

# A CAUTIONARY TALE: EXAMINING THE USE OF MILITARY TRIBUNALS BY THE UNITED STATES IN THE AFTERMATH OF THE SEPTEMBER 11 ATTACKS IN LIGHT OF PERU'S HISTORY OF HUMAN RIGHTS ABUSES RESULTING FROM SIMILAR MEASURES

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"They that can give up essential liberty to purchase a little temporary safety deserve neither liberty or safety."

Benjamin Franklin<sup>1</sup>

"By keeping most aspects of trials out of the public domain, the United States would be forgoing an opportunity to demonstrate the imperative of human society based on the rule of law, the very destruction of which the terrorists who conducted the 11 September attacks sought to achieve."

Louise Doswald-Beck, Secretary-General,  
International Commission of Jurists<sup>2</sup>

## I. INTRODUCTION

Sudden, violent terrorist attacks killed thousands of citizens, including office workers, police, firefighters, and noncombatant military personnel. Property damage mounted into the tens of billions of dollars.<sup>3</sup> In order to bring the persons responsible for the attacks to justice and to prevent future attacks, the president declared a state of national emergency.<sup>4</sup> The president and the legislature swiftly enacted a series of laws designed to assist the police and military in apprehending, trying, and sentencing persons who committed acts of terrorism or assisted those who did.<sup>5</sup> Because of concerns over retribution against judges, prosecutors, and other law enforcement personnel, the president directed that persons accused of terrorism be tried before military tribunals.<sup>6</sup> Although some constitutional due process protections were eliminated in the interest of facilitating law enforcement efforts to combat the terrorist threat, the public overwhelmingly supported the government's

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<sup>1</sup> RICHARD JACKSON, AN HISTORICAL REVIEW OF PENNSYLVANIA 290 (1787).

<sup>2</sup> Letter from Louise Doswald-Beck, Secretary-General, International Commission of Jurists, to President George W. Bush (Dec. 6, 2001), *available at* [http://icj.org/news.php3?id\\_article=2609&lang=en](http://icj.org/news.php3?id_article=2609&lang=en) (last visited Mar. 23, 2003).

<sup>3</sup> Inter-American Commission on Human Rights, Organization of American States, Second Report on the Situation of Human Rights in Peru, Intro., ¶ 5, *available at* <http://www.cidh.oas.org/countryrep/Peru2000en/TOC.htm> (last visited Mar. 23, 2003) [hereinafter Inter-American Commission].

<sup>4</sup> *Id.* ch. 2, ¶ 64.

<sup>5</sup> *Id.*

<sup>6</sup> Craig Mauro, *Peru Military Court Has Dark Side: Military Tribunals Stamped Out Terrorist Threats But Convicted Hundreds of Innocents*, ORLANDO SENTINEL, Dec. 30, 2001, at K6, *available at* 2001 WL 28432212.

actions.<sup>7</sup> Most felt that the unprecedented and extraordinary threat faced by the country called for extraordinary measures in response.<sup>8</sup> Citizens therefore willingly sacrificed some of their constitutional protections in return for additional safety for themselves individually, and the country as a whole.<sup>9</sup>

Is this a description of the United States in the aftermath of the terrorist attacks of September 11, 2001? No; although similar in many respects to the situation in the United States during the months following September 11, 2001, the events described above occurred in Peru in the 1990s.<sup>10</sup> While Peru never experienced a single day of cataclysmic death and destruction of the magnitude experienced by the United States on September 11, Peru's pitched battle with terrorism resulted in over 24,000 deaths over a twelve-year period and threatened the very existence of the government.<sup>11</sup> Peru's government seemed to act in good faith when it enacted draconian measures and suspended the constitutional rights of its citizens in order to fight the terrorists who were threatening its existence, and in many ways the measures were successful.<sup>12</sup> The terrorist threat has largely been defeated, and peace and stability have returned to the country.<sup>13</sup> Unfortunately, as evidenced by the following examples, in the process of defeating the terrorists, Peru developed what is arguably one of the worst records of human rights abuses in the western hemisphere.

Luis Alfonso Moncada Vigo, a law student in his final year at the University of San Marcos in Lima, Peru, was arrested in 1994 and charged with treason under Peru's Decree Law 25659,<sup>14</sup> enacted two years earlier to combat escalating terrorism in the country.<sup>15</sup> Acquitted by a Peruvian military court, he was kept in prison while the government appealed his acquittal.<sup>16</sup> When the appellate court affirmed his acquittal, the Supreme Council of Military Justice sentenced Moncada to twenty years imprisonment for bank

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Inter-American Commission, *supra* note 3. See also Human Rights Watch, Peru, Presumption of Guilt, Human Rights Violations and the Faceless Courts in Peru, 28 vol. 8, no. 5 (Aug. 1996), at <http://www.hrw.org/reports/1996/Peru.htm> (last visited Mar. 31, 2003) [hereinafter Human Rights Watch].

<sup>11</sup> Inter-American Commission, *supra* note 3, intro., ¶¶ 5, 7.

<sup>12</sup> *Id.* at intro., ¶ 10.

<sup>13</sup> Human Rights Watch, *supra* note 10, § IV.A.

<sup>14</sup> Decree Law 25659, *el Peruano*, Aug. 12, 1992.

<sup>15</sup> Human Rights Watch, *supra* note 10, § IV.A.

<sup>16</sup> *Id.*

robbery, a charge that was not included in the indictment against him, and for which no testimony had been given at trial.<sup>17</sup> Moncada is currently serving his sentence at the Miguel Castro prison in Lima for a crime against which he had no chance to defend himself.<sup>18</sup>

Another Peruvian law student, Mirtha Ira Bueno Hidalgo, was arrested in August 1990 under the country's anti-terrorism law, Decree Law 25475.<sup>19</sup> Police accused her of distributing literature for the Shining Path, a notorious terrorist group in Peru.<sup>20</sup> She was acquitted by the trial court, and the decision was upheld by the court of appeals.<sup>21</sup> The Supreme Court remanded the case back to the appellate court, where, without presenting any new evidence, Bueno was found guilty and sentenced to twelve years imprisonment.<sup>22</sup> In violation of internationally accepted standards of due process, Bueno had been tried twice for the same crime.<sup>23</sup>

These cases are just two examples of the thousands of human rights abuses alleged to have occurred in the aftermath of Peru's enactment of anti-terrorism legislation by international organizations such as the United Nations Office of the High Commissioner for Human Rights,<sup>24</sup> the Organization of American States Inter-American Commission on Human Rights,<sup>25</sup> and by non-governmental organizations such as Human Rights Watch<sup>26</sup> and Amnesty International.<sup>27</sup> Since the events of September 11, the United States has similarly faced a crisis stemming from terrorism. In response, it has enacted measures that restrict some rights that have long been considered an integral part of the U.S. legal system. For example, formerly confidential communications between an accused and his attorney can now be monitored by the government

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Decree Law 25475, *El Peruano*, May 5, 1992.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See generally U.N. Commission on Human Rights, Economic and Social Council, Civil and Political Rights, Including Questions of Torture and Detention, *Report of the Working Group on Arbitrary Detention, Addendum, Report on the Mission to Peru*, U.N. Doc. E/CN.4/1999/63/Add.2 (1999), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/2fbc128ab04eeec1802567320037971f?OpenDocument> (last visited Mar. 23, 2003). See also Inter-American Commission, *supra* note 3, ch. 1, ¶ 35.

<sup>25</sup> See generally Inter-American Commission, *supra* note 3.

<sup>26</sup> Human Rights Watch, *supra* note 10.

<sup>27</sup> See generally Amnesty International, Report 2001, Peru, (2001) at <http://web.amnesty.org/web/ar2001.nsf/webamrcountries/PERU?OpenDocument> (last visited Jan. 16, 2001).

in some circumstances,<sup>28</sup> and access to counsel of choice can be, and was, denied for a period in at least one instance.<sup>29</sup> Much of the rhetoric in support of this legislation is similar to that heard in Peru when drastic legislative reforms were enacted; in essence, the sacrifice of some freedom is an acceptable price to pay when faced with certain types of threats.<sup>30</sup> The parallels between the situations faced by the two countries, separated by less than a decade, are obvious. If the United States is to avoid the tragic consequences suffered by the Peruvian people that resulted from their government's attempt to combat terrorism, it must learn from history and avoid Peru's mistakes. This Note examines one of the measures taken by the United States in the aftermath of the September 11 attacks, the establishment of military tribunals by the president's Military Order of November 13, 2001.<sup>31</sup> It compares the U.S. military tribunals to similar measures taken by Peru a decade earlier, measures that resulted in widespread abuses of basic human rights of its own citizens. It argues that while many important aspects of the situations in the two countries differ, the United States, like Peru in the 1990s, may be violating international law in its efforts to deal with the terrorism problem, and is running the risk of doing more damage than good in the long term.

