
Detention and Prosecution of Alleged Terrorists and Combatants

by Jonathan Tracy*

I. INTRODUCTION

“ALL I AM ASKING FOR IS TO BE TREATED LIKE EVERY OTHER PERSON IN THE UNITED STATES WHO IS ACCUSED OF A CRIME, INCLUDING TERRORISM, AND TO BE GIVEN A FAIR TRIAL IN AN AMERICAN COURT,”¹ said Ali Saleh Kahlah al-Marri, speaking through his attorney in a recent article in *The New Yorker*. In contravention of centuries of jurisprudence, the United States has discarded the criminal trial in favor of preventative detention during the “war on terror.” It seems, however, that al-Marri—the last individual held inside the United States with the “enemy combatant” classification—will finally get his wish. Al-Marri’s military detention ended and federal prosecutors indicted him for conspiring to provide material support to al-Qaeda.² Thus, al-Marri will likely receive a fair trial, an opportunity that every criminal suspect—including an alleged terrorist—deserves.

The administration of President Barack Obama has taken other steps to roll back some detention policies of the administration of former President George W. Bush. On January 20, 2009, Obama ordered the closure of the detention facility at the U.S. Naval Base at Guantánamo Bay, Cuba within one year.³ While this is a positive step toward compliance with international law, the closure of the Guantánamo Bay detention facility, by itself, is insufficient. Attorney General Eric Holder recently stated that it is essential that the administration’s new policy to govern detainees “operate in a manner that strengthens our national security, is consistent with our values and is governed by law.”⁴ If Obama hopes to achieve these aims, preventative detention in any context outside of an actual armed conflict as defined by international humanitarian law (IHL), and any trial in which rights fall short of constitutional and human rights law requirements must be rejected. Closing Guantánamo is appropriately viewed as just the beginning.

This article examines two questions. First, can the United States preventatively detain al-Qaeda and Taliban operatives? Second, can the United States use a system lacking significant features of a fair trial to criminally prosecute al-Qaeda and Taliban operatives?

II. THE UNITED STATES MAY NOT PREVENTATIVELY DETAIN ALLEGED TERRORISTS EXCEPT IN STRICT ADHERENCE TO IHL

Since the attacks on September 11, 2001, several executive orders and statutes have claimed to grant authority to detain



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President Obama signs the order to close Guantanamo.

“enemy combatants” without access to trials or certain procedural safeguards. After protracted litigation, the U.S. Supreme Court has held many aspects of these orders and laws unconstitutional, but the underlying assertion of power to detain enemy combatants without access to trial remains. There is cause for concern that the Obama administration is continuing to adhere to the “war on terror” mentality.

The Department of Justice (DoJ) recently filed an alarming brief in *In Re Guantánamo Bay Litigation* in the U.S. District Court for the District of Columbia. The Obama administration reaffirmed the Bush administration’s assertion of the power to preventatively detain certain persons.⁵ This suggests that preventative detention will continue after Guantánamo Bay closes. While the Obama brief declares an end to the categorization “enemy combatant,” the substance of Bush’s policy remains: “The President . . . has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces . . .”⁶ While Obama is limiting the rhetoric long associated with the “war on terror,” his policies continue many of Bush’s, including reliance on a war paradigm.

Proponents of preventative detention rely on an emotional argument and several flawed legal arguments. Fear encapsulates the emotional argument, which essentially states that certain persons—“human missiles of destruction”⁷—pose an existen-

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[Obama] must avoid trying alleged terrorists in any court other than a regularly constituted court offering the full panoply of constitutional rights and privileges.

tial threat to the United States and its interests, which justifies their preventative detention. This ignores a significant feature of modern, liberal democratic governments: the fair trial. The right to a fair trial, an idea born of the Enlightenment, is found in international law⁸ and in U.S. domestic law.⁹ Appeals to our fear of “human missiles of destruction” weakened respect for this fundamental right. While the United States and other nations face a significant terrorist threat, this threat does not justify discarding fundamental values and principles of law. Some proponents of preventative detention claim that human rights groups, by holding fast to long-established principles, exhibit a callous disregard for the potential threat, especially faced by Iraqi and Afghan civilians, from released detainees. As a former U.S. Army judge advocate who served in Iraq for fourteen months, I understand the threat posed to Iraqis and Afghans by terrorists who lack fundamental respect for human life. The U.S. policy apparatus, however, must strike at the roots of terrorism and societal disaffection rather than compromising our principles. Full respect and realization of all human rights would actually go a long way toward eradicating many of the contexts within which terrorism breeds.

