



2003

American Courts-Martial for Enemy War Crimes

Tara Lee
DLA Piper

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Lee, Tara (2003) "American Courts-Martial for Enemy War Crimes," *University of Baltimore Law Review*: Vol. 33: Iss. 1, Article 3.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol33/iss1/3>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

AMERICAN COURTS-MARTIAL FOR ENEMY WAR CRIMES

Tara Lee†

I. INTRODUCTION

During the Persian Gulf War in 1991, nineteen American servicemen and two American servicewomen were taken prisoner by Iraq.¹ All suffered physical abuse.² They were beaten, urinated upon, and electrocuted.³ They sustained broken bones, perforated eardrums, and chipped teeth.⁴ One of the servicewomen was sexually molested.⁵ During and preceding that conflict, it was widely reported that Kuwaiti prisoners and Iraqi civilian detainees were subjected to even worse treatment, including death by acid bath immersion, gang rapes in front of family members, and torture with electric drills.⁶ Despite these acts, no trials based on any of those crimes were ever held.⁷ No tribunals were convened by the United States or the United Nations.⁸ In fact, no charges were ever filed in any international forum based on the Iraqi war crimes of the 1991 Persian Gulf War.⁹

† Resident Fellow, Center for the Study of Professional Military Ethics, United States Naval Academy. My thanks to Scott Silliman, Director, Center for Law, Ethics, and National Security, Duke University School of Law, and LCDR Daniel P. Shanahan, JAGC, USN, for their helpful comments.

1. Christopher Dickey & Donatella Lorch, *Military Justice: Saddam's Crimes*, NEWSWEEK, Feb. 17, 2003, at 42.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE ARMY, SUMMARY OF REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) (1992), at 8, at <http://www.gwu.edu/~nsarchiv/news/20030320/iraqicrimes.pdf> [hereinafter SUMMARY OF REPORT ON IRAQI WAR CRIMES]. See also Louis Rene Beres, *The War's True Measure; The Dossier of War Crimes Grow in Iraq*, CHI. TRIB., Apr. 6, 2003, at C1 (describing official reports of Iraqi war crimes committed against Kuwaiti civilians, including: torture by amputation of or injury to limbs, eyes, tongues, ears, noses, lips, and genitalia; the use of electric drills and acid baths on victims; the repeated rape of women taken hostage; and numerous eyewitness accounts of Iraqis torturing women by making them eat their own flesh as it was cut from their bodies); Dickey & Lorch, *supra* note 1 (reporting that the final Pentagon report on Iraqi war crimes during the 1991 Persian Gulf War included "several linear feet of files").
7. Dickey & Lorch, *supra* note 1.
8. *Id.*
9. *Id.* There have been rare instances of domestic war crimes complaints arising in European countries with universal jurisdiction statutes. For example, charges based on Iraqi war crimes were filed by Danish authorities in No-

There have also been reports of potential war crimes during the recent war in Iraq. On March 23, 2003, members of the U.S. Army's 507th Maintenance Company were captured near Al-Nasiriya, Iraq.¹⁰ That same day, Iraqi state television broadcasted images of five captured American soldiers being questioned by their captors.¹¹ U.S. officials, including Defense Secretary Donald Rumsfeld immediately responded by characterizing the broadcast as a violation of the Geneva Conventions.¹² At one point during the conflict, American officials reported that a number of captured American soldiers may have been summarily executed in front of Iraqi townspeople.¹³ At least one witness reported that an American prisoner was tortured during captivity.¹⁴ Iraqi soldiers also committed other war crimes against coalition troops and civilians, including the misuse of civilian clothes, white flags, hospitals, and mosques, and the use of human shields.¹⁵

member of 2002, against Nizar al-Khazraji, a former head of the Iraqi armed forces. See Brendan Kileen, *Denmark Seeks US Assurance Over Missing Iraqi General*, IRISH TIMES, Apr. 5, 2003, at 11. Al-Khazraji, a high-ranking member of Saddam Hussein's regime who had defected, was living in Soro, outside of Copenhagen, when he was charged under Denmark's universal jurisdiction law with committing war crimes on Iraqi Kurds during the 1980s. *Id.* Specifically, he was charged with violating Articles 146 and 147 of the Fourth Geneva Convention, which deal with the protection of civilians in time of war. *Id.* See also *Denmark-Iraq: International Justice for the Victims of Halabja*, Nov. 22, 2002, at <http://www.amnestyusa.org/news/2002/denmark-iraq11222002.html>. A war-crimes-based complaint was also filed against Saddam Hussein in Belgium, under that country's broad universal jurisdiction legislation. See Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach; Cases Against Political Figures Sparked Crises*, WASH. POST, Sept. 30, 2003, at A1. But the chances of any country opening its courts to future war crimes controversies seem particularly diminished after Belgium's experience. See *id.* Some commentators suggest that Belgium's universal jurisdiction legislation, under which Rwandans were found guilty of war crimes and complaints were filed against Israeli and American officials, has now been effectively "gutted" as a result of diplomatic crises. *Id.* U.S. Defense Secretary Donald Rumsfeld told reporters in Belgium "that he feared U.S. officials would not be able to visit the country for fear of being prosecuted and that the United States would withhold further funding for construction of a new NATO headquarters." *Id.* Rumsfeld further stated that "Belgium needs to recognize that there are consequences for its actions . . . [i]t's perfectly possible to meet elsewhere." *Id.*

10. *Home at Last; Jessica Lynch, Months After Being Injured in Iraq, Returns to West Virginia*, CHI. TRIB., July 23, 2003, at 3.
11. Phillip Coorey, *TV Networks Refuse to Show Shocking Scenes*, COURIER MAIL (Queensland, Australia), Mar. 25, 2003, at 4.
12. *Id.*
13. Eric Schmitt & David E. Sanger, *A Nation at War: Washington; U.S. Officials Say Iraqis May Have Killed Some American Prisoners* ERROR! UNKNOWN SWITCH ARGUMENT., N.Y. TIMES, Mar. 26, 2003, at B11.
14. See Jerry Adler, *Jessica's Liberation*, NEWSWEEK, Apr. 14, 2003, at 42, 46.
15. See Mark Johnson et al., *82nd Airborne Rings Paramilitaries; Commanders Unsure If Saddam Loyalists Will Flee or Keep Fighting*, CHARLOTTE OBSERVER, Apr. 3, 2003, at 6A (quoting Defense Department spokeswoman Torie Clarke: "Iraqi troops are holed up in the mosque and firing at coalition forces . . .