Section I sets forth the purpose and scope of this Note. Section II discusses the history of Peru's terrorism crisis and the legal measures that established its military tribunals. Section III describes the operation of U.S. military tribunals as set forth in the Military Order and analyzes potential problems associated with their operation, both under the United States Constitution and under international law. Finally, Section IV presents conclusions.

## II. PERU'S HISTORY OF TERRORISM AND ANTI-TERRORISM LEGISLATION

In 1980, Peru returned to a democratic form of government after twelve years of military rule that had left the country with serious economic problems and an escalating threat from internal terrorist organizations.<sup>32</sup> From 1980 to

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<sup>28</sup> Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2001).

<sup>29</sup> John Hendren, *Response To Terror; Lawyers in Tribunals to Face Daunting Task; Justice*, L.A. TIMES, Dec. 29, 2001, at A3, available at 2001 WL 28940290.

<sup>30</sup> See Inter-American Commission, *supra* note 3, ch. 2, ¶ 64. See also Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46.

<sup>31</sup> Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].

<sup>32</sup> Inter-American Commission, *supra* note 3, intro., ¶ 4 (the primary terrorist organizations

1992, the period in which the level of violence rose most dramatically, 24,250 people died as the result of political violence in Peru: this figure included 2,044 members of the security forces, 10,171 civilians, 11,773 persons alleged to be members of armed dissident groups, and 262 persons allegedly linked to drug trafficking.<sup>33</sup> The violence perpetrated by the terrorist groups became so severe that it presented a grave danger to the stability of the country.<sup>34</sup> In response to this crisis, President Alberto Fujimori instituted the Government of Emergency and National Reconstruction in 1992.<sup>35</sup> Under the emergency powers given to him, President Fujimori dissolved the Congress and removed the majority of judges and prosecutors at all levels, replacing them with provisional judges.<sup>36</sup> He also suspended Article 2(20)(g) of the Peruvian Constitution, thus allowing the police and military forces to detain persons without judicial authorization.<sup>37</sup>

As the violence continued to escalate, Peru enacted two pieces of legislation that drastically changed the face of Peru's legal system; Decree Laws 25475 and 25659.<sup>38</sup> Violations of Decree Law 25475 were adjudicated by "faceless" civilian courts, where the identities of judges, prosecutors, and law enforcement officials were concealed, and violations of Decree Law 25659 were adjudicated by similarly "faceless" military tribunals.<sup>39</sup> While Decree Law 25475 purports to focus on acts of terrorism and Decree Law 25659 on acts of treason, in effect both laws deal with acts of terrorism, albeit through different venues. Indeed, the acts of "treason" within the scope of Decree Law 25659 were defined as acts of terrorism that differed only slightly from those defined in Decree Law 25475.<sup>40</sup>

The government justified the suspension of civil liberties guaranteed under the Peruvian Constitution by the need to take extraordinary measures to

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were the Sendero Luminoso (Shining Path) and the Movimiento Revolucionario Túpac Amaru (MRTA)).

<sup>33</sup> *Id.* ¶ 5.

<sup>34</sup> *Id.* ¶ 7.

<sup>35</sup> *Id.* ch. 2, ¶ 64 (one of the actions taken by the Government of Emergency and National Reconstruction was the complete reorganization of the Judiciary, the Court of constitutional Guarantees, the National Council of the Judiciary, the Public Ministry, and the Office of the Controller General of the Republic. The Emergency Government dissolved the Congress and removed numerous judges and prosecutors at all levels).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ch. 2, ¶ 83.

<sup>38</sup> *Id.* ch. 2, ¶ 64.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* ch. 2, ¶ 159.

address the terrorist threat that was jeopardizing the stability of the country.<sup>41</sup> Decree Law 25475 defines terrorism very broadly as an act that:

[p]rovokes, creates, or maintains a state of anxiety, alarm, or fear in the population or in a sector thereof, performs acts against life, the body, health, personal liberty and security, or against property, against the security of public buildings, roads, or means of communication or of transport of any type, energy or transmission towers, motorized facilities or any other good or service, using arms, explosive materials or artifacts, or any other means capable of causing damage or grave disturbance of the public peace, or affect the international relations or the security of society and the State.<sup>42</sup>

Decree Law 25475 vests responsibility for investigating and prosecuting crimes of terrorism in the Dirección Nacional contra el Terrorismo (DINCOTE).<sup>43</sup> DINCOTE is authorized to decide whether evidence it collects is sufficient for an indictment, which charges are filed, and whether the accused will appear before a civilian or a military court.<sup>44</sup> Under Decree Law 25475, police are authorized to detain persons incommunicado for up to fifteen days, and are only required to notify the judge and the Public Ministry within twenty-four hours after an arrest.<sup>45</sup> Furthermore, counsel for the accused is prohibited from intervening on behalf of his client until after the accused makes a statement to the Public Ministry.<sup>46</sup> Attorneys are also prohibited from representing more than one defendant who has been charged under Decree Law 25475 at one time.<sup>47</sup> These restrictions severely curtail the due process rights of Peruvian citizens charged under this law.

Article 15 of Decree Law 25475 provided for secret tribunals and "faceless" courts. It stated,

[t]he identity of the judges and members of the Public Ministry, and of the justice auxiliaries who intervene in the trial of crimes

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<sup>41</sup> Human Rights Watch, *supra* note 10, § I.

<sup>42</sup> Decree Law 25475, *El Peruano*, May 5, 1992.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

of terrorism, shall be secret, to which end measures will be adopted to guarantee that measure. The judicial rulings shall not bear signatures or seals of the judges participating, nor of the justice auxiliaries. For this purpose, codes and keys will be used, which shall also be kept secret.<sup>48</sup>

Secrecy pervaded every facet of the process. The judges were invisible to the defendants and their counsel at all times, and trial proceedings were conducted in private.<sup>49</sup> Hearings took place in specially equipped courtrooms inside high-security prisons or, in treason cases, at military bases.<sup>50</sup> The courtrooms were small, with a single door and a large one-way mirror along one wall.<sup>51</sup> Judges, the prosecutor and court secretaries sat in an adjoining room on the other side of the mirror.<sup>52</sup> They communicated with the accused persons and their counsel through voice-distorting microphones.<sup>53</sup> At times, poor audio quality from the sound system made it impossible for the defendant or his or her counsel to understand what was being said.<sup>54</sup> Defense counsel were often forced to wear hoods without vision openings during travel to and from the secret tribunals, and during the trial itself.<sup>55</sup>

Article 13 of Decree Law 25475 establishes a rigid time limit of thirty days, extendable in some cases to fifty days, for pretrial investigation into charges of terrorist activities.<sup>56</sup> This is significantly less than the four months normally allowed for other criminal investigations, and restricts the ability of defense counsel to gather sufficient information to present an adequate defense.<sup>57</sup>

Article 13 also prohibits the appearance of police or military personnel who participated in the interrogation as witnesses at trial, ruling out any possibility of cross examination by defense counsel.<sup>58</sup> The law also provides for secret witnesses whose identities are kept from the defense throughout the trial.<sup>59</sup>

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<sup>48</sup> *Id.* (while Decree Law 25475 remains in effect, the faceless courts described herein have since been abolished).

<sup>49</sup> Inter-American Commission, *supra* note 3, ch. 2, ¶ 106.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Human Rights Watch, *supra* note 10, § III.E.

<sup>56</sup> Decree Law 25475, *El Peruano*, May 5, 1992.

<sup>57</sup> Human Rights Watch, *supra* note 10, § III.A.

<sup>58</sup> Decree Law 25475, *El Peruano*, May 5, 1992.

<sup>59</sup> *Id.*



Defense counsel is not permitted to see, interview, or cross examine these witnesses.<sup>60</sup>

This extreme secrecy had been designed to protect courts and law enforcement personnel from retribution.<sup>61</sup> Many judges and prosecutors had been assassinated by terrorists attempting to intimidate the courts and hamper the prosecution of terrorists.<sup>62</sup> However, it is questionable whether the secrecy provides any real protection for the identities of court personnel, particularly in the provinces and small towns, where terrorists could still determine the identities of judges and prosecutors with relative ease.<sup>63</sup>

Decree Law 25659, in contrast, deals with the crime of *Traición a la Patria* (i.e. treason).<sup>64</sup> Article 1 defines treason as the commission of those acts defined in Decree Law 25475 through certain means such as the use of explosives, causing injury to persons or property.<sup>65</sup> It also establishes that the leaders and members of terrorist organizations who perform the physical elimination of persons are guilty of treason.<sup>66</sup> Unlike violations of Decree Law 25475, which are the responsibility of civilian courts, the military has jurisdiction over violations of Decree Law 25659.<sup>67</sup>

#### A. Effects of Peru's Anti-terrorism Legislation

Because only a small portion of the country remains in a state of emergency,<sup>68</sup> it appears that Peru's draconian measures to combat terrorism were successful in reducing the incidence of terrorist violence in the country. Unfortunately, Peru's success came at a high cost to the human rights of its citizens. Approximately 3,900 Peruvian citizens were convicted of terrorism and related offenses by the "faceless" special courts.<sup>69</sup> The Peruvian government has also admitted that innocent persons were unjustly convicted by Peru's justice system. In 1996, President Fujimori, addressing the issue of

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<sup>60</sup> *Id.*

<sup>61</sup> See Mauro, *supra* note 6.