The flawed legal arguments rest on several bodies of law. The Bush administration relied on the naked proposition that the inherent powers of the “commander in chief” authorized preventative detention. Thankfully, the Obama administration shelved this argument in its brief. Instead, the government relies on two bodies of law in tandem: U.S. law and IHL. According to this argument, U.S. law sanctions preventative detention since the U.S. continues to engage al-Qaeda and the Taliban in an “armed conflict.”¹⁰ After 9/11, all three branches of government declared the United States at war with al-Qaeda: Congress in the 2001 Authorization for Use of Military Force Against Terrorists¹¹; the Supreme Court in *U.S. v. Hamdi*,¹² and statements from the previous and current presidential administrations. According to the Obama administration, since an armed conflict exists, IHL principles apply. This is not an appropriate conclusion. During properly classified armed conflicts, states may preventatively detain enemy forces to keep them from returning to the battlefield. Due to the considerable power associated with this right, strict rules apply within international law regarding when an armed conflict exists giving rise to this authority. When armed conflict does not exist, human rights law applies, under which detention must result from a fair trial.¹³

The issue becomes whether it is proper to classify our fight against al-Qaeda as an armed conflict. The United Nations (UN) Charter is the supreme source of international law in this area. It prohibits states from the use of force and the threat of force.¹⁴ The International Court of Justice (ICJ) considers this prohibition to be a *jus cogens* norm, and therefore a non-derogable

rule.¹⁵ As exceptions to the general rule, the UN Charter allows resort to armed force in two instances. The first exception allows the UN Security Council to authorize force in order to maintain international peace and security,¹⁶ and the second permits acts of self-defense under Article 51:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . . until the Security Council has taken measures necessary to maintain international peace and security.”¹⁷

While contention surrounds the definition of “armed attack,” state practice, decisions of the ICJ and actions taken by the United Nations must inform the discussion. Simply put, an armed attack can be carried out by conventional armed forces, armed bands or irregulars as long as the attack is “sufficiently grave” and is not an isolated or limited use of force.¹⁸ The U.S. government has traditionally assumed that terrorist attacks can be classified as armed attacks, which is an assumption that predates 9/11. Most states and many international lawyers, however, disagree unless the terrorist act occurs within the context of an ongoing-armed conflict.¹⁹ No armed conflict existed, or could have existed, between the United States and al-Qaeda on September 11, 2001 since armed conflict requires “protracted armed violence” between two or more states or within one state against “organized armed groups.”²⁰ To attempt to fit the U.S./al-Qaeda struggle within that definition would require a significant linguistic perversion.

The U.S. government reliance on UN Security Council Resolution 136821 for international support for its armed conflict with al-Qaeda is misplaced. The Resolution recognized the “inherent right of individual or collective self-defense in accordance with the Charter.”²² This does not express approval of a state’s ability to declare “war” on al-Qaeda. Instead, it stresses the right of self-defense under the Charter, which does not include attacking a non-state actor for a terrorist attack. If anything, the Security Council acquiesced silently to the United States’ use of force, but it did not sanction the use of force. Under international law, 9/11 should have been considered a heinous criminal act, not an act of war. The U.S. government’s assertion that an armed conflict exists does not make it so.

Of course, there are some academic and policy experts who wish to “update” IHL by expanding the definition of “armed conflict” and “armed attack.” They claim that current IHL definitions cannot address Twenty-first Century threats. Any changes in this vein would be dangerous to law and policy for decades to come. The horrors of the Second World War informed the UN Charter’s rules on the use of force and current IHL principles, which are both intended to restrict armed conflict. To expand

this area of law would increase the likelihood of horrors the world sought to minimize after 1945 by making it easier for a state to resort to armed force.

Nevertheless, since the United States assumes a state of war exists, it claims the right to preventatively detain. While the United States did, in fact, capture some Guantánamo detainees during armed conflict in Afghanistan, a significant problem exists; the United States violated IHL by moving the individuals across the globe for purposes of interrogation without conducting certain procedural safeguards required under the Third Geneva Convention and U.S. Army Regulation 190-8. These provisions require that if any doubt exists about a captured person's status, a hearing must be held to determine whether he is a prisoner of war, war criminal, or civilian.²³ The U.S. military did not conduct any hearings until years after capture and they took place thousands of miles away from Afghanistan. Even more troubling is that many Guantánamo detainees were not combatants on a battlefield—individuals fighting, or providing direct support to armed groups fighting U.S. military forces in a theater of ongoing military operations.²⁴ A significant difference at law exists between individuals captured on a battlefield in Afghanistan in 2001 and someone arrested in a Pakistani safe house in 2003 accused of organizing the 9/11 terrorist attacks. The former are armed combatants subject to IHL and the latter is a terrorist subject to criminal justice.

