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USING LEGAL PROCESS TO FIGHT TERRORISM: DETENTIONS, MILITARY COMMISSIONS, INTERNATIONAL TRIBUNALS, AND THE RULE OF LAW

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In response to the September 11, 2001 terrorist attacks, the chorus of those arguing that international law cannot serve as an effective tool in the fight against terrorism has grown. In fact, one might say that September 11 has swelled the ranks of international relations realists, who view international law primarily as a cover for strategic interests and thereby as lacking any independent bite.¹ According to this view, for the United States to comply with the letter of international law would be to don a straight-jacket that would hamper efforts to protect national and

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1. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) (describing the "Realist challenge" embodied in "the defiant skepticism . . . that international law could ever play more than an epiphenomenal role in the ordering of international life"). From the realist perspective, states in the international realm always act only in their own national interest. Thus, international law is irrelevant. The only relevant laws are the "laws of politics," and politics is "a struggle for power." HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4-5, 26 (4th ed. 1967). See also Terry Nardin, *Ethical Traditions in International Affairs*, in *TRADITIONS OF INTERNATIONAL ETHICS* 1, 13 (Terry Nardin & David R. Mapel eds., 1992) ("Every student of international affairs has encountered the view that international law is 'not really law' because it lacks effective institutions for making and applying laws, and that it is therefore of negligible importance in international affairs.").

international security.² Instead, because of the serious nature of the threat, ordinary rules should be bent, if acknowledged at all. This type of thinking has even spilled over into domestic law. Anyone who harps too much on the need for law at best is naive³ and at worst aids and abets terrorists.⁴

This resurgent realism with respect to international law has taken several forms. Some have argued that the United States need not pay overly precise attention to international law in its military response to the attacks.⁵ Others have suggested that the detention of captured terrorism

2. See, e.g., Jeanne J. Kirkpatrick, *Law and Reciprocity*, 78 AM. SOC'Y INT'L L. PROC. 59, 67 (1984) (arguing that "we cannot permit . . . ourselves to feel bound to unilateral compliance with obligations which do in fact exist under [international law], but are renounced by others"). Cf. Robert H. Bork, *The Limits of "International Law,"* 18 NAT'L INTEREST 3, 10 (1989/90) (dismissing international law as a device that "serves, both internationally and domestically, as a basis for a rhetoric of recrimination directed at the United States"). For recent expressions of the realist view, see, e.g., Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 309 (2002) (arguing that "if action is in our interests, we should act in furtherance of these interests; if it is not, we should not act, even if such action is 'legitimized' by the imprimatur of some international organization, whether the U.N., NATO, or some other group"); John R. Bolton, *The United States and the International Criminal Court, The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167, 171 (2001) (contending that "[t]he idea that nations and individuals can be bound through 'international law'" is "naïve, abstract to the point of irrelevance from real international relations, and in many instances simply dangerous").

3. See, e.g., Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 ("These criticisms . . . [of the proposed military commissions] reflect a . . . dangerous naïvete about the threat we face.").

4. In testimony before the Senate Judiciary Committee, Attorney General John Ashcroft warned: "[T]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve." *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001), available at http://www.senate.gov/~judiciary/print_testimony.cfm?id=121&wit_id=42 [hereinafter Ashcroft Testimony] (testimony of John Ashcroft, Attorney General, U.S. Dep't of Justice).

5. See, e.g., Michael J. Glennon, *Military Actions Against Terrorists Under International Law, The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (2002) (arguing that the legal framework governing the use of force in the United Nations Charter "is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct"). This is not to say either that the Administration's decision to conduct a military campaign against the Taliban regime or that the manner in which it was conducted violated international law. Rather, what is significant is that the Administration did not appear to see the necessity of publicly justifying its actions by reference to international legal principles. For example, in the immediate aftermath of the attacks, Deputy Secretary of Defense Paul Wolfowitz argued, without any reference to international law, that the Administration's aim was not simply to capture individuals and hold them accountable, but to "end[] states who sponsor terrorism." Elisabeth Bumiller & Jane Perlez, *Bush and Top Aides Proclaim Policy of "Ending" States that Back Terror; Local Airports Shut After an Arrest*, N.Y. TIMES, Sept. 14, 2001, at A1. Similarly, President Bush himself declared that "our responsibility to history is . . . clear: to answer these attacks and rid the world of evil." Todd Purdum, *After the Attacks: The Strategy; Leaders Face Challenges Far Different from Those of Last Conflict*, N.Y. TIMES, Sept. 15, 2001, at A15. See also Patrick E.

suspects is not, or should not be, governed by international law.⁶ And still others have suggested that the United States need not comply with the principles established under international law in prosecuting individual terrorists.⁷ I will focus here on the latter two arguments.

Tyler & Elaine Sciolino, *Bush's Advisers Split on Scope of Retaliation*, N.Y. TIMES, Sept. 20, 2001, at A1 (reporting on a letter released by "a number of conservatives" call on the president to "'make a determined effort to remove Saddam Hussein from power' even if he cannot be linked to the terrorists who struck New York and Washington last week").

6. With respect to the Taliban and Al Qaeda fighters captured by the U. S. military and now detained at Guantanamo Naval base, for example, the Administration's initial public statements regarding the detainees' status and rights under international law suggested that the "Bush administration would respect international law only so far as it chose to." Editorial, *The Guantanamo Story*, WASH. POST, Jan. 25, 2002, at A24. At first, Secretary of Defense Donald Rumsfeld maintained that the Geneva Conventions, discussed *infra* at text accompanying notes 84–98, did not apply to the detainees. Donald H. Rumsfeld, Department of Defense News Briefing (Jan. 11, 2002) (transcript available at http://www.dod.gov/news/Jan2002/t01112002_t0111sd.html). Although he asserted that the detainees would generally be treated humanely in a manner consistent with the treatment required by the Conventions, *id.*, he also stated that those requirements would be observed only "for the most part." *Id.* Moreover, he categorically asserted that the detainees would "be handled not as prisoners of war, because they're not, but as unlawful combatants," *id.*, even though the Geneva Conventions require a "competent" tribunal to make an individualized determination as to whether a detainee qualifies as a prisoner of war. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 3364, 75 U.N.T.S. 135, 140 [hereinafter POW Convention]. This position was immediately criticized, particularly overseas, as demonstrating that the "U.S. [A]dministration is more at home with an improvised process that sometimes skirts the frontiers of legality than with international agreements that impose firm reciprocal responsibilities." Editorial, *Stick to the Prison Rules: The Geneva Convention Protects Us All*, GUARDIAN, Jan. 18, 2002, at 19. The Administration later reversed course and accepted the applicability of the Geneva Conventions, but only as to Taliban fighters and not Al Qaeda members. Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1. Moreover, the Administration continues to maintain that none of the detainees qualifies as prisoners of war. This only slightly less extreme position has continued to draw criticism, including a rare statement of disapproval by the International Committee of the Red Cross. See Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush To Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

Some commentators have even suggested that detainees should be tortured. For example, Alan Dershowitz has argued that torture should be used at least in the "ticking bomb case" in which there is evidence that a suspect who refuses to talk has information that could prevent an imminent disaster. Alan Dershowitz, *Want To Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. According to Dershowitz, such a use of torture would not violate constitutional guarantees of due process because "due process is the process you are due under the circumstances of the case, and the process that an alleged terrorist who is planning to kill thousands of people may be due is very different than the process that an ordinary criminal may be due." *60 Minutes* (CBS television broadcast, Jan. 20, 2002), available at 2002 WL 8424860. See also ALAN DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 470–76 (2002). Dershowitz neglects to mention either the Eighth Amendment's Cruel and Unusual Punishment Clause or the absolute prohibition on torture contained in international law, specifically the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States has ratified. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, S. TREATY DOC. NO. 100-20, at 1, 1465 U.N.T.S. 85, 113–14.

7. For example, the Administration has suggested that suspects might be tried in military commissions with limited procedural protections for the accused, see *infra* notes 28–36 and

On November 13, 2001 President Bush issued an executive order asserting the authority to use military commissions to try individual terrorism suspects captured by the United States.⁸ Such commissions would be conducted unilaterally by the United States and would not be required to include any procedural safeguards to protect the rights of the accused.⁹ Even though the Administration added some procedural protections in its subsequent regulations for the tribunals, these regulations still offer no actually enforceable rights to the accused, provide no guarantee that the tribunals will be open to the media or the public, and do not permit any independent judicial review.¹⁰ Moreover, those who have supported the use of the commissions have made clear—if not in their explicit rhetoric then in the procedures that they have proposed and condoned—that they view law as an inconvenience at moments when real interests are threatened and real action is necessary. Indeed, the Administration has thus far shown little interest in affording the detainees even military trials;¹¹ accordingly, over a year later an unknown number of people are still being held in indefinite and secret detention, without any independent determination having been made about the actual guilt of individual detainees.¹²

In a sense, then, this crisis has forced us to revisit the question of what the rule of law gets us as a nation and as a people, particularly the role that legal process values themselves might play in long-term efforts to combat terrorism. This is a crucial question for anyone interested in the ongoing vitality of international law (particularly international human rights law). In this Article, I approach the issue from a number of different angles. First, I lay out the argument that the Administration's treatment of detainees as well as the proposed military commissions run counter to the rule of law—both domestically, by violating American constitutional

accompanying text, and has not seen fit to mount more than a cursory defense, under international law, of this proposal. See *infra* notes 118–121 and accompanying text. Administration officials have also suggested that suspects might be detained indefinitely without trial. Katherine Q. Seelye, *Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002, at A10.

8. Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Nov. 13 Order].

9. *Id.*

10. See Military Comm'n Order No. 1 (Dep't of Defense Mar. 21, 2002), at <http://defenselink.mil/news/mar2002/d20020321ord.pdf> [hereinafter DOD Regulations].

11. Seelye, *supra* note 7.

12. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–65 (2002) (describing the campaign of secret preventive detentions); Katharine Q. Seelye, *Guantanamo Bay Faces Sentence of Life as Permanent U.S. Prison*, N.Y. TIMES, Sept. 16, 2002, at A1 (noting that 598 detainees from forty-three countries are being held at Guantanamo naval base and that none has been charged with any crime).

protections, and internationally, by flouting established principles of international law. Significantly, however, supporters of the commissions have largely brushed aside these objections (particularly those based on international law), relying primarily on a *realpolitik* conception of such legal requirements as a luxury we simply cannot afford when confronting terrorist threats. Thus, no matter how persuasive the legal arguments against current Administration policies may be, they are inevitably susceptible to the international relations realist critique.

Accordingly, in Part II of this Article, I address such realist concerns head-on by arguing that, far from being a straight-jacket that threatens our security, the respect for legal process values, in particular the respect for international law, will actually *best* serve our long-term strategic interests in containing terrorism. Just as the Roosevelt Administration recognized that holding trials of Nazi war criminals at Nuremberg would ultimately serve U.S. interests by generating a historical record, demonstrating American commitment to the value of legal process, and fostering respect for the rule of law abroad, so too, I suggest that in the current crisis, international law and international security do not conflict but rather reinforce each other. I also argue that, from the standpoint of U.S. strategic interests, an international proceeding to try at least those primarily responsible for the September 11 attacks is likely to be the most effective way of holding terrorism suspects accountable for their actions.

One of the most common arguments against the use of international tribunals in this context is that such tribunals are impractical both because they are so difficult to establish and because they are unlikely to be embraced in the current political climate. Therefore, in Part III, I address this concern by noting at least one way in which an international tribunal process could be initiated expeditiously and, perhaps even more promising, I also present two alternative “quasi-international” models that have received insufficient consideration thus far. First, the United States could establish an *internationalized* military commission that—in addition to including measures to ensure that the proceedings complied with domestic constitutional law and international law—could permit judges or jurists from other countries to preside with American judges. Second, the United States could support the creation of a UN-assisted court in Afghanistan attached to the peacekeeping force there, modeled on similar courts currently in use in East Timor. Such a court, in which Afghan judges would sit alongside judges from other countries, might be particularly appropriate for trying cases involving lower-level Al Qaeda operatives captured within Afghanistan as well as cases involving violations of the

laws of armed conflict committed by both Taliban and Northern Alliance forces. Both of these models are likely to be more politically palatable within the United States, while still retaining many of the benefits of an international process.

Finally, Part IV takes a step back and addresses the law skeptics' perspective at a more theoretical level. The argument that legal niceties cannot work in the context of international relations is based on the perception that law is inevitably used merely to advance strategic interests and that it can never hope to bridge intractable social and political divisions among peoples. Strikingly, however, these are precisely the same types of arguments that critical legal theorists since the early twentieth century (beginning with the legal realists and later including critical legal studies scholars and others) have repeatedly made about ordinary domestic law. Yet for the most part, these critical scholars have not jettisoned the entire idea of legal process or judicial adjudication, and thus it might be fruitful to consider why they have not. While a complete study of such a question is beyond this Article's scope, I offer some tentative observations—inspired by the seminal work of theorist Robert Cover—about the importance of fair adjudicatory processes despite the fact that societies are always to some degree riven by conflict. These observations provide yet another argument for the importance of legal process even in a time of political turmoil.

I. DETENTIONS, MILITARY COMMISSIONS, AND THE RULE OF LAW

The debate over the Administration's treatment of detainees and its proposed military commissions has thus far been waged primarily on the terrain of American constitutional law. In particular, opponents of the Administration's actions argue that indefinite secret detentions, as well as the proposed military commissions themselves, place in jeopardy core procedural rights guaranteed by the U.S. Constitution and violate fundamental separation of powers principles.¹³ In addition, although

13. For arguments concerning the constitutionality of the detentions, see generally Cole, *supra* note 12, at 978–85. For arguments opposing the commissions based on American constitutional law, see generally *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary, supra* note 4 (statement of Laurence Tribe, Harvard Law School) [hereinafter Tribe Testimony]; *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary, supra* note 4 (statement of Neal Katyal, Georgetown University Law Center) [hereinafter Katyal Testimony]; George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1–14, 2002, at 26–29; Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Laurence Tribe & Neal Katyal, *Waging War, Deciding Guilt: Trying the Military*

international law arguments have received less attention in the public discourse,¹⁴ the Administration's actions appear to violate important treaties to which the United States is a party, as well as core elements of customary international law. All of these concerns can be categorized as "rule of law" arguments. They rely for their force on an assumption that legal protections and procedural safeguards embody values that must be defended, even in the midst of a war against terrorism. Many of these arguments have been made elsewhere, and so this Part is primarily intended as an overview.

A. UNITED STATES CONSTITUTIONAL LAW

Both the ongoing detentions—which include U.S. citizens and noncitizens alike¹⁵—and the military commissions envisioned in President Bush's November 13, 2001 order and subsequent Department of Defense regulations would dramatically curtail the rights typically accorded to prisoners and defendants in U.S. civilian courts. Indeed, the military commission order aptly summarizes the Administration's position with regard to legal process more generally, stating flatly that "it is not practicable to apply . . . the principles of law and rules of evidence

Tribunals, 111 YALE L.J. 1259 (2002); Letter from Law Professors and Lawyers, to Sen. Patrick J. Leahy (Dec. 5, 2001), at <http://www.yale.edu/lawweb/liman/letterleahy.pdf>.

14. For arguments opposing the commissions based on international law, see generally Koh, *supra* note 13; Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 324–25 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL'Y 653, 659–63 (2002).

15. For a discussion of the detentions of noncitizens, see generally Cole, *supra* note 12, at 959–65. In addition to noncitizen detentions, at least two people who claim that they are U.S. citizens, Yasser Esam Hamdi and Jose Padilla, have also been held in military detention without any formal charges and without being provided any of the rights accorded citizens.

Yasser Esam Hamdi and Jose Padilla, the two Americans labeled "enemy combatants" for what the government contends is more direct involvement with terrorist groups, are seeking rights once thought to be fundamental to American citizens, like a lawyer's representation and a chance to challenge their detentions before a civilian judge.

Adam Liptak, Neil A. Lewis & Benjamin Weiser, *After Sept. 11, a Legal Battle On the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at 1. In response to legal claims brought by civil liberties groups and others, the government has argued that these individuals have forfeited their American citizenship and therefore are not entitled to any of the rights American citizens enjoy. See Katharine Q. Seelye, *Traces of Terror: The Courts: Lawyer Asks for Access to Prisoner Born in U.S.*, N.Y. TIMES, June 21, 2002, at A16 ("In a broad assertion of presidential authority that could ultimately be tested in the Supreme Court, the government said in court papers on Wednesday that anyone it designated an 'enemy combatant' did not have to be provided the legal protections accorded most American citizens."). As to the military commissions, the executive order authorizing the commissions applies only to noncitizens, but does not distinguish between noncitizens captured overseas and noncitizens captured on U.S. soil. See Nov. 13 Order, *supra* note 8, § 2(a).

generally recognized in the trial of criminal cases in the United States district courts.”¹⁶

Because of intense secrecy surrounding the government’s activities, it is difficult to determine precisely how many people have been placed in secret preventive detention in the United States since September 11, 2001. In early November 2001, when the number was 1147, the government responded to growing criticism of the number of persons it was detaining by refusing to release further information.¹⁷ The vast majority of the detainees appear to have been held on pretextual immigration charges.¹⁸ Others have been detained as “material witnesses” in undisclosed criminal investigations.¹⁹ Immigration detainees have been tried in proceedings closed to the public, the press, legal observers, and family members.²⁰ Indeed, immigration judges do not even list the cases on the public docket, and refuse to confirm or deny that the cases even exist.²¹ Moreover, many of those detained on immigration charges have been held for weeks or even months without any charges at all.²² As David Cole has noted, the Justice Department practices, taken together, amount to a policy of “lock up first, ask questions later, and presume that an alien is dangerous until the FBI has a chance to assure itself that the individual is not.”²³ Indeed, Cole points out that, under the government’s “sleeper” theory, “the fact that a suspicious person has done nothing illegal only underscores his dangerousness; Al Qaeda is said to have ‘sleeper’ cells around the world, groups of individuals living quiet and law-abiding lives, but ready and willing to commit terrorist attacks once they get the call.”²⁴ Under this theory, “the absence of evidence of illegal conduct is not a reason to release a ‘suspicious’ person.”²⁵ Given this rationale, it is not surprising that the number of detainees far surpasses the number who appear to have any

16. Nov. 13 Order, *supra* note 8, § 1(f).

17. See Todd S. Purdum, *A Nation Challenged: The Attorney General; Ashcroft’s About-Face on the Detainees*, N.Y. TIMES, Nov. 28, 2001, at B7.

18. See Cole, *supra* note 12, at 962–63. Cole has further noted that:

The real reason for their incarceration is not that they worked without authorization or took too few academic credits, for example. Rather, the government has used these excuses to detain them because it thinks they might have valuable information, because it suspects them but lacks sufficient evidence to make a charge, or simply because the FBI is not yet convinced that they are innocent.

Id.

19. See *id.* at 960–61.

20. See *id.* at 961.

21. See *id.*

22. See *id.* at 962.

23. See *id.* at 963.

24. See *id.*

25. See *id.*

connection to terrorism.²⁶ And these detentions, of course, do not even include the hundreds of people being confined by the military in Guantanamo Bay, Cuba,²⁷ Afghanistan, or elsewhere throughout the world.

As to the military commissions, the executive order declared that suspects designated by the President would be brought to trial not before a jury, but before a “military commission sitting as the triers of both fact and law.”²⁸ The trials could be completely closed to the public,²⁹ and the order did not guarantee that those accused would be entitled even to know the charges against them or the evidence to be used at trial. Proof beyond a reasonable doubt would not necessarily be required for conviction,³⁰ and the accused would not be permitted to invoke the privilege against self-incrimination, nor would they be entitled to hire counsel of their own choosing.³¹ The ordinary rules of evidence would be suspended.³² Verdicts and sentences, including the death penalty, could be imposed by a two-thirds vote.³³ No legal guarantee would prevent suspects from being detained indefinitely without charge. And, under the terms of the order, those accused would not have the right to any kind of appeal, or indeed to any post-conviction remedy whatsoever, in *any* court—domestic, foreign, or international.³⁴ Not only would the proposed proceeding have limited

26. See *id.* at 960 (noting that only a single detainee—Zaccarias Moussaoui—has been charged with any involvement in the crimes under investigation, and he was arrested before September 11). Government officials have claimed that ten or eleven of the detainees may be members of Al Qaeda. See David Firestone & Christopher Drew, *A Nation Challenged: The Cases; Al Qaeda Link Seen in Only a Handful of 1,200 Detainees*, N.Y. TIMES, Nov. 29, 2001, at A1. Yet, as David Cole points out, “that simply raises the question of why the other 1,990 or so individuals were detained.” Cole, *supra* note 12, at 960.

27. As of September 16, 2002, 598 detainees from forty-three countries are being held at Guantanamo naval base. See Seelye, *supra* note 12, at A1.

28. Nov. 13 Order, *supra* note 8, § 4(c)(2).

29. See *id.* § 4(c)(4) (providing that the Secretary of Defense shall issue guidelines allowing for, “in a manner consistent with the protection of information classified or classifiable under Executive Order 12,958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, . . . the . . . closure of, and access to proceedings”).

30. See *id.* § 4(c).

31. The November 13 order provided that the Secretary of Defense would issue guidelines providing for the “conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order,” but did not provide that accused individuals would have the right to hire counsel of their own choosing. *Id.* § 4(c)(5). For a discussion of the subsequent Department of Defense Regulations, see *infra* text accompanying notes 38–55.

32. See *id.* § 1(f). See also *id.* § 4(c)(3) (providing for the “admission of such evidence as would . . . have probative value to a reasonable person”).

33. See *id.* §§ 4(c)(6)–(c)(7), 4(a).

34. See *id.* § 7(b)(2). According to the terms of the order:

the rights of the accused beyond what is normally guaranteed by the Constitution in civilian trials,³⁵ it would have offered far less protection to the accused than court-martial trials under the U.S. Uniform Code of Military Justice (“UCMJ”).³⁶

After an enormous public outcry over the November 13 order,³⁷ the Department of Defense (“DOD”) issued regulations that purport to provide

[T]he individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

Id. The only review of any kind contemplated by the order is the purely discretionary review by the President or the Secretary of Defense. *See id.* § 4(c)(8) (allowing for “submission of the record of the trial, including any conviction or sentence, for review and final decision by [the President] or by the Secretary of Defense if so designated by [the President] for that purpose”).

35. The Constitution generally requires: (1) indictment by grand jury, U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”); (2) a trial by jury, *id.* art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”); (3) a public trial, *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”); (4) a right to confront witnesses and subpoena defense witnesses, *id.* (“[T]he accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . .”); (5) a privilege against self-incrimination, *id.* amend. V; (6) a conviction that is based only upon proof beyond a “reasonable doubt,” *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”), and that employs detailed procedural protections to ensure accuracy before the imposition of the death penalty, *see, e.g.*, *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (subjecting capital sentencing proceeding to due process analysis); and (7) a right to invoke the writ of habeas corpus to challenge detention, U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended . . .”).

36. The Uniform Code of Military Justice establishes that defendants in court-martial proceedings must be accorded the following rights: (1) the right to choose counsel, 10 U.S.C. § 838 (2000); (2) the right to challenge the military judge and other members of a general or special court-martial panel “for cause,” *id.* § 841; (3) the right of appeal to civilian judges confirmed by the Senate, *id.* § 867; (4) the right to unanimous decision by a court-martial panel before the death penalty may be imposed, *id.* § 852; (5) the right to presumption of innocence and proof beyond a reasonable doubt, *id.* § 851; and (6) the right to public proceedings, U.S. Manual for Courts-Martial, United States, 1984, at § 806.

