliban Forces; Move Signals Tactical Shift*, MIAMI HERALD, Oct. 3, 2002, at A10 (discussing attacks on U.S. soldiers in Afghanistan by non-Taliban warlords); Julius Strauss, *U.S. Base Hit by Rockets as Violence Spreads Through Afghanistan*, DAILY TELEGRAPH (London), Apr. 15, 2002, at 11. One practical question is whether any local inhabitant, who viewed al Qaeda members as "foreigners" and "Arabs," would claim to be a member of that member's organization. *See*, *e.g.*, Karl Vick, *For U.S., Attack on Kandahar Was a Victory on Two Fronts*, WASH. POST, Dec. 26, 2001, at A6; Jonathan Weisman, *Battle Is Fiercest Yet, and It Won't Be Last*, U.S.A. TODAY, Mar. 5, 2001, at 7A.

> Experts had considered that the exact time of the beginning and ending of the application of the Convention should not be explicitly stated. Some Powers had wished to make it possible to change the status of prisoners of war at some time during their captivity, for instance at the end of hostilities; but the majority at Stockholm had decided against making any such change possible. *Article 4 [of the Stockholm Draft, ultimately GPW Article 5,] had been introduced in order to make the situation clear beyond all manner of doubt*.[82]

The significance of Article 5 stems from the context surrounding its drafting. Geneva Convention 3, to include Article 5, was drafted immediately following the Second World War.[83] The prevailing law on POW treatment during World War II was The Convention Between the United States of America and Other Powers, Relating to Prisoners of War, commonly called the 1929 Geneva Convention.[84] The 1929 Convention did not contain a provision similar to GPW Article 5.[85]

Three of the principal warring nations during World War II, Germany, Japan, and the Soviet Union, largely ignored the 1929 Convention's provisions. Germany argued that the 1929 Convention did not apply to the treatment of either Soviet or Polish prisoners, because the former was not a signatory to the Convention, and the latter no longer existed as a state.[86] In fact, Germany turned most Polish prisoners over to the SS for use as slave laborers.[87] The Germans also refused to treat captured partisans and resistance fighters as POWs.[88] Japanese and Soviet treatment of prisoners was also improper.[89] By war's end, there was no real doubt that the 1929 Convention was flawed, and that one major flaw was the refusal of some participants to treat some or all captured combatants as POWs.[90] Article 5 attempts to resolve that problem by creating a rebuttable presumption that any person captured in an international conflict is entitled to POW rights.[91]

The U.S. Army, the primary proponent on POW issues within the DOD, addressed the presumption in *Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (*AR 190-8*).[92] The text of AR 190-8 mirrors the relevant provisions of GPW Article 5. In part, *AR 190-8* states that

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81. GPW, *supra* note 3, art. 5 (emphasis added). One might make a principled distinction between members of an organization apprehended while committing acts of violence outside the protection of Article 4, and members of that same organization, including co-conspirators, captured in or following an international armed conflict. That distinction, of course, relates only to the evidentiary rights and procedural rights due the individual. A detainee who has committed acts of murder and terrorism, within or without an armed conflict, is certainly subject to trial and punishment for those crimes. The phrase "any doubt," necessarily implies any reasonable doubt. If a person is clearly not entitled to POW status, the GPW protections do not apply. For example, in *United States v. Buck*, the defendants claimed status as "revolutionaries" who were part of the Black Liberation Army and thus, supposedly, prisoners of war. 690 F. Supp. 1291 (S.D.N.Y. 1988). The District Court found that the GPW, Article 4, set certain minimum standards for assertion of POW status, and that the "[d]efendants at bar and their associates cannot pretend to have fulfilled these conditions." *Id.* at 1298.

82. 2 Final Record, *supra* note 47, at 245 (Committee II, 4th mtg.) (emphasis added). The *Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva* specifically notes that the second paragraph of Article 5 "will *ensure that in the future no person whose right to be treated as belonging to one of the categories of Article [4] is not immediately clear, shall be deprived of the protection of the Conventions without a careful examination of his case*." *Id.* Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, *in* 2 Final Record, *supra* note 47, at 563 (emphasis added) [hereinafter Report of Committee II].

83. The GPW was drafted at a diplomatic conference convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and held at Geneva from April 21 to August 12, 1949. *See* 3 Final Record *supra* note 47.

84. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. 846 [hereinafter 1929 Convention].

85. 2 Final Record, *supra* note 47, at 245 (13th plen. mtg.). Committee II's Rapporteur, in presenting the Committee's work to the Conference as a whole, noted that

> [m]any of the provisions here submitted to the Conference establish standards which might possibly be deduced from the 1929 convention. Experience has shown, however, that it is the way in which a general rule is interpreted which affects the daily life of prisoners of war. It was, therefore, appropriate to lay down explicit provisions interpreting in reasonable terms standards, many of which were inadequately defined. Further, even general principles, whose force seemed to be their very brevity, have been so grossly violated, that the Committee deemed it necessary so to clarify and amplify them that any future infringement would be at once apparent.

Id.

86. *See* Ronald H. Bailey, Prisoners of War 11-14 (1982); *see generally* Pat R. Reid, Prisoner of War (Hamlyn, London 1984).

87. Bailey, *supra* note 86, at 113.

88. *See* Robert B. Asprey, War in the Shadows: The Guerrilla in History ch. 31 (1975); *see generally* Russell Miller, The Resistance (1979); Ronald H. Bailey, Partisans and Guerrillas (1978).

89. *See* Bailey, *supra* note 86, at 36, 112.

> [i]n accordance with Article 5, [GPW], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, [GPW], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[93]

To achieve this goal, *AR 190-8* requires that a "competent tribunal"[94] determine the status of any person "not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces" who asserts the status *or* concerning whom any doubt exists.[95] It then describes the composition of the tribunal and its procedures.[96]

Thus, the position of the U.S. military is clear. "When in doubt as to the captive's status, treat and protect them as [POWs] until their status can be determined."[97] This policy is grounded in longstanding ideals.

> For over 220 years, our nation's founding principles have extolled the values of human life, and they form the basis for humane treatment of enemy prisoners of war. National ideals demand it, international law requires it. . . . Because the US Army's honor and reputation depend on firm but humane [POW] treatment, we must uphold the highest standards of conduct.[98]

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90. *See, e.g.*, Bohdan Arct, Prisoner of War, My Secret Journal (1988) (containing an excellent source of anecdotal evidence relating to this treatment by a former prisoner). There are numerous biographies and anthologies documenting the experiences of former prisoners. *See also* Roger Axford, Too Long Silent (1986); A.J. Barker, Prisoners of War (1975); Mitchell G. Bard, Forgotten Victims (1994); Josef M. Bauer, As Far as My Feet Will Carry Me (1957); Ron Baybutt, Colditz, The Great Escapes (1982); Harry Beaumont, Old Contemptible (1967); Alan Caillou, The World Is Six Feet Square (1954); Thomas D. Calnan, Free as a Running Fox (1970); Lewis H. Carlson, We Were Each Other's Prisoners (1997); Charlotte Carr-Gregg, Japanese Prisoners of War in Revolt (1978); Gavan Daws, Prisoners of the Japanese (1994); Robert E. Denney, Civil War Prisons and Escapes (1993); Harold Denny, Behind Both Lines (1943); Sam Derry, The Rome Escape Line (1960); Terrence Des Pres, The Survivors (1976); John Dunbar, Escape Through the Pyrenees (1955); William E. Dyess, The Dyess Story (1944); Ian English, Home by Christmas (1997); A.J. Evans, The Escaping Club (1921); Helmut M. Fehling, One Great Prison (1951); Herbert Ford, Flee the Captor (1966); Georg Gaertner, Hitler's Last Soldier in America (1985); Robert Gayler, Private Prisoner (1984); Samuel Grashio, Return to Freedom (1982); Nerin E. Gun, The Day of the Americans (1966); Linda Goetz Holmes, 4000 Bowls of Rice (1994); David Howarth, We Die Alone (1955); Alexander Janta, Bound with Two Chains (1945); Louis E. Keefer, Italian Prisoners of War in America (1992); Agnes Norton Keith, Three Came Home (1981); E. Bartlett Kerr, Surrender & Survival (1985); Arnold Krammer, Nazi Prisoners of War in America (1996); Rolf Magener, Prisoners' Bluff (1954); Bruce Marshall, The White Rabbit (1952); Ian McHorton, The Hundred Days of Lt. McHorton (1963); Kurt Molzahn, Prisoner of War (1962); William Moore, The Long Way Round (1986); Airey Neave, Little Cyclone (1954); Alan H. Newcomb, Vacation with Pay (1947); Graham Palmer, Prisoner of Death (1990); Richard Pape, Boldness Be My Friend (1953); Alexander Ramati, The Assisi Underground (1978); Slavomir Rawicz, The Long Walk (1956); Pat R. Reid, Escape from Colditz (1953); Reid, *supra* note 75; Oscar G. Richard, Kriegie, An American POW in Germany (2000); Anthony Richardson, Alone He Went (1951); Giles Romilly, Hostages of Colditz (1954); Jerry Sage, Sage of the OSS (1985); A.P. Scotland, The London Cage (1957); Lloyd R. Shoemaker, The Escape Factory (New York, 1990); James F. Sunderman, Air Escape and Evasion (1963)); Virgil V. Vining, Guest of an Emperor (1968); William L. White, The Captives of Korea (1957); John S. Whitehead, Escape to Fight On (1990); Eric Williams, The Wooden Horse (1950)); Barry Winchester, Beyond the Tumult (1971); J.E.R. Wood, Detour (1946).

91. Taken together, Articles 4 and 5 effectively require the capturing Power to presume that POW status exists. *See* GPW, *supra* note 3, arts. 4-5. Article 5, however, allows the Detaining Power to rebut that presumption before a fair and competent tribunal. *Id.* art. 5.

92. *See* U.S. Dep't of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees para. 1-4(d) (1 Oct. 1997) [hereinafter AR 190-8] (stating that The Judge Advocate General (TJAG), U.S. Army, will provide guidance and advice regarding GPW Article 5 tribunals).

93. *Id.* para. 1-6.