Even within the contexts of the ongoing-armed conflicts in Iraq and Afghanistan the United States should not exercise the power of preventative detention. During “international armed conflicts”—conflicts between two or more states—the Geneva Conventions operate in a straightforward manner to allow preventative detention of prisoners of war and the prosecution of war criminals.²⁵ In the short periods before the overthrow of Saddam Hussein in Iraq and the Taliban in Afghanistan both conflicts likely fit the definition of international armed conflict. Currently, however, the situations in both countries are “non-international armed conflicts” because U.S. opposition comes from insurgent forces within those states.²⁶

Little is codified regarding detention in non-international armed conflicts. The U.S. government attempts to capitalize on this by asserting that in “novel conflicts” where detention rules appear less precise, the rules of international armed conflict should govern.²⁷ This further militarization of the law must be avoided in favor of reliance on human rights law. Only when an international armed conflict exists can derogable human rights rules be abrogated in favor of certain narrowly tailored IHL rules.²⁸ If the specific conditions authorizing IHL rules do not exist then IHL should not be applied. Today, the Iraqi and Afghani governments allow U.S. forces to operate inside their states. Those governments should oversee all detentions inside their borders, not the U.S. military. In Iraq, under the new Status of Forces Agreement, the United States may only detain if vested with such authority by the Iraqi government and all detainees must be transferred to Iraqi custody.²⁹ Afghanistan requires a similar policy.

Those who attack civilians, U.S. personnel, or otherwise engage in attacks in Afghanistan or Iraq should face prosecution in the local criminal justice system. This approach benefits host countries trying to rebuild their civil and political infrastructure. Of course, upon the detection of intelligence pertaining to U.S. security, the local government could easily allow U.S. personnel

to interrogate detainees while remaining respectful of human rights law. After capturing individuals who have plotted attacks on targets inside the United States, criminal indictments in U.S. courts, followed by extradition, would comport with international law.

Therefore, in order to conform to international law, the United States may not hold anyone in indefinite preventative detention in its fight against al-Qaeda or in Afghanistan and Iraq.

III. THE UNITED STATES SHOULD ONLY RELY ON CRIMINAL PROSECUTIONS THAT INCLUDE FAIR TRIAL GUARANTEES

Many commentators argue that our criminal justice system cannot meet today's terrorist threat; however, this contention should not be accepted without substantial proof. Constitutional law, the criminal justice model, and human rights law are well adapted to meet terrorist threats.³⁰ Until proven otherwise, we must return to that model. Unfortunately, a consensus is building in the United States that tribunals lacking those safeguards may be used for alleged terrorists. The justifications include national security concerns, the possibility of acquittal, the fact that the military did not collect evidence, and the inability to use evidence obtained by coercion or torture. Proposals include a stand-alone national security court, re-constituted military commissions, and simply instituting special rules for terrorism cases in certain federal courts. Generally, all of the proposed models agree on allowing relaxed standards of evidence, limiting the rights of a defendant to confront evidence and witnesses against him, allowing the introduction of evidence obtained by coercive means, and limiting other constitutional protections such as rights to a speedy trial and access to counsel. Despite rhetoric to the contrary, the practical concerns voiced by proponents of national security courts are overstated. Numerous organizations, such as Human Rights First, have issued compelling reports demonstrating that regularly constituted criminal courts can handle terrorism cases.³¹ The convenience arguments offered by proponents of national security courts do not overcome the constitutional requirement of, and value in, a fair trial. Even if some admittedly dangerous Guantánamo detainees cannot be prosecuted because of stale evidence, tainted evidence, or because the particular act was not criminal at the time of commission, we cannot disregard our solemn values of liberty and justice simply due to fear.

