CAPTIVITY AND THE LAW: HOSTAGES, DETAINEES, AND CRIMINAL DEFENDANTS IN THE FIGHT AGAINST TERRORISM

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This article briefly addresses three issues that practitioners handling counterterrorism issues may encounter. First, whether there are limits on the force that can be used in an operation to rescue hostages held by a terrorist organization (such as the group that has alternatively been referred to as ISIS, ISIL, and IS).[1] Second, how the detention policies and practices of the United States, specifically with respect to those detained at Guantanamo Bay, compare to the evolving approach of the international community. Finally, it describes military commissions as a mode of prosecuting alleged war criminals, and how United States and international law relate to one another in this context under present law, mindful that litigation in this area is ongoing.

I. USE OF FORCE IN HOSTAGE RESCUES[2]

October 2015 served as a reminder of what is at stake when engaging terrorist hostage-takers, when the first American serviceman was killed in action in Operation Inherent Resolve. Army Master Sgt. Joshua Wheeler was part of an otherwise successful hostage rescue operation, which reportedly saved the lives of nearly seventy Iraqis from an imminent mass execution.[3]

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1. This article will refer to that group as ISIS.

2. For further discussion on this topic, *see* Adam R. Pearlman, *Life and Proportion: Responding to Hostage Situations* (forthcoming).

3. *See* DEP'T OF DEFENSE, Release No. NR-404-15, DoD Identified Army Casualty (Oct. 23, 2015); Barbara Starr and Jim Sciutto, *American Killed as Hostages Rescued in Iraq, Pentagon Says*,

Kidnapping, hostage-taking, and the use of human shields are all prohibited by various instruments of domestic and international law. They continue to be a significant problem, however, so much so that the President recently issued an Executive Order to update the United States' hostage recovery policy and operations architecture.[4]

As a general matter, international law does not necessarily prohibit "non-state armed groups" from lawfully detaining certain persons.[5] However, the taking of hostages, that is,

> [1] seize[ing] or detain[ing] and [2] threaten[ing] to kill, to injure, or to continue to detain another person [3] to compel a third person or a governmental organization to do or abstain from doing any act [4] as an explicit or implicit condition for the release of the person detained . . .[6]

is recognized as a crime in international law, both in the civil and war contexts. The International Convention Against the Taking of Hostages came into being in 1979, went into force in 1983, and calls for State cooperation regarding prosecution or extradition of hostage-takers.[7] In international humanitarian law, or the law of war, a similar prohibition sounds in several places in the Geneva Conventions of 1949, including Common Article 3 and articles 34 and 147 of the Fourth Convention.[8] In

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CNN (Oct. 22, 2015, 9:13 PM), http://www.cnn.com/2015/10/22/middleeast/us-iraq-hostage-rescue-attempt/; Jennifer Griffin and Lucas Tomlinson, *Pentagon: 'Saddened' by First US Death in Iraq Anti-ISIS Ground Fight*, FOX NEWS (Oct. 22, 2015), http://www.foxnews.com/world/2015/10/22/us-special-ops-rescue-hostages-in-iraq-defense-official-says.html.

4. *See* Exec. Order No. 13698, 80 Fed. Reg. 124 (June 24, 2015).

5. DEP'T OF DEFENSE LAW OF WAR MANUAL § 17.17.2 (June 12, 2015).

6. 18 U.S.C. § 1203(a) (1996).

7. International Convention Against the Taking of Hostages art. 2, Dec. 17, 1979, 1316 U.N.T.S. 205 (came into force June 3, 1983).

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, 34, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *1949 Geneva Convention IV*]. The complete list of grave breaches includes:

> 1) willful killing,
> 2) torture or inhuman treatment, including biological experiments,
> 3) willfully causing great suffering or serious injury to body or health,
> 4) unlawful deportation or transfer or unlawful confinement of a protected person,
> 5) compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,
> 6) taking of hostages and

each of these documents, hostage-taking is considered a "grave" offense or breach of the treaties, a legal determination that, in the context of war, opens the door to corrective actions by the United Nations Security Council.[9]

Further, a State's interest and ability to protect its own nationals in foreign countries is a recognized notion of self-defense doctrine. Former president of the American Society of International Law, Thomas Franck noted that the self-defense claim based on protecting one's citizens abroad requires "clear evidence of provocation" and a reasonable argument that protecting one's citizens actually is the purpose of the forceful response rather than, e.g., regime change.[10] Further, Franck asserted, "the claim to act in self-defense of citizens is asserted most strongly when the citizens are members of their nation's armed forces."[11]

Assuming the correctness of the threshold notion that a country can properly assert self-defense to resort to force against terrorist organizations or others who kidnap that country's citizens, the operational question becomes one relating to the scope of lawful responses to such situations. The principle of proportionality under international humanitarian law would seem to require an analysis of how the life of the hostage weighs against potential collateral damage in large-scale attacks.[12] In other words, is the recovery of one's nationals is cognizable as a "*military* advantage to be gained"[13] in the first instance, and if so, should proportionality be measured in the response against the individual kidnapping as a single event, the continued unlawful detention as an ongoing, continuous violation, or against the cumulative sum of the prior instances of similar conduct?

