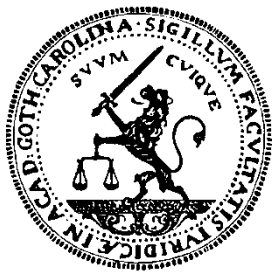

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Military tribunals and fair trial rights -a study of the Guantanamo Commission

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Content

Summary

The right to a fair trial is a vital component of the rule of law, but with the change in global conflicts, and particularly the rise of global terrorism, it has been presented with new challenges. Soldiers' immunity for certain, normally illegal, actions has been established as a principle of international law since the adaptation of the Geneva Conventions. However, new conflicts, and especially the War on Terror, are not always fought by privileged combatants. Still, our worst enemies have the right to a fair trial. This thesis establishes the existence of a right to a fair trial in international statutory as well as customary law, including for non-privileged combatants, and examines the compatibility of military tribunals with it. To do this, the Guantanamo Commission is used as a case study and analyzed with special emphasis on three crucial aspects; competence, independence and impartiality.

Space is given to scholarly works as well as legal reports, debate entries and jurisprudence, and several issues with the use of military courts are identified. This leads to the conclusion that, while the use of military courts is not outright prohibited, their use is problematic enough to be unadvisable. With this, as well as legal developments, in mind, it appears likely that the use of military courts to try civilian suspects will remain controversial and under heavy scrutiny, and that this might eventually lead to the discontinuing of this use altogether.

Sammanfattning

Rätten till en rättvis rättegång är en nödvändighet i en modern rättsstat, men i och med de nya globala konflikternas förändrade natur har den stött på nya utmaningar. Soldaters immunitet för vissa handlingar i krigstid är väletablerad sedan Genèvekonventionernas tillkomst, men de nya konflikternas aktörer uppfyller sällan kraven för sådan immunitet. Särskilt kriget mot den globala terrorismen har utmanat systemet då terrorister inte uppfyller immunitetskraven. Samtidigt förtjänar även våra värsta fiender en rättvis rättegång.

Denna uppsats undersöker och fastställer rätten till en rättvis rättegångs ställning i den internationella rätten i såväl konventions- som sedvanerätten, och dess omfattande av icke-priviligierade kombattanter. Därefter diskuteras huruvida den kan tillfredsställas i militära domstolar. För detta genomförs en fallstudie av Guantanamokommissionen med särskilt fokus på tre centrala element; domstolens kompetens, oberoende och opartiskhet. Utrymme ges till såväl akademisk litteratur som juridiska rapporter, debattinlägg och domstolspraxis. Analysen visar på ett flertal problem, vilka sammantaget leder till slutsatsen att användningen av militärdomstolar, trots att den inte är lagstridig i sig, är så pass problematisk att den bör undvikas. I ljuset av detta, såväl som den rättsliga utvecklingen, är det sannolikt att användandet av militära domstolar för mål mor civila kommer att vara fortsatt kontroversiellt till den grad att det de facto kan komma att upphöra.

Abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ASEAN	Association of South-East Asian Nations
ASEANHRD	Association of South-East Asian Nations Human Rights Declaration
AP1	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
AUMF	Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States (Authorization of Use of Military Force of 2001)
DoD	(United States) Department of Defence
ECHR	European Convention on Human Rights
GC (I-IV)	1949 Geneva Conventions (First-Fourth)
ICCPR	International Covenant on Civil and Political Rights
PoW	Prisoner of War
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

As the faces of war and modern armed conflicts have changed, so have their actors.

The Third Geneva Convention was drafted to protect the interests of soldiers taken prisoner during wartime, and to guarantee their rights as Prisoners of War. However, it also limits the right to become a PoW to certain groups, mainly regular armed forces. Modern conflicts, however, often see the involvement of actors not qualifying for PoW status or classification as military. Despite not enjoying the far-reaching immunities afforded to soldiers, these prisoners should still have the right to a fair trial for any crimes they may be accused of.

It is commonly understood and accepted that civilian courts have jurisdiction in matters relating to civilians, and that military courts or tribunals may only be used to try military personnel for uniformed offenses. However, as evidenced by the Guantanamo Commission, practice does not always match theory. Instead, prisoners held at Guantanamo were tried by a military tribunal despite not being recognized as PoWs.

This thesis will closer examine this process with an eye to critically analyzing both the legal situation with regards to fair trial rights as well as whether the Commission fulfilled fair trial requirements.