94. The "competent tribunal" requirement demonstrates the GPW drafters' close attention to procedural rights. Initially, the Stockholm Draft provided for determination by a "responsible authority." Stockholm Draft, *supra* note 48, art. 4. An amendment offered by the Netherlands proposed the present language of Article 5, but with determination by a "military tribunal." 2 Final Record, *supra* note 47, annex 95, at 63. The Danish delegation proposed substituting the phrase "competent tribunal" because "[t]he laws of the Detaining Power may allow the settlement of this question by a civil court rather than by a military tribunal." *Id.* at 245 (13th plen. mtg.). The final article, with those amendments, was adopted without an opposing vote. *Id.* at 272. Given the drafters' concern with both procedural rights *and* the efficiency of competent tribunals' determinations, it seems clear that a Detaining Power may not satisfy legal rights through a unilateral declaration that it "has no doubt" about a detainee's status.

95. AR 190-8, *supra* note 92, para. 1-6b. Thus, under *AR 190-8*, if someone asserts POW status, that individual is entitled to a tribunal even if the captor believes no doubt exists that he is not entitled to it. This Army regulation, as with all the statements of required actions by the United States, is, of course, evidence of the existence of state practice, and, as such, a primary source of international law. *See, e.g.*, Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1043, 1978 U.N.Y.B. 1185, 1197; Clive Parry, The Sources of Evidence in International Law 8 (Manchester Univ. Press 1965).

96. *See* AR 190-8, *supra* note 92, para. 1-6 (c), (e). The tribunal must be composed of three commissioned officers with at least one of field grade. Proceedings must be open except for deliberations or when security would be compromised. Those claiming POW status are entitled to a number of substantive rights, including the right to attend the hearing, testify and call witnesses, and the right against self-incrimination. *Id*.

97. Note to Army Military Training Materials for Military Police, *Processing Captives*, *available at* http://www.atsc.army.mil/itsd/comcor/mp0001s.htm (last visited July 29, 2003).

D. Issues Raised by the United States Intention to Use Military Tribunals to Try Persons Captured in Combat

Three questions necessarily arise out of the announced intention to use tribunals. First, are such bodies still legal under international law? The short answer is that they are, but only under certain circumstances and for the trial of certain individuals. The United States may only use tribunals to try captives subject to GPW if the tribunal applies current standards for U.S. courts-martial. Since tribunals are not, in themselves, illegal under U.S. law,[99] they can satisfy international requirements.

Second, and more important, are the procedural and evidentiary standards applied to World War II tribunals,[100] which were incorporated either directly or by implication into Commission Order 1,[101] still valid under current international law? The answer to that question is a most definite no. They meet neither the standards of the GPW, nor the current requirements of international law as evidenced by human rights conventions and the rules of various currently existing[102] and developing[103] bodies for the trial of international crimes and war criminals.[104]

Finally, and of particular interest to those asked to participate in such tribunals as convening authorities, judges, juries, prosecutors, or otherwise, does participation in a trial of a POW that applies those World War II standards in itself constitute a war crime? Again, the answer is almost certainly yes. Not only does *United States v. Uchiyama*[105] provide precedent for this conclusion, but the GPW makes it clear that violation of a POW's right to a trial is a war crime.[106]

II. The History of American Military Commissions

The United States has used military commissions[107] as an alternative to courts-martial[108] for a very long time. The name "military commission" was first used during the Mexican War by General Winfield Scott,[109] who announced that military commissions would try civilians for committing certain crimes in occupied Mexican territory.[110] Preceding the Mexican War, however, courts analogous to military commissions heard trials for violations of the laws of war.[111] Contrary to current popular belief, the use of military commissions was not unchallenged.[112] The legality of military commissions was questioned by The Judge Advocate General at the beginning of the Civil War,[113] although trials before commissions were held during that conflict.[114] Following the Civil War, Captain Henry Wirz, commandant of the Andersonville prison camp was tried and sentenced to death by a military commission.[115] He was convicted of "maliciously, willfully and traitorously" conspiring to "injure the health and destroy the lives" of POWs in violation of the laws of war.[116]

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98. Colonel Walter R. Schumm et al., *Treat Prisoners Humanely*, MIL. REV. 83 (Jan.-Feb. 1998).

99. This is not a question of U.S. constitutional law; military tribunals are still valid under the reasoning of *Ex parte Quirin*. Rather, the issue is whether the proceeding meets international standards, and if not, whether the failure to do so invalidates the proceeding. Note, however, *Quirin* holds in part that

> the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the *clear conviction that they are in conflict with the Constitution* or laws of Congress constitutionally enacted.

317 U.S. 1, 25 (1942) (emphasis added).

100. *See* discussion *infra* text accompanying note 148.

101. MCO No. 1, *supra* note 3.

102. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 I.L.M. 1192 (1993), *available at* http://www.un.org/icty; Statute for the International Criminal Tribunal for Rwanda, 33 I.L.M. 1602 (1994), *available at* http://www.ictr.org.

103. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, (entered into *force* July 1, 2002), *available at* http://www.un.org/law/icc/index.html.

104. *See infra* sec. IV (discussing evidence procedure and appellate rights).

105. Tried at Yokohama, *supra* note 6.

106. *See* GPW, *supra* note 3, art. 3. For a discussion of *Uchiyama*, see *infra* notes 234-237 and accompanying text.

107. The Supreme Court has held that

> [n]either the United States Constitution nor United States legislation provides that crimes committed by military personnel, crimes which violate the laws of war, or crimes related to the conduct of war must be tried before military authorities. The Supreme Court has characterized as "well-established" the power of military tribunals to exercise jurisdiction over enemy belligerents, prisoners of war and others charged with violating the laws of war.

Johnson v. Eisentrager, 339 U.S. 763, 786 (1950). The Supreme Court, however, has never stated or implied that such jurisdiction is exclusive. *In re* Demjanjuk, 603 F. Supp. 1468, 1476 (N.D. Ohio 1985).

A. Procedural History of Military Tribunals

Although military commissions were long characterized by an absence of set rules and procedures, they generally followed the principles of law and procedural rules[117] governing courts-martial.[118] That policy is unsurprising, given that commissions were originally developed so judicial bodies could try defendants otherwise outside their jurisdiction. The judicial participants—military officers—were the same; their adoption of the procedures and rules they normally used naturally followed.

Military commissions remained unchanged from the Mexican-American War through the period before World War II.[119] The 1928 *Manual for Courts-Martial* noted:[120] Military Commissions . . . These tribunals are summary in their nature, but so far as not otherwise provided *have usually been guided by the applicable rules of procedure and evidence prescribed for courts-martial*.[121] America's sudden entry into World War II, and the resulting pressure for swift, stringent, and secret punishment of enemy agents, however, brought substantial changes to existing practice. Those pressures quickly culminated in the espionage cases that became *Ex parte Quirin*.[122]

B. U.S. Military Commissions in World War II

1. Ex parte Quirin

The use of commissions to try extraordinary crimes, and resulting questions about their governing rules and procedures, arose early in the war. In *Ex parte Quirin*,[123] a military commission comprised of seven U.S. Army officers[124] appointed by President Roosevelt tried German saboteurs caught on U.S. soil.[125] The most startling departure from previous practice in

108. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920 reprint).

Military commissions have also been called "common-law war courts." Madsen v. Kinsella, 343 U.S. 341, 346 (1952). Military historian William Winthrop explains the development of the name "military commission" as follows:

> The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name. . . . But to employ the [name "court-martial"] for the two kinds of court could scarcely but result in confusion.

WINTHROP, *infra* note 108, at 831.

109. "Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court . . . ." *Id.*

110. The Mexican territory commissions were ordered pursuant to Headquarters, Dep't of Army, Gen. Orders No. 20 (19 Feb. 1847) [hereinafter Gen. Order No. 20]. Note that offenses against the laws of war were tried by a council of war. WINTHROP, *supra* note 108, at 832. The general order provided that "[a]ssassination, murder, poisoning, rape, wanton destruction of churches . . . and destruction . . . of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces . . . should be brought to trial before Military Commissions." Gen. Order No. 20, *infra* note, *quoted in* Nathan April, *An Inquiry into the Juridical Basis for the Nuernberg War Crimes Trial*, 30 MINN. L. REV. 314, 317 (1946).

111. *See Ex parte* Quirin, 317 U.S. 1, 12 nn. 9-10 (1942) (discussing cases, including the 1780 hanging of convicted spy Major John Andre of the British Army by order of a Board of General Officers appointed by General George Washington). In *Madsen v. Kinsella*, the Court noted:

> By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of the courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offense which in war would go unpunished in the absence of a provisional forum for the trial of offenders.

343 U.S. 341, 346 n.8 (1952) (citing HOWLAND, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 1066-1067 (1912)).

112. *Id*.

113. William Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45, 46 (1948) (citing Case of Col. Ebenezer Magoffin, *CSA*, 1 MS Op. JAG 285).

114. Stephen Young, *United States Military Commissions: A Quick Guide to Available Resources*, *at* http://www.llrx.com/features/military.htm; *see also* Winthrop, *supra* note 108, at 833.

115. *Famous Trials The Trial of Captain Henry Wirz*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/wirz/wirz.htm.

116. 8 AM. ST. TRIALS 666 (1918), *reprinted in* 1 THE LAW OF WAR 783 (Leon Frieman ed., 1972).

117. Interestingly, the Rules of Proceeding in at least one post-Civil War military commission are still available. Those rules governed the trial of David Herold and other alleged assassins of President Lincoln. The commission allowed the defendants to choose their own counsel, examine witnesses, object to testimony of witnesses, and provided the defendants' counsel a written daily transcript with a discretionary provision to the press. *See* Proceedings of a Military Commission, Washington D.C. (May 1, 1865), *available at* http://www.surratt.org/documents/Bplact01.pdf.

the rules created under the Roosevelt Order was the wholesale abandonment of prior procedural safeguards, including several steps for appeal.[126] The *Quirin* commission rules, including a reduced standard for the admissibility of evidence and limited appeals, were applied in later war crimes trials conducted by military commissions following the end of the war.[127]

2. Development of the Nuremburg and Tokyo Rules

The *Quirin* rules were applied to post-war trials. Well before combat ended, the allies evaluated procedures for trials of war criminals.[128] Justice Robert H. Jackson of the Supreme Court, who had been appointed[129] chief U.S. prosecutor at the Nuremberg trial of major war criminals, issued a *Report to the President on Atrocities and War Crimes* on 7 June 1945.[130] Justice Jackson's report urged that

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118. *See* Memorandum, Procedural Law Applied by Military Commissions (n.d.) [hereinafter Military Commissions Memorandum] (copy on file with the National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 46, the Legal Division of the office of the Supreme Commander Allied Powers (General Douglas MacArthur)) (quoting several authorities, including Charles Fairman, *The Law of Martial Rule* para. 251, at 264 (2d ed. 1943)) ("There are no requisite formalities, the omission of which would entitle the accused to an acquittal." (citations omitted)); *see* Memorandum, Colonel Fairman, to Officers Attending Army JAG School (Feb. 1943) ("Questions concerning such a tribunal are not to be regarded from any narrow technical view . . . but on general principle."). While the commission followed general principles of law and the procedural rules governing courts-martial, they were not, however, bound to do so. *Id.* Much of the authority cited, however, indicated that

> as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will, like a court-martial, permit and pass upon objections interposed to members, . . . receive all material evidence desired to be introduced, . . . and, while in general even less technical than a court martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.

WINTHROP, *supra* note 108, at 841-42. The Military Commissions Memorandum concluded that

> [a] military commission is not bound by a rigid set of rules governing the procedure and evidence since the authority by which they are brought into being did not provide them with any rules to follow. *If the conduct of military commissions in the past is to be a guide, the same rules for procedure and rules of evidence governing General Courts Martial would prevail.* But no rules of procedure or evidence are prescribed by international law or otherwise, and commissions are not bound to follow court martial procedures.

Military Commissions Memorandum, *infra* note 118, at 3 (emphasis added).

119. *See* WINTHROP, *supra* note 108, at 832.

120. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 2, at 1 (1928) [hereinafter 1928 MCM] (emphasis added).

121. Once again, however, they were not bound to do so. As the-then current *Field Manual of Military Government & Civil Affairs* provided, "[i]t is generally advisable to direct that Military Commissions follow the procedure of General Army or Navy courts Martial, except where such procedure is plainly inapplicable . . . ." U.S. DEP'T OF ARMY, FIELD MANUAL 27-5, FIELD MANUAL OF MILITARY GOVERNMENT & CIVIL AFFAIRS 1 (22 Dec. 1943), *cited in* Memorandum, (n.f.n.) Greenberg, subject: Military Commissions Are Not Bound by Rigid Rules of Procedure of [sic] Evidence (n.d.), (copy on file with National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 46c).

122. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 46 (Univ. of Kansas Press) (2003).

123. 317 U.S. 1 (1942). This case was tried between 8 July to 4 August 1942. *Id.*

124. The trial was held in the Department of Justice Building, Washington, D.C. The prosecutors included Attorney General Frances Biddle and The Judge Advocate General, U.S. Army, Major General Myron C. Cramer. Defense counsel included Colonel Kenneth C. Royall (later Secretary of War under President Truman) and Major Lausen H. Stone (son of Harlan Fiske Stone, the Chief Justice of the Supreme Court). Federal Bureau of Investigation (FBI) Office of Pub. & Cong. Affairs, *George John Dasch & The Nazi Saboteurs*, *at* http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm (last visited 13 Oct. 2003).

125. *Id.* The order of appointment provided that

> The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 3, 1942). The rules developed for the *Quirin* commission followed the Presidential Order. *See Ex parte* Quirin, 317 U.S. 1, 46-48 (1942).

126. FISHER, *supra*, note 122, at 48-49.

127. John Elwood, *Prosecuting the War on Terrorism: The Government's Position on Attorney-Client Monitoring, Detainees, and Military Tribunals*, 17 CRIM. JUST. 30, 51 (2002). The *Quirin* rules were "followed in hundreds of military commissions after World War II." *Id.* Wallach, *supra* note 1, at 862 nn.47- 49.

> [t]hese hearings . . . must not be regarded in the same light as a trial under our system where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But the procedure of these hearings may properly bar obstructionist and dilatory tactics resorted to by defendants in our ordinary criminal trials.[131]

Thus, based upon *Quirin* and its extraordinarily rules, the United States developed procedural and evidentiary approaches for the trial of post-war criminals. Those rules were initially developed for the International Military Tribunal at Nuremburg (IMT), expanded for the International Military Tribunal for the Far East (IMTFE), and applied thereafter to military commissions trying war criminals in both theaters.[132] The rules allowed for great flexibility in their application; consequently, a fair trial depended upon the good faith of the various military commanders empowered to create the commissions.

3. Application of the Rules in Military Tribunals

The procedural development of the IMT sprang from the London Charter[133] and Control Council Law No. 10,[134] which allowed each power, within its zone, to arrest suspects and bring them "to trial before an appropriate tribunal."[135] These follow-up tribunals[136] were comprised of three or more members that the parties could not challenge.[137] They applied rules[138] similar to the IMT[139] governing indictments and inher-

128. Memorandum, Major General Myron Cramer, The Judge Advocate General, U.S. Army, subject: Applicability of Articles of War to Trials of War Criminals by Military Commissions 4 (n.d.) (on file with National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 2A). In this memorandum, The Judge Advocate General, Myron Cramer, noted:

> [T]he proponents of the claim that Congress by the Articles of War intended to regulate the extraterritorial relations of the Army with foreign belligerents, have a heavy initial burden. I am the more moved to this viewpoint by [*Ex parte Quirin*, which held] that Congress by providing in the Articles of War for the trial of offenses committed by enemy belligerents "has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." *If therefore, Congress has not invaded the substantive field of these offenses, there is a fair inference, proof to the contrary being lacking, that it did not intend to enter the procedural field in this respect*.

Id. (emphasis added). Thus, unrestrained by the Articles of War, Cramer proceeded with his reasoning on development and application of procedures for war crimes commissions:

> You have asked my opinion whether the Articles of War constitute a limitation on the procedure of military commissions appointed by authority of United States army commanders in occupied territory for the trial of war criminals. The question is important for the reason that if applicable, alleged war criminals would be entitled to assert a privilege against self-incrimination under Article of War 24, testimony by deposition could not be adduced against their consent under Article of War 25, and the reviewing or confirming authority would be required to refer the record of trial to his staff judge advocate or The Judge Advocate General before acting thereon under Article of War 46.

Id. at 1. His conclusion is telling. After a review of applicable law, Cramer stated that

> [c]arried to its logical extent, the claim that the Articles of War apply to trials of war criminals results in the conclusion that Congress intended, as a matter of public policy, to extend the protection of the Articles of War to such offenders. This in turn would outlaw American participation in international tribunals convened for such trials unless the protections of the Articles of War were observed by those tribunals. *I cannot bring myself to reach any such conclusion.*

Id. at 6 (emphasis added).

129. Exec. Order No. 9547, 10 Fed. Reg. 4961 (1945).

130. Justice Robert H. Jackson, Report to the President on Atrocities and War Crimes (June 7, 1945).

131. *Id.* para. III(2).

132. *See* Phillip Piccigallo, The Japanese on Trial (1979). *See also* Wallach, *supra* note 1, at 862 nn.53-54, 66-70 (demonstrating application of *Quirin* rules to later Far East "minor" trials). Roosevelt's order in *Quirin* has been cited as the "first . . . expression" of the "basic position toward admission of evidence" in trials of war criminals. *Id.*

133. Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The Charter provided that "[t]he constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement." *Id.* art 2; *see generally* Wallach, *supra* note 1. The procedural and evidentiary discussion that follows may be found, in expanded form, in that article.

134. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 3 (Dec. 20, 1945), 3 Official Gazette Control Council for Germany 50-55 (1946) [hereinafter Control Council Law No. 10].

ent powers.[140] These rules provided for the required confirmation of any death sentence by the theater commander and that trials would be held in open court "except when security, protection of witnesses, or other considerations make this inadvisable."[141] The rules did contain certain substantive changes,[142] however, including expansion of the evidentiary rules.[143]

The Tokyo and Nuremberg Charters had important differences.[144] The IMTFE Charter was created on 19 January 1946, by order of General Douglas MacArthur.[145] The Charter provided that the IMTFE would consist of six to eleven members. MacArthur would appoint those members from names submitted by the victor nations in the Far East.[146] The Charter did not provide for appointment of alternates; instead, "the presence of a majority of all members [was] necessary to constitute a quorum. All decisions and judgments, including convictions and sentences, were by a majority vote of members present."[147] Per its Charter, the IMTFE drafted its own procedural and evidentiary rules.[148]

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135. *Id.*

136. The United States conducted two sets of follow-up trials in Germany under Control Council Law No. 10. The first group of trials were prosecuted under Telford Taylor at Nuremberg. *See generally* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (Aug. 15, 1949) [hereinafter TAYLOR, FINAL REPORT]. Most of the other trials were held at the former German concentration camp at Dachau. Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18, 25 (1950). The "common trial" approach, (involving related acts, times, and locales) was used in both Europe and Asia. Paul Spurlock, *The Yokohama War Crimes Trials: The Truth About a Misunderstood Subject*, 36 ABA J. 387, 389 (1950).

137. Control Council Law No. 10, *supra* note 134, art. 3.

138. Control Council Ordinance No. 7 (18 Oct. 1946) [hereinafter Control Council Ordinance No. 7]; *see also* Regulation on Military Commissions Issued by Letter of Headquarters, U.S. Forces, European Theater (25 Aug. 1945), *reprinted in* 39 GEO. L.J. 106-12 (1950).

139. *See* Charter of the International Military Tribunal *supra* note 133. The tribunals were also permitted to promulgate their own supplemental rules of procedure. Control Council Law No. 10, *supra* note 134, art. 5. Several sets of rules were issued, providing for, inter alia, the specifics of representation by counsel, the filing of motions, and the production of evidence at trial. A uniform set of procedures was eventually issued by joint action of the tribunals. Office of Military Government (U.S.), Uniform Rules of Procedure, Military Tribunals Nuremberg, (Jan 24, 1948) (final iteration of rules), *available at* http://www.yale.edu/lawweb/avalon/imt/rules5.htm.

140. Control Council Law No. 10, *supra* note 134, arts. 4-5.

141. Control Council Ordinance No. 7, *supra* note 138; *see also* Regulation on Military Commissions Issued by Letter of Headquarters, U.S. Forces, European Theater (25 Aug. 1945), *reprinted in* 39 GEO. L.J. 106-12 (1950).

142. *See* TAYLOR, FINAL REPORT, *supra* note 136, at 89. One modification was the appointment by the tribunals of commissioners. It had implications on the resolution of the overwhelming numbers of defendants—a continuing problem.

> Upon the conclusion early in 1948 of the "RuSHA case," . . . Judge Crawford (who had been a member of that tribunal) was appointed as the Chief of the Commissioners for the Tribunals. Judge Crawford, assisted by several associate commissioners, took testimony from then until the conclusion of the court proceedings in the "Ministries case" in the fall of 1948. The commissioners had no power to rule on questions of evidence, but certified the transcript of proceedings before them to the tribunals.

Id.

143. *See* Elwood, *supra* note 127, at n.53.

144. Unlike the protracted London Charter negotiations, there was no need for any decision making other than by fiat. The Potsdam ultimatum, issued by the Allies on 26 July 1945, provided that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." Potsdam Declaration, art. 10 (July 26, 1945).

145. Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 105 (2000) ("The Tokyo tribunal in the Far East (IMT-FE) was set up by proclamation of General Douglas MacArthur . . . on January 19, 1946."). The embodiment of sovereignty in General MacArthur as Supreme Commander for the Allied Powers (SCAP) meant there was no need to negotiate. General MacArthur could have issued rules similar to the U.S. Articles of War, those governing military commission in the United States, or an exact copy of the Nuremberg Charter. He did not. The absence of the negotiating process had at least one significant effect. Article 9, which began with the same words as Article 16 of the Nuremberg Charter ("In order to insure fair trial"), did not require a continental indictment including "full particulars which specified the charges in detail. Instead, following the American rule, the indictment was to "consist of a plain, concise and adequate statement of each offense charged." CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST art. 9 (Jan. 19, 1946), *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm (last modified Sept. 9, 2003) [hereinafter IMTFE CHARTER].

146. IMTFE CHARTER, *supra* note 145, art. 2. General MacArthur appointed judges from eleven nations: India, the Netherlands, Canada, the United Kingdom, the United States, Australia, China, the Soviet Union, France, New Zealand, and the Philippines. Walter McKenzie, *The Japanese War Crimes Trial*, 26 MICH. STATE B.J. 16, 17 (1947).

147. IMTFE CHARTER, *supra* note 145, art. 4. If an absent member returned, he could take part in all subsequent proceedings, unless he declared "in open court that he [was] disqualified by reason of insufficient familiarity with the proceedings which took place in his absence." *Id*. art. 4.

Prior to the Japanese surrender, the allies began plans for trials of minor[149] war criminals. The War Crimes branch was organized in March 1945, in the office of the Theater Judge Advocate.[150] These "minor" tribunals[151] used procedures derived from the *Quirin* commission. The internal memoranda of SCAP's (Supreme Commander for the Allied Powers) Legal Division[152] indicate an intention[153] to apply the procedures of U.S. military commissions directly.[154] Their regulations laid out the same rules of evidence and procedure discussed above.[155] When compared with the application of the Nuremberg Rules, however, the tribunals' application of their own rules provides a stark example of the potential for abuse when rules are so flexible as to be non-existent.

a. Procedural Issues in the Post-World War II Trials

The flexible nature of the procedural rules used in the post-World War II trials gave rise to substantial and repeated procedural issues. The evidentiary rulings were more questionable, and are treated separately below. The lax nature of the trial proceedings, however, also raised many other substantive questions.

Procedural problems in the trials went well beyond evidentiary issues, [156] especially in the IMTFE. For example, both IMTs indicted arguably senile or insane defendants.[157] At various times, there were improper communications with judges,[158] inconsistent rulings favoring the prosecution,[159] vague and ambiguous indictments under the Tokyo rules,[160] questions regarding the applicability of the Geneva Conventions to the defendants,[161] and the denial of motions to recuse biased

148. *Id.* arts. 7, 13. The Tribunal's evidentiary powers were a synthesis of those contained in the Nuremberg Charter and Rules and those in the Royal Warrant issued for the trial of war criminals by the United Kingdom. *See* The Royal Warrant, Regulations for the Trial of War Criminals (United Kingdom) (June 18, 1945), *available at* http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm.

149. "The word 'minor' is not used as a definition of the offenses involved, but merely to distinguish the persons they are trying from the 'major war criminals' being tried by the next division." McKenzie, *supra* note 146, at 16.

150. Spurlock, *supra* note 136, at 387. On 6 December 1945, General MacArthur directed General Robert Eichelberger to appoint military commissions to conduct trials immediately. *Id.* n.81.

151. Most of the "minor" trials were held at Yokohama, Japan. *Id*.

152. *See* Military Commissions Memorandum, *supra* note 118.

153. That they were completely successful in doing so may be explained by the complete control exercised by General MacArthur as SCAP, and the pervasive influence which must exist when the power to appoint prosecution, defense, and the judiciary, as well as all administrative services and powers, rest in the hands of one individual. *See* Spurlock, *supra* note 136, at 388. General MacArthur's letter of 6 December 1945, shows the sort of influence which that could be exercised without direct orders:

> [T]he following special provisions will be applied to war criminal suspects . . .
> A. They will not be treated as prisoners of war
> B. Quarters, food and privileges will be accorded suspects in keeping with those customarily provided for ordinary criminals, *charged with an equally revolting domestic crime*.

Letter from General Douglas MacArthur, Supreme Commander for the Allied Powers, to the Commanding General, Eighth Army, subject: Detention, Interrogation and Trial of Suspected Japanese War Criminals (Dec. 6, 1945) (SCAP Letter AG 000.5), *quoted in* Robert Miller, *War Crimes Trials at Yokohama*, 15 BROOK. L. REV. 191, 192 (1949) (emphasis added).

154. *See* Military Commissions Memorandum, *supra* note 118. General MacArthur's issuance of *Regulations Governing the Trial of War Criminals* on 24 September 1945, aided the Legal Division in achieving that goal. These regulations were the precursor to both the December minor trials order and the IMTFE tribunal order. *See* National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1855, File 124 [hereinafter SCAP].

155. The similarity included an article on evidence, Article 16, which was precisely the same as that issued for the Tokyo Tribunal. *See Regulations Governing the Trial of War Criminals, supra* note 154.

156. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 228 (1962). One major substantive distinction between the major war crimes tribunals was that "the Tokyo Tribunal [under Article 5] . . . had jurisdiction over persons only if they were accused of having committed offenses which included crimes against peace, in contrast to the Nuremberg Tribunal which had no exclusive provision of this kind." *Id.*

157. For example, the Nuremberg Tribunal severed Gustav Krupp as a defendant. TAYLOR, *supra* note 68, at 157. Rudolf Hess was probably insane, but stood trial and was convicted. *Id.* at 177-80. Shumei Okawa was adjudged insane on 17 May 1946, but retained as a defendant. Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMP. L.Q. 27, 51-52 (1947).

158. In his capacity as a prosecutor, Justice Jackson engaged in ex parte communications with Judge Biddle before the Tokyo Tribunal. TAYLOR, *supra* note 68, at 134. These communications sent "the proprieties 'by the way' for fair." *Id.*

159. 2 The Tokyo Judgment, Opinion by Judge Pal 633-34 (Amsterdam Press 1977) [hereinafter Pal Opinion] (emphasis added); TAYLOR, *supra* note 68, at 321.

judges.[162] In addition, to an extent often confounding to counsel, there were many unresolved questions.[163]

The distinction between the number of judges at Nuremberg and Tokyo, and the concomitant quorum rules, provides a classic example of the flexibility of the rules and their effect on fairness.[164] The same court could, in good faith, issue diametrically opposed rulings on different days in a case involving the same parties and precisely the same issues. [165]

The procedural flaws of the post-war tribunals illustrate the importance of standardized and closely articulated rules. While it is easy to complain about "technicalities" and "lawyers spouting off," conducting a fair trial without some sort of predictable model is not.[166] The farther a procedure strays from a closely articulated model, the more likely it will go wrong. The divergence in evidentiary issues under the *Quirin* rules in the post-war trials illustrates that lesson even more starkly.

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160. 1 The Tokyo Judgment, Opinion by Judge Bernard 494 (Amsterdam Press 1977) (explaining that the lack of specificity in indictments was one reason Judge Bernard of France dissented stating, "Though I am of the opinion that the Charter permitted granting to the Accused guarantees sufficient for their defense, I think that actually these were not granted to them"). Although the SCAP stated that the accused was "entitled to have in advance of trial a copy of the charges and specifications clearly worded so as to apprise the accused of each offense charged," these requirements were not often followed. Miller, *supra* note 153, at 195-96.

> For example, the specifications might specifically name two or three prisoners alleged to have been abused by the accused and the manner of abuse. Then might follow several wherein it was alleged that between 15 January 1942 and 1 June 1945, he did beat, wound, kick, abuse and otherwise torture an American prisoner of war known as "Whitey" or "Shorty" or some other nickname. The final or "catch-all" specification was that he, between the above-stated periods, abused numerous other American or Allied prisoners of war, no names or other data being stated. The affidavits would usually not identify the party whose nickname had been used. The "catch-all" specification was supported by affidavit statements that the accused was "always slapping and kicking" the prisoners, or "whenever he was around, there was always trouble."
>
> Inasmuch as there was no standing commission to which a motion for a bill of particulars could be addressed prior to trial, such remedy was foreclosed until after trial [commenced] . . . [the name specification might be the same incident as the nick-name specification]. The attempt by way of motion, either for a bill of particulars or to strike, had scant chance for success.

Id.

161. Both in Japan and Germany, the Allies denied war crime defendants their rights to housing, allowances, and association under the existing Geneva Convention. *See In re* Yamashita, 327 U.S. 1, 20 (1946); Miller, *supra* note 153, Koessler, *supra* note 136, at 192 n.69; , *supra* note 30, at 19 n.6. Yet, an Axis defendant was subject to prosecution for denying those same Geneva Convention rights to Allied prisoners charged with war crimes. United States v. Uchiyama, Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July, 1947) (on file with author)**;** *see* discussion, *infra* nn.234-237 and accompanying text.

162. *See, e.g.*, Richard Minear, Victor's Justice (1971). Minear points out that the Soviet delegate at the London Conference and later judge at Nuremberg, General I. T. Nikitchenko, said

> with regard to the position of the judge the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before.

Id. at 80-81 (quoting The Avalon Project, Minutes of Conference Session of June 29, 1945, in International Conference on Military Trials: London (1945)), *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm.

The French Government appointed its London representative as an alternate justice. The United States appointed Francis J. Biddle as Attorney General and a co-author of a memorandum that expressed a preference for military justices, such justices "being less likely to give undue weight to technical contentions and legalistic arguments. *Id*. (quoting The Avalon Project, Minutes of Conference Session of June 29, 1945, in International Conference on Military Trials: London (1945)), *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm. At Tokyo, the Philippine justice, Delfin Jaranilla, was a survivor of the Bataan death march; the second American justice, General Cramer, had submitted a legal brief to President Roosevelt on the responsibility for the attack on Pearl Harbor; and President Webb had been Australian war crimes commissioner during the war. *Id.* at 81-82.

After the Tokyo Tribunal rejected the challenge of any judge, on jurisdictional grounds, President Webb stated

> that, before he accepted his appointment, he seriously considered what effect his reports would have on his position as a member of the Tribunal. He had come to the conclusion without difficulty that he was eligible, his views being supported by the best legal opinion available to him in Australia.

Flight-Lieutenant Harold Evans, *The Trial of Major Japanese War Criminals*, 23 N.Z. L.J. 8, 23 (1947). This was the same judge who, at a later point in the trial, asked a Japanese witness if "the purpose of the Imperial Rule Assistance Association was to prepare the people for an inhumane and illegal war against Great Britain and America, a war which should not have been begun and a war which cannot be defended?" 1 The Tokyo War Crimes Trial 1684 (Garland Publishing Co., 1981).

163. One such question is how to obtain an authoritative translation? Attorneys, who often did not speak the language of the defendants, were at the mercy of the ability and integrity of their translator for vital document reviews and interrogations. *See* Taylor, *supra* note 68, at 176. General MacArthur ordered one case retried because of a failure to translate a confidential document to the accused, although the court admitted it into evidence. Spurlock, *supra* note 136, at 437; Robert Grier Stephens, *Aspects of the Nuremberg Trial*, 8 Ga. B.J. 262, 266 (1946).

b. Evidentiary Issues in the Post-World War II Trials

The permissive nature of the evidentiary rules used in the post-World War II tribunals allowed for the admission of evidence that raised concerns well beyond mere technical quibbles. For example, German suspects in the Malmedy Massacre case[167] claimed the prosecution subjected them to improper methods of investigation, in particular mock trials. An Administrative Review Board[168] (Raymond Board) investigated this complaint.[169] According to the Raymond Report:

> When the prisoner was brought into the mock trial room[,] sometimes other people were brought in who purported to testify against him. There is no evidence on which the board can find that the prisoner himself was forced to testify at such trial. One member of the prosecution team would play the part of prosecutor, and another would act as a friend of the defendant. While this latter may not have been held out affirmatively as defense counsel, the accused had every reason to believe he was taking that part. No sentence was pronounced[,] but the accused was made to understand that it was his last chance to talk and undoubtedly in some cases understood he had been convicted.
>
> Following the mock trial[,] the man who had played the friend of the accused at the mock trial would talk to him confidentially and advise him to tell what he knew. This procedure met with varying success, but undoubtedly some defendants would confess at least part of their crimes under the influence of such procedures.[170]

164. At the Tokyo Tribunal, President Webb, with extraordinary candor, describes the fairness of these proceedings.

> I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says we are not bound by the technical rules of evidence. That not merely prevents us from following our own technical rules—we could hardly do that because there are eleven nations represented and in some particulars they all differ in these technical rules—but it has the effect of preventing us from substituting any other body of technical rules of our own. All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court. Sometimes we have eleven members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from seven judges as you would get from eleven. I know that you would not . . . . You cannot be sure what decision the court is going to come to on any piece of evidence—not absolutely sure—because the constitution of the court would vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we to overcome that? *We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement. The Charter does not allow us to adopt them in any event. It is contrary to the spirit of the Charter. The decision of the Court will vary with its constitution from day to day. There is no way of overcoming it.*

Pal Opinion, *supra* note 159, at 654-55 (quoting President Webb) (emphasis added).

165. One area in which the procedures cannot be faulted at all is the provision of defense counsel. Indeed, the Court noted in *In re Yamashita* that "[i]n all cases it appears that defense counsel were competent and zealous in their representation. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged." *In re* Yamashita, 327 U.S. 1, 5 (1946). Professor Benjamin Ferencz, one of the chief prosecutors in the subsequent Nuremberg cases, pointed out that

> no German lawyer [was] ever . . . excluded if he was requested as counsel for a defendant. In fact, most of the German counsel chosen [were] themselves subject to arrest or trial in German courts under German law for membership in the Nazi Party or the criminal SS. If tried, many of them would [have been] barred from legal practice but they [were], through the intervention of the American authorities, . . . given immunity from prosecution in their own courts in order to ensure that accused war criminals [would] have a free choice of counsel from those Germans whom they consider best suited to defend them.

Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. Crim. L. & Criminology 144, 146 (1948).

166. *See*, e.g. Rich Lowrey, *When to Hold Them Is It OK to Detain the Terrorist-fighters in Guantanamo Bay "Indefinitely"?*, Nat'l Rev. On-Line (March 26, 2002), *at* http://www.nationalreview.com/lowry/lowry032602.asp, and Thomas Sowell, *Two Trials---and future trials*, townhall.com, July 23, 2002, *at* http://www.townhall.com/columnists/thomassowell/ts20020723.shtml

167. Malmedy was the site of the murder of American POWs by SS troops at the orders of their commander. After the press revealed the discovery of the massacre, the American military and the public exerted considerable pressure to discover and punish the perpetrators. *See* Koessler, *supra* note 136, at 26-27.

168. U.S. Dep't. of War, Final Report of Proceedings of Administration of Justice Review Board (The Raymond Report) (14 Feb. 1949).

169. *See also* Wallach, *supra* note 1, at 870-72. The Raymond Report generally rejected allegations of physical abuse as unfounded, but it found that "in an attempt to 'soften up' certain witnesses prosecutors used 'mock trial' procedures." *Id*. at 870.

170. *Id.* paras. 13-14. "This procedure has a further bearing on the preparation of the case when it really came to trial. Defense Counsel appointed for the accused found difficulty in getting the confidence of the defendants because of their experience with the mock trials . . . ." *Id.* para. 15.

The Chief Prosecutor for the Malmedy case was Lieutenant Colonel (LTC) Burton Ellis. He testified before the Senate[171] regarding the propriety of such methods.[172] Ellis's testimony demonstrates the negative effect that unstructured rules may have on the approach of a prosecutor under pressure (external or internal) to achieve successful results. While LTC Ellis' statements may be unusually candid, the attitude he expressed was not his alone.[173]

In *In re Yamashita*[174] *and In re Homma*,[175] the Supreme Court refused to apply constitutional protections to the war crimes trials. In his dissent in *Yamashita*, Justice Rutledge objected to numerous evidentiary problems, and he specifically objected to Article 16 of the IMTFE's Charter.[176] He noted that "[a] more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made."[177]

The tribunals experienced many other evidentiary problems[178] due to the extraordinarily loose language under which they operated, including routinely argumentative questions by counsel,[179] questions of judicial notice,[180] the admission of affidavits by witnesses whom there was no opportunity to cross-

171. *Malmedy Massacre Investigation, 1949: Hearings on S. Res. 42 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 28-69 (1949).

172. *Id.* Lieutenant Colonel Ellis testified before the Senate to the following:

> Colonel Ellis: Sir, . . . the rules of evidence under which the war crimes were tried were most liberal.
> . . . .
> [Senator Joseph R. McCarthy, D-WI]: Do you think this type of mock trial was proper or improper? . . .
> Colonel Ellis: I think the answer to that question would be—so long as I let the court who weighs the evidence know how I obtained that confession, that is the important thing. Then, the duty is on them. . . .
> Sen. McCarthy: In other words, you say it would be proper to get a confession in any way you saw fit, so long as you let the court know how you got the confession?
> Colonel Ellis: I think under the rules of evidence it would be perfectly proper. There were some things that would be repulsive to one individual that would not be to another. I would certainly not allow a confession to be used where a man was beaten or forced under threats or compulsion to make a confession. I am definitely opposed to that.
> . . . .
> Sen. McCarthy: . . . You think it is proper then, to use the mock trial if the court were informed. . . .
> Colonel Ellis: Under the rules of evidence which we were practicing under over there, I think it would be . . . .
> Senator McCarthy: Do you feel . . . using different rules of evidence . . . is proper?
> Colonel Ellis: Most certainly; they admitted hearsay there and you don't here.

Id. at 46-47 (June 6, 1949).

173. *See, e.g.*, Elton Hyder, *The Tokyo Trial*, 10 TEX. B.J. (1947) ("Considerable hearsay testimony was offered against the accused necessitated by the loss or destruction of original documents. Reason dictated its use.").

174. 327 U.S. 1 (1946). At least one author argues that Yamashita was chosen as the first defendant to provide precedence for later trials. He cites reports that General MacArthur had "urged 'haste' upon the military commission." PHILLIP PICCIGALLO, THE JAPANESE ON TRIAL 56 (1979).

175. 327 U.S. 759 (1946).

176. *Yamashita*, 327 U.S. at 48-49.

177. *Id.* at 49 (Rutledge, J., dissenting). Rutledge continues,

> So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself. It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified, reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed, or oral, and one "propaganda" film were allowed to come in . . . .

Id. See also John T. Ganoe, *The* Yamashita *Case and the Constitution*, 25 OR. L. REV. 143, 148 (1946).