Although the United States is a party neither to Additional Protocol 1 of the Geneva Conventions, nor to the Rome Statute of the International Criminal Court, it is nevertheless worth noting that those two documents

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> 7) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id. at art. 147. *See also* DEP'T OF DEFENSE LAW OF WAR MANUAL § 5.3.2 (2015) (stating civilians must not be used as hostages);

9. *Cf.* U.N. Charter art. 42.

10. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 91 (Cambridge Univ. Press 2002).

11. *Id.* at 89.

12. *See also* Int'l Comm. of the Red Cross, Customary IHL Database, *Rule 14*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 (last visited May 10, 2016).

13. *See* Int'l Comm. of the Red Cross, Customary IHL Database, *Practice Relating to Rule 14. Proportionality in Attack*, https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14 (last visited May 10, 2016).

seem to treat these questions somewhat differently in ways that might be relevant to future actions against, for example, ISIS and/or its members. Additional Protocol I requires an attacking state to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[14] The associated commentary provides the military advantage must be "substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."[15] Language in the Rome Statute suggests differently, however, prohibiting certain attacks "which would be clearly excessive in relation to the concrete and direct *overall* military advantage anticipated."[16] The presence of the word "overall" in the statute might offer an affirmative defense of long-term military advantages not necessarily apparent to the public during a few news cycles.

II. DETENTION[17]

The detention function, as a means of removing enemy threats from the battlefield, has long been recognized as a "fundamental and accepted incident to war."[18] At the outset of Operation Enduring Freedom and the first years of housing a small number of detainees at a facility at Guantanamo Bay Naval Station, the government relied heavily on the President's constitutional powers as Commander-in-Chief for authority to hold enemy combatants. In March 2009, the asserted legal basis of detention at Guantanamo Bay was modified to rely on the statutory authorities of the 2001 Authorization for the use of Military Force, the scope of which the government acceded is "informed by the laws of war."[19]

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14. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3.

15. *Id.* at Commentary of 1987, Precautions in Attack, 684, ¶ 2209.

16. Rome Statute of the Intl Criminal Court, Art. 8, War Crimes, art. 8(2)(b)(iv), July 17, 1998, U.N. Doc. No. A/CONF.183/9*, https://daccess-ods.un.org/TMP/8161034.58404541.html.

17. For more in-depth discussion about U.S. detention jurisprudence and the history and analysis of the Copenhagen Process, *see* Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT. SEC. J. 255 (2015).

18. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J. plurality opinion) (citing *Ex Parte* Quirin, 317 U.S. 1, 28, 30 (1942)).

19. Respondents' Mem. Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re: Guantanamo Bay Detainee Litigation, (Misc. No. 08-442), (D.D.C filed March 13, 2009). The Supreme Court in *Hamdan* determined that "law of war"

The international community, however, has identified gaps in international law with respect to detaining combatants in non-traditional conflicts, such as major operations against terrorist organizations. Denmark in particular had noted by the mid-2000s that, "military forces were much more engaged in governance issues, including detaining people . . ."[20] Six years after the 9/11 attacks and the beginning of Operation Enduring Freedom, that country determined that "the single most difficult legal, political and practical challenge has been–and still is–to firmly and clearly answer questions" related to detention.[21] Legal, political, and military-related concerns all were part of the impetus to "identify applicable law and generally accepted principles for the treatment of detainees."[22]

The resulting initiative yielded the so-called "Copenhagen Process," a five-year undertaking concluded in 2012 that included twenty-four countries from five continents, and five international organizations in observer status, including the United Nations and the International Committee of the Red Cross.[23] The United States is one of the seventeen countries to officially "welcome" the resulting sixteen Principles; Russia, the only permanent member of the United Nations Security Council not among them, "welcomed the conclusion of the process and took note of the Principles."[24] The Principles and accompanying guidelines are non-binding and purport to apply only to non-international armed conflicts ("NIACs") and peace operations, not international armed conflicts ("IACs") or law enforcement matters, and the Process' participants failed to reach agreement on the relative application of international humanitarian law versus international human rights law to detention in relevant operations. An accompanying chairman's commentary is not endorsed by the process'

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means *international* law of war, which is especially relevant to the below discussion of military commissions. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 603 (2006).