2 Reseatch Question

In light of this conflict, this thesis asks the following question:
Does the international community live up to its promise of a fair trial for non-privileged combatants taken prisoner in armed conflicts?
On the surface it might appear to be a rather straight forward question, perhaps even one that can be answered with a simple yes or no, but as this thesis will show it is far more complex than it may at first appear. Rather than a simple yes or no, a meaningful answer to the question must delve into not only what has in fact happened, but also how what has happened is to be understood. This involves examining the relevant legal situation, as well as case study of actual events and how the actions relating to can be understood. Finally, to return from the specifics of the case study to the larger question of international law, some conclusions on possible ramifications for international customary law and the future ahead can be made.

3 Method

In order to tackle the above research question this thesis will be based in a critical method born out of the critical theory approach of the sociological Frankfurt school. A critically interpretive approach will be taken to study the potential conflict between espoused values and social reality.[1] This approach lends itself especially well to the study of these kinds of conflicts as it sees reality through a lens of negatives, conflicts and opposites with these oppositions creating dynamic questions. This view in turn helps stimulate reflection on the world and society around us through increased awareness of societal phenomena[2] and can to an extent be understood to resemble hermeneutics as it is in large part interpretive rather than dogmatic. Legal dogmatism may have been the dominant direction of thought for a long time, but at the same time law and hermeneutics have a lot in common. It can be argued that all application of law does in fact carry a strong hermeneutic approach as legal practice is in large part interpretive, with application and interpretation closely linked and sometimes merge.[3] At the same time, there is a notable difference, or extension, in that the critical approach questions existing facts and structures with a problematizing eye[4], asking questions not only of how things are, but also why things are the way they are, to an extent with a values based approach of whether the way things are is good. Such an approach is by nature to some extent political, as all values-based approaches to some extent are, but it is a political approach free from the kind of political dogmatism which can be found in more purely political approaches such as those of Marxist or feminist political

[1] Alvesson, M. & Sköldberg, K. (2017) Tolkning och reflektion: Vetenskapsfilosofi och kvalitativ metod. 3rd edn. Lund: Studentlitteratur. p. 208
[2] Ibid. p. 209
[3] Samuelsson, J. ”Hermenuetik” in Nääv, M. & Zamboni, M. eds., (2018) Juridisk metodlära. 2nd edn. Lund: Studentlitteratur p. 288
[4] Alvesson, M. & Sköldberg, K. (2017) Tolkning och reflektion: Vetenskapsfilosofi och kvalitativ metod. 3rd edn. Lund: Studentlitteratur. pp. 236-237

theory[5] making it by nature more open and available to diverse, and not necessarily left-wing[6], angles.

In its practice it is less of an empirical study and more focused on the ideological, political and societal dimensions of an issue aiming to achieve understanding through second-hand material situated in this broader context.[7] Such an approach lends itself very well to the kind of research question posed above as it not only studies a simple situation of fact or legal state of affairs but also aims to highlight a dimension of conflict by potential contradiction of convention and reality. Yet at the same time such a contradiction is not initially apparent nor assumed, but is rather to be investigated through contrasting and opposition and must, for the sake of academic honesty, be seen as initially hidden if it exists[8].

Concretely, this thesis will examine the state of the right to a fair trial in international law as it stands and contrast this with a case study and its legal developments as well as legal debate surrounding it. By doing so the goal is to both clarify the potential existence, and in that case extent, of this right and to investigate whether said right is being lived up to. In doing so conclusions can be drawn both about the state of international law and whether possible changes to custom should be understood to have taken place.

[5] Ibid. pp. 208, 231-232
[6] Ibid. pp. 235-236
[7] Ibid. pp. 239-241, 244-245
[8] Ibid. pp. 250-251, 253

4 Perspective

The perspective of this study can best be described as one situated in the broader context of human rights and international relations. The connection to a human rights, or more broadly rights based, perspective is clear as the question concerns the existence of a right and the safeguarding, or not, thereof. As is also common with international law, there is also a connection to international relations, specifically to the liberal school. This is natural as the liberal school puts strong emphasis and faith in internationalism, international cooperation, standardization and institutionalism. The belief in international institutions is especially strong, as is the belief in solutions based in international rule of law.[9] The concluding analysis will be conducted with an eye to the principle of separation of powers equally necessary to a liberal society.

[9] Doyle, M. & Recchia, S. "Liberalism in International Relations" in Badie, B., Schlosser, D-B. & Morlino, L. eds , (2011) International Encyclopedia of Political Science. Los Angeles: Sage. pp. 1434-1438

5 Scope and limitations

For the purposes of this thesis, the scope of the research question will have to be limited and the question itself further narrowed down. The reasons for this are both practical and academic. For practical reasons, the relatively limited size of this thesis will require an equal limitation of its scope in order to be able to meaningfully engage on any level other than the very most superficial. While a broader study would most certainly be both a rewarding and highly worthwhile endeavor, it must at this point be left to future research.

