Military Commissions—Kangaroo Courts?

Charles H. B. Garraway*

The decision to use Military Commissions to try persons held at Guantanamo has attracted massive worldwide opposition.1 Unfortunately, much of it has been caught up in the increasing political vitriol that seems to be marking the whole question of the so-called “war on terror.” This is marring what should be a genuine legal debate. The advent of the International Criminal Court (ICC) with its emphasis on the doctrine of “complementarity”2 should have encouraged States to discuss how best crimes arising out of armed conflict should be dealt with on a domestic level. Is it appropriate in the 21st century to use military justice in this way or should “democracy” require a civilian response? Instead the issue has become polarized so that people tend to be either “for” military commissions—and support them without criticism—or alternatively “against”—in which case nothing is good about them at all.

Part of the difficulty is the confusion over the term “war on terror.” Is it an “armed conflict” to which the laws of armed conflict apply? Is it a matter for law enforcement, in which case the laws of armed conflict may be irrelevant? Or is it a new form of conflict to which the law of armed conflict can only be applied by analogy? Traditionally terrorism has been dealt with in the law enforcement paradigm—and to a large extent still is.3 In the view of most, Afghanistan was a traditional armed conflict with the Taliban being the de facto Government of that

* Senior Research Fellow, British Institute of International and Comparative Law.
country. As such, the law of armed conflict applied to that conflict.\textsuperscript{4} The difficult area is when attempts are made to expand that conflict into a worldwide campaign against “terrorism” in general and Al Qaeda in particular.

The attempt to extend the law of armed conflict into what has traditionally been a law enforcement area has been confusing and, frankly, badly handled. There has been a lack of clarity in the pronouncements on law by members of the US Administration that has made it very difficult to ascertain what the official position is. There has been a degree of “pick and mix” about the application of the law so that the impression is given that the United States is selecting those parts that suit its purpose and rejecting those as “unsuitable” that do not. However unfair this assessment may be, there is no doubt that this is how it is seen in many parts of the world including among traditional allies. The campaign against terror does raise some difficult legal issues which both domestic criminal lawyers and international lawyers have to come to terms with, but a unilateral reinterpretation of traditional paradigms is not necessarily the right way forward.

Further confusion is caused by the use of the loose term “unlawful combatant.” It implies that those who take part in hostilities become “combatants” and lose their status as civilians.\textsuperscript{5} The argument is put forward that it is ridiculous to describe a civilian who has chosen to take up arms as anything other than a “combatant.” However, this is not necessarily as ridiculous as it may sound. It is accepted that only certain persons are allowed to take part in hostilities. They are termed under the law of armed conflict “combatants.”\textsuperscript{6} Those who are not so entitled are termed “civilians” who have protected status.\textsuperscript{7} If these “civilians” chose to take a direct part in hostilities, they do not change status, any more than a wounded soldier or prisoner of war changes status. They lose their protection.\textsuperscript{8} Less confusing is the old fashioned—but, coming from Richard Baxter—well established term “unprivileged belligerent.”\textsuperscript{9} Such people, in taking part in combat, remain “unprivileged.” That means that they have no combatant immunity and therefore even acts that to a combatant would be legitimate under the law of armed conflict are criminal in so far as the unprivileged belligerents are concerned. The combatant who tries to masquerade as a civilian remains a “combatant,” and while he may be committing perfidy, he does not become an “unlawful civilian.”