20. *See* Jonathan Horowitz, *Introductory Note to the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 51 INT'L LEGAL MATERIALS 1364, 1364 (2012).

21. Thomas Winkler, *The Copenhagen Process on the Handling of Detainees in International Military Operations*, *in* INTERNATIONAL HUMANITARIAN LAW: HUMAN RIGHTS AND PEACE OPERATIONS 244, 245 (Gian Luca Beruto ed., 2008).

22. *See* Bruce "Ossie" Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16(39) AMER. SOC. INT'L L. INISIGHTS (Dec. 26, 2012).

23. THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS; THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES (2012) [hereinafter "COPENHAGEN PROCESS"].

24. Horowitz, *supra* note 20, at 1365.

participants.[25] The collective document (principles, guidelines, and commentary) addresses, *inter alia*, grounds for and the review of one's detention, as well as the treatment of detainees, conditions of their confinement, and their transfer to third parties.

Although the Principles purport to follow and not expand existing international humanitarian law, they depart from the Geneva Conventions in at least one very basic way, speaking of "detaining authorities," rather than "detaining Powers."[26] "Authority" is defined as "an entity that is recognized as a matter of international law or national law as an entity that may lawfully hold detainees,"[27] whereas the word "State" does not appear in the text of any of the principles until Principle 15.

Perhaps most relevant to the core of the controversy over United States detention policy since 2001, the principles affirm international recognition that "detention is a necessary and legitimate means in the conducting of military operations."[28] The Process also confirmed the international law norm that detention is not limited to people who have committed crimes–security reasons may constitute independent bases for detention beyond any criminal acts a detainee may have committed, and criminal process is not necessary to continued lawful detention of an individual who poses a threat. Further, consistent with the D.C. Circuit's Guantanamo Bay habeas jurisprudence, the Copenhagen Process chairman's commentary implies that one's participation in hostilities is sufficient, but not necessary to render him detainable.[29] Finally, the commentary appears to affirm the use of personal representatives, as opposed to legal counsel for security detainees, implicitly rejecting one of the United States Supreme Court's key reasons for deeming military-led administrative hearings called Combatant Status Review Tribunals ("CSRTs") to be deficient in *Hamdan v. Rumsfeld*.[30]

III. PROSECUTION OF WAR CRIMINALS

People detained may have also committed war crimes for which they can be tried, but that's not the purpose of detention. There are several

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25. *See* COPENHAGEN PROCESS, *supra* note 23, at Preamble II, IV, IX.

26. *Compare* COPENHAGEN PROCESS, *supra* note 23, Principles 5, 8, 9, 11, 14, & 15, with 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 *1949 Geneva Convention III*].

27. COPENHAGEN PROCESS, *supra* note 23, at Commentary 15.1.

28. Winkler, *supra* note 21, at 247.

29. COPENHAGEN PROCESS, *supra* note 23, at Commentary 1.3.

30. *Id.* at Commentary 12.4; *see also Hamdan*, 548 U.S. 557 (2006).

options available for prosecuting terrorists, including in Article III courts.[31] Military commissions also have served as one potential forum for prosecuting war criminals.[32] Military commissions have been used throughout our nation's history as a means to hold war criminals accountable for unlawful actions as belligerents.[33] General Washington convened them in the Revolutionary War; they were readily employed in the Civil War, during Reconstruction, and the Philippine Insurrection.[34] The United States and our Allies also used them in World War I, and during and after World War II.[35] The United Nations Command also drafted regulations to use them during the Korean War.[36]

Importantly, belligerency itself is not a crime and, in fact, the Geneva Conventions protect lawful belligerents (that is, members in the armed force of a state, in uniform, carrying arms openly, and not otherwise protected such as medics and chaplains) from prosecution, hence the distinction between the standards for detention discussed above from those for prosecuting an individual detainee.[37] Perhaps the most famous war crimes tribunals are those of Nuremberg, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and the International Criminal Tribunal for Rwanda ("ICTR"), the latter two of which also tried genocide and crimes against humanity. But States Parties to the Geneva

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31. *See* U.S. CONST. art. III, § 2 (setting forth the judicial power of the United States).

32. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 60–67 (Nov. 28, 2001) (statement of William P. Barr, former Att'y Gen. of the United States), https://www.gpo.gov/fdsys/pkg/CHRG-107shrg81998/html/CHRG-107shrg81998.htm. *See also Ex parte Quirin*, 317 U.S. at 30–31.