<sup>62</sup> *Id.*

<sup>63</sup> Inter-American Commission, *supra* note 3, ch. 2, ¶ 105.

<sup>64</sup> Decree Law 25659, *El Peruano*, Aug. 12, 1992.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Inter-American Commission, *supra* note 3, intro., ¶ 10 (only six percent of Peru remains in a state of emergency).

<sup>69</sup> Mauro, *supra* note 6.

unjustly imprisoned persons, stated, "We recognize that such a situation exists and we are doing all we can. We would like to have a mechanism soon to allow us to bring justice to those who are unjustly in detention. We don't doubt that such people exist . . . ."<sup>70</sup> In 1996, the government established a commission to review convictions.<sup>71</sup> By the end of 2000, 600 persons, known as *los inocentes*, had been released through the work of the commission.<sup>72</sup> No one knows exactly how many more innocent persons remain in prison.<sup>73</sup> These numbers are a testament to the abuses that occurred as a result of Peru's approach of suspending the basic civil rights of its citizens to ensure their safety.

As a result of the government's actions, Peru's record of human rights abuses is well known in the international community. In addition to the abuses noted by the Organization of American States' Inter-American Commission on Human Rights in its Second Report on the Situation of Human Rights in Peru,<sup>74</sup> other international organizations have cited serious human rights abuses in Peru resulting from its anti-terrorism legislation. These organizations include the United Nations Committee Against Torture,<sup>75</sup> the United Nations

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<sup>70</sup> Human Rights Watch, *supra* note 10, § III.

<sup>71</sup> Mauro, *supra* note 6.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Inter-American Commission, *supra* note 3.

<sup>75</sup> *Id.* ch. 1, ¶ 34. Expressing concern for:

a. the continuing numerous allegations of torture; b. the lack of 'independence' of those members of the judiciary who have no security of tenure; c. the period of incommunicado pre-trial detention of 15 days for persons suspected of acts of terrorism; d. the use of military courts to try civilians; e. the automatic penalty of at least 1 year of solitary confinement from the date of the trial of anyone convicted of a terrorism offence; f. the apparent lack of effective investigation and prosecution of those who are accused of having committed acts of torture; g. the use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to Articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate; h. the maintenance in some parts of the country of emergency laws which abrogate ordinary human rights protection; i. the special prison regime applicable to convicted terrorists and in particular to convicted terrorist leaders; j. the failure of the Attorney General's Office to keep a precise register of persons who claim that they have been tortured.

Human Rights Committee,<sup>76</sup> the World Organization Against Torture,<sup>77</sup> the United Nations Committee on the Elimination of Racial Discrimination,<sup>78</sup> and the United Nations Committee on the Elimination of Discrimination Against Women.<sup>79</sup> As evidenced by the concerns expressed by these organizations, Peru's success against terrorism came at a very high price, both to its citizens and to its standing in the international community.

### *B. Current Status of Peruvian Anti-terrorism Legislation*

With only a few minor changes, the severe curtailment of Peruvian citizens' civil liberties brought about by anti-terrorism legislation remains unchanged,<sup>80</sup> despite the fact that the terrorist threat has all but disappeared.<sup>81</sup> Decree Law 26248<sup>82</sup> made it possible for persons accused of terrorism to be released without bail while under investigation for the crime of terrorism; this had been banned under the original version of Decree Law 25475.<sup>83</sup>

Other relatively minor changes to the system have been enacted in Decree Law 26447.<sup>84</sup> Article 2 of the Law restored some due process rights pertaining to defense counsel, giving persons accused of terrorism the right to counsel of their choice, and the right to have counsel present from the outset of the police investigation.<sup>85</sup> It established a requirement that defense counsel be present

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<sup>76</sup> *Id.* ch. 1, ¶ 35 (concluding, "In a system of trial by 'faceless judges,' neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces").

<sup>77</sup> *Id.* ch. 1, ¶ 36 (expressing concern over information it received from two former against of the Peruvian intelligence corps, who allegedly admitted that they received training, by their superiors, in the torture of detainees).

<sup>78</sup> *Id.* ch. 1, ¶ 38 (expressing concern over what is characterized as, "the close relationship [in Peru] between socio-economic underdevelopment and the phenomena of ethnic or racial discrimination against part of the population, chiefly the indigenous and peasant communities").

<sup>79</sup> *Id.* ch. 1, ¶ 41 (expressing concern over "the situation of women who have been displaced from their places of origin with their families as a result of terrorist activity," and recommending that the greatest possible care should be given to such women, who, in the main, were heads of household, and who should be the beneficiaries of programmes to promote their participation in the labour force together with access for them and their families to education, health care, housing, drinking, water and other essential services).

<sup>80</sup> *Id.* ch. 2, ¶ 116.

<sup>81</sup> *Id.* intro. ¶ 10.

<sup>82</sup> Decree Law 26248, *El Peruano*, Nov. 24, 1993.

<sup>83</sup> Decree Law 25475, *supra* note 42.

<sup>84</sup> Decree Law 26447, *El Peruano*, Apr. 20, 1995.

<sup>85</sup> *Id.* at art. 2.

any time the defendant makes a statement, and provides public defenders for persons who do not choose their own counsel.<sup>86</sup> Article 4 reestablishes that persons under eighteen years of age may not be sentenced as an adult;<sup>87</sup> under the original anti-terrorism legislation, the minimum age for sentencing had been fifteen years.<sup>88</sup> Finally, Decree Law 26671 ended the practice of "faceless" courts.<sup>89</sup> These changes have restored some of the due process protections afforded to persons charged under Peru's anti-terrorism laws, and may be reflective of the Peruvian government's recognition of the human rights abuses that resulted from its efforts to fight terrorism.

### III. UNITED STATES ANTI-TERRORISM LEGISLATION

#### A. *Military Tribunals*

After the attacks of September 11, 2001, the United States government moved swiftly to enact legislation and implement other legal measures designed to combat the terrorist threat.<sup>90</sup> The Executive Order establishing military tribunals to try certain persons accused of terrorist acts was issued on November 13.<sup>91</sup> Put into effect a little over two months after the attacks, it provides that certain persons may be tried by military tribunals for offenses related to acts of terrorism.<sup>92</sup> The Military Order itself contains few details concerning how the military tribunals will function, a fact which caused a great deal of concern among civil libertarians in the United States, and among

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at art. 4.

<sup>88</sup> Decree Law 25475, *supra* note 42.

<sup>89</sup> Decree Law 26671, *El Peruano*, Oct. 11, 1997.

<sup>90</sup> See Military Order, *supra* note 31. See also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (signed into law by the president on October 26, 2001, six weeks after the attacks); Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2001) (changing U.S. Department of Justice Bureau of Prison regulations to permit law enforcement officials to monitor attorney/client communications under certain circumstances, promulgated seven weeks after the attacks); Aviation and Transportation Security Act, 49 U.S.C.S. § 40101 (2002) (signed into law by the president ten weeks after the attacks); Enhanced Border Security and Visa Entry Reform Act, 8 U.S.C.S. § 1701 (2002) (enacted over twelve months after the attacks).

<sup>91</sup> Military Order, *supra* note 31.

<sup>92</sup> *Id.*

foreign governments and international organizations, about potential abuses of accused persons' human rights.<sup>93</sup>

The Military Order states the following with respect to persons who are subject to trial by United States military tribunals:

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I [the president] determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaeda;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.<sup>94</sup>

United States citizens are expressly excluded from the jurisdiction of military tribunals.<sup>95</sup>

The Military Order authorizes the Secretary of Defense to develop "such orders and regulations . . . as may be necessary to carry out any of the provisions of this order."<sup>96</sup> On March 21, 2002, Secretary of Defense

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<sup>93</sup> See, e.g., Memorandum from Timothy H. Edgar, Legislative Counsel, American Civil Liberties Union, to Interested Persons (Nov. 29, 2001), available at <http://www.aclu.org/congress/1112901b.html> (last visited Mar. 24, 2003); Letter from Kenneth Roth, Executive Director, Human Rights Watch, to President George W. Bush (Nov. 15, 2001), available at <http://www.hrw.org/press/2001/11/miltribsltr1115.htm> (last visited Mar. 28, 2003); Doswald-Beck, *supra* note 2.

<sup>94</sup> Military Order, *supra* note 31, § 2(a).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 4(b).

Rumsfeld announced procedures that will govern many aspects of military tribunal operations.<sup>97</sup> The procedures that Rumsfeld announced include many protections for defendants provided by civilian courts in the United States, including provisions for plea bargaining,<sup>98</sup> the presumption of innocence until proven guilty,<sup>99</sup> the provision of a military lawyer at no charge to the defendant and permission to use a civilian lawyer paid for by the defendant,<sup>100</sup> the standard of proof of beyond a reasonable doubt<sup>101</sup> (the same as that used in civilian criminal trials), and the ability of a defendant to present evidence in his defense, and to cross examine prosecution witnesses.<sup>102</sup> In contrast, Peruvian tribunals curtailed defendants' right to cross-examine prosecution evidence and witnesses by not permitting defendants to cross examine police officers or military personnel who provided evidence against them.<sup>103</sup>

Defendants will also be protected against double jeopardy<sup>104</sup> and self incrimination.<sup>105</sup> Defendants will have access to evidence the prosecution intends to present against them, but if the evidence is classified, defendants and their civilian attorneys will be barred from such access.<sup>106</sup> Military defense lawyers, if utilized by the defendants, would be granted access to classified prosecution evidence.<sup>107</sup> Likewise, while the proceedings will normally be open to the public and press, if classified information is to be presented, the tribunal proceedings may be closed, and even the defendants and their civilian counsel may be excluded from the courtroom.<sup>108</sup>

Evidentiary standards for U.S. military tribunals will be less stringent than those of civilian courts. For example, hearsay will be permitted because, according to Secretary Rumsfeld, "in wartime it may be difficult to locate

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<sup>97</sup> John Mintz, *Tribunal Rules Aim to Shield Witnesses; Judges, Prosecutors May be Anonymous*, WASH. POST, Mar. 22, 2002, at A1, available at 2002 WL 17584683.

<sup>98</sup> Frank J. Murray, *Terrorism Trials Modeled After Tribunals of WWII*, WASH. TIMES, Mar. 22, 2002, at A4, available at 2002 WL 2907152.

<sup>99</sup> Sally Buzbee, *Pentagon Says Tribunal Rules Protect Terror Suspects—But Limited Right to Appeal and Looser Evidence Standards Draw Criticism*, STAR-LEDGER, Mar. 22, 2002, at 5, available at 2002 WL 17059331.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Inter-American Commission, *supra* note 3, ch. 2, ¶ 179.

<sup>104</sup> Buzbee, *supra* note 99.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

witnesses.”<sup>109</sup> Chain of custody requirements will be relaxed as well because conventional chain of custody requirements are difficult to comply with under battlefield conditions.<sup>110</sup> The general standard for introduction of evidence will be whether it has probative value to a reasonable person, a lower standard than that used in civilian courts and military courts martial.<sup>111</sup>

Judges will be military officers; juries will be comprised of three to seven military officers, with seven required for death penalty cases.<sup>112</sup> Unlike civilian criminal courts where a unanimous jury verdict is required to convict, a conviction by the military tribunals will only require a two thirds majority of the jury.<sup>113</sup> A sentence of death will require a unanimous vote of the seven-officer jury.<sup>114</sup>

All convictions by the military tribunals will be automatically reviewed by a special panel made up of one military officer and two outside experts deputized by the president.<sup>115</sup> The president or the Secretary of Defense have the final say on sentences of death.<sup>116</sup> In accordance with the provisions of the Military Order, the procedures bar appeals to federal appellate courts, or direct appeals to the Supreme Court.<sup>117</sup> The Military Order states:

[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 commission.<sup>118</sup>

However, the Defense Department has acknowledged that it cannot prevent the Supreme Court from intervening if it chooses to do so.<sup>119</sup> Pentagon policy director Douglas Feith stated, “[i]t’s not within our power to exclude the

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<sup>109</sup> *Id.*

<sup>110</sup> Patrick Smyth, *Terrorist Suspects Get More Rights in U.S. Trials*, IRISH TIMES, Mar. 22, 2002, at P12, available at 2002 WL 15897927.

<sup>111</sup> Buzbee, *supra* note 99.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Smyth, *supra* note 110.

<sup>117</sup> Military Order, *supra* note 31, § 7(b)(2).

<sup>118</sup> Military Order, *supra* note 31.

<sup>119</sup> Murray, *supra* note 98.

Supreme Court from the process,"<sup>120</sup> and Pentagon General Counsel William J. Haynes II said, "[f]ar be it from me to tell the Supreme Court not to do something."<sup>121</sup>

Commenting on a similar appeals procedure employed by Peruvian military tribunals, where the appeals body was also composed of military personnel, the Inter-American Commission on Human Rights stated that such a procedure violates Article 8(2)(h) of the American Convention on Human Rights (American Convention).<sup>122</sup> The Commission declared that the right to appeal "is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse . . . the [appeals] court was part of the military structure and as such did not have the [necessary] independence . . ."<sup>123</sup> The United States signed the American Convention on June 1, 1977, but never ratified it;<sup>124</sup> thus, the Inter-American Commission's finding regarding Peru's similar appeals process for its military tribunals may suggest that the United States does not comply with recognized international standards in its provisions for appeals from the decisions of its military tribunals.

In a move disturbingly similar to Peru's "faceless" courts, the Pentagon plans to protect judges, prosecutors, and witnesses from retribution by allowing them to remain anonymous during the trial.<sup>125</sup> Some witnesses may testify from remote locations via telephone or closed circuit television, with their voices altered electronically.<sup>126</sup> If these plans are carried out actually exercised by the Pentagon, they may further degrade the due process protections of persons being tried before U.S. military tribunals, and expose the government to heightened domestic and international criticism.

The 620 prisoners at the United States detention facility at Guantanamo Bay Naval Base continue to be interrogated by military investigators without the presence of counsel.<sup>127</sup> Commenting on Peruvian citizens' lack of adequate

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123. *See also* Inter-American Commission, *supra* note 3, ch. 2, ¶ 182.

<sup>123</sup> Inter-American Commission, *supra* note 3, at ch. 2, ¶ 182.

<sup>124</sup> Inter-American Commission on Human Rights, Signatures and Current Status of Ratifications, American Convention on Human Rights, at <http://www.cidh.oas.org/Basicos/basic4.htm> (last visited Mar. 25, 2003).

<sup>125</sup> Mintz, *supra* note 97.

<sup>126</sup> *Id.*

<sup>127</sup> Paisley Dodds, *U.S. Defends Guantanamo Detentions*, A.P. ONLINE, Jan. 17, 2003, available at 2003 WL 9524202.



access to defense counsel, a requirement of Article 8(2)(d) of the American Convention, the Inter-American Commission on Human Rights criticized the Peruvian government's procedure of not permitting an accused to see his attorney until after he made a statement to the government. The Inter-American Commission further stated that the procedure violated the accused's right to counsel, and his freedom from self-incrimination.<sup>128</sup> The United States' practice of interrogating prisoners while denying them access to counsel may likewise be in violation of international standards of due process as reflected in the American Convention, as well as the International Covenant on Civil and Political Rights, to which the United States is a party.<sup>129</sup>

To date, no detainees from the U.S. war on terror have been tried under the military tribunal system established under the Military Order, and no trials have been scheduled,<sup>130</sup> despite the fact that some of the detainees have been held at the Guantanamo Bay detention facility for over a year.<sup>131</sup> The final decision as to whether to try a detainee before a military tribunal will be made by the president.<sup>132</sup> No charging or sentencing guidelines have yet been issued by the government; the March 21, 2002 rules announced by the Pentagon state only that tribunal jurisdiction covers "laws of war" and "all other offenses triable by military commissions" without specifying what they are.<sup>133</sup> The rules contain no sentencing guidelines beyond punishment "appropriate to the offense."<sup>134</sup> The Defense Department is expected to issue a manual of "crimes and elements" that prosecutors will use to formulate charges.<sup>135</sup> The government has been moving slowly to begin tribunal proceedings because its priority in dealing with the detainees is to gain intelligence information by interrogating them, not to prosecute them.<sup>136</sup> As of December 2002, none of the detainees have been charged with a crime, and there have been no hearings

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<sup>128</sup> Inter-American Commission, *supra* note 3, ch. 2, ¶ 177.

<sup>129</sup> *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at art. 14 ¶ 3(b), U.N. Doc. A/6316 (1967) [hereinafter ICCPR].

<sup>130</sup> Frank Davies, *U.S. Readies Tribunals for Trials: Guidelines From WWII to Play Role*, CHARLESTON GAZETTE, Dec. 27, 2002, at P5C, available at 2002 WL 104625469.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Jess Bravin, *Military Tribunal Defendants Get Fewer Rights and Procedural Rules*, WALL ST. J., Mar. 22, 2002, at A4, available at 2002 WL-WSJ 3389555.

<sup>134</sup> *Id.*

<sup>135</sup> Joan Ryan, *All Eyes on Our Military Tribunals*, S.F. CHRON., Dec. 15, 2002, at E4, available at 2002 WL 4038209. See also Davies, *supra* note 130.

