Jurisprudence and War. The international critique of American policy

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I - Introduction

In this paper I wish to present some aspects of foreign critique of what has been going on under the jurisdiction of the United States of America as a consequence of the attacks of 11 September 2001, in particular with regard to the persons held prisoners in Guantánamo. I want to make two preliminary observations.

A - Personal statement

First, I want to make a personal statement. I am not in any way inimical to the United States of America. I love the country. I have been there many times as a student, an expert, a tourist, a teacher and a lawyer for the US Government. Any criticism I might make is not in any way nourished by personal resentment but, on the contrary, by friendship.

On the same line, I have been deeply shocked and hurt by the horrible attack of September 11, 2001. I will be addressing questions of the Human Rights of persons belonging to al Qaeda. I have no sympathy whatsoever for this group. I have no sympathy whatsoever for the Taliban. I strongly condemn terrorism and fundamentalism as its breeding place. However, I do not wish to take a stand on the developments in Afghanistan.

B - Is international critique of any interest?

One might ask whether the United States and the legal and academic communities of the United States should care about international and in particular European critique. Is this not "below Washington"? Why should America care?

This is indeed an impression that one sometimes gains on the other side of the Atlantic. Again and again one recalls the term "splendid isolation". Many years ago there was a widely circulated publication under the title "The Ugly American"[1]. At least among our older generation, this is not quite forgotten, while, at the same time, we acknowledge that enormous progress has been made. Still, there are quite a number of attitudes which strengthen the impression that there is little empathy with the rest of the world in US politics. For example: the negative attitude towards the Kyoto Agreement, the negative attitude towards the Rome Statute for an International Criminal Court, the fact that the United States has not submitted to any control mechanism under the International Covenant for Civil and Political Rights (ICCPR) or the Inter-American Convention of Human Rights etc.

It is also possible to identify a certain imperialistic attitude in the wide extension of American jurisdiction in areas such as insider trading or money laundering and in the practice of kidnapping suspects abroad and bringing them to the United States for trial and execution of sentence[2].

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I wish to express my gratitude to Ms. Sarah Summers, LM of Glasgow University, for her assistance with the footnotes.

[1] Lederer, William and Burdick, Eugene, The Ugly American, (1958); the book was particularly critical of the behaviour of American diplomats in Asia.

[2] United States v. Alvarez-Machain, 504 US 655 (1992)

Yet, the times of splendid isolation are over and in reality the United States has acknowledged that fact. It co-operates in such organizations as the Organization for Security and Cooperation in Europe (OSCE) and, of course, it has allies in NATO: Some of these allies have taken arms to support the military efforts of the United States in Afghanistan. These European allies watch attentively to see what the United States does to its captives. To a large extent they are highly critical: What they think cannot be a matter without importance to the United States.

On the other hand, after World War II, the United States was, in many respects, a model for the rest of the world and Western Europe in particular. Many aspects of your judicial system have influenced developments in Europe. At present, the prestige of the United States as a champion in the area of the rule of law is at stake and there may be a strong interest in taking into account the view of the international community with regard to legal developments after 11 September 2001.

This paper will not examine the compatibility of American measures with the Constitution. Not only because of lack of competence, but also because no State can invoke its constitution to justify non-compliance with its international obligations.

II - The prisoners in Guantanamo

A - The issue of status

The United States brought a certain number of persons considered to be al Qaeda activists to the airbase of Guantánamo Bay in Cuba. One of the first issues to be discussed is the status of these prisoners.

Some think that they should be considered as prisoners of war. As such they would enjoy the rights and privileges of the third Geneva Convention, relative to the Treatment of Prisoners of War[3]. The main effect of this convention is to recognize that warriors captured by the enemy shall not be punished for having taken part in military activities including killing enemies, to the extent that they have themselves respected the laws and customs of war. A very important guarantee is the qualified right to silence. Although they fall not to be accused, they are entitled, as Americans might say to "take the Fifth": the only information that they are required to give is their "surname, first names and rank, date of birth and army, regimental, personal or serial number or failing this, equivalent information"[4]. Furthermore, and this is what attracted the focus of observers, "prisoners of war must at all times be humanely treated"[5].

Who, then, is a prisoner of war? In the first place, this term refers to members of the armed forces of a party to an armed conflict. These will be members of the army of a state. The Convention, however, also protects members of volunteer corps, militias and other armed groups, provided that four conditions are fulfilled:

"a. That of being commanded by a person responsible for his subordinates;

b. That of having a fixed distinctive sign recognizable at a distance;

c. That of carrying arms openly;

d. That of conducting their operations in accordance with the laws and customs of war" [6].

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[3] Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (GCTPW), adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949, entered into force on 21 October 1950.

[4] GCTPW, Art. 17 § 1.

[5] GCTPW, Art. 13 § 1, first sentence.

[6] GCTPW Art. 4 § 2.