This background has helped to hide what may be the real issue here—a distaste in the modern world for the concept of military justice. The United States, United Kingdom and some other nations, mainly of the common law tradition, have well established military justice systems going back centuries. Based on civil procedures but modified to meet the peculiar requirements of service life, military justice as it is applied in those nations is often fairer than the ordinary domestic criminal systems that it replicates. For example, in the United Kingdom, there was never any
requirement for a judge in a domestic criminal trial to ensure that an accused fully understood the nature of his plea if he pleaded guilty. In military courts, a detailed procedure was followed to ensure that the accused did understand the consequences of his plea and it was not uncommon for guilty pleas to be refused and a not guilty plea entered. Ironically, many of these safeguards are being abandoned in the attempt to reflect more closely the civilian system.10

However, it has to be admitted, this is not the norm worldwide. Since 1945, military justice has got a bad name through the misuse of the system by repressive regimes both military and civilian. Could a military court in Stalin’s Russia or in Argentina under the junta be trusted to administer justice? It is because of these abuses that military courts are looked at askance by so many. The UN Human Rights Committee has criticized military jurisdiction, particularly over civilians, stating that the use of military courts to try civilians “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.”11 The European Court of Human Rights may soon be asked to examine just that issue in relation to UK courts-martial in the case of Alan Martin, a 17-year-old dependent who was tried for murder by a general court-martial in Germany in 1995.12 The UK system has had to undergo radical overhaul in the last ten years because of human rights concerns, but in none of the cases that have gone to Strasbourg have the Court found an actual injustice.13 The Court has made its rulings on the basis that justice must be seen to be done and thus reliance on the good faith of those who run the system is not sufficient. The Convening Officer—“Convening Authority” in US terminology—has been abolished, not because of any abuse of his powers but because of the perceived possibility of abuse. Military judges, who had survived in the Navy though the Army and Air Force had used civilian “judge advocates” since 1948, were abolished in 2003 for the same reason.14 The world has swung full circle.

It was not always so. At the end of World War II, military justice was seen as the most appropriate means of dealing with cases in a wartime situation. Prisoners of war were made subject to the disciplinary laws of the forces of the Detaining Power15 and civilian court proceedings were to be the exception rather than the rule.16 The penal laws passed by an Occupying Power could be enforced by the “properly constituted, non-political military courts” of the Occupying Power.17 It is interesting how military courts were then seen as essentially apolitical. In the case of war crimes, the majority of cases were tried by military courts set up by the Allied powers.18 Although, at Nuremberg itself, the trials were conducted primarily, so far as the Western powers were concerned, by civilian lawyers and judges, many had
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military experience and the military played a major role. Nuremberg was, however, the exception, not the rule.

On June 14, 1945, by Royal Warrant, Regulations for the Trial of War Criminals were established by the United Kingdom.¹⁹ These established “Military Courts” for this purpose and a “war crime” was defined as “a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September 1939.” Procedures were established and rules of evidence laid down. This Royal Warrant is still extant today though it is in grievous need of updating. The United Kingdom War Crimes Act of 1991,²⁰ designed to enable the Government to deal with the legacy of World War II war crimes arising out of the opening up of the records in Eastern Europe, was, strictly speaking, unnecessary except in so far as it granted jurisdiction to civil courts, as military courts already had jurisdiction under the Warrant.

Even today, in many European nations, “military courts” have the primary jurisdiction in war crimes cases. This is so, for example, in Switzerland.²¹ However, this is not always a fair comparison as much “military justice” is now carried out by the civilian authorities, occasionally using special courts or lawyers who hold reservist posts.

There is nothing inherently wrong with military courts, commissions, tribunals—call them what you will—as a forum for dealing with cases of this nature. It is therefore necessary to examine the commissions in a more technical manner rather than attacking them as a matter of legal principle.

The Presidential Military Order of November 13, 2001²² caused considerable alarm due to the starkness of its terms. For example, Section 1(f) stated “that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” The concern was not so much with “rules of evidence” as with “principles of law.” These concerns were compounded by the limitation of the Military Order to non-US citizens.²³ This is not the place to go into the controversy of prisoner of war status and the possible conflict with Article 82 of the Third Geneva Convention. However, it would appear from the text that in the case of US citizens, the impracticability referred to in Section 1(f) does not exist! Why the mere fact of nationality should affect the issue of practicability is not explained. While it may be argued that US citizens are entitled to their constitutional rights of which they cannot be deprived, this is not a matter of “practicability” but one of law.

Other provisions of the Order also gave cause for concern, including the wide provisions on evidence,²⁴ the lack of any judicial appellate structure²⁵ and the exclusion of the supervisory jurisdiction of the civil judiciary.²⁶ In fact, similar
provisions appear in the British Royal Warrant of 1945. The problem, however, lies primarily in the failure to appreciate that the language of 1945 may not any longer be appropriate in the 21st century, some 60 years later. The world has moved on, particularly in the field of human rights, a field in which the United States has played a major part. One only has to consider the role of Eleanor Roosevelt in the drafting of the Universal Declaration of Human Rights. The temptation to go back to old precedents is enormous, but in this case, it undoubtedly caused unnecessary problems. Those assigned to translate the Presidential Order into other Orders and Instructions were then faced with marrying up old language with modern day commitments and starting from a position of antagonism by civil rights organizations that might, with more care, have been prevented. Many of the criticisms were easily foreseeable and could have been forestalled with a bit more thought.

The Military Commission Order No. 1 of March 21, 2002 and the subsequent Instructions were greeted almost with a sense of relief in some circles! They appeared to row back to a considerable extent from the blunt language of the Presidential Order. In fact, they did not. They merely expressed that Order in slightly more acceptable language for the 21st century. After all, it was the Presidential Order that was the overall authority for the subsequent Orders and Instructions and they thus had to be consistent with it. Nevertheless, there was, and still remains, criticism of the structures proposed.

This will not be a detailed analysis of the Orders or Instructions, nor an analysis of them under US domestic law. That is better carried out by others. This article will, however, look at some of the key issues of contention and attempt to give an international perspective to them. This means that it will not examine the scope of jurisdiction including the crimes themselves and the elements of crimes, as this is primarily an issue governed by US law. It is ironic that many of the elements are based on those prepared for the ICC and, where there are changes, these are often specifically designed to meet the different nature of the law. This is a US domestic court—not an international one. This is particularly true in the decision to draft elements for the inchoate crimes. This would have been far too difficult a task to carry out for the ICC given the differences between legal systems. Despite US encouragement, the Preparatory Commission decided not to go down that particular route. However, here, in a court operating under a single domestic legal system, US law, there is merit in drafting such elements. However, these elements should not necessarily be taken as a framework for other jurisdictions where different substantive law applies, particularly civil law jurisdictions where some of the common law terms are simply not known.

While on elements, one particular innovation is noteworthy—the split in command responsibility between knowledge before the fact and knowledge after the
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fact.\textsuperscript{32} The former encompasses liability for the offenses committed, the latter for a separate offense of failing to act. This is a step in the right direction and provides a partial answer to the problems arising from the ICTY Appeals Chamber decision in Hadzihasanovic.\textsuperscript{33}

Criticisms have centered on the evidential provisions, the role of the defense and the appellate structure. Each will be looked at in turn.

On evidence, the Presidential Order provided that the Commissions could admit

Such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission) have probative value to a reasonable person.\textsuperscript{34}

This has been substantially tempered firstly by the Military Commission Order No. 1 itself which required that the Presiding Officer be a lawyer (to be exact “a judge advocate of any United States armed force”),\textsuperscript{35} as well as laying down slightly more detailed evidential admissibility criteria.\textsuperscript{36} It is still unfortunate that the decision of the Presiding Officer can be overruled by lay members but this was so, even in the UK court-martial system, until comparatively recently. However, modern trends are to leave issues of admissibility of evidence in the hands of a judge, thus separating the role of judge and juror.