However, the narrowing of the scope is of course not merely a practical consideration. For the sake of meaningful engagement, and to avoid getting lost in pure hypotheticals, a case study is called for. As the research question relates to international law and specifically a right guaranteed in the Geneva Conventions, the case must be a post-World War II one. This era has seen a reduction in international conflicts of the kind that the Conventions are applicable to overall, especially in the European and North American theatres, making the number of available cases somewhat limited. However, there is one conflict which has dominated public awareness and much of political and legal discourse for the last two decades, which is global in nature and has actualized a large number of questions of international law at that. That conflict is the post-9/11 War on Terror.

Of course, it can be argued that this choice of broader situation for the case is too US-centric. However, if we, in sticking with the liberal international relations perspective discussed above, take the argument first made by Francis Fukuyama about the end of the Cold War also representing a permanent change to the global arena and an end of international ideological struggles and the emergence of a sole dominating superpower[10] for true, the seemingly US-centric outlook becomes justified. With the United States left as the lone and dominating superpower at the time it is only reasonable to

[10] *See* Fukuyama, F. (1989) "The End of History?" in The National Interest, No. 16 pp. 3-18

study its actions as they can be expected to have a norm creating effect for the international community as a whole.

Yet the War on Terror is still too expansive to be dealt with in all its intricacies in this thesis, and the study must therefore be further narrowed down. As the research question concerns the right to a fair trial prominent trials must be sought out. Luckily, a great example exists in the form of the Guantanamo trials carried out through the Guantanamo Commission. Studying the Commission also provides another beneficial opportunity to further define the study. Rather than focusing broadly on the many rule of law and fair trial related aspects of the trials, this thesis will look at one specific and highly controversial element of them; the use of military tribunals to try non-military suspects.

6 Revisiting the research question

With the limiting and narrowing of the scope discussed above it is relevant to revisit the research question. For clarity it can be operationalized to the following:

Does the use of military tribunals for the Guantanamo trials stand in accordance with the right to a fair trial enshrined in international law?

As this question does in itself contain a statement of fact, that that international law includes a right to a fair trial in this case, another question must first be answered:

Does a right to a fair trial for non-privileged combatants exist in international law?

This question is in its very nature one that can be answered either affirmatively or negatively and hence purely a stepping stone to the actual research question.

Finally, once both the above questions have been answered, a potential third question may arise:

If the use of military tribunals for the Guantanamo trials was not in accordance with international law, can the fact that they were nevertheless used be seen as an indication of a change to what is permissible?

7 Situation within greater scholarship

The rule of law, the right to a fair trial and the War on Terror have all been extensively studied within a number of academic disciplines and have all featured prominently in both legal scholarship and activism. This will be of great benefit to this thesis as it provides solid ground to stand on and a good starting point. What gives this study relevance of its own though, is that I have not been able to find any scholarship, legal, political science or otherwise, dealing specifically with the question of the compatibility of the use of military tribunals for non-privileged combatants with the right to a fair trial. Of course, many opinions and debate entries have been given, some of which will be presented in this thesis, but no combined evaluation of them leading to an attempt at a conclusive answer appears to exist. However, the detailed, albeit argumentative, contributions by Shawcross[11] and Wittes[12] have served as step off points for this thesis.

[11] Shawcross, W. (2011) Justice and the Enemy: Nurenberg, 9/11 and the Trial of Khalid Sheikh Mohammed. New York: Public Affairs
[12] Wittes, B. (2011) Detention and Denial: The Case for Candor after Guantanamo. Washington D.C.: Brookings Institution Press

8 Materials

This thesis uses a range of material from scholarly works and reports to court rulings and legal references. By using such a diverse selection of source materials the goal is to highlight multiple dimensions of the issue studied and to include a diversity of views not limited purely to the courts and legal bodies but to also highlight the professional and political dimensions. This is especially appropriate as the studied issue should not be viewed as a shut case but as a step in the constant evolution of international law which in turn relies on a variety of sources and is never free of the political winds de jour.

9 Right to a fair trial

The right to a fair trial is a fundamental component and requirement of the rule of law and should be understood not only to be applicable to criminal cases but to all proceedings taking place before a court.[13] This extensiveness means that the right should be understood to be all encompassing and cover all parties, "[…] fairness means fairness to both sides, not just one."[14], no matter the question at hand. Furthermore, by this definition it should not be limited by nationality, graveness of the accusations or forum. If a judicial proceeding is taking place before any court, any and all parties to said proceeding should enjoy fair trial rights. The ideas of what constitutes fairness have evolved with time as societal views and standards have changed, and with them the law,[15] but there is no implication of a possibility of a devolution of rights. Hence it ought to be understood that a right or concept which has previously been understood to be a component of a fair trial cannot be rescinded in a system without that system being considered to have violated the right to a fair trial, and, hence, the rule of law to have been eroded.

One fundamental requirement for a trial to be fair, according to Bingham, is the independence of the judiciary. For a proceeding to be fair, judicial decision-makers cannot be beholden to anyone and must not risk disadvantages or repercussions should their judgements be considered wrong by those in power. Similarly, they cannot themselves be stakeholders or carry a vested interest in the outcome of a trial but should be neutral and, ideally, politically independent and detached. In other words they must be impartial an unaffected by outside forces or pressures as well as remain free of their own biases.[16] Ideally for this to be the case the judicial system, and judicial appointments, should be separate from politics. This way judges are not hired or promoted for political interests and can more easily and reliably

[13] Bingham, T. (2011) The Rule of Law. London: Penguin. p. 84
[14] Ibid.
[15] Ibid. pp. 84-85
[16] Ibid. pp. 85-87

be assumed to be independent as the reception of their decisions by those in power will not risk affecting their careers or livelihoods. Notably, this is not the case in the United States where federal judicial appointments are instead made by the President and confirmed by the Senate. As a consequence of this, presidents have the ability to pick judges whose views they assume to be similar to their own, and the political leanings of federal judges are scarcely a secret. US presidents have also been known to express explicit displeasure with their decisions when they have not gone as expected upon their appointment.[17] Despite this inherent politicization of the judiciary, with courts having clear ideological splits and lifetime appointments being made with political advantage and expedience in mind, the United States judicial system is still considered to be adherent to the rule of law and the right to a fair trial to be upheld, and the right is further protected in constitutional law. The United States' constitution appears, through its sixth amendment, to guarantee the right to a fair trial. The amendment contains provisions guaranteeing "the right to a speedy and public trial, by an impartial jury" as well as for the accused to "be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".[18] This right has also been expanded upon in the 14th constitutional amendment as well as a number of court decisions granting the accused additional rights and due process protections. These include protections against biases, both from the judge and jury insofar as possible, mutual discovery and the right to not face trial in a prison uniform or, if not absolutely necessary, in any kind of restraints.[19] While the issue of military tribunals is not directly addressed in the constitution, the American Bar Association has expressed the view that they draw their legitimacy from the congressional and presidential powers found

[17] Ibid. pp. 88-89
[18] Sixth Amendment to the United States Constitution, as collected from https://www.law.cornell.edu/constitution/sixth_amendment
[19] Legal Information Institute. "Fair Trial" in US Constitution Annotated. Cornell Law School. Online resource at https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/fair-trial [last visited 26/05 2020]

therein.[20] However, the extent to which they can be used, and for whom, has been the subject of several Supreme Court rulings, some of which will be addressed below.

As a brief comparison it can be noted that the Swedish constitution guarantees the right to a fair trial (SFS 1974:152 2. Chapter 11 § section 2). Additionally, the Swedish constitution makes the European Convention on Human Rights legally binding in Swedish law (SFS 1974:152 2. Chapter 19 §), meaning the additional protections of the right to a fair trial found in article 6 of the convention are also legally binding. With regards to military tribunals it can be noted that the Swedish military justice system was abolished in 1949[21] and hence all crimes are tried by the regular civilian court system since then.

In international law the right to a fair trial is additionally guaranteed by numerous global and regional conventions. Globally, the most noteworthy of these are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The UDHR addresses this right in articles six through eleven. Article 6 guarantees everyone to be recognized everywhere as a person before the law, Article 7 guarantees equal protection by the law, Article 8 guarantees universal access to courts to seek remedy for any acts violating rights prescribed by any law, Article 9 grants full protection from arbitrary detention, arrest or exile, Article 10 guarantees the right to a fair and public hearing by an independent and impartial tribunal and Article 11 guarantees presumption of innocence until guilt is proven and the freedom from punishment for acts that were not criminal at the time they were committed.[22] For the issue of military tribunals, the most relevant of these is Article 10. In full it reads "Everyone 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

[20] American Bar Association (2002) American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions p. 2
[21] Johansson, A. (1950) "Krigshovrätten" in Svensk Juristtidning 1950 pp. 229-230
[22] Universal Declaration of Human Rights, as collected from https://www.un.org/en/universal-declaration-human-rights/

against him." Operative here is the use of the terms impartial and independent as requirements for a tribunal.