178. One such problem related to the introduction of character evidence. The later Nuremberg tribunals incorporated a character evidence rule similar to Rule 12(3), *Rules of Procedure in Military Government Courts*. Rule 12(3) reads that "Evidence of bad character of the accused shall be admissible before finding only when the accused has introduced evidence as to his own good character or as to bad character of any witness for the prosecution." *Id.*

179. Taylor says the "Soviet fashion" was to mix "questions with pejoratives." TAYLOR, *supra* note 68, at 430-31.

180. The Soviets argued that the judicial notice provision of Article 21 required that their report blaming the Germans for a massacre of Polish officers in the Katyn Forest should receive binding weight; considerable evidence indicated the Russians themselves committed the murders. The tribunal refused to find the report irrebuttable. *Id.* at 468-69.

examine,[181] and the exclusion of evidence that was arguably relevant to the defense.[182] These evidentiary problems resulted in inefficiency,[183] uncertainty,[184] and at least in the view of Justice Rutledge, blatant unfairness.[185]

There are most certainly lessons to be learned from the use of the *Quirin* evidentiary rule in the post-war trials. Chief among them is that no matter how good-willed the commission and its members, when "technical rules of evidence"[186] go by the wayside, and evidence is admitted based solely upon the opinion of the commission that it has probative value to a reasonable person; there is an open invitation to misconduct, unfairness, and what Justice Murphy characterized as "judicial lynchings."[187] It is the sum of the problems that arose from those trials, both procedural and evidentiary, which strongly

181. The Nuremberg and Tokyo Tribunals resolved this question differently. The Nuremberg Tribunal generally allowed a party to admit an affidavit subject to calling the witness for cross-examination. *Id.* at 241-242. Apparently the Soviet war crimes report, however, admitted under Article 21 as a government report, was based on some 54,784 depositions of witnesses not subjected to cross-examination. *Id.* at 313. Contrarily,

> A characteristic feature of the Yokohama trials was the large amount of documentary evidence that was introduced by the prosecution to support the charges and specifications and often by the defense to refute them. The defense contested the introduction of affidavits in the first trial but was overruled by the commission, which pointed out that the protection of the United States Constitution and the Articles of War was not available to the accused as a Japanese citizen and a former belligerent.

Spurlock, *supra* note 136, at 389. The difference probably arose because of the language of the SCAP regulation which allowed admission of "affidavits, depositions or other signed statements," as well as "any diary, letter or other document, including sworn or unsworn statements, appearing to the commission to contain information relating to the charge." *See* SCAP Letter, *supra* note 154.

182. At Tokyo, Justice Pal dissented, in part, based on the refusal of the Tribunal to admit eleven categories of evidence. Pal Opinion, *supra* note 159, at 641-42. He noted, "We had, however, admitted in evidence press release of the prosecuting nations when offered in evidence by the prosecution." *Id.* at 642.

Those rulings of the Tokyo Tribunal must be compared with the decision at Nuremberg to permit Admiral Doenitz's counsel, Kranzbuehler, to submit an interrogatory to Admiral Nimitz of the United States Pacific Fleet "to establish that the American Admiralty in practice interpreted the London Agreement in exactly the same way as the German Admiralty, and thus prove that the German conduct of sea warfare was perfectly legal . . . ." 8 NUREMBERG TRIAL PROCEEDINGS 548 (1946). Indeed, Telford Taylor pointed out in his *Final Report to The Secretary of the Army on the Nuremberg War Crimes Trials* that

> [i]n order to shorten the proceedings, the prosecution used affidavits instead of oral testimony whenever possible. Such matters as the *curriculum vitae* of the defendants, organization charts of the ministries and other governmental agencies, and explanations of the functioning of quasi-governmental industrial bodies were usually presented in affidavit form subject, of course, to the right of the defense to call the affiants for cross-examination. A comparatively small number of affidavits on more controversial matters were also introduced. The defense, however, utilized affidavits in great quantity on a wide variety of subjects, but in order that the court proceedings should not be unduly prolonged, the prosecution waived cross-examination except in the most important instances.

TAYLOR, FINAL REPORT, *supra* note 136, at 89.

183. Taylor notes that the admission of "an overwhelming" number of documents was slowed by requiring the prosecution to read them into the record. TAYLOR, *supra* note 68, at 176. A better result, and a fairer one, might have been obtained by requiring the submission of a proper foundation for each document (even if, in most cases that foundation would have been as governmental records). He also says that the Tribunal, "aghast at the slow pace," proposed a rule that only one prosecutor might cross-examine a witness, but that "[n]o such rule was ever adopted, and drawn-out examinations and cross-examinations continued." *Id.* at 324.

184. Taylor notes that "the Tribunal's failure to lay down any general rule left us uncertain of its action on future affidavit presentations." *Id.* at 242.

185. *See* Pal Opinion, *supra* note 159, at 629.

> In prescribing the rules of evidence for this Trial the Charter practically disregarded all the procedural rules devised by the various national systems of law, based on litigious experience and tradition, to guard a tribunal against erroneous persuasion, and thus left us, in the matter of proof, to guide ourselves independently of any artificial rules of procedure.

Id. Others, of course, thought the proceedings eminently fair. Joseph Keenan, the United States' Chief of Prosecution at Tokyo stated: "I have never observed a proceeding in our own country where the rights of the accused were more scrupulously protected by any court. And regardless of what must have been at times a disagreeable duty, the American counsel assigned to the defense manfully performed their duty." Joseph Keenan, *Observations and Lessons from International Criminal Trials*, 17 U. KAN. CITY L. REV. 117, 123 (1949).

186. *See*, *e.g*, Control Council Ordinance No. 7, *supra* note 138, n.130. "The tribunals shall not be bound by the technical rules of evidence. *Id.* at Article VII, *available at* http://www.yale.edu/lawweb/avalon/imt/imt07.htm#art7.

187. *In re* Homma, 327 U.S. 759, 760 (1946) (Murphy, J., dissenting).

> Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow.

Id.

argues against the legality of their application to military commissions under current law.

III. The Legality of Military Tribunals Under Current International Law[188]

Military commissions are still legal if they meet the standards required by current international law.[189] Unless they precisely track a court martial, however, they may not, be used to try persons subject to the protection of GPW.[190] The *Manual for Courts Martial* provides that military jurisdiction is exercised, *inter alia*, by military commissions that, "[s]ubject to any applicable rules of international law or to any regulations prescribed by the President or by other competent authority . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."[191] In addition, GPW requires certain procedural protection for POWs, the most important of which, in relation to the questions here, are found in:

> [1] Article 84. A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war[;][192]
> . . . .
> [2] Article 102. A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power;[193] [and]
> . . . .
> Article 106. Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the

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188. This article does not constitute an analysis under U.S. constitutional law. Under the standards articulated in *Yamashita*, however, war crimes charges against a military accused are subject to the standards of international law, and specifically the law of war. *In re* Yamashita, 327 U.S. 1, 14-15 (1946).

189. *See* UCMJ art. 21 (2002).

190. *See* GPW, *supra* note 3, arts. 4-5; *supra* secs. I.B-I.C.

191. MCM, *supra* note 3, pt. II. That language is, of course, similar to that found in the pre-World War II *1928 MCM*. *Compare id. with* 1928 MCM, *supra* note 120, sec. IIA. Thus, for example, according to the current *MCM*, a POW could be tried before a military commission for engaging in unauthorized communications with the enemy. MCM, *supra* note 3, pt. IV, ¶ 28c(6)(a). For extensive discussion of this point, see Major Timothy MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinction Between the Two Courts*, Army Law., Mar. 2002. MacDonnell concluded that

> based on Articles 84, 85, and 102, the United States could only use military commissions to try prisoners of war when they are used to try U.S. military personnel. Because the United States does not currently use commissions to try its military personnel, it could not use them to try prisoners of war.

Id. at 31.

192. *See* GPW, *supra* note 3, art. 84.

193. *Id.* art. 102. The language of Article 102 seems self-explanatory. Thus, for example, *Field Manual 27-10* interprets Article 102 as follows:

> Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. *They are entitled to the same procedural safeguards accorded to military personnel of the United States* who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.

FM 27-10, *supra* note 74, sec. 178(b), at 69 (emphasis added). In a public forum at New York Law School on 5 March 2002, Professor Ruth Wedgewood, after delivering a talk entitled "Military Commissions, Unlawful Combatants and Terrorism as a Form of War," stated that Article 102's guarantees only applied to sentencing, as opposed to trial procedures, and that in any case, U.S. military personnel could be tried by military tribunals. Professor Wedgewood has been repeatedly cited as an authority on this subject. Accordingly, her position is noteworthy. *See, e.g.*, DOD News Briefing by Secretary Donald Rumsfeld & General Richard Myers (8 Feb. 2002), *available at* http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html) (stating Professor Ruth Wedgewood's position that U.S. military personnel could be tried by military tribunals). If Professor Wedgewood is correct, it does not change the substantive position of POWs facing trial before a military commission. The UCMJ permits only very limited sentences against U.S. military personnel tried without the full procedural and evidentiary rights of a court-martial. *See* UCMJ art. 15 (2002). It also permits trials before military commissions for spying and espionage. *Id.* art. 104, 106.

The intention of the GPW is made clear in the commentary to Article 102 and the structure of the convention including the content of other articles. The structural analysis is made clear by the Report of Committee II: "The provisions relative to judicial proceedings are set forth in logical sequence in three parts; (a) General Observations [current Articles 99 to 101]; (b) Procedure [current Articles 102 to 107]; and (c) Execution of penalties [current Article 108]." Report of Committee II, *supra* note 82, at 571. If Article 102 was not applicable to all procedural issues, but instead limited to sentencing, it seems highly incongruous that the drafters placed it as the first article of the Procedure provisions rather than contiguous with the following part on Execution of Penalties.

> quashing or revising of the sentence or the reopening of the trial.[194]

The requirement of a Detaining Power to accord detainees the same procedure as the Detaining Power gives to the members its own armed forces bears significance when analyzing the current proposal for military tribunals.[195] The Military Order of 13 November 2001 applies to any non-U.S. citizen who is a member of al Qaeda.[196] This includes all members of al Qaeda captured during combat operations in Afghanistan, and it encompasses any surviving leaders of the organization who may have planned the September 11 attacks, even if they are entitled by GPW Article 4 to POW status. Undoubtedly, individuals who conspire to commit war crimes, including the mass murder of civilians on 11 September 2001, may be brought to the bar of justice. But equally without doubt, those defendants who properly fall within the GPW must have the same evidentiary procedural standards found in courts-martial under the UCMJ which governs trials of members of the armed forces of the United States.[197]

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194. GPW, *supra* note 3, art. 106.