37. *See* Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 592 (2002) (“The Military Order has provoked a storm of protest from various civil libertarians, civil and human rights organizations, newspaper editorialists, academics, members of Congress, and sundry others, mostly on the political left, but including some prominent conservatives such as *New York Times* columnist William Safire and Rep. Bob Barr (R-Ga.)”) (footnotes omitted); Katharine Q. Seelye, *In Letter, 300 Law Professors Oppose Tribunals Plan*, N.Y. Times, Dec. 8, 2001, at B7 (reporting that more than 300 law professors have signed a letter protesting President Bush’s order to establish military tribunals, arguing that such tribunals are “legally deficient, unnecessary and unwise”).

additional procedural protections to the accused.³⁸ The DOD regulations state that the accused are entitled to be informed of the charges against them.³⁹ In addition, defendants are to be furnished with government evidence, both incriminating and exculpatory, prior to trial⁴⁰ and are also accorded the opportunity to gather evidence of their own.⁴¹ Finally, defendants are to be provided military defense counsel and given the opportunity to hire civilian counsel,⁴² and all charges must be proved beyond a reasonable doubt.⁴³

On closer examination, however, these increased “protections” turn out to be of almost no benefit to the accused at all. To begin with, even on their own terms, the regulations still fall far short of offering meaningful due process guarantees. For example, although the accused may hire civilian counsel, that counsel must be a United States citizen admitted to the Bar and must possess a security clearance.⁴⁴ Moreover, even with such a clearance, counsel may still be denied access to evidence or be prevented from attending actual proceedings of the trial.⁴⁵ In addition, although the regulations specify that proceedings should be “open to the maximum extent practicable,”⁴⁶ they still give broad unreviewable authority to the commission to close the proceedings to the public as well as to the accused and civilian defense counsel.⁴⁷ Furthermore, the members of the commission must be commissioned officers of the U.S. armed forces.⁴⁸ While defendants may appeal to a panel that can include civilians, those civilians must also have received commissions as military officers.⁴⁹

Even more importantly, neither the commissions nor the appeal body is actually authorized to make binding final judgments. Rather, their rulings are only *recommendations* to the Secretary of Defense or the

38. See DOD Regulations, *supra* note 10.

39. See *id.* § 5(a).

40. See *id.* § 5(e).

41. See *id.* § 5(h).

42. See *id.* § 4(c)(3)(B).

43. See *id.* § 5(c). Although the regulations purport to require a unanimous verdict before a death sentence could be imposed, see *id.* § 6(f), the regulations also provide that, in the event the regulations conflict with the November 13, 2001 executive order, the order shall prevail. See *id.* § 7(b). Because the executive order specifies that a death sentence could be imposed based only on a 2/3 vote of the panel, Nov. 13 Order, *supra* note 8, at § 4(c)(7), the subsequent regulations may not actually alter this relaxed requirement.

44. DOD Regulations, *supra* note 10, at § 4(c)(3)(B).

45. *Id.*

46. *Id.* § 6(d)(5)(A).

47. *Id.* § 6(b)(3).

48. *Id.* § 4(a)(3).

49. *Id.* § 6(h)(12).

President.⁵⁰ And, indeed, Secretary of Defense Rumsfeld has indicated that prisoners may continue to be detained even if acquitted by the commissions.⁵¹

Thus, the procedural rules offered in the regulations appear to be largely for show. Acquittals may mean nothing.⁵² There is no ability to seek review by a non-military court or appellate body. And even the limited procedural protections delineated in the regulations turn out not to be actual rights accorded to the accused. Rather, the DOD order specifically asserts that it does *not* create any right enforceable against the United States.⁵³ Nor does it amend language in the original executive order declaring there is to be no remedy available to defendants in any court—domestic or international—for alleged violations of due process.⁵⁴ Accordingly, there is no way to ensure that these procedural regulations are followed and, even if there were, a not guilty verdict would be no guarantee of release from indefinite detention. Accordingly, even under the seemingly more generous regulations, the proposed proceedings can hardly be called a trial at all.⁵⁵

In addition to these severe limits on the individual rights of the accused, the detentions and the proposed military commissions also depart from the constitutional scheme because these policies were implemented through a unilateral assertion of executive authority without explicit congressional ratification or approval by the judiciary.⁵⁶ As the U.S. Supreme Court has stated, the constitutional system of checks and balances survives even in time of war or national crisis. Indeed, in *Ex Parte*

50. *Id.* § 6(h)(4)–(6).

51. *See* Seelye, *supra* note 7. Thus, even under the DOD Regulations, the protections offered to the accused remain far less than those provided under the UCMJ. *See supra* note 36.

52. Although the regulations provide that an actual verdict of not guilty by the commission may not be altered by the Secretary of Defense or the President to a verdict of guilty, DOD Regulations, *supra* note 10, at § 6(h)(2), they explicitly authorize the Secretary of Defense to vacate a judgment and remand. *Id.* at § 6(h)(5). Moreover, given the suggestion that even those acquitted may continue to be detained, the actual judgment of the commission seems likely to make little practical difference to the detainees.

53. *Id.* § 10.

54. Nov. 13 Order, *supra* note 8, at § 7(b)(2).

55. For this reason, it is unnecessary to engage in a debate about whether or not military commissions may sometimes be permissible under either American constitutional or international law. For example, some commentators have pointed out that military commissions are permitted under the Geneva Conventions. *See* Anderson, *supra* note 37, at 614–20. However, such authorization, in and of itself, does not necessarily sanction the sort of show “trials” that would be acceptable under the executive order and the DOD regulations.

56. *See* Katyal Testimony, *supra* note 13 (arguing that the Nov. 13 Order “usurp[s] the power of Congress”).

Milligan,⁵⁷ a nineteenth-century case addressing the constitutionality of military commissions, the Court waxed eloquent on precisely this question:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.⁵⁸

Thus, the Constitution requires that Congress, the judiciary, and the Executive branch share governmental authority, a requirement that the Administration's actions brush aside. With regard to the detentions, the Justice Department has argued repeatedly over the past year that the judiciary has no oversight role.⁵⁹ With regard to the proposed military commissions, neither the original executive order nor the subsequent DOD regulations envision any role for Congress or the judiciary.

Yet, as critics note, Congress, not the Executive, is given the constitutional authority to "define and punish . . . Offenses against the Law of Nations."⁶⁰ The Administration's executive order and the DOD regulations, by contrast, lodge complete authority to define crimes punishable by the military commission with the Secretary of Defense, answerable only to the President. And the scope of these commission-eligible crimes may be broad indeed. For example, although the military commissions as envisioned could only try noncitizens, no distinction is made between noncitizens captured overseas and noncitizens captured on U.S. soil.⁶¹ Thus, permanent resident aliens, who may have lived in the

57. See 71 U.S. (Wall.) 2 (1866).

58. See *id.* at 120–21.

59. Indeed, in various legal proceedings, the government has argued that the federal courts have no jurisdiction over the detainees in Guantanamo Bay, see *Rasul v. Bush*, 2002 WL 1760825 (D.D.C.) (embracing Administration position that aliens held outside the sovereign territory of the U.S. cannot use U.S. courts to pursue habeas petitions), no ability to review the executive decision to declare U.S. citizens enemy combatants and strip them of constitutional due process rights, see *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (noting the government's assertion that "enemy combatants who are captured and detained on the battlefield in a foreign land" have "no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention"), no power to order the release of the names of detainees, see *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, No. CIV.A.01-2500(GK), 2002 WL 1773067, at *2–*5 (D.D.C. Aug. 2, 2002) (rejecting Justice Department claim that detainees' names may be kept secret), and no ability to open detention hearings to the public or the media, see *Detroit Free Press v. Ashcroft*, No. 02-1437, 2002 WL 1972919, at *1 (6th Cir. Aug. 6, 2002) (rejecting the government's arguments seeking "the power to secretly deport a class if it unilaterally calls them 'special interest' cases").

60. U.S. CONST. art. I, § 8.

61. See Nov. 13 Order, *supra* note 8, § 2(a).

United States for years, could be arrested and tried before military commissions. In addition, the order contemplates trials for substantive offenses that include not only “violations of the laws of war,” but also “other applicable laws,”⁶² without any limiting language as to which laws might fall within the ambit of the order. Finally, even an acquittal may not result in release, and no review by a civilian court is available.

As a matter of legal precedent, critics observe that in the past, military commissions with such dramatically curtailed procedural protections have been established only when Congress has declared war or authorized such tribunals.⁶³ Here Congress has done neither. Thus, the Supreme Court’s 1942 decision in *Ex Parte Quirin*,⁶⁴ which upheld the constitutionality of the trial of Nazi saboteurs before military commissions, provides no support in the current situation, because in *Quirin*, Congress declared war and specifically authorized the commissions in its Articles of War.⁶⁵ Furthermore, the scope of the order issued by President Roosevelt establishing the commissions at issue in *Quirin* is much narrower than the Bush order because Roosevelt limited the substantive offenses triable before the commissions to “sabotage, espionage or other hostile or warlike

62. *Id.* § 1(e).

63. *See* Koh, *supra* note 13, at 339–40.

64. 317 U.S. 1 (1942).

65. Those defending the use of the commissions have argued that Congress *has* authorized them by enacting the Uniform Code of Military Justice, which contains language stating:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000). They note that this language is virtually identical to the language in the Articles of War on which the *Quirin* Court relied in determining that Congress had expressly approved of the commissions in that case. *See, e.g.*, Ashcroft Testimony, *supra* note 4 (“But for those who would disagree with [the view that the President has the inherent authority to establish military commissions], the identical provision of authority that . . . was present in the *Quirin* situation is now present in the U.S. Code of Military Justice.”); Cass R. Sunstein, *Correspondence*, AM. PROSPECT, Feb. 11, 2002, at 4–5 (“The congressional authorization found sufficient in *Quirin* is the same law invoked in Bush’s order.”). *See also* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 252–54 (2002).

Nevertheless, the *Quirin* court did not rely *solely* on this language to justify the military commissions; rather, such language was accompanied by an official declaration of war. *See also Quirin*, 317 U.S. at 30. In contrast, the Congressional Use of Force Resolution passed after the September 11 attacks only authorized the President to use “force” against persons involved in the attacks in order to prevent future harm to the United States, thereby stopping far short of a full declaration of war. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). In addition, in 1996 Congress passed the War Crimes Act, 18 U.S.C. § 2441 (1996), which provided that those accused of “war crimes” would be tried in civilian courts. No such provision existed at the time of the *Quirin* decision.

acts.”⁶⁶ The Bush order, by contrast, defines the offenses triable before the commissions as including violations of “the laws of war and other applicable laws.”⁶⁷ The Bush order would thus extend the scope of military commissions beyond that which the Court upheld in *Quirin*, both to circumstances in which Congress has not declared war or specifically authorized the commissions and to violations far beyond the laws of war. Whatever narrow exception the Supreme Court carved out in *Quirin* surely does not authorize the President unilaterally to shift the forum for ordinary domestic prosecutions to military commissions. Finally, the War Crimes Act, passed by Congress in 1996, envisions that persons who commit statutorily defined “war crimes” be punished in civilian courts,⁶⁸ which is just the opposite of what President Bush’s order seeks.

In short, as George P. Fletcher has pointed out, “[t]here is no tradition or constitutional authority legitimating trial by a military tribunal when the crime is subject to prosecution under American law and the appropriate American courts are open and functioning.”⁶⁹ Accordingly, both the mass detentions and the proposed military commissions pose serious problems under domestic constitutional law.

B. INTERNATIONAL LAW

Although less explored by critics of the commissions, strong rule of law arguments can also be made that the Administration’s actions violate well-established international law requirements. The International Covenant on Civil and Political Rights (“ICCPR”), to which the United States is a party, expressly mandates a variety of procedural protections that the current practice of indefinite secret detentions and proposed procedures for the military commissions ignore.⁷⁰ In particular, Article 12 requires that defendants be assured the right to choose their own counsel, to have reasonable opportunities to prepare their defenses, to be presumed innocent until proven guilty, to know the charges against them, and to appeal. The treaty also forbids discrimination on account of “race . . . and national

66. Proclamation of President Franklin D. Roosevelt, 56 Stat. 1964, 1964 (July 2, 1942). *See also Quirin*, 317 U.S. at 30 (concluding that prosecution did not violate prohibition on federal common law of crime because Congress explicitly incorporated law of war into military tribunals).

67. Nov. 13 Order, *supra* note 8, § 1(e).

68. 18 U.S.C. § 2441 (1996).

69. Fletcher, *supra* note 13, at 28.

70. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Although the DOD Regulations nominally provide some of these protections, such protections are not enforceable rights under the terms of the regulations. *See supra* text accompanying notes 44–55.

origin,” a provision that the November 13 military commissions order expressly violates by subjecting only noncitizens to its truncated procedures.⁷¹ Although the treaty allows trials to be closed for national security reasons, closure must be strictly limited.⁷² Moreover, trials under the ICCPR must be held before “independent tribunals,”⁷³ a requirement that a military commission run by members of the military without any recourse to a civilian judicial body could not satisfy.

In addition to protecting the rights of defendants at trial, the ICCPR also provides pre-trial rights that the Administration has ignored. Article 9, which protects “liberty and security of the person,” specifically requires that those arrested must be promptly informed of the reasons for their arrest, that those arrested or detained be notified of any charges against them, and that detainees be able to challenge the lawfulness of their detention before a court.⁷⁴ The Administration, both in its detention policies and in its proposed procedures for the conduct of military commissions, has failed to assure that any of these rights is respected.

The Human Rights Committee, charged with monitoring the implementation of the ICCPR, has emphasized that while the ICCPR does not categorically bar all trials by special military courts, they “present serious problems as far as the equitable, impartial and independent administration of justice is concerned.”⁷⁵ The Committee has asserted that use of such courts should be “exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”⁷⁶ And while it is true that the ICCPR allows for derogation from certain rights in times of “public emergency,” derogation may be made only in situations that “threaten the life of the nation” and only to the extent “strictly required by the exigencies of the situation.”⁷⁷ As the Human Rights Committee’s General Comment to the provision makes clear, departure from each specific right must be limited to what is absolutely necessary.⁷⁸ Moreover, certain rights, such as the right to life and the right to be free from torture,

71. *Id.* art. 12, 999 U.N.T.S. at 176.

72. *See id.*

73. *Id.*

74. *See id.* art. 9, 999 U.N.T.S. at 175.

75. U.N. Human Rights Comm., General Comment No. 13: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (Article 14), par. 4, U.N. Doc. HRI/GEN/1/Rev.1 (1984).

76. *Id.*

77. ICCPR, *supra* note 70, at art. 4, 999 U.N.T.S. at 174.

78. *See* U.N. Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), pars. 4–5, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter HRC General Comment 29].

are expressly non-derogable,⁷⁹ and other rights, even if not expressly non-derogable, may nonetheless be non-derogable if they serve to protect expressly non-derogable rights. As the Human Rights Committee has asserted, the “provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.”⁸⁰ Thus, because the right to life is non-derogable, “any trial leading to the imposition of the death penalty in a state of emergency must conform to the provisions of the Covenant, including all the requirements of Article 14.”⁸¹ In any event, the United States has not invoked the procedures that would allow for derogation.⁸²

In addition, a strong argument can be made that the detentions and the use of the proposed commissions would violate the Geneva Conventions, to which the United States is also a Party.⁸³ For those suspects who qualify as prisoners of war (“POWs”), use of the military commissions as proposed would directly conflict with the terms of the POW Convention. Under the terms of the treaty, suspects may not be detained indefinitely without trial. Rather, the Conventions spell out specific rights that, at a minimum, POW suspects must be guaranteed. Although POWs may be tried for violations of the laws of war or for committing other crimes,⁸⁵ such trials must take place before an independent and impartial tribunal: “In no circumstances

79. ICCPR, *supra* note 70, art. 4, at par. 2, 999 U.N.T.S. at 174 (listing which rights are non-derogable).

80. HRC General Comment 29, *supra* note 78.

81. *Id.* Furthermore, because the treaty forbids derogations that would interfere with other obligations under international law, ICCPR art. 4, 999 U.N.T.S. at 174, a strong argument can be made that the applicable fair trial provisions in the Geneva Conventions cannot be limited under any circumstances. See *infra* notes 83–99 and accompanying text. See generally Hernan Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with Its Obligations Under Protocol II and Common Article 3*, 33 AM. U. L. REV. 41 (1983).

82. For a discussion of the ways in which the proposed commissions violate the ICCPR, see generally Mundis, *supra* note 14, at 324–25.

83. The Geneva Conventions primarily implicated here are the POW Convention, *supra* note 6 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3522, 75 U.N.T.S. 287, 292.

84. POW Convention, art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214.

85. Indeed, the Conventions not only contemplate such trials, they also obligate the high contracting parties to conduct them. Individuals suspected of committing grave breaches of the Conventions must be prosecuted. *Id.* art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236. Grave breaches include:

[A]ny of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully 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 willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Id. art 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238. Finally, “[t]hose tried for grave breaches, regardless of POW status, are to be guaranteed the rights accorded by Article 105.” *Id.*

whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized.”⁸⁶

In addition to this general requirement of independence and impartiality—a requirement the proposed military commissions likely could not meet because neither the order establishing the military commissions nor the subsequent DOD regulations guarantees an appeal to a civilian tribunal—the Geneva Conventions also mandate that POWs be accorded at trial the specific procedural rights articulated in Article 105. Such rights include the right to “defence by a qualified advocate or counsel of [the suspect’s] own choice” or, if the suspect does not choose counsel, the right to have counsel provided; the right to “calling of witnesses;” the right “to the services of a competent interpreter;” and the right to have a period of at least two weeks to prepare a defense, as well as the right of the suspect’s attorney to have access to facilities to enable preparation of a defense.⁸⁷ POWs are also entitled to an appeal⁸⁸—again, a right that neither the November 13 order nor the DOD regulations guarantees. Furthermore, the treaty obligates contracting parties to provide POWs essentially the same minimum procedural protections that a member of the detaining authority’s armed forces would have at trial.⁸⁹ Accordingly, to the extent that a trial before military commissions would not conform to the same standards laid down for the trial of members of the U.S. Armed Forces under the UCMJ (and the November 13 order and subsequent DOD regulations suggest that the proposed commissions would not), the Geneva Conventions would bar the use of the commissions for POWs.

At least some of the suspects now detained by the United States, either in Afghanistan or at Guantanamo naval base, may well qualify as POWs. Prisoners of war are defined under the Conventions as persons who have fallen into the power of the enemy and who are either “armed forces of a Party to the conflict as well as members of militias and members of other volunteer corps forming part of such armed forces,” or “other militias or volunteer corps” provided they fulfill the following four 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; and (d) That of conducting their operations in

86. *Id.* art. 84, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

87. *Id.* art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214.

88. *See id.* art. 106, 6 U.S.T. at 3398, 75 U.N.T.S. at 206.

89. *See id.* art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

90. *See id.* art. 106, 6 U.S.T. at 3398, 75 U.N.T.S. at 206.

accordance with the laws and customs of war.”⁹¹ Some Taliban fighters might meet these criteria. Moreover, to the extent that there is any ambiguity about whether a detainee qualifies as a POW, the Geneva Conventions expressly require that the detainee presumptively be treated as a POW until a decision is made by a competent tribunal.⁹² Indeed, in a case brought on behalf of the Guantanamo detainees, the Inter-American Commission on Human Rights has issued a preliminary decision on precisely this question. In order to “ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status they are found to possess, which may in no case fall below the minimum standards of non-derogable rights,” the Commission has requested “that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.”⁹³

Even those who do not qualify as POWs retain certain rights at trial. First, such persons are protected, at a minimum, under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Civilian Persons Convention). According to the authoritative Commentary to the Geneva Conventions of the International Committee of the Red Cross (ICRC), an interpretation that the International Criminal Tribunal for the former Yugoslavia has endorsed, “[n]obody in enemy hands can fall outside the law.”⁹⁴ That is, all detainees fall somewhere

91. *Id.* art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

92. *See id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142. They further require that: Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

93. Inter-American Commission on Human Rights, Pertinent Parts of Decision on Request for Precautionary Measures, Detainees at Guantanamo Bay, Cuba, March 12, 2002 [hereinafter Inter-American Commission Guantanamo Decision].

94. INT’L COMM. OF THE RED CROSS, GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 51 (J.S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY]. The commentary further states:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status . . .

Id. *See also* Prosecutor v. Delalic, No. IT-96-21-T, para. 271 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II Nov. 16, 1998), at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> [hereinafter Celebici Case] (“[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied.”), *aff’d*, No. IT-96-21-A (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber Feb. 20, 2001), at <http://www.un.org/icty/celebici>

within the protections of either the POW Convention or the Civilian Persons Convention. Under the Civilian Persons Convention, detainees “in case of trial . . . shall not be deprived of the rights of fair and regular trial,” even if they are suspected of activities hostile to the detaining power.⁹⁵

Second, Common Article 3 of the Geneva Conventions can be read to protect the rights of detainees who do not qualify as POWs. Common Article 3 forbids, with respect to judicial proceedings used to try captured combatants or other civilians, “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁹⁶ Moreover, the ICRC Commentary states that the fundamental guarantees of Common Article 3 apply even if nonstate combatants lack all the hallmarks of classic rebel forces.⁹⁷ Thus, while Al Qaeda members may not possess the attributes of a classic rebel group—which under the Conventions is defined as a group that is organized, has a responsible command, acts on a determinate territory, and is capable of respecting and ensuring respect for humanitarian law—the Commentary suggests that they still possess rights under the Geneva Conventions. Although Common Article 3 and the related ICRC commentary address civil wars against insurgents,⁹⁸ the same rationale should apply to an international conflict against non-state actors such as Al Qaeda.

Third, the Geneva Conventions also protect the rights of detainees, regardless of POW status, who are tried for violations of the “grave breaches” provisions of the Geneva Conventions. These protections include the guarantee of the right to counsel of the detainee’s own choosing and the other rights established under Article 105.⁹⁹

/appeal/judgement/index.htm. In the Celebici Case, the ICTY determined that Bosnian Serbs detained in the Celebici prison camp, some of whom may have participated in the hostilities to a degree, qualified as protected persons under the Geneva Conventions even though they did not have the status of POWs. *Id.* See also generally Human Rights Watch, Background Paper on Geneva Conventions and Persons held by U.S. Armed Forces (Jan. 29, 2002), at www/hrw.org/backgrounder/usa/pow-bck.htm.

95. Civilian Persons Convention, *supra* note 83.

96. *Id.*

97. See ICRC COMMENTARY, *supra* note 94.

98. POW Convention, *supra* note 6, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (noting that Common Article 3 applies “in the case of an armed conflict not of an international character”).

99. See POW Convention, *supra* note 6, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236. For a discussion of “grave breaches” provisions of the Convention, see *supra* note 85. Admittedly, aside from those tried for grave breaches (who are entitled to the rights specified in Article 105), the Geneva Conventions do not provide a great deal of specificity as to the *content* of the due process protections accorded to detained individuals who do not qualify as POWs. One might look for clarification, however, to Article 75 of Protocol I Additional to the Geneva Conventions, which provides a range of

Finally, regardless of their status under international humanitarian law, the detainees cannot lose the core protections of international human rights law. As the Inter-American Commission on Human Rights recently announced, the detainees retain certain fundamental rights even if they do not qualify as POWs because “no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.”¹⁰⁰ As discussed above, such rights include the basic due process rights guaranteed under Article 14 of the ICCPR if any non-derogable rights, such as the right to life, are at stake.¹⁰¹

fundamental guarantees to all persons arrested who do not qualify as prisoners of war. *See* Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts, June 8, 1977, Art. 75, 1125 UNTS 3, 16 ILM 1391. While the United States has not ratified Protocol I, government officials have previously asserted that the United States supports the fundamental guarantees contained in Article 75, *see* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 427–28 (1987), which are appropriately deemed part of customary international law. *See* JORDAN J. PAUST, MICHAEL SCHARF, LEILA SADAT, M. CHERIF BASSIOUNI, JIMMY GURULE, BRUCE ZAGARIS & SHARON A. WILLIAMS, INTERNATIONAL CRIMINAL LAW 817 (2d ed. 2000); Orentlicher & Goldman, *supra* note 14, at 661. Article 75 requires that unprivileged combatants be accorded in all circumstances trials by impartial and regularly constituted courts that, at a minimum, afford the presumption of innocence, the right to counsel before and during trial, the right of defendants to be present at proceedings and to call witnesses and examine witnesses against them, the right to be promptly informed of the charges or reasons for detention, the right to a public judgment, and the right of defendants not to testify against themselves or to confess their guilt, among other rights. The November 13 Order, even as modified by the DOD regulations, falls far short of these minimum requirements. As currently envisioned, there is no guarantee that the defendant will be present at the proceedings (a requirement of Article 75) because the regulations permit the proceedings to be closed to both the defendant and defendant’s counsel. DOD Regulations, *supra* note 10, at § 6(b)(3). Nor do the Order or regulations specify that the accused will be promptly informed of the charges or reasons for detention. In addition, neither the Order nor the regulations require that the judgment be announced publicly. Furthermore, Article 75 prohibits discrimination on the basis of race, religion, and numerous other grounds, a subject that is untouched in the Order and regulations. And, of course, a military panel operating in secret without review by an outside civilian body, and which is only authorized to provide *recommendations* to the Secretary of Defense and the President, *id.*, § 6(h)(4)–(6), could hardly be said to satisfy Article 75’s requirement that all proceedings be before an independent and regularly constituted court respecting the generally required principles of regular procedure.

Perhaps most importantly, even the rights that *appear* to be provided in the regulations do not satisfy Article 75’s requirements because the regulations do not *guarantee* those procedural protections. To the contrary, the regulations state flatly that none of the procedures provided shall be deemed rights enforceable against the United States. *Id.* § 10. Moreover, any claimed violations of the procedures could not be appealed to a civilian court, and even in the unlikely event that detainees could successfully challenge their “trials,” acquittals would not necessitate their release from custody. *See supra* text accompanying note 51. Thus, although some commentators have emphasized the limited nature of the rights guaranteed by Article 75, *see, e.g.*, Anderson, *supra* note 37, at 620, the military commissions as currently envisioned fail to satisfy even those rights.