These right are mirrored and further elaborated upon in articles fourteen through sixteen of the ICCPR.[23] Most notable as concerns military tribunals is Article 14 section 1 and the stipulation that "[…] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Operative are once again the terms competent, independent and impartial as describing requirements for the tribunal.

The right to a fair trial is further enshrined in multiple regional charters, including the African Charter on Human and Peoples' Rights, the American Convention of Human Rights, the Association of Southeast Asian States Human Rights Declaration and the European Convention on Human Rights. In the ACHPR this right is found in Article 7. Section 1 point 4 of the article contains "The right to be tried within a reasonable time by an impartial court or tribunal."[24] Similarly, the ACHR also contains the right to a fair trial with Article 8 section 1 containing the right to a hearing "[…] by a competent, independent, and impartial tribunal, previously established by law […]"[25], as does the ASEAN Human Rights Declaration with the right to "a fair and public trial, by a competent, independent and impartial tribunal"[26] found in Article 20(1). Finally, the ECHR handles the right to a fair trial and rule of law in articles five through seven. Most relevant here is Article 6 section 1 stating that "[…] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[27] As can be seen, a common feature in these regional charters is the recurrence of the same terms used to describe the kind of tribunal

[23] International Covenant on Civil and Political Rights, as collected from https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[24] African Charter on Human and Peoples' Rights, as collected from https://www.achpr.org/legalinstruments/detail?id=49
[25] American Convention of Human Rights, as collected from https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm
[26] Association of Southeast Asian States Declaration of Human Rights, as collected from https://asean.org/asean-human-rights-declaration/
[27] European Convention on Human Rights, as collected from https://www.echr.coe.int/Documents/Convention_ENG.pdf

envisioned as in the UDHR and ICCPR, impartial, independent and competent. Though there is a slight variation in which exact terms are used in the charters, all four emphasize the same requirement of impartiality. Following the principle that customary international law can arise from "general principles of law recognized by civilized nations", and that today all members of the international community are to be considered "civilized nations",[28] the fact that four major organizations of regional cooperation have adopted charters guaranteeing the right to a fair trial with largely similar language and criteria should be taken to further strengthen that right. Despite these charters all being regional in nature, and adopted by organizations without universal membership in their respective regions, their geographic spread over four continents could be taken as a sign of universality. Considered together, then, the UDHR, ICCPR, ACHPR, ACHR, ASEANHRD and ECHR should be taken as evidence and a strong affirmation of the existence of a right to a fair trial not only in international statutory law but also in international customary law, making it a binding principle for all nations, ratified signatories or not. Furthermore, with the recurrence of the requirements that courts or tribunals be impartial, independent and competent, these requirements should also be understood to be universal.

[28] Henriksen, A. (2019) International Law. Oxford: Oxford University Press pp. 29-30

10 The Geneva Conventions

The main rules governing permissible conduct in war, jus in bello, can be found in the four Geneva Conventions and their two Additional Protocols. Of these, the Third Geneva Convention regulates treatment of enemy combatants taken as prisoners of war. However, the convention also has limited applicability with Article 4 of the convention dictating who falls within the category of PoW, and Article 5 limiting its applicability to individuals covered by Article 4.[29] The question of ratification for applicability has become mute as all four Geneva Conventions are now considered part of customary international law.[30]

For those not covered under the Third Geneva Convention, civilians and so called non-privileged combatants, protections can be found in the Fourth Geneva Convention and Additional Protocol 1.[31] Most relevant for this study are the fundamental guarantees found in Article 75 Additional Protocol 1. Specifically, Article 75 section 4 can be understand to guarantee fair trial rights for anyone, including non-privileged combatants, taken prisoner. Most notably, it contains language requiring a conviction be made by "[…] an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure […]".[32] AP1 is not as widely ratified as GC I-IV and hence not always applicable. However, when it comes to the fundamental guarantees provided in Article 75 the issue of recognition is irrelevant as it is generally considered to reflect customary international law.[33]

[29] III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, as collected from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf
[30] Byers, M. (2005) War Law. New York: Grove Press. p. 142
[31] Henriksen, A. (2019) International Law. Oxford: Oxford University Press pp. 289-291
[32] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, as collected from https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf
[33] Henriksen, A. (2019) International Law. Oxford: Oxford University Press p. 290