As this paper is written, it is still too early to sift through accounts from the recent conflict and definitively identify violations of international law.¹⁶ It is reasonable to assume, however, that some allegations of war crimes will be sustained.

The intent to hold recent Iraqi war criminals accountable seemed clear in the spring of 2003. President Bush publicly warned Iraqi officials that they would be held accountable for war crimes committed during this conflict, and the U.S. Senate and the U.S. House of Representatives entered concurrent resolutions calling for prosecution of Iraqi war crimes.¹⁷ But a President's public vow to prosecute and a legislature's resolve to do so are not enough. As many have persuasively argued in the years since the 1991 Persian Gulf War, many identified and documented war crimes went entirely unprosecuted and unpunished after that war.¹⁸ Judicial forums must actually be convened if there is to be any redress for enemy war crimes. Moreover, inaction now, in the face of flagrant violations of the laws of armed conflict, would effectively sanction a continuing course of illegal conduct. Others have addressed the need for war crimes trials adjudicating genocide-level offenses; I am here concerned with the need to adjudicate perfidy-level offenses, which almost inevitably result in indiscriminate killing.

Against all international laws of war, the regime's forces are using and abusing the mosque as a military fortress"); Neil A. Lewis, *A Nation at War: War Crimes; U.S. Is Preparing to Try Iraqis for Crimes Against Humanity and Mistreating Prisoners*, N.Y. TIMES, Mar. 29, 2003, at B14 (reporting that Iraqi soldiers falsely waved flags of surrender, used "human shields, forced conscription, prevent[ed] the civilian population from fleeing, [fought] in civilian clothes and us[ed] protected zones like hospitals for cover"); Neal A. Richardson & Spencer J. Crona, Commentary, *Make Iraqis Pay for Acts of 'Perfidy'; Disguising Soldiers as Civilians Is a War Crime That Must be Prosecuted*, L.A. TIMES, Apr. 8, 2003, pt. 2, at 13 (reporting that "Fedayeen fighters waved a white flag and then opened fire on U.S. soldiers preparing to accept surrender," and describing an ambush "in which an ostensibly pregnant woman lured three American soldiers to their deaths by pretending to be in distress at a checkpoint and then detonating concealed explosives").

16. See, e.g., Mark Bowden, *Ideas and Trends: War and Remembrance; Sometimes Heroism Is a Moving Target*, N.Y. TIMES, June 8, 2003, § 4, at 1 (describing the conflicting news reports regarding the circumstances of the March 23, 2003 capture and rescue of Pfc. Jessica Lynch in Al-Nasiriya).
17. President Bush warned, during a speech about Iraq in Cincinnati, Ohio on October 7, 2002, that "[a]ll war criminals will be pursued and punished." *Saddam Hussein is a Threat to Peace*, WASH. POST, Oct. 8, 2002, at A20. Senator Joe Biden, a Democrat from Delaware, Representative Curt Weldon, a Republican from Pennsylvania, and Senator Arlen Specter, a Republican from Pennsylvania, introduced concurrent Senate and House resolutions on April 8, 2003, calling for prompt prosecution of Iraqi government officials who directed or violated international laws of war. Tom Brune, *Trial Plan Called a 'Mistake'*, NEWSDAY, Apr. 9, 2003, at A33.
18. See, e.g., James S. Robbins, *War Crimes: The Case of Iraq*, 18 FLETCHER F. WORLD AFF. 45 (1994).

We must act; the question is one of forum. Given the inevitable municipal disarray in a post-war society, legal action addressing war crime allegations is best pursued in two phases involving different forums. This paper proposes that when America commits its troops to fight wars on foreign lands, redress for war crimes should follow in two distinct steps. The first step must be to convene U.S. military courts-martial to prosecute mistreatment of American prisoners of war and violations of the laws of armed conflict committed against American troops. The second phase should involve tribunals convened and administered under the authority and direction of the new local government to address crimes that victimized civilians before and during the military conflict.

Part II of this Article demonstrates that the United States Congress has, since at least 1916, legislatively authorized courts-martial jurisdiction over foreign nationals accused of war crimes. Part III briefly describes some of the types of enemy actions that would constitute war crimes. Part IV illustrates that U.S. judicial curtailment of courts-martial jurisdiction has not eliminated the option of court-martialing foreign enemy war criminals. Finally, Part V argues that regular military courts-martial are a preferable option to specially-convened military commissions because they set a better due process benchmark for the forums that will follow.

II. CONGRESSIONAL AUTHORITY FOR COURTS-MARTIAL JURISDICTION OVER INDIVIDUALS ACCUSED OF WAR CRIMES¹⁹

A. *History of the Legislative Grant of Jurisdiction*²⁰

The U.S. Constitution specifically grants to Congress: (1) the power to “make Rules for the Government and Regulation of the land and naval Forces”;²¹ and (2) the power to “define and punish . . . offenses

19. See generally DOROTHY V. JONES, *TOWARD A JUST WORLD* (2002) (a comprehensive history of international military tribunals and war crimes trials); The Honorable Walter T. Cox III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (focusing on the history of America’s system of military justice and congressional involvement in its development).

20. For information regarding the legislative history of the Articles of War and the UCMJ, the author is particularly indebted to the scholarship of Major Jan E. Aldykiewicz, USA, and Major Geoffrey S. Corn, USA. The author’s summary of the legislative history of court-martial jurisdiction over enemy combatants is drawn from Part IV, and notes 28-73, of their article, and from William Winthrop’s 1920 text, *Military Law and Precedents*. See Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 91-101 (2001); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 778-98 (2d ed. 1920).

21. U.S. CONST. art. I, § 8, cl. 14.

against the Law of Nations.”²² Congress originally exercised these powers through the statutory enactment of numerous military codes, known as the Articles of War, the earliest of which date back to the American Revolution.²³ Then, in 1950, recognizing the need for a single codified system of military law, separate from the criminal justice systems of the various states and of the Article III federal courts, Congress enacted the Uniform Code of Military Justice (“UCMJ”) to replace the Articles of War.²⁴ Thus, the first grants of jurisdiction relevant to this discussion can be gleaned from the various congressionally-enacted Articles of War, and the current status of jurisdiction must be derived from the UCMJ.