<sup>136</sup> Davies, *supra* note 130.

to determine if any of the men have been incarcerated by mistake, in contrast to nearly 1,200 such hearings that took place during and after the Gulf War.<sup>137</sup>

Many detainees may be facing the possibility of indefinite detention without being charged.<sup>138</sup> U.S. officials are having difficulty obtaining sufficient information about many detainees to formulate charges, and yet will not release them if the government considers them dangerous.<sup>139</sup> Likewise, Secretary Rumsfeld stated that even persons who are tried and acquitted by military tribunals may not be released if considered dangerous.<sup>140</sup> The government claims the right to detain the prisoners under the provision of the Geneva Convention which allow prisoners of war to be held for the duration of the conflict,<sup>141</sup> while at the same time claiming that the detainees are not entitled to the protections of the Geneva Convention because of their status as unlawful combatants.<sup>142</sup>

### *B. Legality of Military Tribunals Under United States Law*

Any comparison between the use of military tribunals in the United States and their use in Peru must consider first the legitimacy of the United States' military tribunals under United States law. Perhaps more than any other single action taken by the United States government in the aftermath of the September 11 terrorist attacks, the Military Order has generated a firestorm of controversy, both domestically and internationally. One of the primary points of contention is whether the president has the authority to establish the military tribunals in the current situation. On January 4, 2002, the American Bar Association's Task Force on Terrorism and the Law issued its Report and Recommendations on Military Commissions.<sup>143</sup> The ABA Terrorism Task

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<sup>137</sup> Ryan, *supra* note 135.

<sup>138</sup> John Mintz, *Some Detainees May be Held Even if Acquitted*, WASH. POST, Mar. 29, 2002, at A7, available at 2002 WL 17586461.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, § II, art. 118, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.unhchr.ch/html/menu3/b/91.htm> (last visited Mar. 25, 2003) [hereinafter Geneva Convention for Prisoners of War].

<sup>142</sup> Jonathan Fowler, *Red Cross: Thousands of Letters Delivered for Guantanamo Detainees*, A.P. ONLINE, Jan. 13, 2003, available at 2003 WL 2927023.

<sup>143</sup> ABA Terrorism Task Force, American Bar Association, Report and Recommendations on Military Commissions (Jan. 4, 2002), available at <http://www.abanet.org/leadership/military.pdf> (last visited Mar. 25, 2003) [hereinafter ABA Terrorism Task Force].

Force concluded (1) there is extensive historical authority under the Constitution and United States law supporting the president's establishment of military tribunals in wartime; (2) Congress authorized the president to use armed force against those persons, organizations and states responsible for the September 11 attacks; (3) the Supreme Court and Congress have recognized that a state of war may exist without formal declaration; (4) military tribunals have been used in periods other than declared war; (5) the scope of the president's authority to establish military tribunals without express Congressional authorization has not been developed in case law, but the president's constitutional authority to do so is strongest when the president consults with and has the support of Congress; (6) military tribunals have authority to try persons for violations of the law of war, and it can be reasonably argued that the September 11 attacks were such violations; (7) absent additional authority from Congress, military tribunals do not have authority to try persons for crimes other than violations of the law of war; (8) the Military Order can be interpreted to apply to offenses that are not violations of the law of war, and that are not connected to the September 11 attacks; (9) the Military Order applies to all non-citizens, including aliens lawfully present in the United States, raising serious questions about the constitutionality of this provision of the Military Order under existing precedent; (10) military tribunals are subject to habeas corpus proceedings in federal court, at least with respect to persons present in the United States; and (11) the United States is a signatory to the International Convention on Civil and Political Rights, and international tribunals for war crimes should follow the basic standards and procedures contained in Article 14 of that instrument.<sup>144</sup>

Military tribunals derive their authority from Articles I and II of the United States Constitution.<sup>145</sup> The Constitution gives Congress the powers: "[t]o . . . provide for the common Defence . . .,"<sup>146</sup> "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"<sup>147</sup> "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"<sup>148</sup>; "[t]o raise and support Armies . . .,"<sup>149</sup> "[t]o provide and maintain a Navy,"<sup>150</sup> and "[t]o make Rules

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<sup>144</sup> *Id.* at 15-16.

<sup>145</sup> *Id.* at 2.

<sup>146</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>147</sup> *Id.* art. I, § 8, cl. 10.

<sup>148</sup> *Id.* art. I, § 8, cl. 11.

<sup>149</sup> *Id.* art. I, § 8, cl. 12.

<sup>150</sup> *Id.* art. I, § 8, cl. 13.

for the Government and Regulation of the land and naval Forces.”<sup>151</sup> Moreover, Article II gives the president the “executive Power”<sup>152</sup> and makes him the “Commander in Chief of the Army and Navy of the United States . . . .”<sup>153</sup>

Congress provided for military tribunals in Article 21 of the Uniform Code of Military Justice, which states,

[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military commissions of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military commissions.<sup>154</sup>

In *Ex parte Quirin*,<sup>155</sup> the case most often cited in support of the president’s power to establish military tribunals, the U.S. Supreme Court upheld the jurisdiction of a military tribunal ordered by President Roosevelt during World War II to try eight German saboteurs captured in the United States.<sup>156</sup> The Court stated, “[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military commissions shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”<sup>157</sup> The Court expressly left open the question of whether the president’s power as commander-in-chief alone is sufficient authority to establish a military tribunal, since Congress had expressly given the president that power in Article of War 15.<sup>158</sup>

Critics of the Military Order have questioned the president’s authority to establish military tribunals except in situations when Congress has made a formal declaration of war.<sup>159</sup> *Quirin* and a number of other related cases

<sup>151</sup> *Id.* art. I, § 8, cl. 14.

<sup>152</sup> *Id.* art. II, § 1.

<sup>153</sup> *Id.* art. II, § 2.

<sup>154</sup> Uniform Code of Military Justice, Jurisdiction of Courts-Martial Not Exclusive, 10 U.S.C.A. § 821 (2001) [hereinafter U.C.M.J. Article 21].

<sup>155</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 28.

<sup>158</sup> ABA Terrorism Task Force, *supra* note 143, at 3 (U.C.M.J. Article 21 is materially identical to its predecessor, Article of War 15).

<sup>159</sup> *Id.* at 5; *see also* Edgar, *supra* note 93.

supporting military tribunals were adjudicated during World War II.<sup>160</sup> The Supreme Court and Congress have recognized, however, that a state of war may exist without a formal declaration.<sup>161</sup> Military tribunals have been used in hostilities in which there was no declaration of war, including the Civil War and the Indian Wars.<sup>162</sup> Nothing in U.C.M.J. Article 21 or elsewhere in the Code or other statutes expressly prohibits the use of military tribunals when war has not been declared.<sup>163</sup>

In addition to historical precedent supporting the establishment of military tribunals, Congress has also provided support for their existence. On September 18, 2001, Congress enacted a joint resolution authorizing the president:

[t]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.<sup>164</sup>

Thus, it can reasonably be argued that Congress' authorization to use "all necessary and appropriate force" includes authority for the president to establish military tribunals, at least with respect to offenses related to the September 11 attacks.<sup>165</sup>

By its terms, U.C.M.J. Article 21 limits the jurisdiction of military tribunals to "offenders or offenses that by statute or by the law of war may be tried by military commissions."<sup>166</sup> No statute other than U.C.M.J. Article 21 relating to the jurisdiction of a military tribunal appears to apply in the current circumstances, so the exercise of jurisdiction by a military tribunal established by the Military Order must be under the law of war.<sup>167</sup> That jurisdiction generally rests on either of two bases: (1) military occupation, or (2) prosecution for violations of the law of war; only the latter applies to the current

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<sup>160</sup> ABA Terrorism Task Force, *supra* note 143, at 3.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>165</sup> ABA Terrorism Task Force, *supra* note 143, at 6.

<sup>166</sup> U.C.M.J. Article 21, 10 U.S.C. § 831 (2001).

<sup>167</sup> ABA Terrorism Task Force, *supra* note 143, at 6.

situation.<sup>168</sup> In *Ex parte Quirin*, the Supreme Court recognized that military tribunals are proper fora for the trial of violations of the law of war,<sup>169</sup> and this jurisdiction also applies to non-state actors such as al Qaeda.<sup>170</sup> However, the Military Order potentially applies to a much broader group of people than those who may have committed war crimes. In addition to those directly responsible for the September 11 attacks, it expressly applies to members of al Qaeda, persons complicit in acts of international terrorism, and those who have harbored such persons.<sup>171</sup>

The fact that these latter offenses are not limited to the September 11 attacks, or even necessarily related to them, raises several questions. First, it is not clear that membership in al Qaeda alone, or harboring terrorists alone, violates the law of war, which is the necessary predicate to the jurisdiction of a military tribunal under both common law and U.C.M.J. Article 21.<sup>172</sup> Additionally, it is not clear that all acts of international terrorism are necessarily violations of the law of war.<sup>173</sup> Therefore, specific authority from Congress appears to be necessary in order to apply the Military Order to persons other than those involved in the September 11 attacks.<sup>174</sup> Second, the Military Order's application of military tribunals to acts not associated with the September 11 attacks would uncouple the authority of such military tribunals from Congress' September 18 joint resolution,<sup>175</sup> which authorized force against those who "planned, authorized, committed, or aided the terrorist attacks on September 11."<sup>176</sup> Using a military tribunal to address offenses unrelated to the September 11 attacks raises serious questions of constitutional and statutory authority in the absence of further authority from Congress.<sup>177</sup>

The applicability of the Military Order is limited to persons who are not citizens of the United States.<sup>178</sup> Non-citizens prosecuted under the Military Order could fall into two broad categories: those outside and those within the United States. Aliens outside United States territory have few, if any

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<sup>168</sup> *Id.*

<sup>169</sup> *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

<sup>170</sup> ABA Terrorism Task Force, *supra* note 143, at 7.

<sup>171</sup> Military Order, *supra* note 31.

<sup>172</sup> ABA Terrorism Task Force, *supra* note 143, at 9.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>177</sup> ABA Terrorism Task Force, *supra* note 143, at 9.

<sup>178</sup> Military Order, *supra* note 31, § 2(a).

constitutional protections.<sup>179</sup> However, aliens present within the United States, including those residing unlawfully, are entitled to the same constitutional due process protections provided by the Fifth and Sixth Amendments to the United States Constitution as citizens.<sup>180</sup> In *Ex parte Quirin*, the Supreme Court upheld jurisdiction of a military tribunal to try a United States citizen for offenses committed in the United States because the citizen was a "belligerent" in a declared war.<sup>181</sup> It distinguished another case, *Ex parte Milligan*,<sup>182</sup> which held that a military tribunal lacked jurisdiction to try a citizen who was not a belligerent for offenses committed in the United States.<sup>183</sup> The Military Order excludes citizens from the jurisdiction of military tribunals, but arguably the belligerent/non-belligerent distinction drawn in the *Quirin* and *Milligan* cases may have some relevance to the application of the Military Order to aliens in the United States.<sup>184</sup>

The issue is further complicated by the difficulty inherent in defining who is a "belligerent" in the current situation.<sup>185</sup> *Ex parte Quirin* suggests that an exception to constitutional due process protections may exist for a person who enters the United States illegally in order to commit a war crime.<sup>186</sup> Subjecting non-citizens outside the United States to the jurisdiction of military tribunals raises the least likelihood of constitutional issues.<sup>187</sup> However, such jurisdiction over aliens already present in the United States, particularly those present lawfully, raises more serious questions in light of constitutional due process protections for all 'persons' within the United States, not just citizens.<sup>188</sup>

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<sup>179</sup> See *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that German nationals, confined in custody of United States Army in Germany following conviction by military tribunal of having engaged in military activity against United States in China after surrender of Germany, had no right to writ of habeas corpus to test legality of their detention). See also *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States).

<sup>180</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent).

<sup>181</sup> *Ex parte Quirin*, 317 U.S. 1, 44 (1942).

<sup>182</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>183</sup> *Ex parte Quirin*, 317 U.S. at 45.

<sup>184</sup> ABA Terrorism Task Force, *supra* note 143, at 10 n.24.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

The Military Order and the subsequent rules issued by the Defense Department preclude appellate review by civilian courts.<sup>189</sup> However, neither the Military Order or its implementing rules expressly suspend the writ of habeas corpus, nor is it likely that they could do so.<sup>190</sup> Although the Supreme Court has held that military tribunals are outside the normal process of judicial review,<sup>191</sup> it has nevertheless reviewed applications for writ of habeas corpus by persons being tried by military tribunal.<sup>192</sup> The Court has carried out habeas corpus reviews even in the face of language in the implementing Executive Order that purported to bar judicial review,<sup>193</sup> much like that in the current Military Order.<sup>194</sup>

### *C. Legality of Military Tribunals Under International Law*

In addition to concerns about the president's authority to establish military tribunals and the constitutionality of their jurisdiction, there are also questions concerning their legality under international law and their effect on international relations. These concerns include possible violations of the ICCPR and the Geneva Convention.

International standards for legal due process fall generally into the following categories: protection against detention or other punishment that is not based on an officially alleged violation of an established law (i.e. arbitrary detention);<sup>195</sup> the right of the accused to know the charges against him;<sup>196</sup> the right to promptness, both at an accused's initial appearance before a tribunal,

<sup>189</sup> See Military Order, *supra* note 31; see also Buzbee, *supra* note 99.

<sup>190</sup> See Buzbee, *supra* note 99, at 11.

<sup>191</sup> *Ex parte Vallandigham*, 68 U.S. 243 (1863).

<sup>192</sup> See, e.g., *Madison v. Kinsella*, 342 U.S. 341 (1952); *Application of Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942). But see *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying habeas corpus review of the jurisdiction of a military commission outside the United States to try an enemy alien who was never in the United States, for war crimes alleged to have been committed outside the United States).

<sup>193</sup> ABA Terrorism Task Force, *supra* note 143, at 11.

<sup>194</sup> Military Order, *supra* note 31, § 7(b)(2).

<sup>195</sup> See *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 9 (1948); *ICCPR*, *supra* note 129, art. 9 ¶ 1; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. 49, princ. 2, 4, 30, U.N. Doc. A/43 (1988); *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. [ST/DPI/832, ¶ 30 (1984).

<sup>196</sup> *ICCPR*, *supra* note 129, at art. 9, ¶ 2, art. 14, ¶ 3(a) and (f); *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 10.



and to the conduct of the trial or other proceeding;<sup>197</sup> the right to not be tried *in absentia*<sup>198</sup> and to be heard by a competent, independent, and impartial tribunal;<sup>199</sup> the right to the presumption of innocence unless proven guilty;<sup>200</sup> protection against ex post facto laws;<sup>201</sup> protection against invasions of privacy unless specifically provided for by law;<sup>202</sup> the right to be defended by counsel of choice, and for counsel to be provided without cost for those without sufficient means;<sup>203</sup> the right to confidential communications with counsel;<sup>204</sup> the right to adequate time and facilities to prepare a defense;<sup>205</sup> the conditional right to release pending trial;<sup>206</sup> the right against self incrimination;<sup>207</sup> the right to examine prosecution witnesses and to obtain the testimony of witnesses in his defense;<sup>208</sup> the right of appeal;<sup>209</sup> the right not to be tried for the same

<sup>197</sup> ICCPR, *supra* note 129, art. 9, ¶ 3; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princs. 11, 33 ¶ 4, 37-38.

<sup>198</sup> ICCPR, *supra* note 129, art. 14, ¶ 3(d).

<sup>199</sup> *Universal Declaration of Human Rights*, *supra* note 195, art. 10; ICCPR, *supra* note 129, art. 14, ¶ 1.

<sup>200</sup> *Universal Declaration of Human Rights*, *supra* note 195, art. 11, ¶ 1; ICCPR, *supra* note 129, art. 14, ¶ 2; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 36, ¶ 1; *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 195, ¶ 84(2).

<sup>201</sup> *Universal Declaration of Human Rights*, *supra* note 195, art. 11, ¶ 2.

<sup>202</sup> *Id.* art. 12.

<sup>203</sup> ICCPR, *supra* note 102, art. 14, ¶ 3(b) and (d); *Basic Principles on the Role of Lawyers*, ch. I, sec. B, ¶¶ 1, 5, 6, 19, U.N. Sales No. E.91.IV.2 (1990); *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princs. 11, 14, 17.

<sup>204</sup> *Basic Principles on the Role of Lawyers*, *supra* note 203, ¶¶ 8, 22; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 18.

<sup>205</sup> ICCPR, *supra* note 129, art. 14, ¶ 3(b); *Basic Principles on the Role of Lawyers*, *supra* note 203, ¶ 21; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 11-13, 17-18.

<sup>206</sup> ICCPR, *supra* note 129, art. 9, ¶ 3; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 39.

<sup>207</sup> ICCPR, *supra* note 129, art. 14, ¶ 3(g); *Body of Principles for the Protection of All Persons Under Any Imprisonment Detention*, *supra* note 195, princ. 21.

<sup>208</sup> ICCPR, *supra* note 129, art. 14, ¶ 3(e)

<sup>209</sup> *Id.* art. 14, ¶ 5; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 30, ¶ 2.

offense more than once;<sup>210</sup> and the right to bring an action of habeas corpus challenging the legality of his detainment.<sup>211</sup>

### 1. *U.S. Military Tribunals May Violate the ICCPR*

Article 4 of the ICCPR, to which the United States is a party, permits states to temporarily suspend compliance with some of the due process protections required under Article 14 in a time of public emergency that "threatens the life of the nation . . . ."<sup>212</sup> The scope of allowable variances is limited to these "strictly required by the exigencies of the situation . . . ."<sup>213</sup> If a state elects to exercise its discretion to temporarily suspend due process protections, it is required to inform the Secretary-General of the United Nations of the provisions with which it has temporarily suspended compliance, and its reasons for doing so.<sup>214</sup>

In a letter to President Bush dated December 6, 2001, the Secretary-General of the International Commission of Jurists, Louise Doswald-Beck, stated the concern that some of the provisions of the Military Order may violate the requirements of the ICCPR, and that the United States has provided no notification to the United Nations Secretary-General of its intentions to derogate from its obligations as a signatory state.<sup>215</sup> While some of these concerns have been addressed by the rules released by the Defense Department in March 2002, other concerns remain, including the absence of any provisions to meet the requirements of ICCPR Article 9. These provisions include the right of arrested persons to be informed of the charges against them, to be brought promptly before a judicial authority, to challenge the lawfulness of their detention, and to a trial or release within a reasonable time.<sup>216</sup> Doswald-Beck argued that the United States should not forego the opportunity to demonstrate to the world the need for a society based on the rule of law, the

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<sup>210</sup> ICCPR, *supra* note 129, art. 14, ¶ 7; *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 195, ¶ 30.

<sup>211</sup> *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, *supra* note 195, princ. 32.

<sup>212</sup> ICCPR, *supra* note 129, art. 4, ¶ 1.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* art. 4, ¶ 3.

<sup>215</sup> Doswald-Beck, *supra* note 2.

<sup>216</sup> Doswald-Beck, *supra* note 2; *see also* Military Order, *supra* note 31; Buzbee, *supra* note 99.

very destruction of which the terrorists who conducted the attacks of September 11 are seeking to achieve.<sup>217</sup>

In 1997, the Human Rights Committee of the United Nations published the following General Comment (No. 13) on the application of military justice to civilians:

[t]he provisions of Article 14 [of the ICCPR] apply to all courts and tribunals within the scope of that Article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 . . . . If States parties decide in circumstances of a public emergency as contemplated by Article 4 to derogate from normal procedures required under Article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of Article 14.<sup>218</sup>

The U.S. military tribunals therefore appear to be in violation of international law.

## 2. *U.S. Military Tribunals May Violate the Geneva Convention*

Critics have also charged that the Military Order violates the Geneva Convention.<sup>219</sup> Article 4, paragraph 2 of the Geneva Convention Relative to

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<sup>217</sup> Doswald-Beck, *supra* note 2.

<sup>218</sup> General Comment No. 13 of the Human Rights Committee, on Article 14 of the International Covenant on Civil and Political Rights, General Comments Approved by the Human CCPR/c/21/Rev.1 (Dec. 8, 1997), *cited in* Inter-American Commission, *supra* note 3, ch. 2, ¶ 152.

<sup>219</sup> Geneva Convention Relative for Prisoners of War, *supra* note 141, art. 4. *See also, e.g.,*

the Treatment of Prisoners of War<sup>220</sup> defines prisoners of war with regard to armed resistance groups, the category that members of al Qaeda and other terrorist groups likely fall under, as follows:

[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.<sup>221</sup>

It is likely that captured members of covert terrorist organizations such as al Qaeda would fail the test for prisoners of war under criteria (b), (c), and (d) above. Covert terrorists do not generally display distinctive signs or carry their weapons openly (to the dismay of law enforcement officials worldwide), and terrorist operations are generally not carried out in accordance with the laws of war, which preclude, for example, targeting civilian populations as was done in the September 11 attacks.<sup>222</sup> On the other hand, captured members of the Taliban military, who comprised the military arm of the Afghan government, and perhaps even certain elements of al Qaeda operating in Afghanistan, such as the al Qaeda 55th Brigade that was reportedly integrated with Taliban military forces,<sup>223</sup> in all likelihood qualify as prisoners of war under the above

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William Carlsen, *U.S. Faces Tough Call on Use of Tribunals/Enemy Prisoners Push Complex Choices on Bush*, S.F. CHRON., Dec. 26, 2001, at A1, available at 2001 WL 3423460.

<sup>220</sup> Geneva Convention for Prisoners of War, *supra* note 141, art. 4.

<sup>221</sup> *Id.*

<sup>222</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.unhcr.ch/html/menu3/b/92.htm> (last visited Mar. 26, 2003) [hereinafter Geneva Convention for Protection of Civilians].

<sup>223</sup> Human Rights Watch, *Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts* (Oct. 2001), available at <http://www.hrw.org/campaigns/september11/ihlqna>.

criteria. Because the Military Order includes all members of al Qaeda, presumably including members of the 55th Brigade, and because its applicability to persons who "aided or abetted . . . acts of international terrorism" or who, "have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy"; or who "knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) . . ." <sup>224</sup> could be interpreted to include members of the Taliban military, it could include persons who qualify as prisoners of war under international law.

Some other portions of the Military Order seem to be at variance with the requirements of the Geneva Convention for Prisoners of War. Article 102 of the Convention states that prisoners of war can only be sentenced by the same courts following the same procedures as those applied to members of the armed forces of the Detaining Power. <sup>225</sup> In the case of United States armed forces, this is the military courts martial procedure. While the regulations for military tribunals follow some procedures of military courts martial, the fact that the military tribunals will operate under separate procedures that differ in some respects from military courts martial may violate the Geneva Convention. For example, Article 106 of the Geneva Convention requires that prisoners of war have the right of appeal in the same manner as members of the armed forces of the Detaining Power. <sup>226</sup> The Defense Department regulations pertaining to appeal for military tribunals provide for a three-member appeals panel, with the final determination on any verdict and sentence made by the president. <sup>227</sup> Verdicts of military courts martial can be appealed to the Court of Appeals for the Armed Forces, and ultimately to the United States Supreme Court. <sup>228</sup>

Furthermore, Article 105 of the Geneva Convention requires that defense counsel for prisoners of war have the ability to interview their clients in private. <sup>229</sup> Recent changes to the United States Department of Justice Bureau of Prisons regulation 28 CFR 501.3 permitting law enforcement officials to monitor attorney/client communications when the government determines that it is necessary to do so to deter future acts of violence or terrorism. The

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pdf (last visited Feb. 8, 2002).

<sup>224</sup> Military Order, *supra* note 31.

<sup>225</sup> Geneva Convention for Prisoners of War, *supra* note 141, art. 4.

<sup>226</sup> *Id.*

<sup>227</sup> Buzbee, *supra* note 99.

<sup>228</sup> Review by the Court of Appeals for the Armed Forces, 10 U.S.C.A. § 867, art. 67 (2001).

<sup>229</sup> Geneva Convention for Prisoners of War, *supra* note 141, art. 4.

regulation does not explain how the government will make these determinations. This procedure appears to be at odds with Article 105 of the Convention.<sup>230</sup>

### 3. *Possible Effects of Military Tribunals on International Relations*

In addition to concerns over violations of international law, the United States' use of military tribunals raises concerns over their effect on relations with other countries. In the past, the United States has routinely condemned the use of military courts in other countries.<sup>231</sup> For example, the United States has repeatedly criticized Peru's use of military tribunals to try civilians accused of terrorism.<sup>232</sup> The State Department's 2000 Country Report on Human Rights Practices charged that "proceedings in [Peruvian] military courts . . . do not meet internationally accepted standards of openness, fairness, and due process."<sup>233</sup> For example, in the case of U.S. citizen Lori Berenson, convicted by a Peruvian military tribunal of terrorism, the State Department called on Peru to retry Berenson "in open civilian court with full rights of legal defense, in accordance with international judicial norms."<sup>234</sup>

The State Department has also criticized Egypt's use of military tribunals to try persons accused of terrorism. In its criticism of Egypt's military tribunal process the State Department charged, "[t]his use of military and State Security Emergency courts under the Emergency Law since 1993 has deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge."<sup>235</sup> The report continues:

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<sup>230</sup> Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2001).

<sup>231</sup> Letter from Kenneth Roth, Executive Director, Human Rights Watch, to President George W. Bush (Nov. 15, 2001), *available at* <http://www.hrw.org/press/2001/11/miltribsltr1115.htm> (last visited Mar. 26, 2003).

<sup>232</sup> United States Department of State, Country Reports on Human Rights Practices, Peru, 2000 (2001), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/827.htm> (last visited Mar. 26, 2003).

<sup>233</sup> *Id.*

<sup>234</sup> Roth, *supra* note 231.

<sup>235</sup> United States Department of State, Country Reports on Human Rights Practices, Egypt (2000), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm> (last visited Mar. 26, 2003) (from the State Department's description in its criticism, Egypt's military tribunals appear similar in many respects to those established by the Military Order in the United States a year later).

[t]he Government defends the use of military courts as necessary in terrorism cases, maintaining that trials in the civilian courts are protracted and that civilian judges and their families are vulnerable to terrorist threats. Some civilian judges have confirmed that they [have a] fear of (sic) trying high visibility terrorism cases because of possible reprisal. The Government claims that civilian defendants receive fair trials in the military courts and enjoy the same rights as defendants in civilian courts.

However, the military courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also military officers appointed by the Minister of Defense and subject to military discipline. They are neither as independent nor as qualified as civilian judges in applying the civilian Penal Code. There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to a review by other military judges and confirmation by the president . . . .<sup>236</sup>

While the United States has had limited success in influencing other countries to stop using military tribunals to try civilians and to improve legal due process protections, it has arguably helped provide leverage to assist Americans who faced trial in such courts overseas.<sup>237</sup> Such leverage could be significantly reduced if other countries perceive that the United States can no longer criticize their system of military tribunals because it has adopted a similar system, whether the similarity is real or perceived.

The scope of the application of military tribunals by the United States could also have consequences for United States military personnel captured in future conflicts overseas. If the president designates any of the more conventional captured military personnel, such as Taliban troops or leaders, as unlawful combatants in order to try them before military tribunals, a precedent could be established under which other countries could similarly designate United States military personnel engaged in campaigns that they consider illegitimate. Such designations could strip away the protections for United States military

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<sup>236</sup> *Id.*

<sup>237</sup> Neil King Jr., *Bush's Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena*, *Some Say*, WALL ST. J., Nov. 27, 2001, at A2, available at 2001 WL-WSJ 29679021.

personnel under the Geneva Convention for Prisoners of War, and allowing their trial as war criminals before military tribunals.<sup>238</sup>

Also, a number of foreign governments, including member states of the European Union, are refusing to extradite suspected members of al Qaeda and other terrorists captured since the September 11 attacks unless they receive assurance from the U.S. government that the suspects will not be subject to the death penalty.<sup>239</sup> The European Parliament passed a resolution on December 13, 2001 declaring that "no extradition can be allowed to the U.S. from EU states" unless the United States reverses its policy on capital punishment and the use of military tribunals.<sup>240</sup>

#### IV. CONCLUSIONS

There are significant differences between the military tribunals established by President Bush in his Military Order and Peru's system of military tribunals that led to the imprisonment of over 3,900 Peruvian citizens on charges of terrorism, at least 600 of whom were innocent, and which earned Peru one of the worst human rights reputations in the international community. One of the primary differences is the legal background against which the two countries established their tribunals. In establishing their tribunals, the Peruvian president dissolved the country's Congress, replaced the majority of sitting judges and prosecutors, and suspended a portion of the Peruvian Constitution, while in the United States, its Constitution, legislature, and judiciary remain intact. Persons in the United States, citizens and non-citizens alike, still enjoy the full protection of the Constitution, although these protections are largely not available to persons outside the country. Peru's military tribunal system applies to its own citizens, replacing the judicial system for certain classes of crimes. By contrast, the Military Order does not apply to United States citizens, who still enjoy full access to the American judicial system. Moreover, under Peru's military tribunals, defendants do not have access to counsel until after they make a statement to the Public Ministry, potentially

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<sup>238</sup> William Glaberson, *Tribunals May Violate Conventions/Bush Order Conflicts With World Law on Treatment of POWs, Critics Say*, HOUSTON CHRON., Dec. 27, 2001, at 17, available at 2001 WL 31483729.

<sup>239</sup> *Ashcroft Vows to Respect European Legal Norms in Terror Fight*, AGENCE FRANCE-PRESSE, Sept. 17, 2002, available at 2002 WL 23602488.

<sup>240</sup> T.R. Reid, *EU Leaders Convene to Design 'Global Superpower'; Officials Are Unable to Agree on Combined Military Forces*, WASH. POST, Dec. 16, 2001, at A35, available at 2001 WL 31543148.



compromising their protection against self-incrimination. Under regulations implementing the Military Order, however, defendants will have protection against self-incrimination, although the effectiveness of this protection is questionable in light of routine interrogations of detainees who are denied access to counsel. Furthermore, in Peru, attorneys are prohibited from representing more than one defendant accused of terrorism at a time, compromising defendants' access to counsel of their choice. Under the United States tribunal system, the government provides military counsel to defendants, and they will be able to retain private counsel of their choice<sup>241</sup> if they have the means to pay for it. Although Peru's "faceless" courts have now been abolished, the secrecy under which they operated when active was extreme; judges and prosecutors either wore hoods to cover their faces, or sat in a separate room from the defendant and his counsel, communicating through voice-distorting microphones. In contrast, trials under U.S. military tribunals will be open to the public and the press except when classified information must be protected. Still, there are provisions for security measures that are disturbingly similar to Peru's "faceless" courts in cases where the government deems it necessary to protect judges, prosecutors, and witnesses from fears of retaliation. Lastly, defendants tried by Peru's military tribunals are not afforded the opportunity to confront all of their accusers because of a prohibition on the appearance as witnesses at trial of police or military personnel who interrogated the defendant. The law also provides for secret witnesses whose identities are kept from the defense throughout the trial. The regulations for United States military tribunals provide defendants with access to prosecution witnesses for cross-examination, and evidence, "to the extent reasonably available," although some witnesses may testify via telephone or closed-circuit television, and defendants and civilian counsel will not be permitted access to evidence the governments deems classified.

However, while it is clear that the United States' system of military tribunals offers considerably more protection of defendants' rights to due process than those of Peru, there are still areas of concern over both the constitutionality of certain provisions of the United States military tribunals, and possible violations of international law.

It is not clear that the military tribunals have jurisdiction under U.S. law to try persons not directly involved with the September 11 attacks. While it can be reasonably argued that Congress' authorization to use "all necessary and

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<sup>241</sup> Neil A. Lewis, *Officials Draft Rules for Military Tribunals*, MILWAUKEE J. SENTINEL, Dec. 28, 2001, at A1, available at WL 27445175.

appropriate force" includes authority for the president to establish military tribunals to try those charged with offenses related to the September 11 attacks, the Military Order's application of military tribunals to acts not directly associated with the September 11 attacks, including membership in al Qaeda, other acts of international terrorism, and harboring such persons, goes beyond Congressional authorization. While U.S. case law clearly establishes that military tribunals have jurisdiction over persons who commit war crimes, the Military Order potentially applies to a much broader group. It is not clear that membership in al Qaeda, or harboring terrorists, taken alone constitute a war crime, which is the necessary predicate to the jurisdiction of a military tribunal under both common law and U.C.M.J. Article 21. It also remains unclear that all acts of international terrorism are necessarily violations of the law of war. Neither current Congressional authorization nor case law appear to support the jurisdiction of military tribunals to persons charged with offenses not directly related to the September 11 attacks, and the president's authority to establish military tribunals based solely on his position as commander-in-chief is uncertain. Additional specific authority from Congress appears necessary in order to apply the military tribunals to the full extent stated in the Military Order.

Another concern under U.S. law relates to the applicability of the Military Order to non-citizens inside the United States. While non-citizens outside the United States have few if any protections under the Constitution, the due process protections of the Fifth and Sixth Amendments are guaranteed to all persons within the United States, not just citizens. In deciding jurisdiction of military tribunals over persons in the United States, the Supreme Court has relied on distinctions between belligerents and non-belligerents, and suggested that there could be an exception granting jurisdiction over persons who entered the country illegally in order to commit a crime. The constitutionality of jurisdiction over non-citizens in the United States under the current circumstances remains uncertain.

Furthermore, the United States military tribunals may not comply with the requirements of Article 9 of the ICCPR because of the lack of any provisions in either the Military Order or the military tribunal regulations to meet its requirements. The requirements in question include the right of arrested persons to be informed of the charges against them, to be brought promptly before a judicial authority, to challenge the lawfulness of their detention, and to a trial or release within a reasonable time.

Moreover, some provisions of the Military Order appear to be in violation of the Geneva Convention for Prisoners of War. While persons engaged in

covert terrorist operations clearly do not qualify as prisoners of war under the criteria established in Article 4, paragraph 2 of the Geneva Convention for Prisoners of War, and are thus not protected by its provisions, captured members of the Taliban military who could be included under the Military Order do qualify as prisoners of war. Article 102 of the Geneva Convention for Prisoners of War requires trial by the same courts following the same procedures as those applied to members of the armed forces of the Detaining Power, to include military courts-martial in the case of the United States. United States military tribunals will follow some but not all of the same procedures as military courts-martial, and thus may violate Article 102.

Article 106 of the Geneva Convention for Prisoners of War requires that prisoners of war have the right of appeal in the same manner as members of the armed forces of the Detaining Power. The regulations for military tribunals provide for a three-person appeals panel, with the final determination on any verdict and sentence made by the president. Verdicts of military courts martial can be appealed to the civilian Court of Appeals for the Armed Forces, and ultimately to the United States Supreme Court. This difference also appears to violate Article 106.

Article 105 of the Geneva Convention for Prisoners of War requires that defense counsel for prisoners of war have the ability to interview their clients in private. Recent changes to the United States Department of Justice Bureau of Prisons regulation 28 CFR 501.3 permitting law enforcement officials to monitor attorney-client communications under certain circumstances appear to be at variance with this requirement.

In sum, United States military tribunals are likely to provide significantly more due process protections than those of Peru, and are unlikely to result in widespread human rights abuses like those experienced by Peru's citizens. However, depending on the scope with which the tribunals are used and how the implementing regulations are used in practice, the potential exists for violations of both the United States Constitution and international law, specifically the ICCPR and the Geneva Convention for Prisoners of War.