100. Inter-American Commission Guantanamo Decision, *supra* note 93.

101. *See supra* note 81 and accompanying text.

Because the United States has ratified the ICCPR and the Geneva Conventions, they are the supreme law of the land.¹⁰² The United States might claim that the ICCPR is non-self-executing and that no statute implementing the treaty was ever enacted,¹⁰³ but under the principle established nearly two centuries ago by Chief Justice Marshall in *Murray v. Schooner Charming Betsey*,¹⁰⁴ statutes (and by implication executive orders) must be interpreted so as not to conflict with customary international law, which would include the provisions of the ICCPR. Furthermore, no such claim may be made with respect to the Geneva Conventions, which have been fully implemented as a matter of domestic law.¹⁰⁵

Both the indefinite detentions and the proposed military commission trials violate not only our treaty commitments, but also well-established principles of customary international law. For example, the Universal Declaration of Human Rights, the foundation of the modern international human rights system, sets forth several requirements that the Administration's actions do not meet. Article 10 provides that, in general, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."¹⁰⁶ Article 11 provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."¹⁰⁷ These principles are widespread as a matter of both international and domestic law. Indeed, the regional human rights conventions—the American Declaration on the

102. U.S. CONST. art. VI, cl. 2. It states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby

Id. (emphasis added).

103. See COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102-23, at 19 (1992), reprinted in 31 I.L.M. 645, 657 (reporting the Administration's argument for the inclusion of a declaration that the substantive provisions of the ICCPR are not self-executing). Even this argument, however, is undermined somewhat by the acknowledgment in the same report that "existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated." *Id.*

104. 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).

105. See, e.g., War Crimes Act, 18 U.S.C. § 2441 (1996). For an elaboration of this argument, see Koh, *supra* note 13.

106. Universal Declaration of Human Rights, G.A. Res. 217(A), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

107. *Id.* art. 11.

Rights and Duties of Man¹⁰⁸ and the American Convention on Human Rights,¹⁰⁹ the European Convention on Human Rights¹¹⁰ and the European

108. American Declaration on the Rights and Duties of Man, Inter-Am. C.H.R., OEA/Ser.L.V/II.82, doc. 6 rev. 1, at 17 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev. 1, at 17 (1992). The American Declaration's relevant provisions include the right of the accused to be "presumed . . . innocent until proved guilty," to be "given an impartial and public hearing," and to be "tried by courts previously established in accordance with pre-existing laws." *Id.* In addition, anyone who has been deprived of liberty has the right "to have the legality of his detention ascertained without delay by a court." *Id.*

109. American Convention on Human Rights, Nov. 22, 1969, art. 8, 1144 U.N.T.S. 123, 147-48 [hereinafter American Convention]. The American Convention ensures every person the "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law." *Id.* At a criminal trial, the accused "has the right to be presumed innocent;" the right to "be assisted without charge by a translator or interpreter if he does not understand or does not speak the language of the tribunal or court;" the right to "[p]rior notification in detail . . . of the charges against him;" the right to "[a]dequate time and means for the preparation of his defense;" the right to "defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;" the right to "be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;" the right to "examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;" the right not to be "compelled to be a witness against himself or to plead guilty;" and the right "to appeal the judgment to a higher court." *Id.* Criminal proceedings must be public, "except insofar as may be necessary to protect the interests of justice." *Id.* Furthermore, the American Convention states:

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Id. art. 7, 1144 U.N.T.S. at 147.

110. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. The European Convention's relevant provisions include the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," although proceedings may be closed to the press and public

in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Id. art. 6, 213 U.N.T.S. at 228. At trial, the accused has the right to "be presumed innocent until proved guilty," to "be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him," to "have adequate time and facilities for the preparation of his defence," to "defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require," to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," and to "have the free assistance of an interpreter if he cannot understand or speak the language used in court." *Id.* Moreover, anyone who is arrested "shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him," shall be "brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release pending trial." *Id.* art. 5, 213 U.N.T.S. at 226. In addition, anyone deprived of liberty by arrest

Charter,¹¹¹ the African Charter on Human and People's Rights,¹¹² and the Arab Charter on Human Rights¹¹³—all contain procedural protections that the ongoing detentions and the proposed regulations for use of the military commissions do not meet.¹¹⁴ So, too, does the statute of the International Criminal Tribunal for the former Yugoslavia.¹¹⁵

or detention "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." *Id.*

111. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 20, available at http://europa.eu.int/comm/justice_home/unit/charte/index_en.html. The European Charter's relevant provisions include the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." *Id.* At trial, an accused "shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." *Id.* In addition, each accused has the right to be "presumed innocent until proved guilty according to law" and to be guaranteed "[r]espect for the rights of the defence." *Id.*

112. African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5 (Jan., 1981), reprinted in 21 I.L.M. 58 (1982). The African Charter's relevant provisions include the right of an accused to be "tried within a reasonable time by an impartial court or tribunal," the right to be "presumed innocent until proved guilty," and the right "to defence, including the right to be defended by counsel of his choice." *Id.* art. 7. The Charter also guarantees "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs." *Id.*

113. Arab Charter on Human Rights, Sept. 15, 1994, art. 7, reprinted in 18 HUM. RTS. L.J. 151, 152 (1997). The Charter requires that the accused "shall be presumed innocent until proved guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defence." *Id.* In addition, the Charter provides that "[e]veryone has the right to liberty and security of person and no one shall be arrested, held in custody or detained without a legal warrant and without being brought promptly before a judge." *Id.* art. 8.

114. While some of these regional conventions allow for derogation in times of public emergency, as in the ICCPR, derogation must be strictly limited to the exigencies of the situation. See, e.g., European Convention, *supra* note 110, art. 15, at 232-34; American Convention, *supra* note 109, art. 27, 1144 U.N.T.S. at 152. The European Court of Human Rights has construed derogation authority narrowly, particularly in response to terrorism: "The Court, being aware of the danger . . . of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the struggle against espionage and terrorism, adopt whatever measures they deem appropriate." *Kass v. Germany*, 28 Eur. Ct. H.R. (ser. A) at 18 (1978). Although the European Court has allowed states to make limited departures from the due process protections assured by Article 5, the Court has done so only after determining that the state has fulfilled the formal requirements for a public emergency derogation under Article 15 and that such derogation is justified. Compare *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. 117 (1988) (disallowing U.K.'s departure from Article 5's requirements where no formal derogation made), with *Brannigan v. United Kingdom*, 17 Eur. Ct. H.R. 594 (1993) (allowing the U.K. to make limited departure from Article 5's requirements, permitting suspects to be detained for seven days before being brought before a judge, only after determining that the U.K. had made a proper derogation under Article 15). Moreover, the court has allowed states only to make very limited derogations of rights. Compare *Brannigan*, *supra*, with *Aksoy v. Turkey*, 23 Eur. Ct. H. R. 553 (Dec. 18, 1996) (refusing to allow Turkey to derogate from Article 5 by detaining suspects for 14 days before bringing the suspects before a judge and noting that the long delay in judicial oversight and the lack of a habeas remedy distinguished this case from *Brannigan*). The American Convention expressly provides that the "judicial guarantees essential for the protection of such [non-derogable] rights," such as the right to life, are non-derogable. American Convention, *supra*

While it is true that the United States has used military commissions in the past, these precedents largely predate the Geneva Conventions, the ICCPR, and the modern development of due process standards in international human rights and international humanitarian law.¹¹⁶ Moreover, the two most notable examples of military commission trials—

note 109, art. 27, 1144 U.N.T.S. at 152. Relying on this provision, the American Court of Human Rights has concluded that the right to have the lawfulness of one's detention considered promptly by a judge in habeas or other proceedings is essential, because such judicial oversight protects against other serious human rights violations such as torture, disappearance, and summary execution. Advisory Opinion OC-8/87, Inter-American Court of Human Rights (1987). For a discussion of derogation under the regional conventions, see generally MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW 387-401 (2d ed. 2000).

115. See International Criminal Tribunal for the former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); ICTY STATUTE OF THE INTERNATIONAL TRIBUNAL, art. 21, at <http://www.un.org/icty/basic/statut/statute.html> [hereinafter ICTY Statute] (recognizing right of accused to choose legal counsel or have one appointed and providing that ICTY will fund legal representation for indigent defendant; providing that defendant must be immediately informed of nature of charges against him or her and obligating prosecution to disclose all exculpatory evidence; requiring that defendant be given adequate time to prepare defense; providing that trials are open to public and media, and that judgments must also be made public, while allowing trial chamber, in extreme cases, to close proceedings to public if necessary; preserving presumption of innocence; conferring right of appeal to separate appellate chamber of ICTY).

116. Jack Goldsmith and Cass Sunstein recently have speculated about the fact that the Bush military commission order received far more criticism than a military commission order issued by President Roosevelt after World War II. See Jack L. Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 18 CONST. COMMENT (forthcoming 2002). According to Goldsmith and Sunstein, the increased hostility to Bush's order is attributable to Americans' greater mistrust of government in the post-Vietnam, post-Watergate era. While that change in cultural attitude may be a factor, I believe a far more important explanation is the development of a robust and widely internalized set of human rights norms in the decades following World War II. Goldsmith and Sunstein dismiss this suggestion, breezily opining (without support) that "[t]he severest reactions to the Bush Order, in November and December 2001, were premised on violations of American constitutional and civil liberties traditions, and not on violations of international law." *Id.* Further, they state (also without support) that "[f]or the most part, the people who criticized Bush's Order were not at the time familiar with the Order's potential international law difficulties." *Id.* Contrary to these assertions, however, a number of commentators did in fact offer criticisms of Administration actions throughout the fall of 2001 and the winter of 2002 from the perspective of international law. See, e.g., Koh, *supra* note 13; Orentlicher & Goldman, *supra* note 14; Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J.L. & PUB. POL'Y 965 (2002) [hereinafter Slaughter, *Beware the Trumpets of War*]; Laura Dickinson, *Courts Can Avenge Sept. 11: International Justice—Not War—Will Honor Our Character While Securing Our Safety*, LEGAL TIMES, Sept. 24, 2001, at 66; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 [hereinafter Slaughter, *Al Qaeda Should Be Tried*]; Richard Goldstone, *Prosecuting Al Qaeda: September 11 and its Aftermath*, Crimes of War Project, Dec. 7, 2001, at http://www.crimesofwar.org/expert/al_goldstone.html; Michael Scharf, *Editorial: The Case for an International Trial of the Al-Qaeda and Taliban Perpetrators of the 9/11 Attacks*, AM. SOC'Y INT'L L., Spring 2002, at 12. Moreover, because the American civil liberties tradition in the twentieth century developed largely in tandem with the growth of international human rights norms and institutions, even those who did not explicitly invoke international law could not fail to have been influenced by six decades of development in international human rights law.

the trials before the International Military Tribunal at Nuremberg and in the Far East at the conclusion of World War II—not only predate these international law developments, but also contain many more protections for the rights of the accused than are provided in the November 13 order and DOD regulations, which—as discussed previously¹¹⁷—do not actually offer any enforceable procedural rights and which do not even guarantee release upon acquittal. Thus, there is little, if any, precedent or legal justification for the current Administration actions.

C. RESPONSES TO “RULE OF LAW” ARGUMENTS

Those defending the use of the commissions, particularly those within the Administration, have framed their support primarily in pragmatic, rather than legal, terms. To be sure, they have responded to some of the constitutional challenges to the preventive detentions and the proposed military commissions.¹¹⁸ But significantly, when it comes to international law, they have not seen fit to mount more than a cursory defense of their actions under prevailing international legal instruments.

For example, during his congressional testimony defending the military commissions, Attorney General John Ashcroft made little reference to international law, and those references that he did make were both perfunctory and puzzling. For instance, he suggested that, because the U.S. Senate had “voted [ninety] to nothing that [Slobodan] Milosevic should be tried in a war crimes commission,” and because the U.S. Congress had, more broadly, supported the use of international war crimes commissions following World War II and more recently had supported the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Congress should likewise support the military commissions proposed in the November 13 order.¹¹⁹ Yet, he neglected to address the extent to which, as discussed above, all of

117. See *supra* text accompanying notes 44–55.

118. For example, they have emphasized that the U.S. Constitution gives the President the unilateral authority to establish military commissions in a time of national crisis, noting that *Quirin*, while not affirmatively establishing this proposition, does not rule it out. For example, in his testimony before the Senate Judiciary Committee, Ashcroft stated:

[I]t is my position that the President has an inherent authority and power to conduct war and to prosecute war crimes The Supreme Court did address in the *Quirin* Case . . . the issue of war crimes commissions . . . and it cited the authority of the congressional declaration of war as language recognizing the president’s power . . . but I don’t believe that the court indicates or predicates its assumption . . . upon that particular authority.

Ashcroft Testimony, *supra* note 4. For arguments elaborating on this theme, and debating it, see *supra* note 65.

119. See Ashcroft Testimony, *supra* note 4.

the international tribunals he named had provided significantly greater protections for the rights of the accused than the November 13 order.¹²⁰

Ironically, various plausible arguments based on international legal norms might have been advanced in favor of the commissions had the Administration been so inclined. For example, Administration officials might have asserted that the attacks and their aftermath qualified as the kind of emergency justifying derogation from certain provisions of the International Covenant of Civil and Political Rights under Article 4.¹²¹ Great Britain, in fact, has pursued this course and has formally invoked Article 4 of the Covenant to declare a public emergency justifying derogation from certain rights.¹²² The United States, by contrast, has not done so.

Despite the availability of legal arguments, however, those supporting the Administration's actions have justified them primarily in the language of policy. They have made clear that they view law—at least the typical legal protections afforded defendants in criminal trials—to be a nuisance (or, worse, a danger) in the context of fighting terrorism. They contend that the normal principles governing adjudication of criminal responsibility ought to be suspended for several reasons. First, such trials take a long time and cost a great deal of money. Thus, they argue that trials of untold numbers of terrorists in civilian courts would be inefficient.¹²³ Second, civilian trials would present risks to civilian judges and jurors, who might be targeted by terrorists in retaliation for their decisions.¹²⁴ Third, they argue that there is no need to protect rights of people who are, after all,

120. See, e.g., *supra* note 115 and accompanying text.

121. See *supra* text accompanying notes 77–82. See also *supra* note 114.

122. Declaration of the United Kingdom of Great Britain and Northern Ireland Concerning ICCPR, United Nations Treaty Collection—Declarations and Reservations, December 18, 2001, www.unhcr.ch/html/menu3/b/treaty5_asp.htm.

123. See, e.g., Lieutenant Colonel Denise Lind, Remarks at Panel on Military Commissions, University of Connecticut School of Law, (Jan. 24, 2002) (video transcript on file with author).

124. See, e.g., Ashcroft Testimony, *supra* note 4. He further asked:

We have judges in the United States now that are constantly protected because of their prior involvement in terrorist trials. Can you imagine making a courthouse in the city a target for terrorist activity as a result of focusing the world's attention on some trial in the normal setting for these war crimes?

Id. Wedgwood has also noted that:

An al Qaeda member trained in surveillance can easily follow jurors home, even when their names are kept anonymous. Perhaps it is only coincidence that the World Trade Center towers toppled the day before al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies—in a federal courthouse in lower Manhattan six blocks away. But certainly before Sept. 11 no one imagined the gargantuan appetite for violence and revenge that bin Laden has since exhibited. Endangering America's cities with a repeat performance is a foolish act.

Wedgwood, *supra* note 3.

international terrorists. For example, they contend that it is ludicrous to suggest that we should have read Al Qaeda members their Miranda rights before apprehending them in the caves at Tora Bora.¹²⁵ Fourth, the evidence available to convict terrorists does not necessarily fit the strict evidentiary requirements, such as the chain of custody requirement or the hearsay rule, applicable in civilian courts.¹²⁶ Indeed, much of the evidence is secret, we are told, and could compromise national security if it came to light in a public trial.¹²⁷ Furthermore, public trials are subject to capture by grandstanding defendants who might use the process to air their views and thereby undermine the fight against terrorism.¹²⁸ Fifth, it is alleged that indefinite secret detentions and military commissions give the government, and in particular the Executive branch, needed control over the process.¹²⁹ In short, the view is that we cannot afford much law here. Stern measures are needed for violent times.

125. See, e.g., *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of Sen. Hatch) (“Do we really want to litigate in a criminal trial whether the soldiers who apprehended bin Laden should have obtained a search warrant before entering his cave? Now, that’s meant to be humorous . . . or whether he understood his Miranda rights?”); Wedgwood, *supra* note 3 (“U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.”).

126. See, e.g., *Preserving Freedoms While Fighting Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Dep’t of State) [hereinafter Prosper Testimony] (“After the fact, when a particular location has been stabilized, the particular armed forces or members of the armed forces will be able to go in and conduct investigations . . . and often . . . at that point in time, you will have serious questions as to chain of custody if you will because the scene may not have been secured; obviously there’s a conflict going on.”); Wedgwood, *supra* note 3 (“Hearsay statements . . . cannot be considered in a trial by jury. Historically, Anglo-American juries were thought incapable of weighing out-of-court statements, and the Supreme Court attached many of these jury rules to the Constitution. So bin Laden’s telephone call to his mother, telling her that ‘something big’ was imminent, could not be entered into evidence if the source of information was his mother’s best friend. In a terrorist trial, there are few eyewitnesses willing to testify, because conspiracy cells are compartmentalized, and witnesses fear revenge.”).

127. See, e.g., *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of George Terwilliger, III) (“[The commissions] may be critical to the government in . . . protecting the sensitive sources and methods by which relevant evidence to be presented in the tribunal proceedings is obtained. That in turn can preserve our ability to collect and use the intelligence necessary to win the war.”); Wedgwood, *supra* note 3 (“There is also the problem of publishing information to the world, and to al Qaeda, through an open trial record. As Churchill said, your enemy shouldn’t know how you have penetrated his operations.”).

128. For example, Ashcroft, in his testimony before the Senate Judiciary Committee, asked:

Now, when we come to those responsible for this, say in Afghanistan, are we supposed to read them the Miranda rights, hire a flamboyant defense lawyer, bring them back to the United States, create a new cable network of Osama PD or what have you, provide a world-wide platform from which propaganda can be developed?

Ashcroft Testimony, *supra* note 4.

129. See, e.g., Warren Richey, *Tribunals on Trial: Fragile Freedoms*, CHRISTIAN SCI. MONITOR, Dec. 14, 2001, at 1.

It seems to me that the way to combat such law skeptic arguments is not merely to raise repeatedly the formal legal objections discussed above. Although such arguments are compelling to those who are already convinced about the importance of the rule of law in this context, they have little traction with those who believe that legal niceties must be jettisoned in periods of national emergency. Accordingly, the next part of this Article develops arguments regarding the strategic value of legal process and, in particular, multilateral legal process. Upholding such legal process values, I argue, actually advances both our short- and long-term strategic interests.

II. THE STRATEGIC VALUE OF MULTILATERAL LEGAL PROCESS

Critics of the Administration's actions with regard to suspected terrorists have offered a variety of alternatives for holding individual suspects accountable without violating the rule of law. Some suggest that military commissions might be acceptable if enough safeguards were put in place, such as consultation with Congress, judicial review, and some minimal rights for the accused.¹³⁰ Others argue that existing domestic

130. See, e.g., *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 4 (statement of Cass Sunstein, University of Chicago School of Law) (noting that "the legitimate interests behind the President's military order can be accommodated while also producing what the president wants which is full and fair trials," and suggesting that the military commissions would be appropriate if, first, the language of the order were narrowed to clarify that that the commissions would only be used to try violations of the laws of war; second, the "essentials of procedural justice" were protected, including the right of the accused to know charges against them, to reasonable rules of evidence, to be defended by counsel, to respond to the evidence, to be tried in a public proceeding except where strictly necessary, and to be presumed innocent; and third, the neutrality of the judges were assured, perhaps by appeal to a civilian court or the use of federal judges on the commissions); Tribe Testimony, *supra* note 13 (noting that "military commissions are well founded in our history [and] . . . do not per se violate the Constitution," but arguing that to assure constitutionality, Congress should authorize them explicitly and narrow the original order by, for example, "insist[ing] on at least a limited appeal to the court of military justice or to some other independent body" and specifying that the military commissions needn't be held in secret). Tribe developed this argument further in a subsequent magazine article, suggesting that the "core" of the November 13 Order, "its gratuitous branches pruned, [. . .] may well be" . . . consistent with the Constitution." Laurence Tribe, *Trial by Fury: Why Congress Must Curb Bush's Military Courts*, *NEW REPUBLIC*, Dec. 10, 2001, at 18, 20. Tribe argues that it is in wartime that:

"[D]ue process of law," both linguistically and historically, permits trying unlawful combatants for violation of the laws of war, without a jury or many of the other safeguards of the Bill of Rights—provided the trials are conducted by tribunals impartial enough to render fair verdicts, and provided each accused may hear the case against him and receives a fair opportunity to contest it through competent counsel.

Id. Thus, according to Tribe, with some additional safeguards for the rights of the accused, as well as with congressional authorization, the commissions could be constitutional. See also Tribe & Katyal, *supra* note 13, at 1309–10.

courts are sufficient to try terrorists.¹³¹ And still others have argued that an international tribunal of some kind would present the best forum for trying those most responsible.¹³² A fourth option that has received less attention (at least in the United States) is the possibility of trials, Lockerbie-style, in neutral, third party countries.¹³³ And recently, a final option has emerged: the idea of simply returning suspects to their native countries for trial.¹³⁴

Supporters of these alternatives generally contend that one can effectively prosecute suspected terrorists without abandoning the basic hallmarks of legal process. Although there may be some disagreement about the precise contours of the basic elements that cannot be eliminated—the core rights of the accused that cannot be abridged—supporters of each alternative suggest that trials could be conducted in such a way as to protect these fundamental principles while at the same time addressing the pragmatic concerns of those who support the commissions as originally proposed. For example, procedures could be put in place—such as those set forth in the Classified Information Procedures Act¹³⁵ and Military Rule of Evidence 505¹³⁶—to protect secret information and not compromise sources. Such procedures could even be enhanced, if necessary. Some other evidentiary rules could also be relaxed. Trials before judges rather than juries could be arranged to address the concern that jurors would be targeted. And a strong judge would be able to put some limits on defendant grandstanding.¹³⁷ In sum, this group has emphasized that practical concerns can be addressed without abandoning the core elements of the rule of law.

131. Koh, *supra* note 13, at 343–44; Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39. See also Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31.

132. See, e.g., Slaughter, *Beware the Trumpets of War*, *supra* note 116; Mark Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUMAN RIGHTS Q. 323 (2002); Dickinson, *supra* note 116; Goldstone, *supra* note 116; Scharf, *supra* note 116; Slaughter, *Al Qaeda Should Be Tried*, *supra* note 116.

133. In 1999, after years of sanctions imposed by the U.N. Security Council and a series of complex negotiations, Libya agreed to surrender two of its nationals suspected of committing the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, for trial by a Scottish court sitting in the Netherlands. For a discussion of the verdict, in which one of the suspects was convicted and the other acquitted, see generally Sean D. Murphy, *Verdict in the Trial of the Lockerbie Bombing Suspects*, 95 AM. J. INT'L L. 405 (2001).

134. See Seelye, *supra* note 7 (reporting that Secretary of Defense Donald Rumsfeld has indicated that some detainees at Guantanamo Naval Base may be returned to their home countries).

135. 18 U.S.C. app. §§ 1–16 (2000).

136. MIL. R. EVID. 505.

137. See Slaughter, *supra* note 116 (explaining that judges prevented Milosevic from grandstanding).

In this Part, I argue that of all the proposed options, an international proceeding, at least to try those most responsible for September 11, would be the wisest course to pursue. My analysis does not, however, take adherence to the rule of law as an unshakeable shibboleth. Instead, I seek to explore what it is that the rule of law actually accomplishes from a self-interested U.S. perspective in this context. Thus, I look beyond the formality of the rule of law itself to the tangible benefits that adherence to legal process secures. My argument is that, at least in its response to the current crisis, a strong commitment to international legal process actually serves the strategic interests of the United States. Domestically, amid the debate about how much we should trade civil liberties for security, some have suggested that such a choice is a false one;¹³⁸ similarly, in the international arena, adherence to the rule of law does not mean that security must be compromised. Rather, in many instances the two may be mutually reinforcing. Of course, a commitment to the value of legal process does not necessarily mandate an international proceeding as opposed to other possible fora. Moreover, an international proceeding need not be the only mechanism used; undoubtedly a variety of legal avenues are necessary to bring the large number of Al Qaeda and Taliban operatives to justice.¹³⁹ Nonetheless, I argue that an international proceeding (perhaps in combination with other approaches) would do the best job of fulfilling our strategic interests in fighting terrorism and ensuring our long-term security.

Significantly, the current debates about the desirability of summary executive action versus the importance of international legal process echo discussions that took place within the Roosevelt Administration after World War II. Although forceful arguments were made that Nazi and Japanese prisoners should be summarily executed, the Administration ultimately decided to create international war crimes tribunals, first at

138. David Cole eloquently summarizes this argument:

[L]iberty and security are not necessarily mutually exclusive values in a zero-sum game. Liberty often plays a critical role in maintaining security. One of the justifications for guaranteeing political freedoms is that a free people are less likely to be driven to extreme violence. A political process that treats people with equal dignity and allows dissidents to voice their views and organize to change the rules through political means is likely to be more stable in the long run. Recent experience in England and Israel has shown that cracking down on civil liberties does not necessarily reduce violence, and may simply inspire more violence. As Justice Brandeis wrote, the Framers knew “that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government.”

Cole, *supra* note 12, at 956 (2002) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (footnote omitted). See also, e.g., Harriet Chiang, *ACLU Strives for Balance Between Civil Rights and Danger*, S.F. CHRON., Jan. 6, 2002, at A3 (quoting Steven Shapiro, National Legal Director of the American Civil Liberties Union, as saying that his organization has been trying, since September 11, “to resist the notion that we have to trade off liberty for security”).

139. See *infra* Part III.B.

Nuremberg and later in Tokyo. Needless to say, these tribunals have helped generate momentum for a decades-long development of international human rights norms, instruments, and courts, culminating most recently in the creation of an international criminal court. For the purpose of this Article, however, what is most important about the decision to create international trials is that many of the reasons put forth for proceeding with the tribunals were strategic ones, grounded in *realpolitik* considerations of the long-term United States interest. Further, the legacy of Nuremberg in many ways testifies to the wisdom of these strategic choices. Thus, this Part begins with a discussion of this momentous decision and the ways in which the strategic values of legal process articulated then may still hold true today. Then, this Part suggests several additional ways in which an international legal process to try those most responsible for the September 11 attacks might best serve our particular strategic interests in combating terrorism and ensuring domestic safety.

A. THE “NUREMBERG MOMENT” AND THE STRATEGIC DECISION TO
INVOKE LEGAL PROCESS

During World War II, the Allied governments considered a variety of options for handling captured Axis war criminals. The British proposed that the leading Nazi war criminals should be summarily executed or subjected to summary military trials, a plan that President Roosevelt initially accepted.¹⁴⁰ Indeed, at one point Stalin was the only major Allied leader arguing for the trial of Nazi war criminals, although he at times advocated summary executions and forced labor, and in any event his conception of a trial was quite suspect.¹⁴¹ In the end it was the United States, led by Henry Stimson’s war department, that prevailed upon the others to agree to trials of the war crimes suspects and put an end to plans for summary executions or summary military trials.¹⁴² That decision—which was a close thing—embodied a deep commitment to the values of legal process and the need to tame vengeance with justice. And it was a momentous decision as well, both because it reflected a strong commitment to those values within the United States, and because it represented a hope that adherence to those values in international fora could help to instill them in the societies that had brought about the war’s major atrocities. The legacy of the Nuremberg and, to a lesser extent the Tokyo trials, has to a great degree borne out these hopes. The decision about what to do with

140. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 28–33 (1992).

141. See *id.* at 30–31.

142. See *id.* at 33–40.

captured Al Qaeda members suspected of plotting the September 11 attacks and other major terrorist acts is similarly momentous, and we should take a lesson from the decision to favor justice over vengeance in the Nuremberg and Tokyo war crimes trials. In hindsight, of course, it is difficult to pinpoint precisely which arguments within a complex array of factors actually produced a specific historical decision, and the choice to try, rather than summarily execute, suspected Axis war criminals was undoubtedly the result of numerous considerations. Nevertheless, both the difficulty of the decision and the terms of the debate are instructive.

Largely due to the influence of Henry Morgenthau, Jr., then Secretary of the Treasury, President Roosevelt originally agreed in 1943 to a British plan for summary executions of the top 50 or 100 Nazi leaders.¹⁴³ Indeed, Morgenthau apparently favored summary execution of a much larger number, along with the complete de-industrialization of Germany, in order to reduce it to a pastoral and agricultural country.¹⁴⁴ Henry Stimson, then Secretary of War, vehemently opposed this plan and finally prevailed in the President's mind after news of Morgenthau's plan was leaked to the press.¹⁴⁵ Although the majority of Americans might well have favored summary executions of the Nazis, the enormous outcry at news of Morgenthau's plan to reduce Germany to agricultural servitude likely had a significant impact on the ultimate decision to put the Axis war criminals on trial.¹⁴⁶

For Stimson and others, such as George Marshall and Murray Bernays, "Morgenthau's summary executions simply stood against the American domestic legal tradition."¹⁴⁷ Indeed, Gary Bass has argued that a central reason for the decision to hold trials stemmed from the desire to project a liberal democratic conception of fairness and due process into the international arena.¹⁴⁸ Bass observes that all international war crimes tribunals have been established by liberal democratic states, and that illiberal states have never established bona fide war crimes tribunals when they have fought each other.¹⁴⁹ Although such projection is not always successful, it is significant that the need to inculcate legal process values

143. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS* 181 (2000); TAYLOR, *supra* note 140, at 31.

144. See BASS, *supra* note 143, at 157–60.

145. See *id.* at 168–69.

146. See *id.*

147. *Id.* at 164.

148. See *id.* at 163–65, 180–81.

149. See *id.* at 19.

internationally was one of the core elements of the decision to hold the trials at Nuremberg and Tokyo.

Moreover, the decision stemmed from the belief that anything less than a fair trial for the Axis war criminals would be folly, and would lead to a resurgence of the conditions that helped to cause World War II itself, along with its attendant atrocities. For example, Stimson argued to Roosevelt that:

we should always have in mind the necessity of punishing effectively enough to bring home to the German people the wrongdoing done in their name, and thus prevent similar conduct in the future, without depriving them of the hope of a future respected German community. Remember, this punishment is for the purpose of prevention and not for vengeance.¹⁵⁰

Thus, many of the arguments for holding trials were deeply pragmatic ones, based on a strategic calculation about the political value of legal process.

The idea that legal process might serve political ends has been echoed by scholars. Indeed, Judith Shklar has argued that legal process *always* serves political ends—the question is not whether law is political, but rather the particular political values that it serves.¹⁵¹ In her view, the International Military Tribunal at Nuremberg served liberal ends by promoting “legalistic values in such a way as to contribute to constitutional politics and to a decent legal system.”¹⁵² In addition, a growing literature in the area known as “transitional justice” has sought to identify additional values served by trials for those accused of mass atrocities.¹⁵³ Such values include: establishing a historical record such that the fact of the atrocities and responsibility for them cannot be denied; imposing individual responsibility and therefore avoiding the problem of collective guilt; providing redress to victims; supporting the development of democracy and the rule of law in countries or regions where the mass atrocities were ordered or planned; development of norms; and deterrence.

150. *Id.* at 157.

151. See JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 144 (1986).

152. *Id.* at 145.

153. See generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); CARLOS NINO, RADICAL EVIL ON TRIAL (1996); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE (Neil Kritz ed., 1995).

Many of these values were articulated in the arguments after World War II. Stimson's conviction that trials should take place stemmed in part from the view that such trials would be the best way to establish a historical record of Nazi atrocities and Allied efforts to thwart them. According to Stimson, such trials "will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence."¹⁵⁴ As Bernays wrote, if the Nazi criminals were not tried, "Germany will simply have lost another war. The German people will not know the barbarians they have supported, nor will they have any understanding of the criminal character of their conduct and the world's judgment upon it."¹⁵⁵

Stimson also emphasized the role trials could play in promoting democracy and the rule of law within Germany, in establishing norms for the future, and in perhaps providing a measure of deterrence for future atrocities. According to Stimson, plans such as Morgenthau's proposed summary executions "do not prevent war; they breed war."¹⁵⁶ He argued that:

It is primarily by the thorough apprehension, investigation and trial of all the Nazi leaders and instruments of the Nazi system of terrorism such as the Gestapo, with punishment delivered as promptly, swiftly and as severely as possible, that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to extirpate it and its fruits forever.¹⁵⁷

Significantly, Stimson believed that, in order to serve these strategic goals, any trial had to be full and fair, adhering to the basic elements of due process. He emphasized that the "procedure must embody, in my judgment, at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard, and within reasonable limits, to call witnesses in his defense."¹⁵⁸ Indeed, according to Stimson:

[T]he very punishment of these men in a dignified manner consistent with the advance of civilization will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a

154. See BASS, *supra* note 143, at 165.

155. See *id.* at 170 (quoting *Stimson Diaries*, vol. 48, Oct. 24, 1944, p. 179–80).

156. See *id.* at 163.

157. DAVID LUBAN, *LEGAL MODERNISM: LAW, MEANING, AND VIOLENCE* 344–45 (1994).

158. See BASS, *supra* note 143, at 165 (emphasis omitted).

record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.¹⁵⁹

Nuremberg (and to a lesser extent, Tokyo) left a legacy of respect for legal process that endures, particularly when contrasted with the likely result of the proposed alternatives: summary executions or summary military trials. The defendants' responsibility for the acts for which they were on trial was proved according to strict standards of evidence. The deeds for which they were held liable were specified both in the Charter and in their indictments, providing them an opportunity to know the charges in advance of the trial so that they could prepare a defense. The standard for liability (at least in the Nuremberg trials) required direct causal involvement and not the looser notion of simple moral liability. And by and large the trials were fair—the judges and the prosecution abided by the rules set out in the Charter, and those rules did not bias the inquiry against the defense.¹⁶⁰

Moreover, this legacy has contributed to specific strategic benefits over time. It is true that the charges of retroactivity and victor's justice have left some blemishes on the historical legitimacy of the trials. And the proceedings certainly did not deter all future outbreaks of genocide or aggressive war in the world. Nonetheless, more modest, but no less important, values were served. For example, according to Shklar, the "main value" of the trials was the "historical facts about Nazi government which they brought to light."¹⁶¹ Once the evidence was duly presented according to the fair procedures of the trial, it was impossible to deny credibly the Nazi role in the atrocities of the war. Thus, "even the critics of the Trial in Germany [did] not deny that the crimes against humanity were

159. *See id.* Stimson's focus on the importance of procedural justice is also reflected in scholarly work that delineates the values inherent in legal process and the core elements of adherence to the rule of law. For example, David Luban, drawing on Lon Fuller's pathmarking work on legal process, has identified several such elements: (1) public rules; (2) that are non-retroactive; (3) that correspond to their actual administration with like cases being treated alike and implementation being taken by the state rather than unauthorized lynch mobs; and (4) that result in adjudication which respects the various elements of procedural fairness, publicity, and impartiality that constitute natural justice and due process of law conceived in its most general aspects. *See* LUBAN, *supra* note 157, at 345–46. The Nuremberg and Tokyo trials may be said to have fallen short of these ideals in some respects. Indeed, because neither the concept of crimes against humanity nor the principle of individual criminal responsibility for war crimes or crimes against peace existed as a full-fledged legal category prior to Nuremberg, the tribunals imposed a sort of retroactive justice. And, because no Allied suspects were tried for such crimes, the tribunals might be said to have failed to treat like cases alike, thereby amounting only to victor's justice.

160. *See id.* at 353–54.

161. SHKLAR, *supra* note 151, at 154.

in fact committed, nor have the Nazi leaders become martyr figures.”¹⁶² In addition, the trials had as one of their aims the development of democracy and the rule of law in post-War Germany and Japan. While the results in Japan are the subject of debate,¹⁶³ the “rehabilitation of Germany after World War II is one of the great political successes of the century, turning a fascist enemy into a democratic ally.”¹⁶⁴ The trials of the major war criminals cannot be seen as solely responsible for this shift—the enormous economic reconstruction plans in both countries perhaps deserve most of the credit—nor can their role be seen as necessarily insignificant. For example, according to polling after the war, approximately two-thirds of Germans in the American zone supported Nuremberg, and half thought that all the defendants were guilty.¹⁶⁵ Significantly, far fewer supported the subsequent trials in Germany, which were run by Americans alone.¹⁶⁶ To be sure, this willingness to embrace legal process may in part be the result of the “traditional legalism of Germany’s professional and bureaucratic classes.”¹⁶⁷ Because Japan lacked such a legal tradition, many believe that the Tokyo trials had less of an effect on postwar Japan.¹⁶⁸ Nevertheless, subsequent to the trials, there was a rapid development of strong rule of law institutions in Japan as well.

Perhaps most important, Stimson and others argued that a trial that was not part of a legal system, and thus remote from domestic principles of legal justice, would defile the entire concept of law. In the end, they were able to make the case that to eliminate the Nazis without a trial and without producing the evidence of their action ultimately would have a corrosive effect upon the future of law and order in both in Germany and throughout Europe.¹⁶⁹ As Shklar points out, not to conduct such trials “would have been to invite a perfect blood bath, with all its dynamic possibilities for anarchy and conflict on an already disoriented continent.”¹⁷⁰ The decision to hold trials at Nuremberg, therefore, was both historically and

162. *Id.* at 160.

163. *See, e.g.*, R. JOHN PRITCHARD, AN OVERVIEW OF THE HISTORICAL IMPORTANCE OF THE TOKYO WAR TRIAL, NISSAN OCCASIONAL PAPER SERIES, NO. 5, at 3, 47–51 (1987); B.V.A. ROLING, THE TOKYO TRIAL AND BEYOND, REFLECTIONS OF A PEACEMONGER 85–91 (1993). For a comprehensive critique of the Tokyo Trial, see RICHARD H. MINEAR, VICTOR’S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

164. BASS, *supra* note 143, at 295.

165. RICHARD L. MERRITT, DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC 1945–49 160–61 (1995).

166. *See id.* at 163.

167. SHKLAR, *supra* note 151, at 156.

168. *See id.* at 179–91. Shklar describes the Tokyo trial as a “complete dud.” *Id.* at 181.

169. *See id.*

170. SHKLAR, *supra* note 151, at 158.

strategically significant and remains an important wellspring for international legal process values today.

In choosing our path, we might well consider the lessons to be learned from the debates preceding the Nuremberg trials. As Stimson and others recognized (and as the postwar history of Germany and Japan reflects), international trials conducted according to basic due process standards serve important, pragmatic aims. In the current context as well, such trials, more than any other option, have the best chance of creating an accurate historical record of the attacks, holding individuals accountable—thereby absolving the Arab-Muslim world from collective responsibility—and supporting the development of democracy and the rule of law in Afghanistan and elsewhere.

When reports circulate—particularly in the Arab-Muslim world—that the United States government committed the September 11 attacks,¹⁷¹ the urgent need for establishing such a record is evident. While it may be true that a record created in a court of law has greater impact in societies that place high values on legal process to begin with, nonetheless the impact of such a trial in this respect cannot be underestimated, even in countries without a strong legal tradition. After all, even Libya accepted the results of the Lockerbie terrorism trial, and believed such a trial, in a neutral third country, to be important.

The impact of such a trial on the development of democracy and rule of law in countries and regions that are the breeding grounds for terrorism also cannot be ignored. Of course, it would be foolish to suggest that a mere trial of terrorism suspects could stop terrorism, let alone create the rule of law in a country such as Afghanistan or Sudan. But it would be equally foolish to suggest that the summary execution of terrorists would not fan the flames of the sentiments that inspire terrorists. The Bush Administration certainly has not suggested the summary execution of captured terrorism suspects, but in proposing unilateral summary trials with truncated procedures and no real prospect of release, even if the suspects are acquitted, the Administration has barely paid lip service to the values of legal process. As the debates surrounding Nuremberg (and the legacy of the trials themselves) indicate, however, we ignore these values at our own peril.

If it is true that we are now in our own Nuremberg moment, then we must take seriously these important benefits of international legal process,

171. See, e.g., *Iraqi TV Says US Attacked Itself*, BBC NEWS, Sept. 11, 2002, at http://news.bbc.co.uk/2/hi/middle_east/2251496.stm.

all of which flow directly from the Nuremberg experience itself. This is not the end of the analysis, however, because the new reality of a global campaign to combat terrorism brings with it still more reasons to choose a path that fosters international cooperation and respect for the rule of law. The remainder of this Part, therefore, briefly summarizes the significant strategic benefits of international legal process in our altered sociopolitical context.

B. CEMENTING THE INTERNATIONAL COALITION TO COMBAT TERRORISM
AND STRENGTHENING INTERGOVERNMENTAL NETWORKS NEEDED TO
FIGHT TERRORISM

In addition to the benefits discussed above with regard to the Nuremberg proceedings, an international process for holding individual terrorists accountable would help the United States hold together the international coalition it needs to fight terrorism effectively and foster intergovernmental efforts that are key to long-term terrorism prevention. Terrorism is a transnational problem that spans virtually the entire world, and strong multilateral efforts are required if it is to be contained.¹⁷² The Al Qaeda network alone draws on the nationals of multiple countries who leave their homes to train in terrorist camps in host countries such as Afghanistan, Somalia, Sudan, and the Philippines, and who are then sent to target countries such as the United States, where they live in cells, waiting to be deployed.¹⁷³

Immediately following the September 11 attacks, the United States drew on the support of numerous countries around the globe in efforts to combat terrorism. On the day after the attacks, the UN Security Council issued a resolution strongly condemning the attacks and recognizing “the inherent right of individual or collective self-defence in accordance with

172. Even before September 11, terrorism experts were calling for enhanced multilateral cooperative intelligence efforts to combat transnational threats such as terrorism. See, e.g., John C. Gannon, Chairman, Address at the Conference Sponsored by Friedrich Ebert Stiftung on the Role of Intelligence Services in a Globalized World (May 21, 2001), at http://www.cia.gov/nic/speeches/speeches/role_intel_services.htm.

173. See Sam Dillon, *Indictment by Spanish Judge Portrays a Secret Terror Cell*, N.Y. TIMES, Nov. 20, 2001, at A1; Susan Sachs, *An Investigation in Egypt Illustrates Al Qaeda's Web*, N.Y. TIMES, Nov. 20, 2001, at A1; Benjamin Weiser & Tim Golden, *Al Qaeda: Sprawling, Hard-to-Spot Web of Terrorists-in-Waiting*, N.Y. TIMES, Sept. 30, 2001, at B4. See generally UNITED KINGDOM PRIME MINISTER'S OFFICE, RESPONSIBILITY FOR THE TERRORIST ATROCITIES IN THE UNITED STATES, 11 SEPTEMBER 2001: AN UPDATED ACCOUNT (2001), available at <http://www.pm.gov.uk/news.asp?newsID=3025>.

the Charter.”¹⁷⁴ Shortly thereafter, the Security Council issued another resolution, explicitly invoking its authority under Chapter VII of the United Nations Charter, referring to the previous resolution’s recognition of the right to self defense, reaffirming the need to combat by “all means” terrorist acts threatening international peace and security, requiring states to take steps to block terrorist finances and end any state support for terrorism, and calling on states to increase cooperative intelligence-gathering and law enforcement efforts.¹⁷⁵ The North Atlantic Treaty Organization (“NATO”) for the first time invoked Article 5 of its charter, which declares an attack against one member to be an attack against all.¹⁷⁶ The Organization of American States (“OAS”) invoked a similar provision.¹⁷⁷ As of the end of December 2001, 146 countries had acted to freeze terrorist assets, 136 countries had offered a diverse range of military assistance, and forty-six multilateral organizations had declared their support.¹⁷⁸

174. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/Res/1368 (2001). In this resolution, the Security Council did not explicitly invoke Chapter VII of the United Nations Charter, although it asserted that it “regards such acts, like any act of international terrorism, as a threat to international peace and security.” *Id.*

175. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. at 1–4, U.N. Doc. S/RES/1373 (2001). The resolution does not explicitly authorize the use of force in response to the September 11 attacks, although some have read its invocation of Chapter VII authority, coupled with its reaffirmation of Resolution 1368’s recognition of “the right of individual or collective self-defence” and its statement “reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by international terrorist acts,” *id.* at 1, as an implicit authorization of the use of force. For a lucid overview of the debate about whether the Security Council Resolutions authorize the use of force, see Drumbl, *supra* note 132, at 328–29.

176. Article 5 states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. *See also NATO to Support U.S. Retaliation*, CNN.COM, Sept. 12, 2001, at <http://www.cnn.com/2001/WORLD/europe/09/12/nato.us> (reporting that NATO invoked Article 5 in response to the attacks for the first time in fifty-two years).

177. C.P. Res. 796, O.A.S. C.P., Doc. CP/RES.796 (2001) (resolving “to condemn, *as an attack against all the States of the Americas*, the acts of terrorism perpetrated within the territory of the United States of America on September 11, 2001, that resulted in the murder of thousands of citizens from many Member States and other nations”) (emphasis added).

178. *See* COALITION INFORMATION CENTERS, THE GLOBAL WAR ON TERRORISM: THE FIRST HUNDRED DAYS 8 (2001), available at www.whitehouse.gov/new0s/releases/2001/12/100dayreport.html [hereinafter WHITE HOUSE REPORT]. Specifically, with respect to military assistance, eighty-nine countries have granted over-flight authority for U.S. military aircraft, seventy-six countries have granted landing rights for U.S. military aircraft, and twenty-three countries have agreed to host U.S. forces involved in offensive operations. *Id.* at 8.

An international legal process would help to build on these cooperative efforts. First, as discussed in more detail below, an international process would likely have greater legitimacy internationally than the proposed military commissions or even domestic trials within the United States.¹⁷⁹ If other governments perceive the United States as acting fairly and with appropriate deference to international norms, they are more likely to continue as active members of a coalition to combat terrorism. Second, even beyond the question of perceived legitimacy, the international proceeding itself, by involving participants from many countries, would strengthen both formal and informal intergovernmental networks and institutions.

An international proceeding would involve participants from many nations in the prosecution and punishment of terrorism suspects, which would give those nations a stake in the process, lead to the development of a cadre of governmental, intergovernmental, and nongovernmental personnel with expertise in addressing the problem of terrorism, and foster channels of communication and collaboration among them. As at the Nuremberg Tribunal,¹⁸⁰ the Tokyo Tribunal,¹⁸¹ and the modern international tribunals—the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)¹⁸² and the International Criminal Tribunal for Rwanda (“ICTR”)¹⁸³—panels of judges from multiple countries could sit together to determine suspects’ guilt or innocence. Prosecutors could be drawn from multiple countries as well. Indeed, creating such a forum for

179. See *infra* Part II.G.

180. At Nuremberg, judges from the United States, France, Great Britain, and the Soviet Union presided over the trials. National Archives and Records Administration, National Archives Collection of World War II War Crimes Records, 238.3, Records of the Office of the U.S. Chief of Counsel for the Prosecution of Axis Criminality (OusCCPAC), summary of history. For an account of the proceedings, see generally TAYLOR, *supra* note 140.

181. The International Military Tribunal for the Far East drew judges from eleven countries: Australia, New Zealand, Canada, the Netherlands, France, Britain, the United States, the Soviet Union, China, India, and the Philippines. National Archives and Records Administration, National Archives Collection of World War II War Crimes Records, 238.7, Records of the International Military Tribunal for the Far East (IMFTE), summary of history.

182. Judges from France, Guyana, the United Kingdom, Germany, China, Zambia, Australia, Jamaica, Turkey, Sri Lanka, Italy, the United States, Egypt, Malta, the Netherlands, Korea, Singapore, Ireland, the Czech Republic, Japan, Mali, Canada, and Colombia currently sit on the ICTY. United Nations, ICTY General Information, at <http://www.un.org/icty/glance/index.htm> (last modified July 24, 2002).

183. The ICTR shares its appeals chamber with that of the ICTY, and thus the judges from France, Guyana, Australia, Turkey, Sri Lanka, Italy, and the United States. United Nations, ICTR General Information, at <http://www.un.org/icttr> (last visited Aug. 2, 2002). Its trial chambers include judges from South Africa, Norway, Senegal, Tanzania, Lesotho, Madagascar, Saint Kitts and Nevis, Slovenia, and Russia. *Id.*

both personal and official encounters among jurists from many nations is precisely the sort of international process that fosters future cooperation and obedience to international legal norms. As Abram Chayes and Antonia Handler Chayes have argued, states comply with international norms in part because of the way in which their representatives interact within international institutions.¹⁸⁴

In order to see how an international process helps to create a context for the development of intergovernmental networks, we can look at the problem of secret evidence. Critics have charged that an international process offers the greatest potential for damaging leaks, which will make countries reluctant to provide the intelligence information needed at trial.¹⁸⁵ Due to the transnational nature of terrorism, however, information-sharing is absolutely essential, and countries will refuse to disclose information only at their peril, with or without an international legal process. Indeed, as UN Security Council Resolution 1373 recognizes, enhanced multilateral information-sharing is an intrinsic part of any serious effort to contain terrorism.¹⁸⁶ In tracking down and locating Al Qaeda suspects, the United States has already relied considerably on intelligence provided by other countries.¹⁸⁷

An international criminal proceeding could help to strengthen the needed intelligence-sharing networks and could help to provide a framework for screening sensitive information that would have greater legitimacy than a purely U.S.-run process. Some intelligence experts have suggested—even before September 11—that an international terrorism

184. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS*, 88–134 (1995).

185. See, e.g., Wedgwood, *supra* note 3.

186. See S.C. Res. 1373, *supra* note 175, at 3.

187. See, e.g., Chris Hedges, *A European Dragnet Captures New Clues to bin Laden's Network*, N.Y. TIMES, Oct. 12, 2001, at B10; Warren Hoge, *Blair Says New Evidence Ties bin Laden to Attacks*, N.Y. TIMES, Nov. 15, 2001, at B5; James Risen & Tim Weiner, *Arrests Are Said to Have Disrupted Attacks*, N.Y. TIMES, Oct. 21, 2001, at B6 (reporting Defense Department assertions that, “[s]ince Sept. 11, at least 23 foreign intelligence services—sometimes working with American intelligence, sometimes on their own—have disrupted terrorist cells and arrested hundreds of people around the world.”); James Risen & Tim Weiner, *C.I.A. Is Said to Have Sought Help from Syria*, N.Y. TIMES, Oct. 30, 2001 [hereinafter Risen & Weiner, *CIA*] (noting that the CIA has opened lines of communication with intelligence officials from several nations that had in the past been accused of providing state support for terrorism, including Syria, Libya, and Sudan, and that many of these states “do not support what is widely seen as the main terrorist threat to the United States—Mr. bin Laden and Al Qaeda”); John Tagliabue & Raymond Bonner, *German Data Led U.S. to Search for More Suicide Hijacker Teams*, N.Y. TIMES, Sept. 29, 2001, at A1; John Tagliabue, *Italian Tapes Portray Young Arabs Operating on the Edges of Islamic Terror*, N.Y. TIMES, Oct. 29, 2001, at B4. For an account of U.S. efforts to develop enhanced cooperation with Pakistani intelligence officials, see Douglas Frantz, *C.I.A. Leader Asks Pakistan for Help in bin Laden Hunt*, N.Y. TIMES, Dec. 4, 2001, at A1.

court, run by the G-8 powers, would be beneficial precisely because it would strengthen and develop intelligence-sharing networks and procedures.¹⁸⁸ Moreover, as in the domestic context, procedures could be put in place to protect highly classified information from coming to public view.¹⁸⁹ The ICTY and ICTR already have adopted such procedures, but new rules could be developed to address specific concerns. For example, evidence that might compromise security if it came to light could be reviewed *in camera* by a multilateral intelligence panel. A decision made by such a panel to keep the information secret would have greater legitimacy than a purely unilateral determination within the United States. In addition, such a panel could form the basis for an enhanced structure for ongoing intelligence-sharing.

To be sure, the United States might well be reluctant to disclose, even to a group of intelligence officials operating under conditions of secrecy, certain information that would be necessary to convict Al Qaeda operatives, if members of the panel included representatives from governments deemed less trustworthy. The circle of governments to which we might be willing to disclose such information could well be, and perhaps should be, quite narrow. Indeed, we may not even trust certain other countries enough to give credence to the information *received* from them, let alone enough to give them additional material.¹⁹⁰ Nonetheless, there can be no doubt that information-sharing is already occurring and that it is necessary in the fight against terrorism. Moreover, even a multilateral panel with representatives from only a few countries would be an improvement over a purely unilateral approach.

This is just one example of the way in which an international process could further the cooperative efforts that are needed to track down, apprehend, and punish terrorists. Certainly, such cooperative efforts could

188. See Dov Waxman, *Terrorism: The War of the Future*, 23 FLETCHER F. WORLD AFFAIRS 201 (1999). See generally Symposium, *Post Cold-War International Security Threats: Terrorism, Drugs, and Organized Crime*, 21 MICH. J. INT'L L. 655 (1999) (arguing that a G-8 international court could result in concrete intelligence-sharing benefits, including coordination of standards and procedures, that would improve efforts to deter and punish transnational crimes).

189. See, e.g., Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2000).

190. Indeed, experts are cautious about the CIA's moves to open lines of intelligence-sharing with nations such as Syria, Libya, and Sudan. See Risen & Weiner, *CIA*, *supra* note 187. As Gregory F. Treverton, former vice chairman of the National Intelligence Council, a group that oversees American intelligence analysis, observes:

While we need the intelligence very much, the trick is that some of the people we're sharing with are people with whom our partnership will be very limited We are not close friends with all these nations. All the people we share with have their own interests. And they will cook the books to pursue their own interests.

Id.

develop without an international proceeding to impose criminal responsibility on individual suspects, but the existence of an international tribunal would provide a context and a set of personal and governmental networks for developing long-term joint efforts to combat terrorism.

C. APPREHENDING, EXTRADITING, AND TRYING TERRORISM SUSPECTS

The creation of an international tribunal would more likely lead to the arrest and trial of terrorists. Despite our military presence in Afghanistan, capture of all of the Al Qaeda leaders who masterminded the September 11 attacks—even those who remain in Afghanistan—has proven to be elusive. To date, Osama bin Laden and most of the major figures suspected of plotting the attacks remain at large.¹⁹¹ We are likely to have more success extraditing terrorism suspects for trial in an international tribunal than in U.S. civilian courts or military commissions.

Doubts about military commissions exist even among many of our allies. Officials from Spain and other European countries, for example, have voiced concerns about extraditing suspects to the United States for trial.¹⁹² Spain has gone so far as to announce that it might not be willing to extradite terrorism suspects for trial in the United States unless assurances are made that they will be tried in civilian courts.¹⁹³ Other European government officials have expressed similar reservations.¹⁹⁴ For Arab-Muslim states¹⁹⁵ where top terrorists may be found, extradition of suspects

191. See John F. Burns, *10-Month Afghan Mystery: Is Bin Laden Dead or Alive*, N.Y. TIMES, Sept. 30, 2001, at A1.

192. For example,

Spain told the Americans that it will not extradite eight men [charged with helping to prepare the assaults on the World Trade Center and Pentagon] unless Washington agrees to bring them before a civilian court, not the military tribunals that President Bush envisions. . . . Concerns were also raised that other European Union countries would be unwilling to hand over prisoners without similar assurances from the Americans.

Clyde Haberman, *Taliban Holdouts, Europe's Reservations and Anthrax Frustrations*, N.Y. TIMES, Nov. 24, 2001, at B1. See also Denis Barnett, *Ashcroft in Rome As Tour Fails to Bear Fruit on Death Penalty*, AGENCE FRANCE PRESSE, Dec. 14, 2001 (“U.S. Attorney General John Ashcroft arrived in Rome Friday unlikely to find in Italy a willing ally in his efforts to win European support for the extradition of terrorist suspects facing a possible death penalty in the United States.”).

193. Haberman, *supra* note 192. See also Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 29, 2001, at B4 (noting that a “senior European Union official said last week that he doubted that any of the 15 nations would agree to extradition for military trials”).

194. *Id.*

195. Throughout this Article, I use the appellations “Arab-Muslim states,” “Arab-Muslim countries,” and “Arab-Muslim world” as shorthand for both the Arab countries of the Middle East and those countries with a predominantly Muslim population, such as Indonesia, Pakistan, and Malaysia. I certainly realize that because these countries are not monolithic, generalizations about them are

to the United States may be even less palatable.¹⁹⁶ An international proceeding, in contrast, would provide a face-saving way for such states to surrender terrorism suspects without seeming to capitulate to the United States.

Moreover, such a process would be much more effective than trial in a neutral third country, the other face-saving option. For example, in the Lockerbie case, Libyan officials' reluctance to surrender suspects to the United States served to stall criminal proceedings for years. Ultimately, agreement was reached on a trial in a neutral third country (the Netherlands) under Scottish law.¹⁹⁷ Such a process, pursued on an ad hoc basis, terrorist by terrorist, is bound to be cumbersome and time-consuming. If an international proceeding were established, however, it would create a ready-made alternative to the embarrassment of surrendering a suspect directly to the United States, while avoiding the drawbacks of a trial in a third country.

D. PROTECTING U.S. CITIZENS ABROAD

The establishment of an international proceeding to try terrorism suspects in a manner consistent with fundamental due process standards would also protect U.S. citizens abroad. The use of an international court would help to establish the minimum procedural standards acceptable to the international community, and would thereby strengthen the U.S. government's hand in its efforts to shield American citizens apprehended abroad from trials without due process protections.

In contrast, trials of terrorism suspects before the military commissions as originally proposed would endanger U.S. citizens abroad by weakening the U.S. government's capacity to criticize and deter other countries from trying U.S. citizens before tribunals with inadequate procedural guarantees. For example, when Peru tried U.S. citizen Lori Berenson before a military tribunal in a closed proceeding, the U.S. government protested, and in part due to those protests, helped to secure a

inherently problematic. For the purposes of this Article, however, the term provides a convenient way to refer to a set of countries that, in U.S. foreign policy, is often distinguished from, for example, "Western Europe" (an equally problematic moniker).

196. *What's News World-Wide*, ASIAN WALL ST. J., Feb. 5, 2002 ("Malaysia won't extradite to the U.S. a Malaysian army captain who officials say had direct contact with three participants in the Sept. 11 terrorist attacks.").

197. See, e.g., *Contemporary Practice of the United States Relating to International Law; Verdict in the Trial of the Lockerbie Bombing Suspects*, 95 AM. J. INT'L. L. 405, 405 (2001) (Sean Murphy, ed.); Michael P. Scharf, *International Law Weekend Proceedings: Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 J. INT'L & COMP. L. 355, 356-58 (2000).

second trial for Berenson in a civilian court.¹⁹⁸ Such protests would be far less likely to succeed if the United States were itself to insist on using similar commissions to convict noncitizens in the present circumstances. Indeed, it is difficult to imagine that, after sentencing a Yemeni citizen to death on the basis of a secret trial held before a military commission, the United States would be able to persuade Yemen not to go forward with a summary secret trial of an American citizen suspected of terrorism. And even in countries other than those whose nationals might be tried before the proposed commissions, U.S. officials, in seeking to protect their citizens from military tribunals or other summary proceedings, would be considerably less able to exert the necessary diplomatic pressure.

Concerns about the potential repercussions to U.S. citizens abroad appear to have prompted the Bush Administration to reverse its position on the applicability of the Geneva Conventions to the terrorism suspects detained at Guantanamo Naval Base.¹⁹⁹ After initially maintaining that the Geneva Conventions do not pertain at all to these suspects, the Administration has shifted course and has acknowledged that the Conventions do apply to Taliban captives, though not to members of Al Qaeda.²⁰⁰ This shift was inspired, at least in part, by fears that eschewing the Geneva Conventions in this instance might render U.S. troops captured overseas more vulnerable.²⁰¹ Similar concerns that we might be establishing a precedent whereby U.S. citizens could be subjected to military trials overseas without basic due process guarantees should be no less pressing.

Furthermore, regardless of whether U.S. citizens might be involved in such trials, the United States would find it more difficult to criticize other

198. On June 1, 2000, Phillip Reeker, Acting Spokesman for the Department of State, in a press briefing stated that:

The United States Government has at all levels been actively involved in Ms. Berenson's case since her arrest in November 1995. We have consistently maintained that Ms. Berenson's military trial did not meet international standards of due process, and we have repeatedly urged the Government of Peru to grant her a new trial in civilian court with full due process protection.

at http://www.state.gov/www/global/human_rights/000601_dosbrief_peru.html. See also Phillip Reeker, Deputy Spokesman, Department of State, Daily Press Briefing (June 21, 2002) (noting that the second, civilian, trial, which was held in public and at which Berenson was represented by counsel, was able to confront witnesses against her, was able to present evidence in support of her side of the case, and was able to file an appeal, "addressed some of the concerns we had about the military trial"), at <http://www.state.gov/r/pa/prs/dpb/2001/3722.htm>.

199. See *supra* note 6.

200. Shanker & Seelye, *supra* note 6.

201. *Id.* Similar concerns led to a similar shift during the Vietnam War. See William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. TIMES, Dec. 26, 2001, at B1.

countries for using military courts to evade due process standards if it moves forward with the military commissions proposal. As Harold Hongju Koh, former Assistant Secretary of State for Democracy, Human Rights and Labor, has pointed out, “[w]hen the Chinese or Russians try Uighur or Chechen Muslims as terrorists in military courts, U.S. diplomats protest vigorously and the world condemns those tribunals as anti-Muslim. But how can the U.S. object when other countries choose to treat U.S. military commissions the same way?”²⁰²

To be sure, any type of trial with basic due process protections—whether domestic or international—would do more to protect U.S. citizens overseas than would the current practice of indefinite secret detentions or the proposed military commissions. The existence of an international proceeding, however, would be particularly helpful because it would signal that multiple countries accept whatever procedures are adopted for such a tribunal as fair. This in turn would strengthen the U.S. government’s hand in objecting to truncated procedures falling short of those guaranteed by the international process that other governments might attempt to impose on U.S. citizens apprehended abroad.

E. ESTABLISHING THE INTERNATIONAL NATURE OF THE CRIME AND ISOLATING AL QAEDA FROM THE REST OF THE ARAB-MUSLIM WORLD

An international process, more than any of the other options, would establish the international nature of the crimes committed on September 11 and would isolate the perpetrators from the rest of the world. Although the attacks occurred on U.S. soil, in violation of U.S. law, and killed or wounded thousands of U.S. citizens,²⁰³ characterizing them solely in this way undermines the magnitude of the atrocities committed. The acts perpetrated on September 11 were not only domestic crimes, but international ones, in several important respects.

Perhaps most significantly, the attacks constitute a crime against humanity. The attacks could easily be shown to consist of murder and other “inhumane acts . . . intentionally causing great suffering . . . or serious injury to body or to mental or physical health,” committed as part of a “widespread or systematic attack on a civilian population, with knowledge of the attack.”²⁰⁴ Moreover, under the reigning definition of

202. Koh, *supra* note 13, at 342.

203. See WHITE HOUSE REPORT, *supra* note 178.

204. Rome Statute of the International Criminal Court, U.N. GAOR, 52d Sess., Annex II, art. 7, at 4, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

crimes against humanity, as reflected in the Rome Statute of the International Criminal Court, there is no requirement that the attack be committed by a state actor.²⁰⁵ Thus, no link between the suspected Al Qaeda perpetrators and the Taliban government of Afghanistan need be shown. Nor is there any requirement that there be a nexus to armed conflict,²⁰⁶ thus avoiding the thorny problem under international law of whether the attacks themselves qualify as the initiation of armed conflict.²⁰⁷ It is true that, to establish a crime against humanity, a prosecutor must show evidence of some kind of “organizational policy” behind the attack. But even media accounts of Al Qaeda’s plans indicate that such an organizational policy existed,²⁰⁸ so it likely would not be hard to prove.

The attacks also could be shown to violate widely ratified international antiterrorism conventions. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft,²⁰⁹ the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft,²¹⁰ and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation²¹¹ make aircraft hijacking and other offenses committed aboard aircraft international criminal offenses. Countries that have ratified these conventions must criminalize the offenses set forth in them as a matter of domestic law and either extradite suspects or try them domestically (or submit the cases to the authorities for investigation). Although the offenses defined in these conventions are somewhat limited in scope, the hijacking and the destruction of the four airplanes on September 11 likely would be included.²¹²

205. See *id.* art. 7, at 4–5; Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 452 (2000).

206. See Rome Statute, *supra* note 204, art. 7, at 4–5. Sadat & Carden, *supra* note 205, at 427–28.

207. See, e.g., Drumbl, *supra* note 132, at 340 (noting the “conceptual, moral, and legal challenges of characterizing the September 11, 2002 attack as an armed attack”). See also Jordan J. Paust, *Addendum: Prosecution of Mr. bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims*, AM. SOC’Y INT’L L. INSIGHTS (Sept. 21, 2001), at <http://www.asil.org/insights/insigh77.htm>.

208. For example, the bin Laden videotape released by the Pentagon on December 13, 2001 suggests not only that bin Laden had prior knowledge of the attacks, but that they formed part of a broader plan. See *Scenes of Rejoicing and Words of Strategy from bin Laden and His Allies*, N.Y. TIMES, Dec. 14, 2001, at B4.

209. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter “Hague Convention”].

210. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219 [hereinafter “Tokyo Convention”].

211. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter “Montreal Convention”].

212. See *id.* arts. 1–2, 24 U.S.T. at 568–69, 974 U.N.T.S. at 178–81; Hague Convention, *supra* note 209, art. 1, 22 U.S.T. at 1644, 860 U.N.T.S. at 107; Tokyo Convention, *supra* note 210, art. 11,

Moreover, while these conventions might not cover the destruction of the World Trade Center, the partial destruction of the Pentagon, and the enormous casualties on the ground, the recent International Convention for the Suppression of Terrorist Bombings, poses no such problems. Having entered into force on May 23, 2001, the treaty now has fifty-eight signatories and twenty-five parties. (The United States signed the treaty on January 12, 1998, but has not yet ratified it.) It specifies that a person commits an offense if he or she:

unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility . . . with the intent to cause death or serious bodily injury . . . or . . . with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.²¹³

While the drafters may have contemplated primarily a common bomb or other explosive device, at least one commentator has noted that it is “not too much of a stretch to consider a plane filled with tons of jet fuel and used as an explosive missile as an ‘explosive device’ within the scope of Article 2.”²¹⁴ Like the other terrorism treaties, the convention essentially requires that state parties either extradite or try suspects.²¹⁵

In addition, the attacks might also be characterized as war crimes, although prosecuting the terrorists for such acts may prove more difficult under established international law. The intentional targeting of civilians and civilian objects during armed conflict is a war crime.²¹⁶ And the attacks of September 11 could clearly be shown to target, deliberately, civilians and civilian objects. Nevertheless, it is unclear whether the attacks were of such a nature as to qualify as armed conflict for purposes of international law.²¹⁷

704 U.N.T.S. at 230; Arnold N. Pronto, *Comment*, AM. SOC. INT’L L. INSIGHTS (Sept., 2001), at <http://www.asil.org/insights/insigh77.htm>.

213. Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, art. 2, S. TREATY DOC. NO. 106-6, at 4, 37 I.L.M. 249, 253.

214. See Pronto, *supra* note 212.

215. *Id.* Also, unlike the some of the other terrorism treaties, the Convention expressly excludes the application of the political offense exemption in the context of extradition and mutual legal assistance. Its scope also covers attempts, those who participate in the acts as accomplices, and those who participate by organizing or directing others to commit the acts. *Id.* It even includes groups of individuals linked to the act by a common purpose. *Id.*

216. See, e.g., Rome Statute, *supra* note 204, art. 2, at 2.

217. See *supra* note 207.

Regardless of the legal label, however, the international character of the crimes—as crimes against humanity or as violations of the terrorism conventions—is beyond dispute. If for no other reason, the fact that the perpetrators likely were citizens of numerous countries and that the casualty list included citizens from over eighty countries²¹⁸ establishes that this was more than a crime against the United States.

A purely domestic trial, whether civilian or military, would undermine the international nature of the crimes committed. In arguing that domestic courts are perfectly suitable to try the perpetrators of the attacks, some have cited Israel's trial of Adolf Eichmann as an example.²¹⁹ Yet, the Eichmann trial should not necessarily be a model here. Hannah Arendt, for example, has argued that the Eichmann trial suffered from serious problems precisely because it was a domestic proceeding.²²⁰ According to Arendt, the trial retold the story of the Holocaust as a crime against Jews, rather than conceiving of Jews as members of the human community more broadly, and the trial thereby distorted both the truly monstrous nature of the crimes in question and their international character.²²¹ Moreover, although the Eichmann trial may well have served an important purpose in enabling victims to tell a story of the Jewish Holocaust,²²² it did so only after an international trial had already demonstrated the truly international nature of the genocide and crimes against humanity that the Nazis had committed.

If domestic trials in the United States were the primary means of imposing criminal liability on those responsible for the September 11 attacks, and no one were tried in an international forum, similar problems might well arise. The dominant narrative that would emerge would likely be one about Americans as the principal victims of the attacks, thereby particularizing the crimes in question. It might also present a polarized picture of the United States alone in a battle against the terrorists. An international process, by contrast, would have a much better chance of presenting a picture of the world united against terrorism and emphasizing the acts of September 11 as crimes against all of humanity.

218. WHITE HOUSE REPORT, *supra* note 178, at 5.

219. *See, e.g.*, Koh, *supra* note 131.

220. HANNAH ARENDT, EICHMANN IN JERUSALEM 269–76 (1963).

221. *Id.* Arendt's is not the only possible interpretation of the Eichmann trial, of course, and she has been criticized by many. *See, e.g.*, Leora Bilsky, *In a Different Voice: Nathan Alterman and Hannah Arendt on the Kastner and Eichmann Trials*, 1 THEORETICAL INQUIRIES IN L. 509, 526 (2000). Nevertheless, her insight, whether or not accurate, illuminates the potential danger of a purely domestic trial for such universal crimes.

222. *See, e.g.*, Shoshana Felman, *A Ghost in the House of Justice: Death and the Language of the Law*, 13 YALE J.L. & HUMAN. 241, 242–51 (2001).

I should make clear that I am not arguing that domestic courts should never try international crimes. To the contrary, such trials are an important means by which international human rights law is incorporated domestically. The international human rights system is a complex intersection of multiple procedures—domestic, international, subnational, and transnational. I am certainly not suggesting that all matters of international human rights law, or even international human rights criminal law, ought to be resolved by international institutions. Indeed, such institutions are often poor substitutes for domestic processes.

In extraordinary cases, however, an international forum is more appropriate than a domestic one. The Rome Statute of the International Criminal Court, for example, recognizes this principle, and provides that only the most serious crimes of truly international concern should come before the court.²²³ Of course, the International Criminal Court, which only recently has come into being now that the requisite number of countries have ratified the convention,²²⁴ cannot serve as a forum in which to try the perpetrators of September 11 because the new court will only hear cases that arise after it was established.²²⁵ Nonetheless, the principle reflected in the statute of the court is relevant here.

In order to determine whether a crime is sufficiently serious to warrant an international trial, several factors might be relevant. For example, one could evaluate the scope of the actual damage (number of victims and extent of damage to property) as well as the scope of the planned damage.²²⁶ The heinous nature of the acts involved might be another factor, as might be—to the extent that a group of individuals committed the crimes—the rank of the individuals in that group (with leaders being the most appropriate for international prosecution).²²⁷ Yet another factor might be the extent to which the victims and perpetrators are citizens of multiple countries, thus making it difficult to characterize the crime as having a particular location and making domestic resolution of the crimes complex. Indeed, this was one of the factors that shaped the way in which the United States and other Allied countries defined the “major war criminals” who would ultimately be subject to international, rather than domestic, justice at

223. See, e.g., Rome Statute, *supra* note 204, pmbl., arts. 1, 5, at 1–3.

224. The Rome Statute provides that the court can only be created once sixty states have ratified the treaty. *Id.* art. 126, at 88. As of the time of writing this article, seventy-eight states have now ratified the treaty. See Rome Statute of the International Criminal Court Website, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

225. *Id.* art. 11, at 11.

226. Sadat & Carden, *supra* note 205, at 419.

227. *Id.*

Nuremberg.²²⁸ Certainly, a strong case could be made that the September 11 attacks, which were coordinated by a worldwide terrorist organization run by large networks of individuals of multiple nationalities working in dozens of countries, in which thousands of people from over eighty countries around the world were killed or wounded in multiple locations in the United States, which took their toll in billions of dollars worth of damage to some of the tallest buildings in the world, and which shut down the U.S. air transport system and indeed much of the U.S. government, easily satisfies all of these factors.

Moreover, an international trial for those most responsible for September 11 would not violate the so-called “complementarity principle.” That principle, as reflected in the Rome Statute of the International Criminal Court, allows international proceedings only when domestic courts are unwilling or unable to adjudicate a given offense.²²⁹ Such a principle is intended to help alleviate the tension between international justice and nation-state sovereignty concerns. By establishing a preference for domestic proceedings, where possible, it minimizes interference by international institutions in the internal affairs of a state against the will of that state. But the principle should not prevent an individual state, if it actually desires international adjudication, from seeking an international forum in a given case. It is true that the Rome Statute might be read as foreclosing that option, because international adjudication is permissible only when a state is “unwilling or unable” to adjudicate the dispute. But one could plausibly read “unwilling or unable” to include circumstances in which a state might not want to adjudicate the leaders of an international crime of enormous magnitude in a domestic court. It is also a fair question, in this case, whether U.S. courts and juries could in fact provide a fair trial to bin Laden and other top Al Qaeda leaders suspected of plotting the September 11 attacks.