The criticism of the scope of permitted evidence would seem to be wide of the mark. In domestic jurisdictions, particularly those of a common law nature, there are extensive—and often illogical—rules on evidence admissibility.\textsuperscript{37} Such rules are much more relaxed in civil law jurisdictions and this is apparent also in the rules governing international courts. Article 69(3) of the ICC Statute, for example, gives the Court “the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”\textsuperscript{38} This extremely broad provision is countered slightly by Article 69(4) which allows the Court to rule on admissibility “taking into account, inter alia, the probative value of the evidence” against any prejudicial affect. While the Rules of Procedure address methods of dealing with admissibility questions,\textsuperscript{39} they do not detract from the breadth of the admissibility provisions in the Statute itself. Compared to that, the provisions for the Military Commissions are comparatively modest!

The second area of concern is the provision of defense counsel. Article 14(3) of the International Covenant on Civil and Political Rights refers to “counsel of his own choosing.”\textsuperscript{40} It also refers to the right “to have legal assistance assigned to him,
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...among them, the following: In any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. In so far as this latter requirement is concerned, it is met by the provisions in Military Commission Order No. 1, that “Detailed Defense Counsel” will be assigned “for each case.” Such counsel are free of charge. Criticism is made of the fact that such counsel are all military judge advocates. However, this appears to be merely another facet of the distrust of military justice that pervades the world today (and in particular the human rights community). Military judge advocates assigned to be defense counsel are fiercely independent as they have already indicated. However, they are at risk of coming under pressure from within the chain of command. It is because of the possibility of such influence that human rights courts have discouraged the use of military defense counsel. The concern is therefore one of presentation rather than substance. It does not matter how independent military defense counsel are; they will not be seen to be so by vast swatches of the community—and particularly in the Muslim world.

Of greater concern is the requirement to provide “counsel of his own choosing.” It is true that, subject to certain requirements, the accused can select a military judge advocate. However, his choice outside that is limited. He may retain the services of a civilian attorney “at no expense to the United States Government” but that attorney must himself fulfill a number of requirements including being a US citizen and having been determined “to be eligible for access to information classified at the level SECRET or higher.” In addition, Military Commission Instruction No. 5 required such counsel to sign an affidavit placing severe restrictions on his movements, his power to seek assistance, and even on his right to confidential communications with his client. Such restrictions would be unacceptable to any British lawyer and the National Association of Criminal Defense Lawyers issued an ethics opinion “that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.” This resulted in some amelioration of these rather draconian provisions, in particular the requirement that counsel pay for their own security clearance and, though here the changes are ambiguous, on the monitoring of attorney-client communications. Nevertheless, the role of the “Civilian Defense Counsel” is very definitely subordinate to the military Detailed Defense Counsel. He can be excluded from closed sessions and prevented from obtaining any information on what went on during such sessions. If, for whatever reason, it was decided to hold the complete trial in closed session, the role of the civilian defense counsel would effectively be denied completely.
The balance between security considerations and the requirements of fair trial are always difficult and it is clear that an attempt has been made to find a way through these two conflicting interests. However, it must be said that it is a compromise that, on paper, can satisfy nobody. Only time will tell if the efforts of the National Association of Criminal Defense Lawyers and the American Bar Association bear fruit sufficiently so that the civilian defense counsel actually has a genuine role to play. While presiding officers, in accordance with their duty, will undoubtedly strive diligently to ensure that the balance between fairness and the needs of security is maintained, at present, the risk of abuse is too great and it would almost have been better to bite the bullet and dispense with the civilian defense counsel altogether. This would undoubtedly lead to an outcry from human rights activists but in some way would be more honest than introducing such an option hedged around with so many restrictions as to make it impracticable.

The third area of concern is the appellate structure. The Presidential Order required the “submission of the record of trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense, if so designated by me for that purpose.” The exclusion of the jurisdiction of the US civil courts further illustrated that the appellate process would not be through the judiciary but through the Executive. Again Military Commission Order No. 1 sought to ameliorate this by the insertion in the process of a “Review Panel” at least one member of which “shall have experience as a judge.” There have been further developments including the appointment of senior civil judges to the Review Panel (all being given two-star rank for the purpose!). The “Review Panel” has been given enhanced powers which do seem to go far beyond the original terms of the Order.