11 The Guantanamo Commission/ Military Tribunals and fair trial rights

The American Bar Association was early to issue a report[34] on military commissions and potential fair trial rights questions. While not directly opposed to their use, the report contains some warnings and guidance. It notes that the scope of the September 18 2001 Authorization for Use of Military Force, while broad, strengthens presidential authority to establish such tribunals as it provides support from Congress. The AUMF, in designating the 9/11 attacks as acts of war, would also legitimize the use of military tribunals to try the perpetrators as they are the correct fora. Attacks on civilians are a violation of the laws of war, the laws of war should be understood to also apply to non-state actors and individuals can be responsible for their violation. Hence, the attackers can be tried in military courts.[35] However, the use of military tribunals to try people not directly connected to the attacks is more ambiguous. US military tribunals have jurisdiction over war crimes but not over violations of the US Criminal Code, and it is not clear that all terrorism related offenses constitute war crimes. Because of this, the envisioned broad use of military tribunals could be problematic.[36] The report further notes that the United States is party to the ICCPR and that, while the convention may not explicitly have envisioned war crimes tribunals, the rights it guarantees in Article 14 have been adhered to in past war crime prosecutions.[37] With all this in mind, the report recommends against using military tribunals for trials of persons not directly involved in the 9/11 attacks and stresses the importance of

[34] American Bar Association (2002) American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions
[35] Ibid. pp. 6-8
[36] Ibid. pp. 8-9
[37] Ibid. pp. 12-13

constitutional rights and rule of law protections to be respected[38] while also warning of potential future ramifications if trials are not seen to be fair and unbiased[39].

The Congressional Research Service also produced a report[40] discussing some issues of military court jurisdiction. Notably, it highlights the vagueness of statutory language providing for the use of military courts and reminds of how they normally only hold jurisdiction over the crimes of aiding the enemy and espionage, and how it is unclear whether it lies within the powers of the presidency to redefine crimes normally falling under criminal statutes as offenses against the law of war. Additionally, it points out that military courts may normally only exercise jurisdiction over civilians in very limited cases, when martial law may be exercised or when the regular courts are unavailable.[41] Potential issues of "temporal and spatial jurisdiction" are also highlighted as the intended reach of jurisdiction was much more far reaching than that of regular war crimes courts would be. Due to the vagueness of the language, tribunals could be understood to have almost unlimited jurisdiction, including in places normally excluded such as territory of friendly or neutral states as well as the US' own, covering acts, including attempted acts, not normally falling within the scope of war crimes.[42]

Notably, a debate about the legitimacy of the Commission also took place within the military justice system itself. In an article[43] in the Army Lawyer, retired US Coast Guard Captain Barry argued that the rules for the Commission deviated substantially from current accepted standards of both military and civilian justice and that this would certainly lead to questions about their fairness.[44] He further outlined a series of concerns about the

[38] Ibid. pp. 16-17
[39] Ibid. pp. 13-14
[40] Elsea, J. (2005) The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice. Congressional Research Service
[41] Ibid. pp. 6-7
[42] Ibid. pp. 10-11
[43] Barry, K.J. (2003) "Military Commissions: Trying American Justice" in The Army Lawyer, November 2003
[44] Ibid. pp. 1-4

limitations placed on defense counsel and their work, raising further questions about the ability to provide a fair trial.[45] Particularly noteworthy among these is the fact that the lead defense counsel would always be a person employed by the same organization, the Department of Defense, as the prosecution. This naturally raises serious questions about the possibility of impartiality and independence of the proceedings.

Colonel Fredric L. Borch III issued a rebuttal[46] in defense of the Guantanamo Commission. In essence, he argued that the system was indeed lawful and living up to both US and international standards[47], and that the restrictions placed on defense counsel were reasonably mandated by national security concerns[48]. The structure of the defense team should be understood and respected as analogous to that in the US military's internal proceedings and should therefore not be a cause for any concern.[49] Most notably though, Borch appeared to hold that the Presidents statement that trials would be "full and fair" should be held as sufficient and that structural and procedural concerns should be waylaid by trust in the people involved.[50]

A number of international organizations have also commented on the use of military tribunals in the context of fair trial rights form a more general perspective. The common theme of these can be summarized as skeptical of their use.