An international trial, then, at least for those most responsible for the attacks, would best establish the truly international nature of the crime in question. Indeed, only such a forum could do justice to the magnitude of the crime. And only such a forum could avoid the portrait of the United States acting alone against the terrorists. An international tribunal stands

228. TAYLOR, *supra* note 140, at 27–40.

229. Rome Statute, *supra* note 204, art. 17, at 14. For a discussion of the complementarity principle, see generally Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT’L L. 120 (2001); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26 (2001); Sadat & Carden, *supra* note 205.

the best chance of showing the world coming together and uniting against terrorism. To the extent that any Arab or Muslim judges were to participate in such a proceeding, it would isolate Al Qaeda from the rest of the world, sending a message that Al Qaeda cannot claim to represent Islam. If one of the primary strategic goals of the United States is to contain terrorist threats, then it is absolutely essential that followers of Islam not align themselves with Al Qaeda, and an international trial of Al Qaeda leaders, presided over by a panel that includes judges from Muslim nations, could be an important part of that effort.

F. PROMOTING DEVELOPMENT OF INTERNATIONAL NORMS RELATED TO TERRORISM

An additional benefit of an international process is the development of international norms relating to terrorism that would likely result. Numerous widely ratified treaties have outlawed certain acts of terrorism. As discussed above, the Montreal Convention, the Tokyo Convention, and the Hague Convention require state parties to criminalize the hijacking of planes and other similar acts regarding airplanes. Other intergovernmental agreements and treaties criminalize the taking of hostages,²³⁰ attacks on diplomats,²³¹ the endangerment of nuclear material,²³² acts affecting the safety of maritime navigation and the continental shelf,²³³ and the marking of plastic explosives.²³⁴ More recent treaties have addressed the problem of terrorist bombing²³⁵ and financing.²³⁶ The general structure of these treaties is to require state parties to criminalize the acts in question and either to try suspects domestically (or submit them to the local authorities for investigation) or to extradite them.

Nevertheless, greater norm development in this area is urgently needed. As even the titles of these antiterrorism conventions make clear,

230. Convention Against the Taking of Hostages, U.N. GAOR 6th Comm., 34th Sess., Supp. No. 39, at 2, U.N. Doc. A/C.6/34/L.23 (1979).

231. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, art. 2, 28 U.S.T. 1975, 1978, 1035 U.S.T.S. 167, 169.

232. Convention on the Physical Protection of Nuclear Material, March 3, 1980, art. 7, T.I.A.S. No. 11080, at 11.

233. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 3, S. TREATY DOC. NO. 101-1, at 2-3, 27 I.L.M. 668, 674-75.

234. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, arts. 2-4, S. TREATY DOC. NO. 103-8, at 3-4, 30 I.L.M. 726, 727-28.

235. 1997 Convention for the Suppression of Terrorist Bombings, *supra* note 213, art. 2, S. TREATY DOC. NO. 106-6, at 4-5, 37 I.L.M. at 253.

236. Convention for the Suppression of Financing Terrorism, Jan. 10, 2000, art. 2, S. TREATY DOC. NO. 106-49, at 4-5, 39 I.L.M. 270.

the international community has emphasized criminalizing specific acts rather than attempting to agree on a definition of terrorism. That strategy has proven more effective in developing common ground than in working out a comprehensive definition.²³⁷ An international proceeding to try individuals suspected of carrying out the September 11 attacks could help in three different ways.

First, an international proceeding would itself generate interpretive norms. For example, the decisions of the International Tribunals for the former Yugoslavia and Rwanda have created a body of important legal interpretations of international criminal law, the law of armed conflict, and human rights law. Those interpretations have helped to resolve long-debated aspects of the law in this area. As Sean Murphy has noted:

[T]he ICTY is developing an unprecedented jurisprudence of international humanitarian law. Prior to its creation, the principle sources of international judicial precedent remained the fifty-year-old decisions of the Nuremberg and Tokyo Tribunals. Now there is a further substantial and growing corpus of international judicial decisions that will ultimately affect international humanitarian law in a variety of areas, comprising (to name just a few) . . . the attribution of crimes to superiors pursuant to theories of “command responsibility”; the permissibility of defense to such crimes, such as those based on reprisal or duress; . . . the rights of suspects to counsel, cross-examination of witnesses, and exculpatory evidence; and the treatment of victims and witnesses.²³⁸

Second, as discussed previously,²³⁹ the establishment of these tribunals has contributed to the development of a cadre of lawyers, judges, and others who are familiar with, and committed to, the implementation of these norms. Such governmental officials and members of civil society have formed both formal and informal relationships and networks that have helped develop the international human rights movement. Moreover, because these jurists come from a diverse array of countries and backgrounds, they can draw on their experience and help to generate increased support within their own countries for international human rights norms.

Third, and perhaps most important, an international proceeding has the capacity to act as a catalyst in a much larger sense for the development of norms. As discussed previously, the Nuremberg trials are a good example

237. See, e.g., PAUST ET AL., *supra* note 99, at 995.

238. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 95 (1999).

239. See *supra* text accompanying notes 180–184.

of this phenomenon. Consider that, at the time of their creation, although almost nobody seriously argued that the perpetrators should go unpunished,²⁴⁰ there was considerable disagreement about whether it was appropriate to create a legal proceeding.²⁴¹ Charles Wyzanski, for example, contended that punishing those captured in war was not a legal but a political act.²⁴²

But the great achievement of Nuremberg (and the proceedings in the Far East that followed) was its “capacity . . . to project a new legal meaning into the future.”²⁴³ As Wyzanski himself later acknowledged, “the outstanding accomplishment of the trial, *which could never have been achieved by any more summary executive action*, is that it has crystallized the concept that there already is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement.”²⁴⁴ Significantly, Wyzanski’s statement reveals that he came to believe not only that the tribunals were legitimate, but also that they served a norm-creating function that went beyond the realm of political or military power and that could not have been achieved through the use of such power. Robert Jackson, chief prosecutor at Nuremberg, has made a similar argument:

We have also incorporated [the trial’s] principles into a judicial precedent. “The power of the precedent,” Mr. Justice Cardozo said, “is the power of the beaten path.” One of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction.²⁴⁵

Thus, an international process may help to inculcate norms for the future. By drawing the attention of the world to an international proceeding, the Nuremberg trials created a significant moment that

240. *But see* MONTGOMERY BELGION, VICTORS’ JUSTICE 42–131 (1949) (arguing that the alleged crimes were acts of war in which both sides were engaged and therefore did not warrant criminal punishment).

241. *See id.* at 195; ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 11–90 (1983).

242. *See* CHARLES E. WYZANSKI, JR., *Nuremberg—A Fair Trial? Dangerous Precedent*, in *WHEREAS—A JUDGE’S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW* 164, 174–76 (1965).

243. ROBERT COVER, *The Folktales of Justice: Tales of Jurisdiction*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 173, 196 (Martha Minow et al. eds., 1995).

244. CHARLES WYZANSKI, JR., *Nuremberg in Retrospect*, in *WHEREAS—A JUDGE’S PREMISES*, *supra* note 242, at 180, 189–90 (1965) (emphasis added).

245. ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE, TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (1945).

spawned sixty years of development of international human rights and humanitarian law. An international proceeding to try those suspected of involvement in the September 11 attacks could do the same for the international law of terrorism.

G. ENHANCING THE PERCEIVED LEGITIMACY OF UNITED STATES
GOVERNMENTAL ACTION

Finally, an international process would be more likely to be perceived as legitimate and therefore would help to establish broader societal support around the world both for the trials themselves and for antiterrorism efforts more generally. Indeed, to the extent that decisions are not made solely by the United States but rather by an international panel of judges from multiple countries, the perceived fairness of the process would be enhanced, thereby helping to diffuse some resentment against the United States and perhaps leaving Americans less likely to be singled out and targeted in retaliatory action.

A delineation of the factors that might contribute to the legitimacy of any particular international legal institution has been the focus of attention elsewhere,²⁴⁶ and a detailed discussion either of the general legitimacy of international norms and processes or the reasons people and states might obey or be influenced by them²⁴⁷ is beyond the scope of this Article. For my purposes, it is sufficient to note that legitimacy is likely to be greater when the legal process under consideration bears certain hallmarks of fairness and, in particular, has greater participation by actors from multiple backgrounds. A recent study of the ICTY's legitimacy in Bosnia supports this view. Interviews with a range of Bosnian jurists across the political and ethnic spectrum suggest that the best way to increase the court's legitimacy is to provide opportunities for greater involvement of Bosnians

246. See, e.g., Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1998) (focusing on legitimacy as "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process"); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990) (book review) (arguing that international law is a form of "rhetoric" whose persuasiveness depends on its legitimacy, which in turn depends on the process whereby it arises, its consistency with accepted norms, and its perceived fairness and transparency).

247. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.") (emphasis omitted). See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

in the work of the institution and greater outreach by the institution in Bosnia through education and information campaigns.²⁴⁸

The November 13 order prompted representatives from numerous countries to voice concern about the proposed military commissions.²⁴⁹ As the hesitancy of even European nations to extradite suspects makes clear, there is widespread resistance to the unilateral use of a forum that offers limited rights to the accused, that has no provision for an appeal to civilian authorities, and that imposes the death penalty, which the Europeans have abolished.²⁵⁰ Of course, such criticism has not been limited to Western Europe.²⁵¹ Indeed, as the Berenson case demonstrates, when *other* countries have used military tribunals with truncated procedures to try terrorism suspects, even the United States has expressed concerns about their legitimacy.

Thus, the Administration's use of indefinite secret detentions and military commissions is a particularly galling example of American exceptionalism, whereby procedures that the U.S. would not tolerate in others are justified as part of a righteous mission when they are in the U.S. interest. Indeed, at the same time that the Administration has ignored the potential relevance of international law to the treatment of terrorism suspects, Administration officials have justified their actions in the language of a global moral crusade.²⁵² Such a double standard surely contributes to the perceived illegitimacy of the proposed commissions.

248. The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 153–55 (2000) [hereinafter *Joint Study*]. See also Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 416 (1999) (“The ICTR, with a bench composed of the principal legal systems of the world but without a judge or judges from within Rwanda, has no . . . claim to representative legitimacy.”); Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 300 (1997) (“If states party to a treaty establishing a supranational tribunal hope to enhance its legitimacy and authority, the experience of the [European Court of Justice] and the [European Court of Human Rights] suggests that they should give careful consideration to the background and experience of jurists who serve on it.”).

249. See *EU Ministers Lay Groundwork for Anti-terror Talks with U.S.*, AGENCE FRANCE PRESSE, Feb. 15, 2002; *Most Americans Can't See Why Europeans Are So Upset*, ECONOMIST, Jan. 19, 2002, at 26, 26–27.

250. See *id.*

251. For example, Richard Goldstone, Justice of the South African Constitutional Court, has criticized the commissions and has called for an international proceeding to try those responsible for September 11. See Goldstone, *supra* note 116.

252. See, e.g., Purdum, *supra* note 5, at A15 (quoting President Bush as saying that “our responsibility to history is . . . clear: to answer these attacks and rid the world of evil”).

Increased protection of the rights of the accused within the military commission framework, or civilian trials within the existing U.S. domestic court system, could allay some of the concerns that have been raised. But even domestic trials would not fully address concerns about the perceived credibility abroad of the convictions that might result. A unilateral process sends a signal that the United States is acting alone against the rest of the world. Even if the Administration enhances the protections for the rights of the accused, trials run solely by the United States are likely to foster a perception abroad that the proceedings are merely victors' justice. In contrast, a multinational decisionmaking process to determine the guilt or innocence of individuals suspected of participating in the September 11 attacks stands a better chance of being regarded around the world as fair.

We can see, even in the current crisis, how a multilateral process helps to generate legitimacy. In the weeks immediately following September 11, the United States announced that it had evidence linking bin Laden to the attacks and indicating that the Taliban government of Afghanistan was intimately bound up in bin Laden's terrorist activities.²⁵³ Citing security concerns, the Administration did not release information to demonstrate this point.²⁵⁴ But the Administration *did* share information privately with officials in other governments, including Prime Minister Tony Blair of Great Britain, who then made public statements reiterating the claims.²⁵⁵ These assertions enhanced support, outside the United States, for the Administration's military effort in Afghanistan.²⁵⁶

Similarly, a multilateral proceeding to determine the guilt or innocence of the accused would enhance the perceived legitimacy of the process beyond the United States. To the extent that a highly regarded Muslim judge were to participate in the trials, the process would stand a better chance of gaining support—or at least acquiescence—in the Arab-Muslim world.

To be sure, the mere creation of an international proceeding does not ensure its legitimacy either beyond our borders or within them. Concerns about the politicization of such an entity can undermine its credibility. Within the United States, for example, opposition to the proposed

253. See Tim Weiner & Benjamin Weiser, *Officials Balk at Release of Indictment of bin Laden*, N.Y. TIMES, Sept. 27, 2001, at B4.

254. *Id.*

255. See *Britain's Bill of Particulars: "Planned and Carried Out the Atrocities,"* N.Y. TIMES, Oct. 5, 2001, at B4; Alan Cowell, *Blair Says He's Seen Proof of bin Laden Role*, N.Y. TIMES, Oct. 1, 2001, at B4.

256. Cowell, *supra* note 255.

International Criminal Court has stemmed in part from fears that, because it will not be directed by the UN Security Council (thereby depriving the United States of its veto power), the court could become hostage to the whims of a runaway prosecutor or could be manipulated by countries with political grievances against the United States.²⁵⁷ In addition, even an international tribunal may face accusations that it is providing victors' justice. For example, in Bosnia and Yugoslavia, some have criticized the ICTY as a political tool of western powers.²⁵⁸ Numerous other factors also influence an international judicial institution's perceived credibility. Yet increased participation by representatives of multiple countries is generally viewed as enhancing the credibility of an institution within those countries.²⁵⁹

The need to pay attention to the issue of legitimacy beyond our borders is no mere idealist vision; the credibility of any proceeding the United States uses to hold individual terrorism suspects accountable is in the direct strategic interest of the United States. As described above,²⁶⁰ a process that is widely perceived as fair strengthens the multilateral intergovernmental efforts needed to combat terrorism. At the same time, such a process might gain greater acceptance within societies around the world, thereby at least playing a part in helping to defuse the resentment toward the United States that may be one of the root causes of terrorism.

In recent months the Administration has begun to recognize the need for public diplomacy efforts to win the "hearts and minds" of the Arab-Muslim world.²⁶¹ To that end, the Administration recently has launched an advertising campaign run by former Madison Avenue advertising executives to promote a positive image of the United States²⁶²—with little

257. See, e.g., David J. Scheffer, *America's Stake in Peace, Security and Justice*, AMER. SOC'Y. INT'L L. NEWSLETTER Sept.–Oct. 1998, at 1, 9 (expressing concerns that prosecutor's decisions could become politicized and emphasizing need for Security Council to exercise check on prosecutor's function).

258. In his trial before the ICTY for genocide and other crimes, former Yugoslav leader Slobodan Milosovic has levied this charge against the ICTY. See, e.g., Ian Fisher, *The Pointed Finger*, N.Y. TIMES, Feb. 17, 2002, at A14. A recent study of Bosnian judges and lawyers also suggests concerns, particularly within the Serbian ethnic group, about the politicization of the ICTY. *Joint Study*, *supra* note 248, at 131–32.

259. The Bosnia study makes this point quite forcefully: increased involvement of Bosnians in the ICTY would enhance its legitimacy in Bosnia. *Joint Study*, *supra* note 248, at 146–47.

260. See *supra* text accompanying notes 172–190.

261. See Elizabeth Becker, *In the War on Terrorism, a Battle to Shape Opinion*, N.Y. TIMES, Nov. 11, 2001, at A1.

262. See *id.*

success so far.²⁶³ A multilateral process to determine the guilt or innocence of individual terrorists would be one of the best advertising campaigns available to the United States.

III. A WORKABLE INTERNATIONAL APPROACH TO TRY TERRORISTS

Regardless of the possible benefits from an international proceeding, one of the most common arguments against such an approach is that trying suspected terrorists in an international forum is unrealistic because it could not be established quickly and because it is politically unpalatable. This Part therefore begins by addressing the implementation question, concluding that, while a number of international approaches would indeed be difficult to create and would run into procedural obstacles, at least one option (expanding the jurisdiction of current international tribunals) could be accomplished quite easily.

The fact that there appears to be little political will in the United States to create a full-fledged international tribunal to try the perpetrators of the September 11 attacks leads to a more serious practical objection. Nevertheless, I argue that this objection too need not derail an international process altogether. Instead, I offer two alternative models that have received insufficient consideration so far: an internationalized military commission and a hybrid domestic/international court based in Afghanistan itself. Both models would be more palatable politically, while still retaining many of the benefits of an international process.

A. AN INTERNATIONAL TRIBUNAL

Despite the benefits of an international proceeding, there is no existing international forum that, as presently constituted, could hear cases arising from the September 11 attacks. For example, although the Permanent International Criminal Court (ICC) has recently been established,²⁶⁴ those suspected of committing the September 11 attacks cannot be tried in the court because it is not authorized to hear cases arising before its establishment.²⁶⁵ Likewise, although some academics and international

263. See, e.g., James Dao, *Panel Urges U.S. to Revamp Efforts to Promote Image Abroad*, N.Y. TIMES, July 29, 2002, at A2; Jane Perlez, *U.S. Is Trying to Market Itself to Young, Suspicious Arabs*, N.Y. TIMES, Sept. 16, 2002, at A1.

264. See *supra* note 224.

265. Rome Statute, *supra* note 204, art. 11, at 11. Ironically, for any future terrorist acts committed after the court is established that rise to the level of the crimes within the ICC's subject matter jurisdiction—crimes against humanity, war crimes, and genocide—the ICC could provide an

lawyers favor the creation of a new ad hoc international tribunal to try those suspected of committing the September 11 attacks,²⁶⁶ such a prospect seems highly unlikely because the establishment of a new judicial body, even with the requisite political will, is a cumbersome process that would surely take time.²⁶⁷ And the existing international criminal tribunals—the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda—could also not be used, at least in their current form, because their jurisdiction is both temporally and spatially limited.²⁶⁸

Michael Scharf, however, has recently argued that the existing statute of the ICTY (or the ICTR, for that matter) easily could be *amended* to allow for trials of those suspected of committing the attacks of September 11.²⁶⁹ Such an amendment could be enacted fairly swiftly, requiring only a Security Council Resolution. This approach would also have the advantage

ideal forum for holding suspects accountable. *Id.* art. 5, at 3. The ICC does not have jurisdiction over terrorist crimes as such; although it was suggested, no agreement could be reached on that issue. *See, e.g.,* Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, 6 HUMAN RIGHTS BRIEF 1 (Fall 1998) (“The inclusion of drug trafficking and terrorism enjoyed significant support, though less than aggression. In a resolution attached to the Final Act, the conference participants recommended that a review conference consider adding these crimes to the Court’s subject matter jurisdiction. As a practical matter, the Court’s onerous amendment provisions render it unlikely that these crimes will ever fall within the Court’s aegis.”). Nevertheless, to the extent that a terrorist act qualifies as any one of the crimes over which the court does have jurisdiction—war crimes, genocide, and crimes against humanity—suspected terrorists could be tried in the ICC. The opposition of the Bush Administration and the current Congress to the ICC is so vehement, however, that it seems highly unlikely that the ICC would be used for this purpose even in the event of future attacks against the United States.

266. *See, e.g.,* Goldstone, *supra* note 116; Slaughter *supra* note 116.

267. It should be noted, of course, that the international tribunal at Nuremberg was established in just a matter of months. *See* TAYLOR, *supra* note 140, at 43–115. Nevertheless, even if the United States were to support such a process, it might well become enmeshed in disagreements over whether its jurisdiction should include terrorist acts in other circumstances, most notably the Israeli-Palestinian conflict. *See* Koh, *supra* note 13.

268. The jurisdiction of the ICTY extends only to crimes committed in the territory of the former Yugoslavia since 1991, ICTY Statute, *supra* note 115, art. 1 (“The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”), and the jurisdiction of the ICTR extends only to crimes committed in 1994 in Rwanda or in neighboring states by Rwandan citizens.

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

International Criminal Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994); ICTR STATUTE OF THE INTERNATIONAL TRIBUNAL, art. 1, at <http://www.ictt.org/wwwroot/ENGLISH/basicdocs/statute.html#statute> [hereinafter ICTR].

269. Scharf, *supra* note 116.

of relying on an existing institution that, despite some problems, has functioned quite well. Moreover, because the institution is controlled by the Security Council, it may be a more politically palatable arrangement for the United States than the ICC. Indeed, U.S. objections to the ICC are based in part on the fact that the Security Council does not exercise enough control over the court.²⁷⁰ The existence of this amendment option, therefore, seriously undermines arguments that an international process would be too difficult to establish or would inevitably spin out of control.

B. POLITICALLY PALATABLE “QUASI-INTERNATIONAL” MODELS

Despite the readily available option of simply amending the statutes for tribunals already in existence, it is highly unlikely in the current political climate that a full-fledged international tribunal will be established. Indeed, so far the Administration has adamantly refused to abandon the option of trying suspects before military commissions.²⁷¹ Moreover, to the extent they have mentioned it at all, officials have made clear that they oppose establishing an international tribunal to try suspects.²⁷² Given such political resistance to a full-fledged international proceeding, there are at least two other options worth considering, both of which still retain at least some of the benefits of an international tribunal, but might be more feasible politically.

1. An Internationalized Military Commission

To the extent that the Administration does move forward with military commission trials, one way of achieving some of the benefits of an international proceeding in a more politically palatable form would be to internationalize the military commission process. There is strong historical precedent for such an approach. After all, the leading recent historical examples of international trials are the post-World War II International Military Tribunal (“IMT”) at Nuremberg and the International Military Tribunal for the Far East (“IMTFE”), both of which were military tribunals.

270. David Scheffer, the Ambassador-at-Large for War Crimes during the Clinton Administration, articulated that part of the U.S. concern stemmed from the fact that “[u]nder Article 12, the ICC may exercise . . . jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents.” David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 18 (1999). Of course, in order for the court to exercise jurisdiction in such cases, the case in question must satisfy the complementarity principle. See Sadat & Carden, *supra* note 205, at 443–44.

271. See Seelye, *supra* note 7.

272. See Prosper Testimony, *supra* note 126.

As discussed previously, the primary impetus for the Nuremberg tribunal came from the United States.²⁷³ Moreover, Justice Robert Jackson, the chief prosecutor for the United States, exercised a great deal of control in shaping the court and the prosecution.²⁷⁴ Nonetheless, the court was established by multilateral agreement,²⁷⁵ and the judges, prosecutors, and staff were appointed from the four major allied powers: the United States, Great Britain, France, and the Soviet Union. In addition, although the Nuremberg Tribunal was officially designated a military tribunal, it was staffed only in part by military personnel, and only one judge, the Russian Nikitchenko, was a military judge. The IMT indicted twenty-four defendants, tried twenty-two (one having hanged himself prior to trial and another having been declared medically incompetent), convicted nineteen (of which twelve were sentenced to death), and acquitted three.²⁷⁶

Although a multilateral proceeding modeled on Nuremberg would require the United States to relinquish control over many aspects of the proceedings, including the shape and composition of the court, the International Military Tribunal for the Far East (IMTFE), by contrast, might offer a more acceptable model because it would permit the United States to retain more control. Indeed, unlike the Nuremberg tribunal, the IMTFE was largely directed by the United States.²⁷⁷ Where the IMT was established by multilateral agreement, the IMTFE was established by an executive decree of U.S. General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan.²⁷⁸ Under orders from the United States Joint Chiefs of Staff, MacArthur retained absolute authority over the establishment of rules, regulations, and procedures.²⁷⁹ Thus, although modeled on Nuremberg, the United States effectively set the rules for the proceedings. Moreover, the United States appointed the judges.²⁸⁰ In the end, judges from nine countries sat on the IMTFE, representing Australia, New Zealand, Canada, the Netherlands, France, Britain, the

273. See *supra* text accompanying notes 142–156.

274. See TAYLOR, *supra* note 140, at 56–115.

275. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The agreement, initially signed by the United States, Great Britain, France, and the Soviet Union, was subsequently signed by nineteen other nations.

276. See TAYLOR, *supra* note 140, at 571–611.

277. See R. JOHN PRITCHARD, *THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS* (1989); R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 27 (1995) [hereinafter Pritchard, *International Military Tribunal*].