The original provisions were again based on old precedents. The British Royal Warrant of 1945 provides for petitions to the Confirming Officer (the equivalent of the “Appointing Authority” under Military Commission Order No. 1) and reference to the Judge Advocate General “for advice and report.” Beyond that, the relevant authorities were the Secretaries of State (in this case for War and Foreign Affairs) or various other designated officials, principally High Commissioners in occupied territory. This reflected the procedures adopted under military justice generally. However, again times have moved on as has been reflected in some of the modifications introduced.

The International Covenant on Civil and Political Rights gives the right to “everyone convicted of a crime” to have his conviction and sentence “reviewed by a higher tribunal according to law.” In 1951, the United Kingdom introduced the Courts Martial Appeals Court, from where appeal lay to the House of Lords and there are similar appeal provisions applicable in the United States military justice system. Here, there was initially a regression back to the position where appellate
structures are wholly within the discretion of the Executive. Even before 1951, in the United Kingdom, the military justice system was subject to control by the civilian courts through the medium of the prerogative orders, even if that power was rarely used. However, here, even that supervisory jurisdiction has been excluded.

It is worthy of note that in all the international tribunals established in recent years to deal with war crimes and similar offenses, a judicial appellate structure has been built into the system. The days of the Executive having the final say in judicial matters, or even a single judicial body with no right of appeal, have gone. The United States would have been the first to protest if US citizens had faced similar executive-controlled processes in the former Soviet block—and rightly so. What is good for the goose is good for the gander and the argument of “Trust me—I’m the good guy” no longer washes.

To conclude, this article has looked at three particular areas of concern. There are others but these are the ones that have attracted the most opposition. It is unfortunate that the Executive chose originally to revert to precedents from the first half of the last century, appearing to ignore the developments in procedures over the last sixty years, many championed by the United States. The problems are real. If these proceedings are commenced in a manner that, rightly or wrongly, is seen as unfair, the effects could be incalculable. There is already a growing view, particularly in the Muslim world, that these Commissions are designed for convictions and that nobody can receive a fair trial before them. That is wrong. Military judge advocates of all armed services in the United States are proud of their profession and will do their best to ensure that justice is done. Military defense counsel and military judges will act “without fear or favor” and trials will be conducted to the highest standards of military justice. However, there is more to it than that. There is a political battle to be won and it is here ground is being lost. While great play was made on the original Order and its deficiencies, there has been little publicity outside the United States of the ameliorating changes that have been introduced.

The authorities have made great efforts to listen to criticism and to seek to meet those criticisms within the parameters laid down. It is a great tribute to all those involved that they have not “hunkered down” and sought to defend their own positions. However, the damage has been done by the failure to present the case properly. There has been an apparent lack of transparency in the process which has affected the way outsiders have looked at it.

Whether or not anybody accepts such a concept as a “war on terror,” all may unite in the view that there is a campaign to be fought and that it must be won, at least in part, in the hearts and minds of ordinary people. If convicting a few people of crimes by what are seen as dubious means simply antagonizes hundreds of others, driving them into the hands of extremist organizations, the end will be worse
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than the beginning. The United States has been a beacon of liberty and democracy for most of its existence. It would be unfortunate if the light from that beacon was obscured by the apparent pursuit of short-term advantage at the expense of long-term security.

Notes


6. "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . . ) are combatants, that is to say, they have the right to participate directly in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), reprinted in DOCUMENTS ON THE LAWS OF WAR 444 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000).

7. See id., art. 50(1).

8. See id., art. 51(3).


10. See Rule of Procedure 42, Rules of Procedure (Army) 1972 (S.I. 1972/316 as amended). These Rules were abrogated in the reforms introduced by the Armed Forces Discipline Act 1996 (c. 46) as a result of rulings made by the European Court of Human Rights.