In my view, the United States have a rather strong point in affirming that suspected al Qaeda activists do not fall under this category, although the facts do not seem to be fully clarified in that respect as yet. The first criterion might be met, the "responsible" commander being Osama Bin Laden or one of his vassals[7]. However, they did not wear any distinctive sign, as far as one can judge from the information available. To the extent that they belong to an organization which attacked the United States, it certainly cannot be said that they carried their weapons openly or that they acted in accordance with the laws and customs of war. On this point I am in full agreement with Michael Dori[8]. At any rate, it would be for a court to deter mine the status of the prisoners, although it is not clear which court would have jurisdiction to decide the issue.

In fact, I do not hesitate to say that they are suspected of being criminals, members of a terrorist organization. In this respect, I do not find it necessary to dwell upon the difficult issue of what constitutes terrorism. The attack on targets in the United States by the ruthless use of civilian aircraft is as typical a terrorist attack as one could imagine. I find it very difficult to understand how one could justify the opposite view.

If these prisoners are not prisoners of war, then what are they? Are they to be regarded as civilian persons who would be protected under the fourth Geneva Convention for the Protection of Civilian Persons in Time of War[9]? According to Art. 4 par. 1 of this Convention, "persons protected by the Convention are those who, at a given moment and in a manner whatsoever, find themselves, in cases of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals". Art. 5 par. 1 provides for a somewhat cryptic exception: "Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in favour of such individual person, be prejudicial to the security of such State". I do not think that it is necessary to examine whether in the present case these conditions (or those of the following par. 2) are met, because par. 3 adds: "In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention"[10].

What about Taleban fighters? There can be doubts as to whether Afghanistan was a state and whether the Taleban were the Government[11], but I shall leave these points aside and suppose that the answer is positive. The Taleban fighters probably fulfil the requirements listed above, with one exception: It appears that they did not wear a uniform or any other distinctive sign. However, this does not necessarily mean that they can be denied the protection afforded to POW's. According to the Comments of the ICRC of September 1st 1983, in "exceptional cases" this obligation can be dispensed with. In the present case, such an exception ought, in my view, to be admitted. It would be completely disproportionate to deny these fighters the protection of POW' s for the sole reason that the Taleban leadership did not provide them with a uniform. They are entitled to the protection of the GCTPW.

After the drafting of this paragraph, it became known that President Bush is prepared to extend the protection of the third Geneva Convention to the Taleban held in Guantánamo. The question then immediately arises as to why they are not returned to their country.

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[7] Even this assumption, however, is far from certified - the network seems to be knit rather loosely according to recent news reports.

[8] Dorf, Michael, 'What is an 'unlawful' combatant, and why does it matter?: The Status of Detained Al Qaeda and Taliban Fighters', www.FindLaw.com (23 January 2002).

[9] Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949, entry into force 21 October 1950.

[10] GCPCPTW, Art. 71 ss.

[11] Cf., e.g., Michael Byers, 'The US doesn't have the right to decide who is or isn't a PoW', Daily Mail & Guardian January 22, 2002; Michael Dorf, 'What is an 'unlawful' combatant, and why does it matter? The Status of Detained Al Qaeda and Taliban Fighters' FindLaw.com (23 January 2002).

Still, for the issue of the treatment of prisoners at Guantánamo, status is without relevance. My point of departure is that all these people, irrespective of their status under the laws of war, are human beings. It is in fact not necessary to attach to them any 'ready-made' label deriving from the laws of war.

B- Human Rights

I will base my further considerations on the international law regarding Human Rights[12]. Such rights are in part not only customary international law but in fact jus cogens. The most important example is the protection against torture or cruel, inhuman or degrading treatment or punishment. This right is also guaranteed by the International Covenant on Civil and Political Rights (ICCPR) [13] and the International Convention against Torture (ICAT)[14]. Both have been ratified by the United States.

I. Applicability

The United States is bound to these treaties whenever and wherever they exercise their "jurisdiction". Recently in the case of Bankovic[15], the European Court of Human Rights discussed this concept in considerable detail. The case concerned the bombing of RTS Belgrade during the Kosovo conflict. The Court came to the conclusion that by dropping bombs on a foreign territory, a state did not exercise its jurisdiction. However, jurisdiction is exercised whenever a territory is occupied. The finding could be criticized, but in the present case such criticism is not called for.

There can be no doubt that Guantánamo is "occupied" by the United States. The camp where the prisoners are held is run by officials acting for the US government, more particularly for the Secretary of Defence. The United States exercises its jurisdiction and thus is responsible for what happens there.

2. Compliance

a) Deprivation of liberty

The first question that has to be addressed is whether the United States has a valid title to deprive the individuals concerned of their personal liberty. The relevant section under international law is Art. 9 of the ICCPR which in its first subsection says that "everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Contrary to Art. 5 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[16], the Covenant does not enumerate a limited number of cases in which deprivation of liberty can be justified. However, it still requires a justification in law and the respect of proceedings set down by law[17].

I do not think that it is necessary to insist on compliance with the 'normal' domestic procedures following arrest or detention. I accept the objection of Ruth Wedgwood, that it is not realistic to expect a Miranda warning in the appropriate language to have been given at the time these prisoners were first

[12] I shall refrain from discussing here the issue of the relationship between Human Rights law and humanitarian law. The latter, in my view, ought to be strictly separated from the former for a variety of reasons.

[13] International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

[15] Bankovic, Stojadinovic, