Redeeming Gitmo: The U.S. Can Take Steps to Rise Above the Guantanamo Bay Controversy

*By Glenn Sulmasy**

This past summer I attended meetings on international humanitarian law in San Remo and Geneva that provided me the chance to meet with, debate and discuss various legal issues associated with the Global War on Terror (GWOT). Government officials from around the world, representatives from nongovernmental organizations (NGOs) like Human Rights Watch and ICRC, and international-law scholars reviewed and debated the myriad issues surrounding the current legal situations in the GWOT. As one might expect, there was sharp disagreement on many issues. However, there was unanimity on one issue. The U.S. must do something regarding the detainees at Guantanamo Bay (GITMO)—and do something now.

The new world (dis)order in which the U.S. functions as the sole superpower is terribly complex, and the situation is further exacerbated by the American discomfort in its role as an empire.[1] We appear uncertain how to "behave" among other nations. We consistently balance our strength and sovereignty while functioning within the international community, attempting to comply with international law. Gitmo offers the perfect opportunity for the United States to resolve her identity crisis and re-establish herself as a noble superpower. The GWOT is going to be a long-term effort. It is critical to maintain the support of the international community and the NGOs throughout this struggle.

Though the administration has performed exceedingly well in balancing myriad issues the last four years, some changes are necessary to improve our ability to conduct operations into the foreseeable future. Three crucial steps will help to regain the requisite national support and rally international consensus: 1) Article 5 tribunals must be held immediately for all detainees; 2) The U.S. must establish national-security-court apparatus not very different from Great Britain and France; 3) The U.S. must lead the effort in modifying Geneva to better handle the legal issues associated with the jihadists.

Article 5 Tribunals

First, we must admit the current situation in Guantanamo Bay, at the very least, appears unjust. Five hundred detainees with no hearing for over four years seems unfair to our international partners—and has become a breeding ground for misinformation and propaganda by al Qaeda and jihadist supporters.[2] We should provide these people, as I was reminded by every person I met with this summer, with Article 5 Tribunals to determine whether they should be afforded Prisoner of War (POW) status. The tribunal system is provided for in the Geneva Conventions.[3] It is an established way of ascertaining the status of those captured. These "tribunals" are not criminal trials nor are they "military tribunals or commissions" in the sense of military law jurisprudence. They are merely hearings that are used on the "battlefield" as an objective means of determining status. To date, the United States has used record reviews by judge advocates to make this determination of the captured jihadists. This closed, paper "hearing" is simply not acceptable to our international partners and colleagues.[4] With very little effort and few resources, Article 5 Tribunals can provide a hearing to the jihadists and thereby, at the minimum, afford the appearance of process. In reality, it IS due process and one that can inject universal, and as importantly Western, ideals into these procedures. Some conservatives have asserted the jihadists should be accorded no rights. They argue (and correctly) after all, these same people, as a matter of doctrine, flout the laws of war. Summary executions, torture, and attacking civilians is the written code of al Qaeda and other international terrorists.[5] Again, Art. 5 tribunals simply inject minimal process into an extraordinarily difficult, and new, war of the 21st century. Utilizing this mechanism is one of the three key initiatives the United States needs to employ in order to keep international cynicism of our motives and efforts to a minimum. We have refused to give the detainees this option even though these are quick "hearings" by design and could be accomplished with relative alacrity and few resources. Most, if not all, will not be given POW status. However, this appearance of due process is a critical issue for our international partners.

National Security Courts

The military commissions, as much as they should have worked (and are constitutional and comply with international law),[6] have not been successful. Although the case most often cited to support the use of commissions, *Ex Parte Quirin*,[7] is on point, the current use of the commissions has been bogged down in procedural problems, evidentiary concerns, and four years without a prosecution (which was clearly never intended).[8] The commissions were adopted by the President to appropriately prosecute al Qaeda just two months after the attacks of September 11th.[9] One of the key justifications for the employment of commissions was that this was, *de jure* and *de facto*, a "war."[10] The United States was now dealing with unlawful belligerents, and this would be the best, most rapid means to adjudicate the actions by the enemies once captured. Indeed, one of the main reasons we have a separate military justice system is the rapidity in which prosecutions can occur within the military.[11] Because of the unique nature and training of the armed forces, a separate system was and continues to be required. Similarly, in warfare, there is a need for rapid justice against the illegal belligerents. Thus, at first glance, it appears logical and rational to employ these commissions against al Qaeda.