Congress authorized specific military jurisdiction over certain crimes unique to time of war—such as aiding the enemy and spying—as early as 1775.²⁵ The original statutory Code of Articles of War, enacted in that year, provided at Article 27 that “[w]hosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy . . .” and at Article 28 that “[w]hosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly . . .” shall each “suffer death, or such other punishment as a court-martial may direct.”²⁶

The question of whether persons other than American soldiers can be tried at courts-martial for time-of-war offenses is hardly a new issue. Eighteenth and nineteenth-century legal scholars reviewing the above language from the 1775 Articles debated that very question.²⁷ They noted that, unlike other Articles, 27 and 28 began with an unqualified “whosoever” rather than a qualified “whosoever serving in the continental army” and concluded that Articles 27 and 28 included civilians within their jurisdiction.²⁸

In addition to the jurisdiction over certain limited offenses such as aiding the enemy and spying, a clear, broader legislative grant of courts-martial jurisdiction over all individuals, civilian and military, who have committed war crimes first appeared in the 1916 Articles of War.²⁹ Article 12 of that statute provided, in pertinent part, as follows:

22. *Id.* cl. 10.

23. See WINTHROP, *supra* note 20, at 21-22.

24. Act of May 5, 1950, ch. 169, 64 Stat. 107, 107-08 (1950). The UCMJ is currently codified as Chapter 47 of Title 10 (“Armed Forces”) of the United States Code. 10 U.S.C. §§ 801-941 (2000).

25. See WINTHROP, *supra* note 20, at 629 (indicating that Articles of War proscribing aiding and communicating with the enemy first appeared in 1775).

26. See *id.* at 102.

27. See *id.*

28. See *id.* (discussing Articles 27 and 28 of the 1775 Code: “Whether the word ‘whosoever’ is here employed in a general sense, and includes civil equally with military persons, is a question frequently discussed in cases arising during the late war, but which must be regarded as determined by the weight of reason and authority in the affirmative”).

29. Articles of War of 1916, ch. 418, § 3, art. 12, 39 Stat. 619, 652 (1917).

“General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles *and* any other person who by the law of war is subject to trial by military tribunals.”³⁰

Prior to 1916, all previous Articles of War had limited courts-martial jurisdiction to a particular class of persons—persons otherwise subject to the code, or active duty military personnel and spies—or to only certain types of offenses.³¹ Notably, other provisions of the 1916 Articles of War did retain language from earlier versions of the statute limiting their jurisdiction to events occurring “in time of war.”³² Article 12 of the 1916 Articles, however, contained none of those limitations.³³ Article 12 of the 1916 Articles of War was clearly written to provide for courts-martial of war criminals, both enemy and American.³⁴

Article 12 was amended slightly in 1920, but the key language, quoted above, which granted courts-martial jurisdiction over two categories of people, those “subject to military law . . . *and* . . . any other person who by the law of war is subject to trial by military tribunals,”³⁵ remained unchanged.³⁶ In 1946, the U.S. Supreme Court, in *In re Yamashita*,³⁷ acknowledged that Congress, through the Articles of War, had expressly sanctioned military law jurisdiction over enemy combatants for war crimes, via military commission or courts-martial.³⁸ While affirming the post-WWII military tribunal convictions of Japanese General Yamashita for violations of the law of war, the Court explicitly described the various kinds of courts-martial jurisdiction as follows:

Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions “any other person who by the law of war is subject to trial by military tribunals,” and who, under Article 12, may be tried by court-martial, or under Article 15 by military commission.³⁹

30. *Id.* (emphasis added).

31. Aldykiewicz & Corn, *supra* note 20, at 92-94; Articles of War of 1916, ch. 418, § 3, art. 12, 39 Stat. 619, 652 (1917).

32. Aldykiewicz & Corn, *supra* note 20, at 94-95.

33. Articles of War of 1916, ch. 418, § 3, art. 12, 39 Stat. 619, 652 (1917).

34. *Id.*

35. Articles of War of 1920, ch. 227, art. 12, 41 Stat. 759, 789 (1921) (emphasis added).

36. Aldykiewicz & Corn, *supra* note 20, at 96.

37. 327 U.S. 1 (1946).

38. *Id.* at 7.

39. *Id.* General Yamashita was tried, convicted, and sentenced to death by hanging based on charges specifying that he had failed to control the members of his command and had permitted them to commit “brutal atrocities and other high crimes.” *Id.* at 5, 13-14. The Supreme Court upheld mili-

When the UCMJ was enacted in 1950, essentially codifying “military law” as previously set forth in the Articles of War, the language of Article 12 became UCMJ Article 18.⁴⁰ UCMJ Article 18 was amended in 1956 and again in 1968.⁴¹ The reference to persons subject to “military law” became a reference to persons subject to the UCMJ,⁴² but Article 18 always retained the jurisdictional provision incorporating persons *not* otherwise subject to jurisdiction, and the current version of Article 18 is identical to the version passed in 1968.⁴³ Article 18 states that, *in addition to* jurisdiction over U.S. servicemembers regularly subject to the UCMJ: “General courts-martial *also* have jurisdiction to try *any* person who by the law of war is subject to trial by a military tribunal⁴⁴ and may adjudge any punishment permitted by the law of war”⁴⁵ Thus, from 1916 to the present, Congress has expressly extended courts-martial jurisdiction to cover any persons, including civilian foreign nationals or enemy soldiers, who have committed war crimes.⁴⁶

tary commission jurisdiction over Yamashita, finding that Yamashita’s commission “was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants.” *Id.* at 11.

40. Aldykiewicz & Corn, *supra* note 20, at 96. Section 818 comprises Article 18 of the UCMJ. 10 U.S.C. § 818 (2000).

41. Aldykiewicz & Corn, *supra* note 20, at 97.

42. Aldykiewicz & Corn, *supra* note 20, at 97; *see also id.* at 80 n.10 (discussing the term “persons subject to the code”). The critical point is that “foreign nationals and U.S. citizens not listed in UCMJ Article 2(a)(1) through 2(a)(12) are not subject to the [UCMJ] and therefore are not subject to general courts-martial under the first sentence of UCMJ Article 18.” *Id.*

43. *See id.* at 96-97.

44. Vast attention and scholarship in the last two years has been devoted to the point that enemy combatant war criminals qualify as persons who by the law of war are subject to the jurisdiction of military tribunals. *See, e.g.*, Christopher M. Evans, Note, *Terrorism on Trial: The President’s Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002); Lisa M. Ivey, Comment, *Ready, Aim, Fire? The President’s Executive Order Authorizing Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism Is a Powerful Weapon, But Should it be Upheld?*, 33 CUMB. L. REV. 107 (2002); Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-depth Analysis of the Government’s Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465 (2003). Moreover, in 2001, President Bush signed Executive Order 222, entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” Exec. Order No. 222, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). The Executive Order authorizes military tribunal prosecution of certain enemy combatant war criminals. *Id.* §§ 1(e), 2(a). The relative merits of military tribunal and courts-martial prosecution are discussed at Part V below.

45. Aldykiewicz & Corn, *supra* note 20, at 97 n.61 (emphasis added) (citing Military Justice Act of 1968, art. 18, Pub. L. No. 90-632, 1968 U.S.C.A.N. (82 Stat. 1335); *see also* 10 U.S.C. § 818 (2000)).

46. *See* Aldykiewicz & Corn, *supra* note 20, at 97-98. The War Crimes Act of 1996 also gave federal courts jurisdiction over war crimes committed by or

B. Executive Recognition of the Legislative Grant of Jurisdiction

While the legislatively-enacted UCMJ sets forth substantive law concerning courts-martial, procedural rules for courts-martial are set forth in the Rules for Courts-Martial.⁴⁷ The Rules for Courts-Martial are promulgated by the President of the United States in his capacity as Commander-in-Chief, are reviewed annually by the Executive Branch, and are amended by Executive Order as deemed necessary.⁴⁸ The current edition of the Rules for Courts-Martial acknowledges that two types of war crime courts-martial jurisdiction exist in the UCMJ: the first type explicitly includes only servicemembers; and the second type includes any person, potentially including servicemembers, who commits a war crime.⁴⁹

The acknowledgment of two types of war crimes courts-martial jurisdiction is first evident in Rule for Courts-Martial 201(f)(1)(B), which states that, in addition to the general courts-martial jurisdiction provided over "any person subject to the code," that "[g]eneral courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against . . . [t]he law of war"⁵⁰ Additionally, in the discussion following Rule for Courts-Martial 307(c)(2), the drafters offer the following direction as to how to bring charges based on war crimes: "Ordinarily persons subject to the code [(distinguishing such persons from those not otherwise subject to the code)] should be charged with a specific violation of the code rather than a violation of the law of war."⁵¹ With this language, the Rules for Courts-Martial implicitly recognize that Article 18's jurisdiction encompasses two types of war crimes defendants: "persons subject to this chapter for any offense made punishable by this chapter"⁵² and "any person who by the law of war is subject to trial by a military tribunal"⁵³

against U.S. nationals or members of the U.S. armed forces. *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (2000). The legislative history of that bill indicates that some members of Congress mistakenly believed, contrary to the plain language of Article 18, that courts-martial jurisdiction could not reach beyond members of the U.S. armed forces, persons serving with the armed forces in the field, and enemy prisoners of war. *See* Aldykiewicz & Corn, *supra* note 20, at 144-50 (discussing the relationship between The War Crimes Act of 1996 and Article 18); *see also id.* at 80 n.9 (citing H.R. REP. NO. 104-698, at 5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2170 (noting that "during the War Crimes Act debate, the viability of court-martialing non-U.S. servicemembers for war crimes" was discussed and determined not to be a "viable option").

47. *See* R.C.M. 101(a) (2000).

48. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-54.00 (2d ed. 1999).

49. R.C.M. 201(f)(1)(A), (B).

50. *Id.* at 201(f)(1)(B).

51. *Id.* at 307(c)(2) discussion.

52. 10 U.S.C. § 818 (2000).

53. *Id.*

In sum, a new statute is not needed to invoke courts-martial jurisdiction over foreign nationals, including enemy combatants, who commit war crimes. In addition, a new Executive Order from the President is not necessary to set forth the rules governing those courts-martial. Such jurisdiction already exists under Article 18 of the UCMJ, and the applicable procedures are those already used during courts-martial of our own servicemembers. Courts-martial is a legislatively-sanctioned, immediately-available forum for prosecuting war crimes committed against American prisoners and troops in Iraq.

II. ENEMY OFFENSES CONSTITUTING VIOLATIONS OF THE LAW OF WAR

The Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions, and international treaties generally comprise the law of war or the law of armed conflict.⁵⁴ Because I advocate American courts-martial only for enemy war crimes committed against American prisoners and soldiers, the focus can be narrowed to the specific laws of war applicable to these alleged types of offenses. In November of 1992, the Department of Defense Office of General Counsel prepared a classified report for the Judge Advocate General of the Army specifically identifying substantiated instances of war crimes committed by Iraqi military forces during and preceding the 1991 Persian Gulf War.⁵⁵ That report identified violations of the Geneva Conventions for the Protection of War Victims of August 12, 1949,⁵⁶ to which Iraq is a party, and of Hague Conventions IV and VIII of 1907,⁵⁷ to which Iraq is not a party.⁵⁸ The report ultimately con-

54. See Center for Defense Information, *Iraq: Questions Regarding the Laws of War*, at <http://www.cdi.org/iraq/lawsofwar-pr.cfm> (last visited Mar. 18, 2003).

55. See SUMMARY OF REPORT ON IRAQI WAR CRIMES, *supra* note 6.

56. See *id.* at 11-13. The Geneva Conventions for the Protection of War Victims of August 12, 1949, are comprised of the following: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

57. See SUMMARY OF REPORT ON IRAQI WAR CRIMES, *supra* note 6, at 11-13. See also Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3) 461, available at <http://www1.umn.edu/humanrts/instreet/1907c.htm> [hereinafter Hague IV]; Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3) 580, available at <http://www1.umn.edu/humanrts/instreet/1907g.htm>.

cluded that "Iraqi violations of the law of war were widespread and premeditated."⁵⁹

Based on written and videotaped witness accounts and photographs, videotapes, and other documentary evidence, sixteen specific categories of war crimes were found to have been committed by Iraq during the 1991 Persian Gulf War.⁶⁰ Two of those categories concern war crimes committed against American prisoners, soldiers, and civilians.⁶¹ Given the early reports of potentially analogous offenses committed during the recent conflict, those types of war crimes serve as particularly relevant examples here.⁶² These two categories of crimes are: (1) torture and other "inhumane" treatment of prisoners of war, in violation of the Third Geneva Convention,⁶³ and (2) the use of subterfuge through civilian human shields in violation of the Fourth Geneva Convention.⁶⁴

58. Though Iraq is not a party to the 1907 Hague Conventions, the Judge Advocate General has concluded, at least with regard to offenses committed during the 1991 Persian Gulf War, that Iraqi citizens are bound by their provisions and subject to prosecution for violations of the law of war as therein set forth because those conventions have become a part of customary international law. See Summary of Report on Iraqi War Crimes, *supra* note 6, at 2.

59. *Id.* at 11.

60. See *id.* at 8, 11-13.

61. See *id.* at 11-12.

62. See *supra* notes 12-16 and accompanying text.

63. SUMMARY OF REPORT ON IRAQI WAR CRIMES, *supra* note 6, at 12 (identifying such war crimes as violations of Articles 13, 17, 22, 25, 26, 27, and 130 of the Third Geneva Convention). Article 13 of the Third Geneva Convention mandates that prisoners of war "at all times be humanely treated." Third Geneva Convention, *supra* note 56, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146. Article 17 of the Third Geneva Convention provides, among other things, that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." *Id.* art. 17, 6 U.S.T. at 3332, 75 U.N.T.S. at 150. Article 22 of the Third Geneva Convention requires that prisoners of war be interned only in healthy and hygienic areas. *Id.* art. 22, 6 U.S.T. at 3336, 75 U.N.T.S. at 154. Article 25 of the Third Geneva Convention similarly requires, among other things, that prisoners of war be housed in warm, dry quarters with adequate light. *Id.* art. 25, 6 U.S.T. at 3338, 75 U.N.T.S. at 156. Article 26 of the Third Geneva Convention requires that prisoners of war be given decent, nutritious food and clean water. *Id.* art. 26, 6 U.S.T. at 3340, 75 U.N.T.S. at 158. Article 27 of the Third Geneva Convention requires that prisoners of war be provided with adequate, climate-appropriate clothing. *Id.* art. 27, 6 U.S.T. at 3340, 75 U.N.T.S. at 158. Finally, Article 130 of the Third Geneva Convention describes "wilful [sic] killing, torture [or] inhuman treatment" of prisoners of war as "grave breaches" of the Convention. *Id.* art 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 288.

64. SUMMARY OF REPORT ON IRAQI WAR CRIMES, *supra* note 6, at 12 (identifying such war crimes as violations of Articles 28 and 38(4) of the Fourth Geneva Convention). Article 28 of the Fourth Geneva Convention provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." Fourth Geneva Convention, *supra* note 56, art. 28, 6 U.S.T. at 3538, 75 U.N.T.S. at 308. Article

Media reports from the recent conflict suggest that Iraqis may have violated other treaties as well.⁶⁵ For instance, Article 23 of Hague Convention IV prohibits killing or wounding the enemy “treacherously,” improperly using a flag of truce, and killing an enemy soldier who has surrendered.⁶⁶ Fighting in civilian clothes to feign non-combatant status and feigning surrender would constitute violations of the first 1977 Additional Protocol to the Geneva Convention (“Protocol I”).⁶⁷ Lastly, fighting from hospital zones violates the First Geneva Convention,⁶⁸ and using mosques as fortresses violates Article 53 of Protocol I and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁶⁹ These crimes, partic-

38(4) of the Fourth Geneva Convention provides that “[i]f [protected persons] reside in an area particularly exposed to the dangers of war, they shall be authorised [sic] to move from that area to the same extent as the nationals of the State concerned.” *Id.* art. 38(4), 6 U.S.T. at 3542, 75 U.N.T.S. at 312.

65. *See, e.g., supra* notes 12-16 and accompanying text.

66. Hague IV, *supra* note 57, art. 23, 3 Martens Nouveau Recueil (ser. 3) at xx.

67. 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. 37, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Article 37 of Protocol I generally prohibits killing, injuring or capturing an adversary by “resort to perfidy.” *Id.* art. 37(1), 1125 U.N.T.S. at 21. It defines perfidy as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence” and gives four examples of perfidy:

(A) The feigning of an intent to negotiate under a flag of truce or of a surrender; (B) The feigning of an incapacitation by wounds or sickness; (C) The feigning of civilian, non-combatant status; and (D) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

Id. Some may be inclined to argue that the Iraqi tactics are mere “ruses of war” necessary to engage a superior foe. Article 37 clarifies that “[r]uses of war are not prohibited,” and defines “ruses” as “acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law.” *Id.* art. 37(2), 1125 U.N.T.S. at 21-22. It lists the following examples: “the use of camouflage, decoys, mock operations and misinformation.” *Id.* art. 37(2), 1125 U.N.T.S. at 22. Clearly, white flags and civilian clothes are examples of perfidy, not ruses. Though neither Iraq nor the United States has signed Protocol I, its provisions are generally recognized as customary international law and therefore are binding even on states that are not parties to it.

68. First Geneva Convention, *supra* note 56, art. 19, 6 U.S.T. at 3128, 75 U.N.T.S. at 44 (providing that medical units and establishments “may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict”).

69. Protocol I, *supra* note 67, art. 53, 1125 U.N.T.S. at 27 (prohibiting the commission of acts of hostility against “places of worship”); Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, arts. 1, 2, 249 U.N.T.S. 215, 242 [hereinafter the 1954 Hague Conven-

ularly where they appear to have been executed as a matter of policy and strategy, are of the type that I propose be adjudicated in the first phase of post-conflict accountability by American-convened courts-martial.

Additional war crimes identified in the 1992 report may also prove to be analogous to offenses committed in the recent conflict. Such war crimes include compelling foreign nationals to serve in the Iraqi armed forces in violation of the Fourth Geneva Convention, and indiscriminate missile attacks and unnecessary destruction in violation of Hague IV.⁷⁰ Those crimes, however, are examples of the types appropriate for adjudication during what I have characterized as the second phase of war crimes accountability, consisting of Iraqi-convened forums.⁷¹

As summarized in the Introduction, various media reports give strong indication that war crimes were committed by Iraqis against American soldiers during the recent war.⁷² At this writing, official investigations into those incidents are underway.⁷³ Assuming substantiating evidence is ultimately uncovered, and having established in Part II that courts-martial is an available forum, the following sections set forth why courts-martial prosecution is an appropriate and advantageous first forum for prosecution of those war crimes.

IV. JUDICIAL CURTAILMENT OF COURTS-MARTIAL JURISDICTION HAS NOT LIMITED ARTICLE 18 JURISDICTION

Though, as described in Part II, Congress clearly intended for the UCMJ to cover enemy war criminals, it must briefly be acknowledged that the original jurisdictional reach of the UCMJ has been judicially curtailed in several significant ways. These limitations on courts-martial jurisdiction have created the widespread misperception that courts-martial cannot try anyone but servicemembers.⁷⁴ Over the last fifty years, in three main respects, courts have rejected language in the UCMJ that evidenced a Congressional intent to subject persons other

tion] (providing that "cultural property" covered by the Convention includes religious buildings and monuments and mandating the "safeguarding of and respect for" such property).

70. See SUMMARY OF REPORT ON IRAQI WAR CRIMES, *supra* note 6, at 12.

71. See *infra* note 114 and accompanying text. Other treaties to which Iraq is a party might also serve as a basis for locally-convened war crimes prosecutions during this second phase. Such treaties include: the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 14 I.L.M. 49; and the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

72. See *supra* notes 10-15 and accompanying text.

73. See Lewis, *supra* note 15.

74. See, e.g., *supra* note 44-46 and accompanying text (discussing the legislative history of the War Crimes Act of 1996).

than active duty American military members to trial by courts-martial.⁷⁵

The first example of judicial reluctance to let Congress extend courts-martial jurisdiction beyond American servicemembers concerns Article 2(11) of the UCMJ. Article 2(11) was amended in 1956 by Congress specifically to subject “persons serving with, employed by, or accompanying the armed forces outside the United States” to courts-martial jurisdiction.⁷⁶ In 1957, and again in 1960, the U.S. Supreme Court declared such jurisdiction unconstitutional as applied to civilian dependents and employees.⁷⁷ In *Reid v. Covert*, by a 6-3 vote, the Supreme Court reversed the courts-martial murder convictions of two dependent wives who had each been separately convicted of murdering their servicemember husbands, one while stationed in England, and one while stationed in Japan.⁷⁸ The Court held that civilian dependents of members of the armed forces overseas could not constitutionally be tried by a court-martial in times of peace for capital offenses committed abroad.⁷⁹ Then, in *Kinsella v. U.S. ex rel. Singleton*, by a 5-4 vote, the Supreme Court held that the courts-martial involuntary manslaughter conviction of a dependent wife was also unconstitutional, finding any distinction between capital and non-capital offenses to be constitutionally insignificant.⁸⁰ The Court reached the same decision in another 1960 case, *McElroy v. U.S. ex rel. Guagliardo*, regarding the application of Article 2(11) jurisdiction to civilian em-

75. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (invalidating the extension of Article 2(11) of the UCMJ); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (invalidating portions of Article 3(a) of the UCMJ); *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (questioning Article 2(10) of the UCMJ).

76. 10 U.S.C. § 802(11) (1958).

77. See *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

78. 354 U.S. at 3-4, 41, 65.

79. *Id.* at 5.

80. 361 U.S. at 235-36, 248-49. Though court-martial prosecution of civilian dependents has been invalidated by the U.S. Supreme Court, military commission prosecution of civilian dependents during times of military government jurisdiction overseas has been upheld. In *Madsen v. Kinsella*, a case that preceded *Reid v. Covert*, the Court recognized that the United States Court of the Allied High Commission, established in the American Zone in Occupied Germany, had the constitutional authority under military government jurisdiction to try civilian Yvette Madsen for the murder of her active duty husband. 343 U.S. 341, 342-43 (1952). While denying Madsen’s habeas petition, the Court observed:

[A]s Commander-in-Chief of the Army and Navy of the United States, [the President] may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities.

Id. at 348, 362. Madsen was charged under the German Criminal Code and was committed to the Federal Reformatory for Women in Alderson, West Virginia. *Id.* at 344-45.

ployees.⁸¹ In *McElroy*, the Court, by a 5-4 vote, reversed the courts-martial convictions of a civilian Air Force employee in Morocco and a civilian Army employee in Germany, finding the convictions to be unconstitutional extensions of military jurisdiction over U.S. citizens.⁸²

Another Congressional extension of courts-martial jurisdiction was invalidated in 1955.⁸³ Article 3(a) of the UCMJ provides that court-martial jurisdiction is retained when a servicemember commits a crime on active duty but separates from the service before court-martial proceedings commence.⁸⁴ That type of jurisdiction was declared unconstitutional in *Toth v. Quarles*.⁸⁵ The Supreme Court, in a 6-3 decision, invalidated the court-martial of Robert Toth, a former servicemember convicted of committing a murder in Korea while on active duty with the Air Force.⁸⁶ Notably, the *Toth* Court opined that Congress could have constitutionally created such jurisdiction, but had not done so.⁸⁷

The final way that courts have limited Congress's attempts to extend the reach of courts-martial jurisdiction beyond active duty servicemembers concerns Article 2(a)(10) of the UCMJ. Article 2(a)(10) provides that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to courts-martial jurisdiction.⁸⁸ This provision has not been reviewed by the Supreme Court, but it was rejected during the Vietnam War by a federal appellate court in *Latney v. Ignatius*.⁸⁹ The *Latney* court found Article 2(a)(10) courts-martial jurisdiction to be unconstitutional, at least as applied to a civilian seaman serving under time charter to the Navy.⁹⁰

In sum, despite contrary Congressional intent, the U.S. Supreme Court has taken the position that a court-martial may not try a U.S. citizen unless that citizen was in the U.S. armed forces at the time of the crime and at the time of the trial.⁹¹ Some commentators may be tempted to broadly suggest that this indicates a judicial intent to permit courts-martial only against active duty servicemembers. But the judicial curtailment of UCMJ jurisdiction described above has only limited when courts-martial may be convened to try American citizens. Other well-known domestic⁹² and international⁹³ precedents clearly

81. 361 U.S. 281 (1960).

82. *Id.* at 282-83, 287.

83. U.S. *ex rel.* *Toth v. Quarles*, 350 U.S. 11, 11 (1955).

84. *See* 10 U.S.C. § 803(a) (2000).

85. 350 U.S. at 23.

86. *Id.* at 13, 23.

87. *Id.* at 21 ("If Congress had included this jurisdiction, it would be proper.").

88. 10 U.S.C. § 802(a)(10).

89. 416 F.2d 821, 823 (D.C. Cir. 1969).

90. *Id.*

91. *See supra* notes 74-90 and accompanying text.

92. For a history of early American military commissions and courts, see Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two*

support the jurisdiction of military courts over enemy war crimes. Thus, despite some judicially-imposed limitations on Congress's intent, courts-martial remain an entirely viable forum for prosecution of war crimes committed by foreign nationals. The following discussion sets forth why courts-martial are a particularly appropriate forum for war crimes recently committed against Americans in Iraq.

V. FOR PROSECUTION OF IRAQI WAR CRIMES AGAINST AMERICAN PRISONERS AND SOLDIERS, REGULAR MILITARY COURTS-MARTIAL ARE A PREFERABLE OPTION TO SPECIALLY-CONVENED MILITARY COMMISSIONS

The Bush administration has pointedly reserved military commissions as one option for prosecution of enemy combatant war criminals.⁹⁴ Although it has been described by the Administration as a tool to be used against "foreign enemy war criminals,"⁹⁵ the language of President Bush's November 13, 2001 Military Order authorizes military commission prosecutions only of members of Al Qaeda, international terrorists, and those who harbor them.⁹⁶ It has been reported that we may pursue justice against Iraqi war criminals via an amendment to that order, or through an entirely new order establishing similar military commissions for war crimes committed in Iraq.⁹⁷

Courts, 2002 ARMY LAW 19 (2002), and Major Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW 41 (2002). Virtually every American armed conflict since the American Revolution has seen military jurisdiction prosecution of war crimes. See Lacey, *supra*, at 41.

93. Military trials of war criminals are hardly unique to the American military justice system. In the aftermath of WWII, for example, over two thousand war crimes trials were conducted by ten different countries. See JONES, *supra* note 19, at 168.
94. Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.
95. According to White House counsel Alberto R. Gonzales, the military commissions authorized in the President's Nov. 13, 2001 Military Order would be applied only to "foreign enemy war criminals." *Id.*
96. Exec. Order No. 222, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001). President Bush's November 13, 2001 Military Order sets forth three categories of individuals to be potentially tried by military commission: (1) anyone whom the President finds reason to believe is or was a member of Al Qaeda; (2) anyone whom the President finds reason to believe "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, (3) anyone whom the President finds reason to believe "has knowingly harbored one or more individuals" described in the first two categories. *Id.* Though much criticism has been levied against the Order's use of the word "harbored," one cannot resist noting that this language practically mirrors the language used in Article 27 of the original 1775 Articles of War. See *supra* notes 26-29 and accompanying text (discussing the language of Article 27).
97. Neal A. Lewis, *Tribunals Nearly Ready for Afghanistan Prisoners*, N.Y. TIMES, Apr. 8, 2003, at B11.

The November 13, 2001 Military Order itself prompted an immediate flurry of domestic and international criticism, from legal scholars, political pundits, and moral philosophers.⁹⁸ A brief review of the main criticisms levied against military commissions demonstrates why court-martial is a preferable forum for prosecution of enemy war criminals.

The most resonant criticisms of the President's Order establishing military commissions have been those directed towards its perceived procedural short-cuts—the authorization of prosecutions providing less due process than would be available to U.S. federal district court defendants.⁹⁹ Typical of these criticisms is the expressed concern that the potential military commissions fall short of “the kind of fundamentally fair trial process that America has held up to the world as the standard for criminal adjudications.”¹⁰⁰ Indeed, the American Bar Association (“ABA”) commissioned a task force to address whether the commissions would fall short of “recognized standards of American Justice.”¹⁰¹

The initial criticisms of the proposed commissions cited the following specific procedural shortcomings: the absence of some form of grand-jury-like presentment; the possibility of closed, rather than open trials; the absence of the opportunity for the accused to retain counsel of his choice; the possibility that the death penalty could be handed down by a non-unanimous verdict; and the absence of full appellate rights, including the opportunity to petition the U.S. Supreme Court for a writ of certiorari.¹⁰² Many, but not all, of these

98. See Michael J. Kelly, *Essay: Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283 (criticizing Executive Order No. 222 as “illegal”); Letter from William A. Courson, Executive Director of the Magnus Hirschfeld Centre for Human Rights, to Members of the New Jersey Delegation of the United States Senate and the United States House of Representatives, (Dec. 1, 2001), available at <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg03736.html> (describing the Order as yet another “blow against the Constitution” and accusing the President of “bypass[ing] fundamental principles of justice”).

99. See Kelly, *supra* note 98, at 290 (stating that the Order “breaches other protections by eliminating the right to appeal, not ensuring an independent and impartial court, and not providing for private conferral with counsel”). Many commentators also attacked the potential commissions as unconstitutional, and lacking a proper jurisdictional predicate. See, e.g., Neil K. Katya & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259-60 (2002). Those jurisdiction-based, absence-of-proper-legislative-mandate criticisms are unlikely to carry over to military trials of war crimes committed by soldiers and government officials during the recent war in Iraq and thus are not summarized here.

100. J. Gordon Forester, Jr., & Kevin J. Barry, *Military Commissions: Meeting American Standards of Justice*, 49 FED. LAW. 28, 29 (2002).

101. REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS, 2002 A.B.A. TASK FORCE ON TERRORISM AND THE LAW 1, JAN. 4, 2002, available at <http://www.abanet.org/leadership/military.pdf>.

102. *Id.* at 16-17 (recommending that procedures for military commissions convened under the authority of the President's Order provide for prompt notice of charges, proceedings open to the press and public, the opportunity

concerns are addressed and effectively mooted by the Department of Defense (“DOD”) regulations promulgating procedures for the commissions.¹⁰³ The drafters of the DOD regulations on military commissions do seem to have taken many of the criticisms, and especially the recommendations of the ABA, to heart.¹⁰⁴

But not all commentators are satisfied with the procedures set forth in the DOD regulations. Continuing criticisms include: (1) denial of the right to trial before a “regularly-constituted” tribunal; (2) lack of review of commission proceedings by an independent, impartial court—military commissions would be reviewed only by the Secretary of Defense or President; (3) denial of the “full federal or military rules of evidence”—the DOD rules permit some hearsay evidence and unsworn written statements and otherwise relax the rules of evidence; and (4) lack of judicial review of detention.¹⁰⁵ We can reasonably expect that both American and international observers will continue to voice such criticisms if tribunals are convened.