Other commentators propose the use of courts-martial. While tempting, this idea is fraught with problems. Guantánamo detainees could conceivably be tried under Article 18 of the Uniform Code of Military Justice (UCMJ), the statute governing the prosecution of U.S. service members, which allows for personal jurisdiction over “any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”³² Attempting to use this system would guarantee years more litigation to determine the applicability of the “law of war” to the specific cases brought. Given the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*, it is not clear that the ubiquitous charges of conspiracy and providing material support to terrorism are valid war crimes.³³ Congress could amend the jurisdictional provisions and some of the substantive crimes in the UCMJ, but this is not an attractive option since it is likely to be viewed as too similar to the discredited military commission system. It may also raise *ex post facto* and statute of limitations concerns. Ultimately, this

option should be avoided, given the human rights norm of trying civilians in military courts only in exceptional cases.³⁴

Reliance on federal courts allows the United States to return to its legal and philosophical tradition. The criminal trial, with all its procedures, remains the ideal method for determining truth and meting out justice. The right to a fair trial should be considered so fundamental that only a monumental justification could allow non-compliance, such as an open rebellion that threatens the existence of the state. All Guantánamo detainees must be charged criminally in a regularly constituted court or be released from military custody.

IV. CONCLUSION

Obama's tasks to close Guantánamo and to determine the fate of detainees are difficult for political reasons. The legal answer remains readily available if he chooses to return to the rules existing on September 10, 2001. In his inauguration speech on January 29, 2009, Obama declared:

We reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the

rule of law and the rights of man—a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.

In order to ensure the respect of our nation's constitutional principles, and our international obligations, Obama must prohibit preventative detention except in strict adherence to IHL. He must avoid trying alleged terrorists in any court other than a regularly constituted court offering the full panoply of constitutional rights and privileges. Finally, moving forward in Iraq and Afghanistan, detainees should be held under the sovereign authority of those countries and handled within their criminal justice systems. The argument that "the rules changed after 9/11" should carry no weight. As the recent report from the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, an initiative of the International Commission of Jurists made up of leading experts in the field, explained, "the legal framework that existed prior to 9/11 is extremely robust and effective: international human rights and international humanitarian law were elaborated precisely to guarantee people's security."³⁵ Our laws, inspired by our long-cherished values, are capable of meeting Twenty-first Century threats. HRB

ENDNOTES: Detention and Prosecution of Alleged Terrorists and Combatants

¹ Jane Mayer, *The Hard Cases*, THE NEW YORKER, Feb. 23, 2009.

² Press Release, Dep't of Justice Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda, (Feb. 27, 2009), available at <http://www.usdoj.gov/opa/pr/2009/February/09-ag-177.html>.

³ Exec. Order, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/.

⁴ William Douglas & Carol Rosenberg, *Obama Administration Dropping 'Enemy Combatant' Term*, MIAMI HERALD, Mar. 14, 2009, available at <http://www.miamiherald.com/news/nation/story/949260.html>.

⁵ Respondent's Memorandum Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In Re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. 2009).

⁶ *Id.* at 2.

⁷ See Daniel R. Williams, *After the Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN ST. L. REV. 341, 393 (2007); See also *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), (Steven, J., dissenting).

⁸ See, e.g. International Covenant of Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

⁹ See, e.g., U.S. CONST. AMENDS IV, V, VI, and VIII.

¹⁰ See Respondent's Memorandum, *supra* note 5 at 1.

¹¹ Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

¹² 542 U.S. 507 (2004).

¹³ See generally, International Covenant of Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁴ U.N. Charter art. 2(4).

¹⁵ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 190 (June 27).

¹⁶ U.N. Charter art. 42.

¹⁷ *Id.* at art. 51.

¹⁸ See David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 548 (2009).

¹⁹ See, e.g., Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE (Oxford 2008).

²⁰ See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, § 70 (Oct. 2, 1995).

²¹ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

²² *Id.*

²³ See Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), art. 5, Aug. 12, 1949 75 U.N.T.S. 287.

²⁴ See generally, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51.3, June 8, 1977, 1125 U.N.T.S. 3.

²⁵ See generally Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949.

²⁶ See *Tadić*, *supra* note 20.

²⁷ See Respondent's Memorandum, *supra* note 5.

²⁸ See generally, Robert K. Goldman, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the UN Commission on Human Rights*, E/CN.4/2005/103 (Feb. 7, 2005), at 23–31.

²⁹ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces From Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Art. 22, Nov. 17, 2008.

³⁰ See INTERNATIONAL COMMISSION OF JURISTS, EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE, URGING ACTION, (2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf>.

³¹ Richard B. Zabel & James J. Benjamin, *In Pursuit of Justice: prosecuting Terrorism Cases in the Federal Courts*, Human Rights First, May 2008, <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

³² Uniform Code of Military Justice, 10 U.S.C. § 818 (1968).

³³ See 548 U.S. 557, 610-612 (2006).

³⁴ *Id.* at 597.

³⁵ See International Commission of Jurists, *supra* note 30, at 14.