A report to the UN Commission on Human Rights expresses the view that, while the use of military courts to try non-military suspects is not explicitly prohibited, special care should be taken to guarantee their fairness and that they should in principle not have jurisdiction to try civilians.[51] This view is further reiterated by the UN Counter-Terrorism Implementation Task Force who stress that the ability of regular courts to try terrorism cases should be

[45] Ibid. pp. 6-9
[46] Borch, F.L. (2003) "Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials" in The Army Lawyer, November 2003
[47] Ibid. pp. 10-12
[48] Ibid. p. 14
[49] Ibid. p. 15
[50] Ibid. p. 16
[51] UN Commission of Human Rights. (2006) "Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity" undoc: E/CN.4/2006/58 pp. 10-11

strengthened rather than special courts created. Civilians accused of any form of criminal offenses should be tried by civilian courts and their trial by military courts should be prohibited.[52]

Regionally, the Organization for Security and Co-Operation in Europe represents a slightly less restrictive view. Its analysis of the legal situation is that the use of military tribunals is neither prohibited by the ICCPR nor ECHR. Still, it notes a trend in court rulings towards stricter limitations as well as the Human Rights Committees non-hesitation to criticize their use, and expresses the view that any situation where civilians must appear before a court with any number of military judges seriously undermines the faith in that court.[53]

[52] United Nations Counter-Terrorism Implementation Task Force, CTITF Working Group on Protecting Human Rights While Countering Terrorism. "Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism" October 2004. pp. 17-18

[53] OSCE Office for Democratic Institutions and Human Rights (2012) Legal Digest of International Fair Trial Rights. Warsaw: OSCEODHR pp. 68-70

12 Military Tribunals in the US Supreme Court

The extent of permissibility for the use of military tribunals has been the issue of numerous US Supreme Court rulings, from the very founding of the republic until present day. An overview of these rulings presents a relatively clear trend of limitation which can be seen as reflective of greater developments of understanding and perception of the rule of law, both nationally and globally.[54] Notable among these is the trend of limiting military court jurisdiction over civilians, culminating in an understanding that US citizens must be tried by regular courts.

In relation to the Guantanamo Tribunal, three rulings are of special importance. In *Rasul v. Bush* the Court held that prisoners held at Guantanamo Bay have the right to file habeas corpus petitions challenging the legality of their imprisonment in US federal courts irrespective of their citizenship or immigration status as they were held in a territory under US control.[55] In *Hamdan v. Rumsfeld* the Court dealt a further blow by ruling that the military commissions, as structured at the time, were illegal as they violated both the US Uniform Code of Military Justice and the Third Geneva Convention, which was hence also held to have the power of law in the United States.[56] Finally, in *Boumediene v. Bush* the Court held that the Military Commissions Act of 2006, intended to legalize and normalize the new military tribunals, violated the US Constitution in that it unlawfully suspended prisoners' right to seek habeas corpus relief.[57]

Viewed together, these rulings represent a significant blow to the Guantanamo Commission as first envisioned, as well as a legal reaffirmation that neither national nor international rule of law principles may be suspended, even in the fight against global terrorism. At the same

[54] Fisher, L. (2004) Military Tribunals: Historical Patterns and Lessons. Congressional Research Service pp. 60-65
[55] Rasul v. Bush, 542 U.S. 466 (2004)
[56] Hamdan v. Rumsfeld, 548 U.S. 557 (2006)
[57] Boumediene v. Bush, 553 U.S. 723 (2008)

time, it ought to be noted that these three decisions were not made with any overwhelming majorities (the decisions fell 6-3, 5-3, with Chief Justice John Roberts having recused himself, and 5-4, respectively), and that, while Supreme Court jurisprudence is binding for the lower courts, the Court has been known to revisit and reverse its opinions in the past[58].

[58] *See* Murrill, B.J. (2018) The Supreme Court's Overruling of Constitutional Precedent. Congressional Research Service

13 Discussion and Analysis

Fair trial rights are a necessity in any society governed by the rule of law. Their exact components and extent are not set in stone, but rather a reflection of societal and political norms expressed through the law. As such, they have seen constant evolution and development reflecting societal development. This evolution, however, should not be taken to imply the possibility of devolution. Rather, developments should, as a rule, be considered binding expansions and devolution is rightly criticized as abandonment of and diversion from fundamental principles of the rule of law. This stands despite the ability of the highest courts to revisit and revise their previous jurisprudence and should be an uncontroversial conclusion, especially in light of the views expressed by the US Supreme Court in *Rasul v. Bush*, *Hamdan v. Rumsfeld* and *Boumediene v. Bush* which together defeated the Bush administration's reliance on primarily World War II era jurisprudence and disregard for later legal developments.