By comparison, courts-martial is a forum that: (1) is regularly-constituted;¹⁰⁶ (2) is appealable to the U.S. Supreme Court;¹⁰⁷ (3) is governed by the Military Rules of Evidence, which largely mirror the Federal Rules of Evidence;¹⁰⁸ and (4) provides for pretrial confinement review¹⁰⁹ and prohibits chargeless indefinite detentions.¹¹⁰

Thus, following established courts-martial procedures, rather than those authorized by the DOD regulations, would avert many, if not all, of the due-process-based criticisms levied against military commis-

for defendants to choose their own counsel, the right to review of conviction and sentence by a higher tribunal, and a prohibition of the death penalty on less than a unanimous vote of all members of the commission).

103. See DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMMISSION OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.
104. See *id.* (providing the accused with the opportunity to choose his or her own military or civilian counsel under certain circumstances, and providing that proceedings should be open “to the maximum extent practicable”).
105. Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 678-89 (2002). Paust notes that the “improprieties” in Military Commission Order No. 1 mirror the improprieties concerning the Peruvian military commissions addressed by the Inter-American Court of Human Rights. *Id.* at 678 (citing Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, at 10 & n.20 (2001)).
106. See R.C.M. 501(a) (2000) (governing courts-martial composition).
107. See R.C.M. 1205 (permitting review of courts-martial decisions by the Supreme Court).
108. Gregory P. Noone, *Essay: President Bush’s Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 34 CASE W. RES. J. INT’L L. 253, 255 (2002).
109. See R.C.M. 305(i).
110. See R.C.M. 308(a) (requiring that the accused be notified of the charges against him as soon as possible).

sions.¹¹¹ In one sense, convening courts-martial to try enemy war criminals is virtually immune from criticism—if court-martial offers sufficient due process for the men and women serving in the American armed forces, critics will be hard-pressed to argue that others are somehow due more. Court-martial prosecution has the appealing symmetry of offering exactly the same procedural safeguards to those captured by the American military and charged with crimes as would be applied to an American soldier who commits a crime in the process of that capture.

VI. CONCLUSION

I do not expect American courts-martial convened for enemy war crimes to be embraced by every critic. They will not provide a complete retributive panacea or a perfect path to reconciliation. I only propose that we give consideration to courts-martial as a *third* possible option for addressing crimes committed against our soldiers during armed conflict, given that our current consideration seems limited to either (1) inaction and acquiescence, or (2) military commissions. Even the most stalwart critics of military justice forums must concede that the Geneva Conventions give us the right to try enemy prisoners who have committed war crimes against our soldiers,¹¹² and that courts-martial prosecutions satisfy international norms regarding the rights to be afforded even unprivileged combatants in criminal proceedings.¹¹³ Moreover, the two-phased approach to post-conflict justice that I have advocated may help legitimize the actions of the fledgling government by establishing some clear separation between American and Iraqi war crimes forums.

In April 2003, the world watched as American Marines and Iraqi civilians in Baghdad's Firdos Square pulled down a 40-foot bronze statue of Saddam Hussein. In subsequent years, when it comes time to prosecute war crimes committed against American prisoners and American soldiers in Iraq, the world will be watching just as intently. We must decide, and soon, exactly what precedent American military justice will set. If post-war Iraq is to accomplish the transition from oppression to a free and just society, redress for war crimes committed against American prisoners and soldiers is only the first phase of accountability. Other forums must certainly follow the initial prosecutions; forums such as Iraqi tribunals to adjudicate crimes committed

111. Some critics of the tribunals have conceded as much. See, e.g., Forester & Barry, *supra* note 100, at 28 ("If they are to be fundamentally fair, military commissions must follow court-martial procedures and be subject to some sort of meaningful judicial review.").

112. See *supra* notes 56-64, 68 and accompanying text (describing violations of the Geneva Conventions committed by Iraqis during both the 1991 Persian Gulf War and the recent conflict in Iraq).

113. See, e.g., Protocol I, *supra* note 67, art. 75, 1125 U.N.T.S. at 52.

by Hussein's regime against the Iraqi populace,¹¹⁴ and possibly even Kuwaiti courts seeking accountability from Iraqi regime officials accused of war crimes from the last decade. America has the opportunity, through its system of military justice, to set an example of immediate and just redress. If one is not set, history suggests that future Iraqi or Kuwaiti forums will be no more than kangaroo courts susceptible to the "victors' vengeance" criticism.¹¹⁵ Having committed troops to armed conflict abroad, America also has the moral obligation to ensure that crimes of perfidy and other violations of the law of war do not continue to go unpunished and thereby become the de facto means of defense against an asymmetric force.

Crimes were unquestionably committed against Americans during the 1991 Persian Gulf War.¹¹⁶ The international norms and rules of armed conflict appear to have been openly flouted by Iraqi forces during the recent war as well. The first forum convened to try those crimes must provide expedient but judicious resolutions. It should also be a forum that can effectively set a due process benchmark for post-conflict justice in a new, free society. American courts-martial is that forum.

-
114. For post-conflict societies trying to shift from tyranny to democracy, the main routes to this "transitional justice" have historically been criminal prosecution or grants of amnesty. For a thorough review of the advantages and disadvantages of retributive justice during societal transition, see Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 74-76 (2002) (noting that the new government's response to past abuses is an important opportunity to accomplish some transformation of the culture and arguing that neither prosecution nor amnesty adequately serves the goal of transformation). Other scholars have argued, pointing to the examples of South Africa's TRC and Rwanda's gacaca tribunals, that in many cases reconciliation may simply be a more important societal goal than the retribution offered by criminal adjudication. See Bert van Roermund, *Rubbing Off and Rubbing On: The Grammar of Reconciliation*, in LETHE'S LAW: JUSTICE, LAW, AND ETHICS IN RECONCILIATION (Emilios Christodoloudidis & Scott Veitch eds., Hart Publishing 2001) at 180 (describing reconciliation as the situation where victims "defer the right to retribution to the extent that retribution would obstruct peace").
115. Iraq's U.S.-appointed Governing Council announced on October 2, 2003, that it was preparing a "domestic war crimes tribunal" to "try members of Saddam Hussein's government and Hussein himself should he be captured." Karl Vick, *Iraqi War Crimes Tribunal Proposed; 2 More U.S. Soldiers Killed in Attacks*, WASH. POST, Oct. 2, 2003, at A14 (noting that "[s]uch a course would defy the recommendation of international legal experts who have warned that an Iraqi court would generate suspicions of "Victor's justice," or manipulation by the American authorities who retain ultimate power in Iraq").
116. See *supra* notes 1-6 and accompanying text; see also *supra* notes 55-64 and accompanying text.