> [B]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

33. Patrick F. Philbin, *Legality of the Use of Military Commissions to Try Terrorists* 238, 240 (Nov. 6, 2001), http://www.justice.gov/sites/default/files/olc/opinions/2001/11/31/op-olc-v025-p0238.pdf.

34. *Id.* at 240, 252.

35. *Id.* at 240.

36. Haridimos V. Thravalos, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 750 (2006).

37. *See 1949 Geneva Convention III*, *supra* note 26, at art. 4.

Conventions also have duties to uphold the laws of war, and thus may prosecute war crimes, as well.[38]

The military commissions system currently prosecuting certain Guantanamo Bay detainees is governed by the Military Commissions Act of 2009 ("MCA"),[39] which enumerates several specific war crimes, including: attacking civilians or civilian objects, murder of protected persons, attacking protected property, pillaging, denying quarter, taking hostages, using poisons, using human shields, torture, rape, mutilation, perfidy, hijacking, material support to terrorism, and conspiracy to commit war crimes.[40]

The post-2001 military commissions system has been subject to robust review by Article III courts. In *Hamdan v. Rumsfeld* in 2006, the Supreme Court ruled that the President did not have authority under then-current law to convene commissions without express Congressional sanction.[41] Congress immediately enacted the current MCA's predecessor statute, the Military Commissions Act of 2006. Salim Hamdan (the namesake of the famous Supreme Court case) was subsequently re-charged under the statute with, among other offenses, material support of terrorism.[42] On appeal the D.C. Circuit invalidated Hamdan's material support conviction under the United States Constitution's Ex Post Facto Clause, because his conduct occurred before the statute was enacted.[43]

It should be noted that there is no equivalent hard-line rule in international tribunals. Although there is an analogous maxim to "ex post facto," namely "*nullum crimen sine lege*" ('no crime without law'), it is recognized as a "principle of justice,"[44] that has historically been subject to broad interpretation. For example, the violation of aggressive war did not require specific codified elements to be prosecuted by the International Military Tribunal at Nuremberg; instead, the tribunal determined that, "in

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38. *See, e.g.*, ICRC Advisory Service on Int'l Humanitarian Law, *Universal Jurisdiction over War Crimes* (March, 2014), https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf; *see also 1949 Geneva Convention IV*, *supra* note 8, at art. 146.

39. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190 (2009); *see also Obama Orders Resumption of Military Commissions at Guantanamo*, CNN (Mar. 8, 2011 11:20 AM), http://www.cnn.com/2011/POLITICS/03/07/obama.guantanamo/.

40. *See* Crimes Triable by Military Commission, 10 U.S.C. 950t (2009).

41. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

42. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat 2600 (2006).

43. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012).

44. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 1, 219 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

such circumstances [that] the attacker must know that he is doing wrong, so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[45] Indeed, international criminal law, especially as it pertains to combatants' conduct in the course of hostilities, "follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."[46]

A related issue currently being litigated is whether Congress has the authority to convey jurisdiction to the military to prosecute war crimes not widely recognized in international law. Last year, a D.C. Circuit panel effectively ruled that the presence or absence of international law can affect the political branches' exercise of their respective war powers, and, in particular, Congress's powers under the Define and Punish Clause of the United States Constitution.[47] The panel majority treated international law precedent as a jurisdictional predicate for military commission jurisdiction over certain offenses (specifically, conspiracy)–i.e., the President and Congress are constitutionally, institutionally incapable of empowering law of war military commissions with jurisdiction to try domestically codified provisions that lack a clear and unambiguous grounding in the international law of war.[48]

The D.C. Circuit granted rehearing en banc and vacated the panel's ruling. In its brief to the en banc court, the government argued, *inter alia*, that Congress' power to "define and punish offenses against the law of nations"[49] is not limited to codifying preexisting international law prohibitions, and that, with respect to military commissions, that mandate and authority is furthered by Congress' other war powers.[50] Oral arguments before the en banc court were held on December 1, 2015; an opinion has not yet issued.

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45. *Id.*

46. *Id.* at 221.

47. U.S. CONST. art. I, § 8, cl. 10.

48. *See* Bahlul v. United States, 792 F.3d 1 (D.C. Cir. 2015).

49. U.S. CONST. art. I, § 8, cl. 10.

50. *See* Brief for the United States at 51–60, Bahlul v. United States, (No. 11-1324), (D.C. Cir. argued Dec. 1, 2015) (en banc), http://www.justsecurity.org/wp-content/uploads/2015/11/bahlulenbanc.doj_.pdf.