The right to a fair trial is strongly established in international law, with multiple global and regional treaties reaffirming it. It is enshrined both in the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights and in the regional human rights conventions and charters of the African Commission on Human and Peoples' Rights, Organization of American States, Association of South-East Asian Nations and Council of Europe. It also features prominently in democratic constitutions, including those of the United States of America and Sweden. Taken as a whole, this widespread recognition can be taken to indicate not only a treaty based existence but also one based in customary law. Furthermore, the right to a fair trial is guaranteed in the laws of war, jus in bello, through the Third Geneva Convention and its first Additional Protocol. Even though AP1 does not enjoy universal recognition, the fair trial rights found in its 75th Article, as well as GCI-IV, are now considered part of customary international law. With regards to the legal status of GCIII in national law, the US Supreme Court has held in *Hamdan v. Bush* that it

has legally binding power in the United States. The right applies both to privileged combatants, through GCIII, as well as non-privileged, through AP1. Given this, a determination of Prisoner of War status becomes unnecessary for fair trial rights to apply as its necessity is negated by international customary law status of Article 75 of AP1.

In order for a trial to be considered fair, the trying court must fulfill three requirements; competence, independence and impartiality. The compatibility of the Guantanamo Commission with the fair trial rights found in international law can hence be analyzed by examining the Commission against these three criteria.

The first question to be answered to determine the Commissions ability to provide a fair trial is that of competence. In order to be considered competent, a court should be established by law and have competence to rule on the cases put before it.

While it is considered to lie within the presidential powers to create courts and tribunals, there is some question as to the necessity of congressional involvement as the separation of powers means that the executive cannot make laws without involvement of the legislature. This concern, however, appears to be defeated by the subsequent legislative actions by the US Congress. More concerning is the question of competence to try. Special tribunals should not be established to try cases triable by other functions of the judiciary, and it appears to be relatively widely agreed that military courts should not try non-military suspects. The Bush administration's designation of the 9/11 attackers as enemy combatants, albeit non-privileged ones, provides some basis for the Commission to try them for war crimes, but all acts of international terrorism do not automatically constitute such crimes. Hence, the view that the Commission should not try other terrorism suspects appears correct while the question of competence to try the 9/11 attackers becomes more ambiguous.

The next set of questions concerns the independence of the Commission. In an independent judiciary, judges should ideally not be politically appointed. However, the fact that general US practice deviates from this by federal judges already being politically appointed as the rule should imply

permission for military judges to be similarly appointed. More troubling is the connection between all parties of the trials, prosecution, defense and judges, and the Department of Defense. The mandatory use of DoD appointed defense counsel, in addition to civilian counsel of the accused's' choosing, is certainly cause for concern, as are the limitations that were placed on civilian counsel. The choice to create a new tribunal altogether, rather than using one within the existing structure of military justice, might also be of some concern, although the creation of special tribunals should not lead to questions about their independence per se.

Finally, the Commission's impartiality can be questioned largely on the same basis as its independence. It follows that a court that is not independent can hardly be impartial. Attempts, though struck down by the Supreme Court, to deny prisoners habeas corpus rights, as well as significant deviation from established military court procedure, also somewhat remedied by the Court, can also be taken as an indication that, despite the Bush administration's assertions to the contrary, the Commission was not initially set up to be fair or impartial. If prisoner are denied the right to challenge the legal basis for their imprisonment, questions about its justness naturally arise.

While it is not clear that military tribunals are prohibited as a matter of course, one could certainly envision a differently structured tribunal where fair trial rights could be guaranteed, the facts laid out above certainly provide grounds to question whether the Guantanamo Commission did. Even though it might be premature to declare the Commission unlawful, the number of issues, and the fact that they related to all three criteria for fairness, should be enough to deem its adherence to fair trial rights questionable enough that it should not have been used.

14 Conclusions

It is clear that a right to a fair trial for non-privileged combatants exists in both statutory and customary international law. However, the question of whether that right can properly be guaranteed through military courts remains unclear. While there are no explicit treaty texts or international court rulings prohibiting them, a clear trend against them is still discernible. With the many concerns as to the ability of military courts to fulfill the requirements of independence and impartiality, as well as the trend towards increased criticism of their use, it does not appear entirely unlikely that they will eventually be explicitly deemed incompatible with fair trial rights. At the same time, the wheels of international justice turn slowly, and it seems unlikely that a treaty banning their use outright would reach any significant level of support and acceptance in the near future. Rather, such a change would most likely come from further development of customary law, aided by international courts. With evermore countries suspending their use and limitations placed by courts, their use could become so problematic that it might eventually be so rare as to have appeared to stop. With such a development, the appearance of a custom against their use might eventually lead to such a custom actually developing, in turn making their impermissibility under international law a fact. Such a development would be entirely in line with a general development towards stronger rule of law protections overall and a strengthened global liberal order.

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