195. The discussion in *Yamashita* of Article 63 of the Geneva Convention of 1929, bolsters this analysis. Article 63 provided that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." *See* http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm#art63. The Court determined that "examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant." *In re* Yamashita, 327 U.S. 1, 21 (1946). The court based its reasoning on an analysis of the placement of Article 63 in a chapter entitled "Penalties Applicable to Prisoners of War," and the placement of that chapter in section V, "Prisoners' Relations with the Authorities" as part of Title III, "Captivity." *See id*. "The three parts of Chapter 3, taken together," the Court said,

> are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of their offenses, and of the procedure by which guilt may be adjudged and sentence pronounced. We think it clear, from the context of these recited provisions, that part 3 and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war.

Id.

Article 85 of GPW, however, contains a provision not found in the 1929 Convention analyzed in *In re Yamashita*. It provides that "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." GPW, *supra* note 3, art. 85.

The impact of that change on the *Yamashita* analysis is clear. The provisions surrounding Article 85, especially Articles 84 and 102, are all found in Chapter III, "Penal and Disciplinary Sanctions," of section IV, "Relations Between Prisoners of War and the Authorities." *See id*. ch. III. Under the *Yamashita* analysis, Chapter III of the 1949 Convention was clearly designed to apply to judicial proceedings directed against a POW for offenses committed before capture. That was unquestionably the intent of the Convention's drafters. In discussing Article 74 of the Stockholm Draft (the precursor to GPW Article 85), the representative of the Netherlands

> pointed out that the 1929 Convention only dealt with crimes committed during captivity. *That view had been adopted by the Supreme Court of the United States of America . . . . The Conference of Government Experts of 1947 considered it reasonable, however, not to deprive a prisoner of war of the protection of the Convention on the mere allegation that he had violated the laws and customs of war, but to leave him under the protection of the Convention until such violation had been proven in a court of law*, in other words until he had been sentenced by a court of such a crime or offense.

2 FINAL RECORD, *supra* note 47, at 318 (Committee II, 18th mtg.) (emphasis added). Thus, following that change from the 1929 Convention, and given the drafters' intent, there is simply no legitimate argument that the reasoning of the Court in *Yamashita* is now applicable.

In the case of *In re Quirin*, the Court said:

> 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.

317 U.S. at 30-31.

196. Bush Order, *supra* note 15, sec. 2(a) ("The term 'individual subject to this order' shall mean any individual who is not a United States citizen . . . is or was a member of the organization known as al Qaeda . . . .").

IV. The *Quirin* Standards Developed for World War II Tribunals Do Not Meet Current Standards Either Under the Uniform Code of Military Justice or Current International Law

In his dissent in *Homma v. Patterson*,[198] Justice Murphy excoriated the results of a trial held under the *Quirin* standards, characterizing them as a precedent for "judicial lynchings."[199]

Article 36(a) of the UCMJ provides that the President may prescribe procedural and evidentiary rules for tribunals that should "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," but which must in any case be consistent with the UCMJ.[200]

President Bush's Military Order of 13 November 2001, based as it is upon *Quirin* precedent, and Commission Order 1 of 21 March 2002,[201] give rise to a number of problems both in the instance of those prisoners entitled to treatment under GPW, and those who can only assert the current minimal international standards for a fair criminal trial. The retention of the *Quirin* evidentiary rules and the denial of full appellate rights both represent serious failures to meet those required standards. Unless the proposed rules for the current military tribunals are modified, their application is certainly improper in any trial of a person protected as a POW.

1. The Quirin *Rules of Evidence Did Not Provide a Fair Trial*

The *Quirin* rules of evidence were based directly upon the portion of President Roosevelt's Order of 3 July 1943, which provided that "[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."[202]

As applied in *Quirin* and in tribunals following World War II, the evidentiary rule at issue allowed unfounded affidavit evi-

197. The current *Manual for Courts Martial* includes language similar to the *1928 MCM* but modified by subsequent sources of international law.

> (2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. *Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*

MCM, *supra* note 3, pt. I (emphasis added).

198. 327 U.S. 759 (1946).

199. *Id.* at 759.

> This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution, or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges.
>
> . . . . [N]either clearer proof of guilt nor the acts of atrocity of the Japanese troops could excuse the undue haste with which the trial was conducted or the promulgation of a directive containing such obviously unconstitutional provisions as those approving the use of coerced confessions or evidence and findings of prior mass trials. To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way.

Id. at 759-60 (Rutledge, J., dissenting).

200. UCMJ art. 36(a) (2002). For instance, the MRE provide that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence." MCM, *supra* note 3, MIL. R. EVID. 304. Also "the privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied." *Id.* MIL. R. EVID. 301. Under MRE 304,

> [a] person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first: (1) informing the accused or suspect of the nature of the accusation; (2) advising the accused or suspect that the accused or suspect has the right to remain silent; and (3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

Id. MIL. R. EVID. 304 (e)(3); *see id.* MIL. R. EVID. 802 (prohibiting the admission of hearsay evidence); *id.* MIL. R. EVID. 701 (limiting opinion by lay witnesses); *id.* MIL. R. EVID. 601 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see also* United Nations International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (containing a privilege against self incrimination).

201. MCO No. 1 "prescribes procedures" pursuant to President Bush's Military Order. MCO No. 1, *supra* note 2, para. 1.

202. 7 Fed. Reg. 5103 (July 3, 1942).

dence, suspect hearsay, and evidence obtained through unfair coercion.[203] Apparently, the Bush Administration intends to apply those same evidentiary standards to the proposed tribunals. Not only does the Bush Order[204] and Commission Order 1[205] substantially adopt the evidentiary language of the Roosevelt Order, but there have been repeated references to procedural standards comparable to those of the *Quirin* commission.[206] As discussed above,[207] military commissions employing the *Quirin* rules interpreted the standard "probative value to a reasonable person" to permit (1) evidence obtained involuntarily and by unethical means;[208] (2) unfounded affidavit evidence not subject to any form of reasonably available rebuttal;[209] (3) failure to produce classified exculpatory evidence;[210] and (4) other evidentiary rulings involving standards and issues now recognized as essential to a fair trial.[211]

One may derive the current minimum standards of evidence by examining the Military Rules of Evidence (MRE),[212] those adopted by the International Criminal Tribunals for the former Yugoslavia[213] and Rwanda,[214] which are similar,[215] and those developed for the International Criminal Court,[216] which are even more extensive.[217] When compared to currently accepted

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203. *See supra* notes 168-187 and accompanying text.

204. "[A]dmission of such evidence as would, in the opinion of the presiding officer of the military commission . . . have probative value to a reasonable person." Bush Order, *supra* note 15, sec. 4(C)(3). Except for the bow to gender neutrality, the operative language is precisely the same.

205. MCO No. 1 makes its acceptance of the *Quirin* standard clear:

> Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.
> . . . .
> Subject to the requirements [above] concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

MCO No. 1, *supra* note 2, para. 6(D)(1), (3).

The statements in MCO No. 1 that "[t]hese procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission," *id.* para. 1, and that "[t]he Commission shall . . . proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence," *id.* para. 6(B)(2), are not, in themselves, substitutes for failure to provide evidentiary and procedural requirements of the Geneva Convention. If the promise of a full and fair trial was itself a sufficient guarantee, it would by necessity incorporate by reference the rights guaranteed under the UCMJ, rendering the bulk of MCO No. 1 moot.

206. *See Military Commissions: Hearing Before U.S. Senate Armed Services Comm*., 108th Cong. (2001) (testimony of Secretary of Defense Donald Rumsfeld), *available at* http://www.defenselink.mil/speeches/2001/s20011212-secdef.html. Secretary Rumsfeld stated,

> [F]ederal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence—a flexibility that could be critical in wartime, when it is often difficult, for example, to establish chains of custody for documents or to locate witnesses. Military commissions allow those judging the case to hear all probative evidence—including evidence obtained under conditions of war—that could be critical to obtaining a conviction.

Id. See Ray Rivera, *Bush Looks to '42 Case to Justify Military Tribunals for Terrorism*, SEATTLE TIMES, Dec. 7, 2001, *available at* http://seattletimes.nwsource.com/html/nationworld/134374561_tribunals05m.html.

207. *See supra* sec. II (B)(3)(b).

208. *See supra* notes 168-174 and accompanying text.

209. *See supra* note 181.

210. In at least one instance, it appears that relevant evidence was clearly not provided to post-Nuremburg defendants. Article 6(b) of the Nuremberg Charter and Control Council law No. 10, in paragraph 1(b) of Article II, both recognize without qualification the "killing of hostages" as a war crime. The defendants in the *Hostages Trial* were charged with violations of those provisions, although the Tribunal held that subject to a number of conditions, the killing of reprisal victims or hostages to guarantee the peaceful conduct in the future of the populations of occupied territories was legal. G. Brand, *The War Crimes Trials and the Laws of War*, 26 Y.B. INT'L L. 414, 426 (1949). The defendants did not, apparently, have available a "Top Secret" appendix to a draft 1944 U.S. Army plan for the occupation of Germany entitled, "Measures Which May Be Taken to Enforce the Terms of Surrender or in the Event of No Surrender to Compel the Enemy to Comply with the Laws of War." That plan provided for four categories of action which could be taken as sanctions or reprisals to enforce compliance with the terms of surrender or the rules of war, including the *taking and execution of hostages*. U.S. Army, Measures Which May Be Taken to Enforce the Terms of Surrender or in the Event of No Surrender to Compel the Enemy to Comply with the Laws of War (n.d.) (copy on file with National Archives, Records of USGCC Record Group 260, Stack 390, Row 40, Compartment 17, Shelf 3, Box 17, Folder 4).

211. *See* Hyder, *supra* note 173, at 137.

212. *See* MCM, *supra* note 3, pt. III.

standards for trials of war criminals, the *Quirin* rules of evidence are unacceptable for a trial under current international law.[218]

2. The Right of Appeal Provided by Commission Order 1 Does Not Meet UCMJ Standards

The appeals procedure provided by Commission Order 1 falls short of that available in a court-martial. The Order provides for a multi-stage series of reviews by: (1) the appointing authority;[219] (2) a review panel consisting of three military officers;[220] and (3) the Secretary of Defense,[221] or if the Secretary of Defense is not the final reviewing authority, the President.[222] The President's military order attempts to eliminate any other appeal by providing that the "military tribunals shall have exclusive jurisdiction"[223] over the commission defendants, and that

> the[se] individual[s] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought . . . in any court of the United States, or any State thereof[,] . . . any court of any foreign nation, or . . . any international tribunal.[224]

213. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence (as amended through Dec. 13, 2001), *available at* http://www.un.org/icty/basic/rpe/IT32_rev21.htm#Rule%2042 [hereinafter ICTY Rules].

214. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (as amended through May 27, 2001), *available at* http://www.ictr.org/ENGLISH/rules/260503/270503e.pdf [hereinafter ICTR Rules].

215. Those rules are sometimes cited as providing a similar regime to the World War II commissions because they permit a court to "admit any relevant evidence which it deems to have probative value." ICTY Rules, *supra* note 213, R. 89(C). *See, e.g.*, Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which Is the Oxymoron?*, 19 Fordham Int'l L.J. 475, 518 (1995) (asserting that the rules follow the example of, or are consistent with, the World War II tribunals); Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 Syracuse J. Int'l L. & Com. 1, 17 (1995).

216. *See* Int'l Crim. Ct. R. P. & Evid., *available at* http://www.icc-cpi.int/library/basicdocuments/rules(e).html.

217. The ICC rules include protections for the following: (1) "privileged communications with attorneys and a . . . medical doctor, psychiatrist, psychologist or counselor, [sic] [and] religious clergy;" (2) a right against self-incrimination by a witness; and (3) a privilege against parental, spousal, or child testimony. *Id.* R. 74-75.

218. An additional and separate argument may be made that any accused who is a combatant unprivileged under GPW is still entitled, at minimum to the protection of Additional Protocol 1 (1977) to the Geneva Conventions of 1949. Article 75 of Protocol 1, "Fundamental Guarantees" provides that

> [n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
> . . . .
> (d) Anyone charged with an offence is presumed innocent until proven guilty according to law;
> (e) Anyone charged with an offence shall have the right to be tried in his presence;
> (f) No one shall be compelled to testify against himself or to confess guilt;
> (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> . . . .
> (i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
> (j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised . . . .

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977, 1125 U.N.T.S. 3. The United States, however, has not ratified Protocol 1, and would doubtless oppose application of its guarantees to unprivileged combatants. *See id.*

219. MCO No. 1, *supra* note 2, para. 6(H)(3) (holding that this only applies if the Secretary of Defense is not the appointing authority).

220. *Id.* para. 6(H)(4). The panel may include civilians commissioned as officers for that purpose, and must include at least one experienced judge. It must disregard any variance from required procedures "that would not materially have affected the outcome of the trial . . . ." *Id.*

221. *Id.* para. 6(H)(5). The Secretary of Defense must, upon review, either return the case for further proceedings or forward it to the President with a recommendation for disposition (unless he is designated as the final reviewing authority under section 4(C)(8) of the President's Military Order). *Id.*

222. *Id.* para. 6(H)(6). If the Secretary of Defense has been designated, he may approve or disapprove findings or change a finding of guilty to one of guilty of a lesser-included offense, or mitigate, defer, or suspend sentence. *Id.*

223. Bush Order, *supra* note 15, sec. (7)(b)(1).

These provisions differ substantially from the rights of appeal provided to a member of the armed forces of the United States. Detailing service members' entire range of available appellate proceedings is beyond the scope of this article;[225] however, they include not only review by the convening authority, but also by a Court of Criminal Appeals,[226] and in certain cases, the Court of Appeals for the Armed Forces,[227] and, by *writ of certiorari*, to the Supreme Court of the United States.[228]

Article 106 of GPW provides:

> Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.[229]

That Article 106 right of appeal is included among the procedural rights discussed by the drafters of GPW.[230] Thus, to the extent the Bush Order and Commission Order 1 deny and attempt to limit the appeal rights of a POW, it is the thesis of this article that they will result in a breach of GPW.[231]

Taken together, a tribunal that tries POWs using *Quirin*-type evidentiary rules, combined with restricted appeal rights, is both potentially unfair and in direct violation of governing law. The effect of such tribunals on the development and application of the law of war might carry enough weight for military lawyers to oppose their use. Under the circumstances here discussed, however, there is a more compelling reason for opposing the use of commissions. As applied to those with legitimate claims to POW status, the convening of and participation in an unlawful tribunal is a war crime, with potentially serious ramifications for all involved.

V. Convening of and Participation in an Unfair Tribunal Is a War Crime

In *United States v. Uchiyama*,[232] a U.S. military commission tried those Japanese officials involved in the Japanese military commission, which tried two captured American who participated in the carpet bombimg of Kobe and Osaka. In the bombing raid, the Americans inflicted heavy civilian casualties. The Japanese military commission tried the Americans, and convicted and then executed them. Those officials included the commanding general of the Japanese Fifteenth Area Army, his chief of staff, his judicial officer, the three members of the Japanese commission, the prosecutor, and the executioner.[233]

The prosecution's opening statement before that U.S. commission is significant.

> We are now charging the accused with having failed to have applied to these prisoners of war the type of procedure that they were entitled to. In other words *they applied to them a special type of summary procedure which failed to afford them the minimum safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war.*[234]

The prosecution finessed the POW/Geneva rights question by *accepting* that one charged with war crimes was not entitled to assert those rights for actions taken before capture. It instead charged that the proceedings in the Japanese trial were "illegal, unfair, false, and null."[235] The commission did not issue any

224. *Id.* sec. (7)(b)(2).

225. *See generally* UCMJ arts. 66-67, 69 (2002). In an opinion column in the *New York Times*, White House Counsel Alberto Gonzales said, "The order preserves judicial review in the civilian courts." Alberto Gonzales, *Martial Justice, Full & Fair*, N.Y. Times, 30 Nov. 2001, at A27. While that right of review does not appear in the President's Order, Mr. Gonzales' statement may indicate an intent to preserve it.

226. UCMJ art. 66; MCM, *supra* note 3, R.C.M. 1203.

227. MCM, *supra* note 3, R.C.M. 1204.

228. *Id.* R.C.M. 1205.

229. GPW, *supra* note 3, art. 106.

230. *See* Report of Committee II, *supra* note 82**.**

231. *See* GPW, *supra* note 3, art. 130.

232. *See generally* Tried at Yokohama, *supra* note 6**.**

233. *Id.* at 1.

234. United States v. Uchiyama, Trial Transcript, Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July, 1947), at 20 (emphasis added) (on file with author).

decision stating the basis for its findings. The reviewing Staff Judge Advocate's analysis, however, makes it clear that the American commission found the Japanese trial, while legal under international and Japanese law, so unfair as to constitute a war crime.[236] Thus, relevant to any current military tribunal are the specific actions the United States alleged were unfair, which included:

> [1] the prosecution offered, and the tribunal accepted as evidence, an interrogation report on which the interrogator had obtained the signatures of the American prisoners, "without any attempt to verify the genuineness of the document";
> . . . .
> [2] the members of the tribunal were disqualified . . . by reason of having participated in the pre-trial preparation of the prosecution's case;
> . . . .
> [3] the members . . . did not exercise free and independent judgment; [and]
> . . . .
> [4] no attempt was made by the tribunal to ascertain the facts concerning the offenses alleged against the accused . . . .[237]

Both the GPW[238] and the domestic law of the United States[239] make it clear that failure to accord fair procedural and evidentiary standards in a trial of a POW is a war crime of substantial magnitude. If *Uchiyama* is valid precedent, and 18 U.S.C. § 2441 seems to say it is, then participants in any U.S. military tribunal that followed the *Quirin* evidentiary and procedural standards should seek counsel. Clearly, an unfair war crimes trial of a POW violates both the GPW and current U.S. and international law. To imagine otherwise would set the law of nations back to the dark days of history when the fate of the captive rested on the whim of their captors.

VI. Conclusion

A military tribunal must meet current standards of fundamental rights under the written and customary laws of war. If such a tribunal tries a POW, it must follow the procedural and evidentiary standards of a court-martial. The *Quirin* rules of World War II do not meet that standard. Several solutions to this problem exist: (1) the tribunal can employ the same rules as a general court-martial, which by their nature comply with fundamental international standards of fairness; or (2) simply try POW defendants before a court-martial or U.S. district court rather than before a military commission.[240] It is in the interest of all civilized societies to apprehend, try or punish the perpetrators of mass murders, including those of 11 September 2001. It is also, unquestionably, in the long-term interest of civiliza-

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235. *Id.* Charges and Specifications at 4, ¶ 4.

236. *Id.* Review of Staff Judge Advocate, 1 July 1948, at 29 (on file with author).

237. *Id*.

238. Article 130 of GPW provides:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or *wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention*.

GPW, *supra* note 3, art. 130 (emphasis added).

239. 18 U.S.C. § 2441 (2000). Section 2441 provides in part :

> (a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> (b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
> (c) Definition.—As used in this section the term "war crime" means any conduct—
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party . . . .

Id.

240. While not precisely similar, the rights accorded in a U.S. District Court criminal trial are sufficient to satisfy the GPW requirement that a POW "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forced of the Detaining Power." GPW, *supra* note 3, art. 102. As noted in *United States v. Berrey*, "The Manual, including those Rules [for Court-Martial], was to conform to Federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable." 28 M.J. 714, 730 (N.M.C.M.R. 1989); *see* UCMJ, art 36 (2002); MANUAL FOR COURTS-MARTIAL, UNITED STATES, at A21-1 (1984).

tion's advancement that these procedures be fair and in accord with the advances in international law over the past fifty years. In light of *Uchiyama* and the doctrine it represents, it seems obvious that no informed judge advocate advising a tribunal or any of its potential members could permit the proceeding to go forward if a defendant had not been determined to be unprotected by POW status before a competent tribunal under *AR 190-8*. To do otherwise not only provides individuals who may pose a grave threat to the United States with a challenge to their convictions; but also potentially exposes those involved with the tribunals to liability as war criminals.

Because Article 18 of the UCMJ provides for general court-martial jurisdiction over any possible tribunal defendant,[241] the safety of a military trial may protect both the legitimate state interest in national security and safeguard against potential physical assaults against the trial process itself. At the same time, the demonstrated fairness of the UCMJ would shield the legitimate right of POW defendants to evidentiary and procedural safeguards. That compromise may be the most workable solution legally available to the United States. Since trials under the UCMJ exceed all reasonable standards of fairness, the answer to the government's dilemma may lie directly under its nose.

241. "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." UCMJ art. 18.