12. Martin’s appeal against conviction was rejected by the Judicial Committee of the House of Lords on December 16, 1997. The judgment is available at http://www.publications.parliament.uk/pa/id199798/idjudgmt/jd971216/mart01.htm.
13. See, for example, the comment of the Court in the case of Findlay v United Kingdom, ECHR Case No: 22107/93, decided February 25, 1997, at paragraph 84, upholding the view of the Commission that “no causal link had been established between the breach of the Convention complained of by the applicant and the alleged pecuniary damage, and…that it was not possible to speculate as to whether the proceedings would have led to a different outcome had they fulfilled” Convention requirements, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hhkm&action=html&highlight=Findlay%20%20%20United%20%20%20Kingdom&sessionid=557312&skin=hudoc-en.


16. Article 84 of Geneva Convention III states, “A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.” Id.


21. See, for example, the case of G before the Military Tribunal of Division I, cited in HOW DOES LAW PROTECT IN WAR 1255 (Marco Sassoli & Antoine Bouvier eds., 1999).


23. Id., sec. 2(a).

24. Id., sec. 4(3).

25. Id., sec. 4(8).

26. Id., sec. 7(b).

27. “A key figure in the evolution of the Universal Declaration was Eleanor Roosevelt, the widow of President Franklin Roosevelt, who had died in 1945. She was selected to be the first US representative to the commission by her husband’s successor, President Harry Truman.” David Pitts, The Noble Endeavor, 3 USIA ELECTRONIC JOURNAL No. 3 (October 1998), available at http://usinfo.state.gov/journals/itdhbr/1098/ijde/noble.htm.

30. See Section 6(C) of Military Commission Instruction No. 2, on Crimes and Elements for Trials by Military Commission, available at id.
31. For example, the provisions relating to “conspiracy” in Section 6(C)(6) of Military Commission Instruction No. 2. Id.
32. See id. § 6(C)(3) and (4).
34. See Military Order of November 13, 2001, supra note 22, § 4(c)(3).
36. Id., § 6(D).
37. The rule against hearsay in English law has developed in a particularly convoluted manner over centuries. “There can be little doubt that the rule excluding hearsay is the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses alike.” See Extract from Consultation Paper No. 117 of The Law Commission for England and Wales on The Hearsay Rule in Civil Proceedings Part V – Provisional Conclusions, ¶ 5.1, available at http://www.lawcomm.gov.uk/appendix_a_bestvidence_rule_paper.htm.
38. ICC Statute, supra note 2.
40. The full wording is: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing:"

41. Id., art. 14(3)(d).
43. See, for example, the unclassified motions cited on the Department of Defense website. Available at http://www.defenselink.mil/news/Aug2004/commissions_motions.html.
47. Id. § 3(A)(2)(e) and Annex B.
49. See Military Commission Order No. 1, supra note 28, § 5(B)(3).
51. See Military Order of November 13, 2001, supra note 22, § (c)(8).
52. See Military Commission Order No. 1, supra note 28, § (H)(4).
54. See Regulation 10, Regulations for the Trial of War Criminals, MML Part III, at 349, supra note 19.
55. See Regulation 12, id. at 349–350.
56. See International Covenant on Civil and Political Rights, supra note 40, art. 14(5).
57. The current legislation is contained in the Courts Martial (Appeals) Act 1968.
58. The Uniform Code of Military Justice (UCMJ) was enacted on May 5, 1950. Article 67 of the UCMJ established the Court of Military Appeals as a three-judge civilian court. The Report of the House Armed Services Committee accompanying the legislation emphasized that the new Court would be "completely removed from all military influence of persuasion." The legislation became effective on May 31, 1951. In 1968, Congress redesignated the Court as the United States Court of Military Appeals.
59. See, for example, the appellate provisions in relation to the Yugoslav and Rwanda Tribunals and the International Criminal Court. All available on the UN website at http://www.un.org.