278. See Pritchard, *International Military Tribunal*, *supra* note 277, at 27.

279. See *id.* at 31.

280. See Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 2, T.I.A.S. No. 1589, 4 Bevans 20, 22.

United States, the Soviet Union, and China, along with two colonial territories on the brink of independence, India and the Philippines.²⁸¹ Twenty-eight individual defendants were indicted, and judgments were rendered against twenty-five, with no acquittals. Seven of the twenty-five were sentenced to death.²⁸²

If the United States were to internationalize the military commission process along the lines of the IMTFE, the Administration could retain control over the shape of the proceedings while at least obtaining some of the benefits of an internationalized process. Of course, in my view a civilian international proceeding would be preferable to a military proceeding. Moreover, unless basic procedural safeguards were put in place to protect the rights of the accused, a military proceeding would violate international law. But if such protections were established, an internationalized proceeding could at least offer some of the legal process benefits described above while satisfying political constraints.

Nonetheless, the benefit of internationalizing the process would depend in part on how wide a circle of judges the Administration would be willing to appoint. Indeed, both the IMT at Nuremberg and the IMTFE have been criticized for not opening the circle beyond the Allied powers, thereby imposing victors' justice.²⁸³ Yet even such a limited range of judges would be preferable to the purely unilateral victors' justice that a completely U.S.-run domestic military commission process would offer. Thus, even if the judges on the commission were limited to Western European countries, the Administration would still increase the perceived legitimacy of the process. If the Administration would further be willing to appoint judges from non-western countries, particularly Arab or Muslim judges, the credibility of the process would be even greater. The appointment of jurists from countries such as Saudi Arabia, Pakistan, or India might prove to be too difficult for obvious diplomatic reasons; candidates acceptable to the United States might well be found, however, in South Africa or Indonesia, because those countries are democracies with jurists who are well-established and recognized both in the West and around the world. Jurists of Arab or Muslim background who are citizens of the United States or Western European countries could also be considered.

281. Pritchard, *International Military Tribunal*, *supra* note 277, at 27 & n.3.

282. *Id.* at 32.

283. *See, e.g.*, M. Cherif Bassiouni, *Nuremberg: Forty Years After*, 80 AM. SOC'Y INT'L L. PROC. 59, 64 (1986).

Even if the procedures for and composition of an international military commission could be settled upon, however, the death penalty might remain a significant stumbling block. Western Europeans would not likely be willing to take part in a court, even with enhanced protections for the rights of the accused, if the death penalty were to be imposed,²⁸⁴ and the Bush Administration might be unwilling to sacrifice the death penalty as an option. Nonetheless, if Slobodan Milosevic can be sentenced to a maximum of life imprisonment for committing genocide, it is hard to argue that, despite the magnitude of the September 11 attacks, the perpetrators should receive a greater penalty. In any event, if the death penalty proved to be too big an obstacle for the appointment of European judges, the Administration could appoint judges from non-European countries who might tolerate the death penalty.

Administration officials often cite the many military commission trials that were held unilaterally, both by the United States and by other allied countries, after the IMT and the IMTFE did their work in Germany and the Far East.²⁸⁵ For example, in Germany, after trying the major Nazi War criminals in the international proceedings at Nuremberg, the United States held a series of twelve trials under the provisions of Control Council Law No. 10, in which 185 defendants, lower-level Nazi war criminals, were indicted.²⁸⁶ Many more cases were later tried before U.S.-convened military commissions, including 489 cases involving 1,672 defendants tried at Dachau.²⁸⁷ Other Allied forces held similar trials.²⁸⁸ By the end of 1958, the Western Allies had used military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by U.S., Australian, British, Chinese, Dutch, and French forces for atrocities committed during the war.²⁸⁹

Yet, it is important to recognize that these unilateral trials came only *after* a process in which the leading war criminals were tried in international proceedings. Thus, the international process helped to define the appropriate legal norms and establish the legitimacy of the trials, which then paved the way for subsequent trials of lower-level offenders.

284. See *supra* text accompanying notes 249–252.

285. See, e.g., Prosper Testimony, *supra* note 126.

286. Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under control Council Law No. 10, at 136–38 (1949).

287. The Simpson Report, Sept. 14, 1948, in PAUST ET AL., *supra* note 99, at 634–35.

288. See, e.g., Matthew Lippman, *Prosecutions of Nazi War Criminal Before Post-World War II Domestic Tribunals*, 8 U. MIAMI INT'L & COMP. L. REV. 1 (2000).

289. Prosper Testimony, *supra* note 126.

Accordingly, these historic examples of military commissions at Nuremberg and Tokyo offer possible models for the Administration.

2. A UN-Supported Criminal Court Based in Afghanistan

Another option that should be considered is a hybrid domestic/international court based in Afghanistan. For peace to exist within Afghanistan—an urgent goal in the fight against terrorism—the new government requires substantial international assistance in creating a workable criminal justice system. As U.S. Ambassador-at-Large for War Crimes Pierre-Richard Prosper recently noted, “promoting the rule of law in Afghanistan” is not only a “fully necessary and justifiable end in itself,” but it also “aids the overall war on terrorism.”²⁹⁰ Thousands of Al Qaeda and Taliban prisoners continue to be held in Afghanistan, and decisions must be made about whether they should be released, sent to another state for prosecution, or tried in Afghanistan.²⁹¹ An important task for Afghan courts will be to hold those on all sides accountable for violations of the laws of armed conflict, as well as to try those responsible for serious crimes and human rights violations during the Taliban regime. Meaningful accountability and fair proceedings will not be possible without a significant contribution of funding and expertise by the international community.²⁹² As part of that effort, a hybrid court, with domestic Afghan judges sitting alongside judges from other countries, could be established to try those accused of human rights crimes, violations of the laws of armed conflict, crimes related to the September 11 attacks, and other terrorist acts.²⁹³

The United Nations has supported similar efforts elsewhere. Although attempts to establish a hybrid domestic/international court in Cambodia have progressed very slowly²⁹⁴ and the project to establish such a court in

290. Pierre-Richard Prosper, *Symposium, Reluctant Nation-Building: Securing the Rule of Law in Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 433 (2002).

291. *See id.*

292. William Spencer, *Symposium, Reluctant Nation-Building, Securing the Rule of Law in Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 445 (2002).

293. For an analysis of the viability of such hybrid tribunals in Afghanistan, see Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, *Symposium on Terrorism and Ethnic Conflict*, 29 DENV. J. INT'L L. & POL'Y (forthcoming 2002) [hereinafter *Mixed Tribunals*].

294. Although the attempt to create such a tribunal stalled in February, *see* Seth Mydans, *U.N. Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4, recent reports suggest that the United Nations and Cambodia have renewed their efforts, *see* Seth Mydans, *Cambodia and U.N. Break Icy Silence on Khmer Rouge Trials*, N.Y. TIMES, Sept. 1, 2002, at A11.

Sierra Leone is still underway,²⁹⁵ this hybrid court model has met with some preliminary success in East Timor and Kosovo.²⁹⁶ In East Timor, for example, the United Nations Transitional Administration for East Timor (UNTAET) has established a process under which “serious crimes” are to be tried before three-judge panels, comprised of two international judges and one East Timorese judge, sitting within the jurisdiction of the District Court of Dili.²⁹⁷ “Serious crimes” are defined as “war crimes,” “crimes against humanity,” and “genocide,” as well as murder and sexual offenses, insofar as the latter two crimes were committed between January 1, 1999, and October 25, 1999.²⁹⁸ Prosecutors and investigators are drawn from other countries, as well as from the local population.²⁹⁹

This hybrid court has faced some difficulties. Critics charge that the Timorese people were not sufficiently consulted in the design of the tribunals and that the court adopted its criminal categories from the Rome Statute of the International Criminal Court, without enough sensitivity for the particular circumstances of East Timor.³⁰⁰ In addition, there is concern

295. See S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg. at 2, U.N. Doc. S/RES/1315 (2000).

296. For a comparison of the United Nations efforts to help build a justice system and promote the rule of law in East Timor and Kosovo, see generally Dickinson, *Mixed Tribunals*, *supra* note 293; Hansjoerg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, FLETCHER F. WORLD AFFAIRS 107 (2001).

297. See Section 10 of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/11 on the Organization of Courts in East Timor, U.N., 55th Sess., at 4, U.N. Doc. UNTAET/REG/2000/11 (2000), at <http://www.un.org/peace/etimor/entaetR/Reg11.pdf>, by which exclusive jurisdiction throughout East Timor in relation to the most serious crimes, including genocide, war crimes, and crimes against humanity, has been vested in the Dili District Court. Section 10 is further supported by UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction for Serious Crimes, U.N., 55th Sess., at 2–14, U.N. Doc. UNTAET/REG/2000/15 (2000). This regulation grants the panels universal jurisdiction and contains, *inter alia*, the relevant penal provisions for war crimes, crimes against humanity, and torture, and it spells out internationally recognized principles of criminal law, taking into consideration the Statutes of the International Criminal Tribunal for the former Yugoslavia and of the International Criminal Court. For an analysis of the serious crimes unit, see Laura A. Dickinson, *The Dance of Complementarity: Relationships Between Domestic, International and Transnational Accountability Mechanisms in East Timor and Indonesia*, in *THE MANY FORMS OF ACCOUNTABILITY: INTERNATIONAL AND DOMESTIC METHODS OF HOLDING INDIVIDUALS RESPONSIBLE FOR ATROCITIES* (Jane Stromseth ed., forthcoming 2003); Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 145–73 (2001); Strohmeyer, *supra* note 296; Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT’L L. & POL. 1101 (2001).

298. UNTAET Regulation No. 2000/15, U.N. Doc. UNTAET/REG/2000/15, *supra* note 297, at §§ 1–2.

299. *Id.* at § 14. See also Strohmeyer, *supra* note 296, at 118.

300. See, e.g., Linton, *supra* note 297, at 150. For a more positive view of the UNTAET justice sector in comparison to the rest of UNTAET, see Beauvais, *supra* note 297.

that this court has received insufficient funding from the international community.

Nevertheless, these are not criticisms of the overall project, but rather of its execution, particularly in its early phases. Recently, the mixed tribunals have made great progress. By June of 2002, prosecutors had issued forty-two indictments for 112 individuals and obtained twenty-four convictions,³⁰¹ and investigations into hundreds of other cases are being pursued.³⁰² The hybrid court has thus played an important role in the accountability process for the mass atrocities committed when Indonesia pulled out of East Timor in 1999, a process that continues to aid efforts to establish the rule of law and promote peace and security in East Timor now that the country has gained independence.³⁰³

301. *See id.*

302. For example, in his August 22, 2001 daily press briefing, Fred Eckhard, Spokesman for the Secretary-General, stated the following:

Today in East Timor, the Deputy Prosecutor General for the Special Panel for Serious Crimes, Jean-Louis Gilissen, said his office had evidence in 674 cases of killings related to the violence connected to the 1999 popular consultation, and have already investigated 300 of those cases.

He said the Serious Crimes Unit had carried out considerable work despite its small size, with [thirty-one] investigators in the Unit.

Daily Press Briefing by the Office of the Spokesman for the Secretary-General, Aug. 22, 2001, at <http://www.un.org/News/briefings/docs/2001/db082201.doc.htm>.

303. In Kosovo, the United Nations Mission has established a similar hybrid domestic/international process for trying serious crimes. International judges and prosecutors have served alongside domestic counterparts. For example, as of December 2000, there were ten international judges and three international prosecutors serving in the five regions of Kosovo. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 55th Sess., at 8, U.N. Doc. 5/2000/1196 (2000) [hereinafter *Report of the Sec.-Gen.*]. *See also* DEP'T OF HUMAN RIGHTS AND RULE OF LAW, ORG. FOR SEC. AND CO-OPERATION IN EUROPE, KOSOVO: A REVIEW OF THE CRIMINAL JUSTICE SYSTEM, 1 SEPTEMBER 2000–28 FEBRUARY 2001, at 76 (2001), at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice2.pdf (discussing the U.N. regulations dealing with the nature and kind of prosecutors and judges on these panels). Due to the limited capacity of the International Criminal Tribunal for the former Yugoslavia (ICTY) to try all perpetrators of international crimes committed in Kosovo, it has been left to these hybrid courts to prosecute the less high-profile offenders. Strohmeyer, *supra* note 296, at 119. By the end of 2000, the courts had completed a total of thirty-five trials and investigations. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 55th Sess., at 8, U.N. Doc. 5/2000/1196 (2000). As of mid-2001, eighteen cases of international crimes were pending before domestic courts in Kosovo, including thirteen cases of war crimes, four cases of genocide, and one case of crimes against humanity. Strohmeyer, *supra* note 296, at 128 n.50. A total of nineteen international judges had been appointed by December 2001, with a goal of thirty-four to be hired by mid-2002. *See Justice*, Focus Kosovo, December 2001, at <http://www.unmikonline.org/pub/focuskos/dec01/focuskchron.htm>; *Interview with Clint Williamson*, head of UNMIK Department of Justice, FOCUS KOSOVO, April 2002, at <http://www.unmikonline.org/pub/focuskos/apr02/focusklaw1.htm>. For a more detailed discussion of the hybrid courts in East Timor, see Dickinson, *The Dance of Complementarity*, *supra* note 297. For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and*

Similarly, in Afghanistan, courts with local judges sitting alongside judges from other countries could be convened to try certain types of crimes, for example, violations of the laws of armed conflict, crimes against humanity, and terrorist acts outlawed by the international terrorism conventions. The creation of these courts is necessary if for no other reason than to accommodate the sheer numbers of people who otherwise might need to face trial before U.S. military commissions or in other fora. Moreover, as the East Timor and Kosovo experiences indicate, support for the establishment of a strong judiciary is an essential foundation for lasting peace.³⁰⁴ A hybrid domestic/international structure helps to provide a vehicle for training and consulting with the local population and helps to establish a degree of independence in cases involving intense ethnic conflicts and rivalries. Such a model may well be highly useful in Afghanistan, and important lessons can be learned from mistakes in Kosovo and Timor. Certainly, in order to be successful, significant financial resources are required. But such a hybrid judicial process could provide the best way of assuring accountability and deterring terrorism, human rights crimes, and violations of the laws of armed conflict.³⁰⁵ Although the United States might be unlikely to accept such a process for trying Taliban or Al Qaeda leaders, it might be willing to accept and support such trials for low-level Taliban or Al Qaeda operatives.

While neither an internationalized military commission nor a hybrid domestic/international tribunal located in Afghanistan would offer the full benefits of a formal international tribunal, both are far more likely to be established given the current political constraints, and both could offer at least some of the strategic advantages discussed previously. This is not to suggest that any of these international fora could be, or should be, the *only* forum in which to hold suspected terrorists accountable for their actions. Rather, my claim is that the existence of an international forum, in addition to other mechanisms, would at least help to promote the key strategic legal process interests described previously.

Nevertheless, if such an international forum were established, clear principles would be needed to determine which cases should be brought before it and which cases should be tried elsewhere. For example, an

the Rule of Law, 22 MICH. J. INT'L L. 371 (2001); Dickinson, *Mixed Tribunals*, *supra* note 296; Strohmeyer, *supra* note 296.

304. See Betts et al., *supra* note 303, at 380–82. See also Prosper, *supra* note 290, at 433–36.

305. Of course, there are significant hurdles that would need to be overcome in creating a mixed international tribunal that would be accepted by the local population. For a discussion of these issues, see Dickinson, *supra* note 293.

international tribunal would be the most appropriate for trying the highest ranked and most responsible perpetrators of the most serious crimes. Indeed, international courts since Nuremberg have been used in this way.³⁰⁶ Thus, the ICTY,³⁰⁷ the ICTR,³⁰⁸ the proposed special court for Sierra Leone,³⁰⁹ and indeed the International Criminal Court³¹⁰ all adopt versions of this principle. Although attempting to determine which perpetrators to try in an international forum has sometimes been difficult,³¹¹ the principle itself is a sound one and has been widely accepted. Moreover, if the jurisdiction of an international tribunal were limited to cases involving the September 11 attacks, many of the hazards posed by lingering disagreements about the definition and scope of terrorism could be avoided. Indeed, just this sort of temporal or incident-based limitation can be found in the statutes of the ICTR³¹² and, to a lesser degree, the ICTY.³¹³

In contrast, if a hybrid court in Afghanistan were established, it would probably be best-suited for trying lower-level Al Qaeda and Taliban operatives for crimes committed on Afghan soil (or with at least a link to

306. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Aug. 8, 1945, art. 6, 59 Stat. at 1547, 82 U.N.T.S. at 286 (providing for trial of “major” war criminals of the European Axis countries and conferring jurisdiction only over the serious international crimes of aggression, crimes against peace, and crimes against humanity).

307. See ICTY Statute, *supra* note 115, arts. 1–5 (establishing competence of court to consider “serious” violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 and conferring jurisdiction over only violations of the “grave breaches” provisions of the Geneva Conventions, violations of the laws of armed conflict, genocide, and crimes against humanity).

308. See *id.* arts. 1–4 (establishing competence of the court to consider “serious” violations of international humanitarian law committed on the territory of Rwanda, and in neighboring states if committed by Rwandans, from January 1, 1994 through December 31, 1994 and conferring jurisdiction of court over only genocide, crimes against humanity, and violations of Common Article 3 of Geneva Conventions and Protocol II to the Conventions).

309. See, e.g., S.C. Res. 1315, *supra* note 295, at 2 (recommending that special court for Sierra Leone should be competent to hear cases for serious violations of international law, including war crimes and crimes against humanity, and should have personal jurisdiction over those who bore the “greatest responsibility” for those crimes).

310. See Rome Statute, *supra* note 204, arts. 1, 5–8, at 2–10 (establishing competence of court to hear cases involving “the most serious crimes of international concern” and conferring its jurisdiction over only genocide, war crimes, crimes against humanity, and crimes of aggression).

311. Telford Taylor, for example, has criticized the selection of individuals indicted at Nuremberg as too hasty and therefore as leading to serious mistakes. See TAYLOR, *supra* note 140, at 90.

312. See ICTR Statute, *supra* note 268, art. 1 (establishing competence of court to consider cases arising in the territory of Rwanda, and in neighboring states if committed by Rwandans, between January 1, 1994 and December 1, 1994).

313. See ICTY Statute, *supra* note 115 (limiting competence of court to cases arising within the territory of the former Yugoslavia since 1991). A territorial-based limitation with respect to September 11 could pose problems because many perpetrators may never have set foot on U.S. soil and because establishing the requisite links to U.S. territory for jurisdictional limitations might complicate the cases.

Afghanistan). As between the hybrid court within Afghanistan and other Afghan courts, distinctions could be made based on the types of crimes committed, using the East Timor and Kosovo models. Relevant crimes might include crimes against humanity, violations of the laws of armed conflict, and perhaps crimes of international terrorism as defined by the existing terrorism conventions. Because the hybrid court could also serve the goal of ensuring more general accountability for serious human rights abuses committed before or during the Taliban regime, as well as abuses associated with the Northern Alliance insurgency itself, the court should have a relatively broad mandate to hear other Afghanistan-based human rights crimes as well.

IV. THE VALUE OF LEGAL PROCESS AMID SOCIAL AND POLITICAL CONFLICT

Thus far, I have presented arguments that the United States should try suspected terrorists in proceedings that comport with fundamental due process principles as a matter of domestic and international law, and, further, I have contended that *international* trials that comport with these principles—at least for those most responsible for the September 11 attacks—would best serve the strategic interests of the United States. The first set of arguments takes as a given the importance of the rule of law, both domestically and internationally. The second seeks to identify ways in which the observance of legal process values in the international realm, through the particular form of international adjudication, broadly advances U.S. interests. Thus, both sets of arguments rely to some extent on the notion that law quells private vengeance. In order to combat terrorism, on this view, we need to be perceived as complying with the rule of law ourselves. Fair procedures are important if we want to deter future acts of terrorism or at least not inspire new ones.

Although powerful, these approaches still may not address fully the law skeptics' concern that placing too much faith in the peacemaking power of law is somewhat naive in the fight against international terrorism. Too fine a respect for legal niceties will not work in this context, we are told, because law will inevitably be used to advance strategic interests and will be unable to bridge intractable social divisions, such as those between Islamic fundamentalists and the West. From this perspective, international law remains simply a set of formal principles to be used (or ignored) in order to advance strategic geopolitical interests, and, moreover, the schisms in the world run so deep that no amount of legal process can result in cooperation, compromise, or consensus.

One of the striking ironies of this law skeptic position, however, is that these are precisely the same types of arguments that critical legal theorists beginning in the early twentieth century repeatedly have made about ordinary domestic law.³¹⁴ Thus, American critical scholars have, like the international relations realists, argued that the interpretation of legal norms is inherently political and shaped by social interests and that there are deep conflicts within society that cannot be resolved through law. Yet, for the most part these critical scholars do not jettison the entire idea of legal process or judicial adjudication, and it is useful to consider why not. Although a more detailed analysis of these critical theorists and the application of their views to international law is beyond the scope of this Article, in this Part, I offer three principles about the value of legal process that I have derived from one such theorist, Robert Cover. In addition, I suggest how these principles might illuminate the role that legal process and adjudication can play even in the midst of divisive international social and political conflict.

I have taken inspiration from Cover because he, more than many others, explicitly acknowledged both the extent to which law is politicized—often violently so—as well as the degree to which human societies tend to be riven by conflict. Yet, despite these observations, Cover did not dispense with the need for law and adjudication. His work thus invites us to consider the way in which law and legal institutions gain their legitimacy and force in a world of competing and conflicting “norm-generating communities.” Although Cover did not focus particularly on international legal questions, I believe that the insights one may draw from Cover about the role of law and adjudication in the face of social conflict are relevant not only to questions of domestic law but also to those posed in the international context.

Cover does not shy away from the extent to which violence is bound up in the law. Indeed, he argues that law is itself violence, in at least two senses. First, law wreaks *physical* violence. Perhaps most famously, he begins his article *Law's Violence* with the provocative sentence: “Legal interpretation takes place in a field of pain and death.”³¹⁵ Cover reminds us that, at the end of legal process, someone may be ordered to surrender

314. See generally William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991, at 266 (Michael J. Lacey & Knud Haakonssen eds. 1991) (providing a lucid and concise account of the way in which the legal realist insights shaped the development of more recent strands of American legal theory).

315. ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER, *supra* note 243, at 203 (citation omitted).

property or be taken into custody, or, in the most extreme case, executed: “A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, . . . even his life.”³¹⁶ Furthermore, the act of legal interpretation seeks to legitimize this imposition of violence.³¹⁷ Law does its violent work, leaving behind “victims whose lives have been torn apart by these organized, social practices of violence.”³¹⁸

Second, and perhaps more importantly for our purposes, Cover argues that law does violence not only through meaning but *to meaning* by enforcing an official narrative and stamping out (or attempting to stamp out) other interpretations of norms that arise from various norm-generating communities:

Judges are a people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.

But judges are also a people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence.³¹⁹

Cover sees official state law not according to the classic liberal story, in which law replaces private vengeance and fills a vacuum created by the *absence* of law, but rather as the “jurispathic” imposition of a dominant interpretation that curbs alternative interpretations.³²⁰ This view stems from his belief that many types of communities, not simply the nation-state, generate norms that could be called law in some sense.³²¹ Thus, an official state interpretation necessarily attempts to replace numerous existing “unofficial” interpretations. Moreover, although the official state interpretation can alter competing interpretations dramatically, it cannot destroy them completely. Ultimately, in a world of such competing narratives, official state interpretations of law must depend for their force

316. *Id.*

317. By repeatedly stressing the violence inherent in the law, Cover has sought to resist the trend to treat the interpretation of legal texts as merely a kind of interpretation similar to the interpretation of literature. Thus, Cover emphasizes that “[n]either legal interpretation nor the violence it occasions may be properly understood apart from each other.” *Id.*

318. *Id.*

319. ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER*, *supra* note 243, at 95, 155.

320. *Id.*

321. *See id.* at 139–40.

on the acceptance of those interpretations by the inhabitants of the community over which they purport to establish authority.³²²

If one accepts this proposition and views violence as inherent in law, one might say that it then would not matter which legal response the United States chooses in order to hold terrorists accountable for the September 11 attacks. There should be no difference between a trial and a summary execution, or between an international proceeding and a domestic one. Yet, taking inspiration from Cover's refusal to jettison law and adjudication in the face of deep social conflict, I suggest that there are several reasons for retaining law and legal process that can be derived from his insights. These reasons cast the debate about the appropriate proceedings for trying terrorists in a different light, one which may help to address the law-skeptics' concerns.

A. MULTIPLE ACTORS IN THE SYSTEM ACT AS A CHECK

First, one of the distinctions between the violence of the law and other forms of violence is the extent to which many actors in a given institutional apparatus must be mobilized to do law's violent work, according to collective decision rules. As Cover suggests, "[N]o judge acts alone. . . . The application of legal understanding in our domain of pain and death . . . always require[s] the active or passive acquiescence of other judicial minds."³²³ To implement a death sentence, for example, "[t]he most elementary understanding of our social practice of violence ensures that a judge know that she herself cannot actually pull the switch."³²⁴ A trial judge, therefore, relies on the fact that there will always "be another judge to whom application could be made to stay or reverse her decision."³²⁵ Moreover, it is not merely other judges who must be persuaded, but also the prison guards, the executioner, and other penal officials.³²⁶

Thus, there appears to be something about the multiplicity of actors involved that tames and legitimates law's violence. The fact that no one judge carries out an execution, as Cover suggests, "is not a trivial convention. For it means that someone else will have the duty and

322. See *id.* at 98–99 (noting that this "normative universe is held together by the force of interpretive commitments—some small and private, others immense and public").

323. ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 243, at 235 (emphasis omitted).

324. *Id.* at 234.

325. *Id.*

326. See *id.*

opportunity to pass upon what the judge has done.”³²⁷ Although the warden and the penal officials differ from the various judges engaging in acts of interpretation (since their compliance is assumed to be relatively automatic), they nonetheless must accept the authority of the judges and the decision rules that give priority to some judges’ decisions over others in order to carry out law’s violent work. All of these actors must accept the official story, at least enough to be willing to engage in the acts necessary to do law’s violence. The *collective* nature of law’s violence therefore acts as an important check:

So let us be explicit. If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it. . . . The alternative is truly unacceptable—that they be within our polity but outside the discipline of the *collective* decision rules and the individual efforts to achieve outcomes through those rules. The fact that we require many voices is not, then, an accident or peculiarity of our jurisdictional rules. It is intrinsic to whatever achievement is possible in the domesticating of violence.³²⁸

Cover, of course, is somewhat ambivalent about this conclusion, and elsewhere in his work he is less comfortable about the extent to which law’s violence *can* be domesticated.³²⁹ Yet his emphasis on the checking power of the collective is significant.

Moreover, this insight offers a different way of thinking about the appropriate forum for trying suspected terrorists. The Administration’s military commission proposal severely limits the number of actors involved in the imposition of law’s violence by denying civilian judicial review and offering the possibility that trials will be held in secret. The fact that the order and regulations were issued without consultation with or approval by Congress also suggests a limited checking function. And, as discussed previously, neither the order nor the regulations provide a right of appeal to a non-military body.³³⁰ Thus, fewer actors are involved in the relevant decisionmaking, and those who are involved form part of an insular community with a hierarchical command structure, namely, the military. Domestic criminal trials would offer a greater check, and an international tribunal would offer a still greater check, as the number of individual actors

327. *Id.*

328. *Id.* at 236.

329. See Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW’S VIOLENCE* 211, 233–41 (Austin Sarat & Thomas R. Kearns eds., 1992).

330. Nov. 13 Order, *supra* note 8, at § 7(b)(2); DOD Regulations, *supra* note 10, at § 6(h)(4).

required to implement a given legal decision would be larger and more diverse.

B. OFFICIAL LEGAL SETTINGS SERVE AS A FORUM FOR CONFLICTING
NARRATIVES

Second, legal settings serve as a forum in which social narratives emerge. As Cover notes, law includes not only formal rules or precepts, a “corpus juris,” but also a “language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it.”³³¹ These narratives imbue law both with meaning and with its normative force.³³² Moreover, the narratives of law form a way of comprehending current social reality and debating the shape of future worlds:

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains.³³³

Inevitably, these narratives are both plural and collective.³³⁴

When these narratives emerge, however, they often—if not always—conflict. Different groups or subgroups read the precepts differently, or attach different significance to them. An authoritative precept may be national in character, but “the meaning of such a text is always ‘essentially contested,’ in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation.”³³⁵ For example, as Cover observes, all Americans share the First, Thirteenth, and Fourteenth Amendments of the Federal Constitution as a “national text,” but we “do not share an authoritative narrative regarding [the Amendments’] significance.”³³⁶ Indeed, “even if we had a national history declared by law to be authoritative,” we would not share the same account of that history.³³⁷ “Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis.”³³⁸

331. Cover, *supra* note 319, at 101.

332. Indeed, legal narratives “establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic.” *Id.*

333. *Id.* at 102.

334. *See id.*

335. *Id.* at 111 (citation omitted).

336. *Id.*

337. *Id.*

338. *Id.*

Furthermore, neither law, nor the narratives that emerge from the interpretation and application of law, fall exclusively within the domain of the state. As Cover argues, “[T]he state is not necessarily the creator of legal meaning.”³³⁹ Other groups—subnational, supranational, or transnational—might serve as the basis for the generation of norms having a legal character.³⁴⁰ Nevertheless the language of law and its official setting can provide both a forum and a framework within which these narratives emerge, contributing to them and shaping them. The type of law at issue in the given forum becomes the language of contest among the various collectives that might be subject to it. Thus, an official state forum differs from other fora not in kind but rather in degree—it alone carries with it the coercive power capable of being deployed to attempt to enforce a particular interpretation.³⁴¹ Although an official interpretation backed by force cannot kill off competing interpretations, it can alter them dramatically.³⁴²

Because Cover recognizes that legal process generates and shapes narratives significant to the communities involved in the proceedings, his work suggests a way of thinking about the question of where (and how) to try suspected terrorists in terms that have largely been missing from the debate thus far. We must recognize that the process that is used will generate a narrative, or indeed, multiple narratives, that will play a significant role in determining law’s legitimacy. Secret summary trials before military commissions as proposed by the Administration, like the more extreme option of summary executions, would not provide a forum for conflicting narratives. To be sure, the Administration’s support for the military commissions likely stems in part from this fact. Advocates of the secret military trials are concerned that terrorists might use a more open judicial process to make propaganda-type statements to criticize the United States and gain greater support for terrorism.³⁴³ Yet even summary secret trials or summary executions could not completely quell the alternative narratives. Rather, such an approach merely moves these alternative stories outside the legal forum and adds an additional twist: a story about

339. *Id.* at 103.

340. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 131 U. PA. L. REV. (forthcoming Dec. 2002) (arguing that jurisdictional rules should be modified to account for the fact that such non-territorial communities articulate norms in the public forum of law).

341. See Cover, *supra* note 319, at 144.

342. See *id.* at 154.

343. See Ashcroft Testimony, *supra* note 4 (“[A]re we supposed to . . . create a new cable network of Osama PD or what have you, provide a world-wide platform from which propaganda can be developed?”).

American injustice. Although such a tale might also be told within a legal forum—as Slobodan Milosevic is currently attempting to do during his trial for genocide at the Hague³⁴⁴—channeling that story into a legal forum is more likely to tame it. And the more the procedures in place are perceived as fair, the better the chance that any story about injustice will lose traction and be contained.

With regard to the choice between domestic and international trials, I have already suggested that, as in the Eichmann trial, the dominant narrative likely to emerge in a domestic trial—at least for those most responsible—could undermine the international nature of the crimes committed.³⁴⁵ This in turn could impede international efforts to combat terrorism. The attacks might well be turned into a story about the terrorists' anti-Americanism, rather than into an account of the international community standing together and isolating Al Qaeda. Indeed, without an international proceeding of any kind, there would be little, if any, chance that the latter account *could* emerge. The trial of the suspected terrorists would thus play no role in building bridges between the United States and other countries in efforts to combat terrorism.

C. LAW PROMOTES ACCEPTANCE OF SHARED MECHANISMS FOR ADJUDICATING VALUES

Third, out of the clash among conflicting interpretations of norms articulated *within* legal fora, acceptance of shared mechanisms for adjudicating values might emerge. That is, one might return to the notion of law playing a peacemaking role—but through the medium of the language and proceedings of law rather than simply through its disciplining authority. On this view, law—and in particular adjudication—tames conflict at least to a degree because of the discourse it creates. Law constructs an aspirational community that, over time, binds people together despite conflict.

Although Cover does not explicitly assert this justification for law and adjudication, it is implicit in his work. Indeed, Cover emphasizes the way in which the mythos arising from a legal setting is always collective and holds a normative force over that collective.³⁴⁶ Moreover, he suggests that without official legal narratives backed by force, the conflicting narratives

344. See, e.g., Ian Fisher, *Combative Milosevic Displays a Flair for Courtroom Tactics*, N.Y. TIMES, Feb. 20, 2002, at A4.

345. See *supra* text accompanying notes 219–222.

346. See COVER, *supra* note 319, at 102.

arising from competing norm-generating communities would be left to play out in an undisciplined, violent setting.³⁴⁷

And as discussed previously,³⁴⁸ Cover even wrote about the power of international criminal trials, such as the Nuremberg and Tokyo proceedings, “to project . . . new legal meaning into the future.”³⁴⁹ To Cover, the use of the legal forum was significant: in the case of Nuremberg and Tokyo, “[t]he fact of having shed blood in the juridical mode made the precedent one of special character.”³⁵⁰ Such a decision constructed procedural and substantive norms that could then be recognized and appropriated by a wide variety of communities.³⁵¹

Thus, we can see that conflict mediated within the language of the law can build acceptance for, if not substantive norms, then at least procedures for adjudicating conflict. That is, conflict may be endemic to society, but law and legal process provide a framework for setting boundaries to that conflict and a language for bridging at least some differences. The debate, by taking place within the language and institutions of the law, can draw disparate communities into the discussion, at least to a degree.

Stuart Hampshire has recently developed an argument along these lines.³⁵² Drawing on Plato’s analogy between the soul and the city, he takes as a starting point the observation that conflict inheres in all society—whether international, national, subnational, or transnational—and indeed manifests even within the individual psyche.³⁵³ Moreover, he argues that “justice cannot consist of any kind of harmony or consensus either in the soul or in the city, because there never will be such a harmony, either in the

347. *See id.* at 236.

348. *See supra* text accompanying notes 243–245.

349. COVER, *supra* note 243, at 196.

350. *Id.*

351. Indeed, although the Nuremberg and Tokyo trials were imposed by military victors, Cover describes the way in which the norms of those tribunals were available for appropriation by alternative communities seeking to challenge established power. *See id.* at 197 (stating that although the tribunals were “employed . . . in the interests of power,” the precedent created “could not be so circumscribed”). For example, Cover notes that, in 1967, Bertrand Russell and Jean Paul Sartre convened an “International War Crimes Tribunal” purporting to adjudicate whether the United States had violated the Nuremberg norms in prosecuting the Vietnam War. *See id.* at 198–201. One could also view the growing use of truth commissions in a widely disparate range of countries as evidence of the way in which the norms of Nuremberg and Tokyo have been accepted and appropriated to justify new normative systems. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 291–97 (2001) (listing twenty truth commissions established since 1982).

352. *See generally* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000) (discussing the relationship between conflict and the law).

353. *See id.* at 3–4.

soul or in the city.”³⁵⁴ According to Hampshire, there is no universal principle of substantive justice. Rather, “[f]airness and justice in *procedures* are the only virtues that can reasonably be considered as setting norms to be universally respected.”³⁵⁵ Building again on “Plato’s inspired analogy between justice in the workings of an individual mind and justice in the city,” he suggests that “the one common and indisputable basis of morality, which makes a bridge between all moral differences in conflict-prone humanity[, is] the habit of argument within the solitary soul that is modeled on the habit of argument within assemblies, committees, and law courts.”³⁵⁶ From this observation, he builds his thesis that justice is itself conflict. Justice inheres in procedures and institutions that both allow opposing points of views to be heard, and do so in a manner that follows established, regular rules.³⁵⁷

In the international arena, Hampshire contends that “the human race is unlikely to survive for very long unless reasonably fair procedures develop and become accepted for negotiations and arbitrations in the settling of international conflicts threatening war.”³⁵⁸ He suggests that priority should be placed on “bringing into existence institutions and recognized procedures [rather than] declarations of universal principles,” and that “institutions earn respect mainly from their customary use and from their gradually acquired familiarity.”³⁵⁹

One of the most potent critiques of using an international legal proceeding to try those responsible for the September 11 attacks (or indeed other acts of terrorism) is rooted in the concern that the divisions between the United States and the rest of the world, in particular the Arab-Muslim world, run too deep for an international proceeding to work. For example, critics point to the inability of the international community, even after decades of effort, to develop a coherent definition of terrorism. In addition, they point to serious differences on other issues that likely would spring to the forefront of any effort to construct an international forum to try terrorists. For example, some point to the discord that erupted at the recent World Conference on Racism, in which “several Islamic countries sought to use the forum to pursue their political grievances against Israel.”³⁶⁰ Any effort to establish an international tribunal to try terrorists would prompt

354. *Id.* at 4.

355. *Id.* at 53 (emphasis added).

356. *Id.* at 72.

357. *See id.* at 71, 97.

358. *Id.* at 40.

359. *Id.*

360. Koh, *supra* note 13, at 343 n.41.

many of these same countries to “use their diplomatic clout” to contend that such a tribunal “should also try Israeli officials who bore no connection to the September 11 attacks,” a proposal “that Western proponents of the tribunals would find politically unacceptable.”³⁶¹ One might also think that such deep differences between countries and cultures would render an Arab or Muslim judge incapable of presiding over the trial of an Arab or Muslim defendant accused of acts of terrorism in a fair or impartial manner. And even if such a trial did take place, one might be concerned that, no matter how many procedural protections are provided, there would be little chance that a verdict convicting an Arab or Muslim defendant would be accepted as fair in the Arab-Muslim world.

Nevertheless, although rifts between the United States and the Arab-Muslim world certainly exist, and undeniably run deep, the existence of such rifts does not necessarily make international legal proceedings impossible.³⁶² Indeed, the international realm does not have a monopoly on social conflict and dissension. Serious conflicts exist within societies as well, yet such social rifts do not make law and legal process unattainable. Even if one accepts that greater division exists *among* nation-states than *within* any one of them, the difference might be better seen as one of degree rather than of kind. The existence of social divisions should not itself be a bar to efforts to set up an adjudicatory process involving communities on both sides (or multiple sides) of the divide—otherwise, even domestic legal proceedings would be impossible and illegitimate.

It is important to emphasize that I am not suggesting that a legal proceeding of any kind, let alone an international trial of terrorists, creates a shared narrative or cultural consensus. It would clearly be too much to hope for that one could create such a shared narrative in the international context. But even within the domestic setting, it would be difficult to achieve such a collective narrative, given the degree of social dissension that exists.³⁶³ Nevertheless, legal proceedings help to forge what we might

361. *Id.*

362. And of course the Arab-Muslim world does not have a monopoly on terrorism. Even some of the suspected perpetrators of the September 11 attacks, widely believed to be members of the Al Qaeda terrorist network, are citizens of Western countries. For example, Zacarias Moussaoui is a citizen of France. Nor are all bin Laden members of Arab descent, as evidenced by the arrest of John Walker Lindh, a U.S. citizen apprehended while fighting for the Taliban and accused of belonging to Al Qaeda.

363. Certainly, Cover would be unlikely to expect such consensus. *See, e.g., COVER, supra* note 319, at 113 (“One great strength and one great dilemma of the American constitutional order is the multiplicity of legal meanings created out of the exiled narratives and the divergent social bases for their use.”).

call provisional compromises, both with respect to certain substantive norms—such as acts that fall so beyond the pale of the acceptable in almost all societies that they can be condemned as criminal—and procedural norms of fairness that allow people to accept outcomes even in the face of political or social disunity.

In the international sphere, the issue of what constitutes fair procedures may be the easiest place to find agreement. Although differences in the precise content of fair procedures might complicate efforts to establish an international forum, there is already a broad base of consensus on this issue, and it is unlikely that disagreements would be insurmountable. The International Covenant on Civil and Political Rights, for example, has been widely ratified and establishes a baseline set of procedural norms,³⁶⁴ as do numerous other treaties. Indeed, as discussed previously,³⁶⁵ some procedures are so widely accepted that they can now be considered a matter of customary international law. Moreover, the existing international criminal tribunals for the former Yugoslavia and Rwanda represent an existing compromise on many procedural issues. Judges from a diverse array of countries sit on these tribunals, including judges from the Arab-Muslim world.³⁶⁶ Finally, even countries as far apart ideologically as the United States and Libya ultimately have been able to accept as fair the trial of Libyan terrorism suspects in a Scottish court convened in the Netherlands. Ironically, the biggest obstacle to agreement about appropriate procedures for an international proceeding to try terrorism suspects might lie in the reluctance of the United States to adhere to widely accepted standards for just adjudication, rather than the Arab-Muslim world's reluctance to accept "Western" conceptions of fair process.

But in addition to compromises about *procedure*, provisional compromises about *substantive* norms relating to the September 11 attacks may also be possible. Numerous governments, including many Arab-Muslim governments, have strongly condemned the attacks as a violation of international law. One need not delve into the contentious ground of the definition of terrorism to view the attacks as an international crime, because they would very likely qualify as crimes against humanity.³⁶⁷ Even within the highly contested debate about what constitutes terrorism,

364. See ICCPR, *supra* note 70, art. 2, 999 U.N.T.S. at 173–74. One hundred and forty-eight countries have ratified the ICCPR, including Libya, Afghanistan, Syria, Kuwait, Iran, Iraq, and Egypt.

365. See *supra* text accompanying notes 106–115.

366. Judge Amin El Mahdi of Egypt, for example, sits on the ICTY. United Nations ICTY General Information, *supra* note 182.

367. See *supra* text accompanying notes 204–208.

there is widespread agreement that certain acts, such as the hijacking of airplanes, the commission of acts of violence on airplanes, the taking of diplomatic hostages, and the like, are so beyond the pale that they qualify as criminal. The multiple, widely ratified terrorism conventions reflect this view.³⁶⁸ And elements of the September 11 attacks would clearly fall within these existing treaties.³⁶⁹ Thus, although widespread agreement on the precise scope of terrorism does not exist—one person’s terrorist is still another person’s freedom fighter—there is a broad-based compromise that certain terrorist acts are so extreme that they qualify as criminal acts in any circumstances. This compromise is almost certainly strong enough to sustain an international trial of the perpetrators of the September 11 attacks.

Furthermore, the purported normative differences between “Western” and “Muslim” interpretations of the Al Qaeda attack may be exaggerated. Indeed, a strong argument can be made that the September 11 attacks and other similar terrorist acts violate Islamic law and Islamic principles. Sohail Hashmi has observed that “the overwhelming consensus of modern scholars is that Islamic ethics endorses international humanitarian law, including the Geneva Conventions, that makes the deliberate targeting of noncombatants and the terrorizing of civilian populations a war crime.”³⁷⁰ Hashmi traces these principles to a verse of the Qur’an that states: “And fight in God’s cause against those who wage war against you, but do not transgress limits, for God loves not the transgressors.”³⁷¹ He notes that, according to authoritative tradition, the Prophet Mohammed always instructed military commanders to “adhere to certain restraints, including giving fair notice of attack and sparing women and children.”³⁷² Successors of the Prophet have further developed these rules, clearly establishing the principles of “discrimination [with respect to targets] and proportionality of means.”³⁷³ Hashmi also emphasizes that modern Muslim

368. See *supra* text accompanying notes 209–215.

369. See *supra* text accompanying notes 209–215.

370. Sohail Hashmi, *Terrorism and Jihad* 7 (Nov. 9, 2001) (on file with author) [hereinafter Hashmi, *Terrorism*]. See also Sohail Hashmi, *The Terrorists’ Zealotry Is Political Not Religious*, WASH. POST, Sept. 30, 2001, at B1.

371. Hashmi, *Terrorism*, *supra* note 370, at 6 (quoting Qur’an 2:190).

372. *Id.*

373. *Id.* at 8. Hashmi notes that the first caliph, Abu Bakur, is recorded as advising:

Do not act treacherously; do not act disloyally; do not act neglectfully. Do not mutilate; do not kill little children or old men, or women; do not cut off the heads of the palm-trees or burn them; do not cut down the fruit trees; do not slaughter a sheep or a cow or a camel, except for food. You will pass by people who devote their lives in cloisters; leave them and their devotions alone. You will come upon people who bring you platters in which are various sorts of food; if you eat any of it, mention the name of God over it.

Id.

interpreters have continued to develop these principles. For example, the Syrian scholar Wahba al-Zuhayli interprets the verse from the Qu'ran quoted above as saying: "Do not fight anyone unless they fight you. Fighting is thus justified if you fight the enemy and the enemy fights you. It is not justified against anyone who does not fight the Muslims" ³⁷⁴ Zuhayli thus "clearly rules out the possibility of collective responsibility, that all citizens belonging to a perceived foe are somehow responsible." ³⁷⁵ Other scholars have made similar arguments. Indeed, an eminent historian of Islam at Harvard University, Roy P. Mottahedeh, recently has launched a project to involve Muslim scholars in drawing up an indictment of Bin Laden under Islamic law. ³⁷⁶ Thus, at least on certain topics, there is a very real possibility that compromises and provisional agreements even about substantive norms can be forged.

The insights that can be drawn from the work of Robert Cover, and approaches that can be drawn from domestic critical legal theory more broadly, offer an alternative set of arguments about why law is still important despite conflict, whether that conflict exists within a state or internationally. These arguments do not idealistically assume that legal process will quell all private violence, heal all social divisions, or forge complete consensus. To the contrary, they start from the premise that deep underlying social conflict will always result in bitter disputes about the interpretation of legal norms and that interpretations of those norms will often be affected or determined by political commitments. Yet adjudication remains essential as a way of ensuring the involvement of multiple actors, creating a forum for dispute among competing narratives, and providing a context for the development of provisional compromises about procedural and substantive norms. Thus, even from the skeptical vantage point of critical legal theory, the adjudicatory process offers significant advantages despite the fact that violence and political conflict are everywhere and always present.

IV. CONCLUSION

Moments of national crisis or uncertainty often make it seem as if the rule of law is merely a quaint artifact of a more innocent time. Indeed, one might be tempted to think that if the rule of law cannot prevent acts of destruction like the ones we witnessed on September 11, then we might be

374. *Id.* at 9.

375. *Id.*

376. Alan Cooperman, *Scholars Plan to Show How Attacks Violated Islamic Law; Muslim Jurists Sought to Draw Up an "Indictment,"* WASH. POST, Jan. 20, 2002, at A15.

better off jettisoning belief in law altogether. Instead, we might turn to the imagined security of power politics and military muscle.

The Bush Administration has largely embraced this perspective. Particularly with regard to international law, Administration officials have rarely acknowledged the force of legal norms even when they are obeying them. Such an attitude reinforces the view that law in general, and international law in particular, are merely aspects of political strategy and therefore lack any independent impact or usefulness. In the thrall of this conception of international law, the Administration has held hundreds of people in indefinite secret detention and issued a surprising order stating that individuals suspected of terrorism could be tried before military commissions rather than in domestic or international fora.

In this Article, I have attempted to refute the law skeptics and to make a case both against military commissions and in favor of an internationalized process. First, I have recounted the rule of law arguments that the military commissions and the mass detentions of terrorism suspects as proposed by the Administration would violate the United States Constitution, a variety of international treaties to which the United States is a signatory, and customary international law. Second, I have observed that even if one believes that obedience to legal niceties should take a back seat to strategic interests, an international legal process would actually best serve those strategic interests by helping to promote international cooperation in the fight against terrorism, the capture and extradition of terrorism suspects, the isolation of Al Qaeda from the rest of the Islamic world, and the lessening of resentment that might breed further acts of terrorism. As the Roosevelt administration realized in moving to establish the Nuremberg trials, international legal process can be an essential part of a *realpolitik* consideration of effective policy. Thus, although an international legal process surely cannot guarantee our safety or even our success in stamping out Al Qaeda, such an approach stands the best chance of advancing our long-term interests in the fight against terrorism. Third, I have suggested that an international process would not be difficult to establish and that, even if the political will for an international tribunal is lacking, an internationalized military commission and a hybrid international/Afghan court offer effective alternatives that provide at least some of the benefits of an international process while still providing more U.S. control. Moreover, I have noted that none of the various options with regard to accountability for acts of terrorism are mutually exclusive, and that some combination of mechanisms is likely to be both necessary and desirable. Fourth, I have offered an alternative perspective on the

importance of adjudication drawn from the insights of Robert Cover. As Cover and other domestic critical legal theorists have made plain, it is not only international law that is inevitably a by-product of social disunity and political decisionmaking, but domestic law as well. Yet such theorists do not dismiss the importance of adjudication because they see legal process as a way of including multiple participants in decisionmaking, providing a forum for competing narratives, and offering the hope of developing provisional compromises about procedural and substantive norms over time. Thus, law is not rendered irrelevant by the existence of political imperatives and social disunity; it is instead rendered all the more necessary.

Together these arguments provide several possible responses to those who say law is an unnecessary or burdensome straight-jacket at a time when important interests are threatened. Moments of national emergency not only test our commitment to the rule of law, but also force us to consider why we care about the rule of law in the first place—to consider what values adherence to law’s rule serves, and what interests it advances. In short, they force us to ask what law gets us, as a nation and as a people. The answers to these questions are far less obvious than one might assume. Nevertheless, by suggesting a number of different avenues for approaching this question, I hope that I have provided a space for further consideration of the various ways in which the norms of legal process are both useful and important, even in (and perhaps especially in) a time of national crisis.