The use of military commissions was intended to provide the best possible, and most rapid means of trying the jihadists. For example, in the *Quirin* case, the German saboteurs were captured, tried by military commission, had habeas petitions heard by the Supreme Court, were convicted and executed in under fifty days.[12] Currently, we have waited four years for a trial. Although Secretary Rumsfeld recently announced that several commissions hearings will begin in the immediate future,[13] a long term established mechanism is clearly needed to rapidly adjudicate the remaining 450 detainees, not to mention the inevitable future cases. France, Great Britain, Israel, and others have special courts in place to specifically try terrorists. These nations, like the United States, recognize these are not ordinary cases and need to be handled differently than standard criminal prosecutions. Terrorists are different than both criminals and warriors. They are a unique blend of both. Although we have, and continue to, justifiably characterize the battle with international terror as a war,[14] these unique unlawful belligerents

can best be prosecuted by a separate, unique national security court system. The national-security court would function as a hybrid of the military commissions and our federal court system— a decreased expectation of rights at trial but still much more than is currently afforded to the detainees at Guantanamo. The courts would be presided over by a recognized law of armed-conflict experts appointed by the president, and if convicted, the terrorist would be sent to military brigs. The U.S. must establish national-security courts to handle these cases expeditiously and resolve the ambiguity and international cynicism surrounding Gitmo. The GWOT will be part of our lives for a generation; these courts will help to prosecute fairly those accused of engaging in international terror.

Modify Geneva

The asymmetrical war we are fighting against terror will continue to dominate geo-political debate in the West. The conflict of the 21st century will likely be fought by this generation's children and grandchildren. While establishing national-security courts domestically, internationally the United States must lead the call for modifications to the Geneva Conventions.[15] Drafted in 1949, they were never intended to be the legal basis to prosecute detainees in the unique environment of the GWOT. They were drafted during the age of the nation state, and hence, al Qaeda and other jihadists relish their ambiguous status as either "warrior" or civilian. My colleagues all seem to agree there is a "hole" in the current laws of war and that we are trying to push a "round peg into a square hole." The United States should call for a commission to analyze, provide guidance, and forge international consensus on how best to categorize these illegal belligerents.

Conclusion

The United States, uncomfortable in its role as the sole superpower in a dynamic world, has an opportunity to re-establish itself as the "shining city on the hill." This is a new war in a new era: we are all trying to figure out how best to proceed. Let us take Guantanamo Bay, a public-relations problem, and turn it around to demonstrate American and Western ideals. The past summer in Europe has affirmed, in my mind, that the international community does want us to lead, and needs us to lead—and we need their willing support in order to win this war. Implementing Article 5 Tribunals, creating a national security court apparatus, and leading the call to modify the Geneva Conventions to best meet the current threats of the wars of the 21st century and beyond will assist us in beating al Qaeda and the other jihadists. If nothing else, it will certainly help us to win in the "court of international public opinion."

* Glenn Sulmasy is an Associate Professor of Law at the United States Coast Guard Academy and Commander and Judge Advocate in the United States Coast Guard. The author specializes in international humanitarian law and national-security law. He has been researching in this area as part of a grant from the George HW Bush Library Foundation. The views expressed herein are his own.

Footnotes

[1] Michael Ignatieff, *The American Empire; the American burden*, NY Times Mag., Jan 5, 2002, at 22.

[2] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L.Rev. 675 (Dec, 2004).

[3] Geneva Convention Relative to the Treatment of Prisoners of War of Aug 12, 1949 (article 5) provides: ". . . Shall any doubt arise as to whether persons, having committed a belligerant 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."

[4] DoD personnel, normally Judge advocates with extensive legal training, have performed these record reviews in both Gitmo and at continental U.S. military bases to date.

[5] *See*, Arthur H. Garrison, *The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back*, 27 Am. J. Trial Advoc. 473, 513 (2004).

[6] *See generally*, Glenn Sulmasy, "*Send Moussaoui to court, A Military Court*," Foxnews.com, July 27, 2005.

[7] *Ex parte* Quirin, 317 U.S. 1 (1942).

[8] The desire to fit existing military law into a wartime situation was intended to provide "some rights" into the detainee situation during a unique time of war. The intention was to avoid long delays in prosecutions and to implement what was thought to be the appropriate process within both domestic and, at least in the past 50 years, international law.

[9] *See*, Military order of November 13, 2001: Detention Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

[10] *See generally*, Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against those responsible for the Sept 11th terrorist attacks), S.C. 1368, U.N. Res. 1368, U.N. SCOR, 56th Sess., 4370 mtg., U.N. Doc. S/RES/1368 (2001), and *See*, President George W. Bush, State of the Union Address, (Jan 39, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/2002012911.html.

[11] Historically, American military law scholars agree one of the key reasons to employ military law instead of the existing federal court system is the unique society in which the military operates and the need for rapid justice in order be able to focus on fighting the war.

[12] *See, supra* note 7.

[13] *See*, Josh White, *Military Trials for Detainees to Resume; Four Cases to Be Heard Immediately*, Wash Post, July 19, 2005.

[14] *See, surpa* note 11.

[15] *See*, Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the last War*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 309, (2005).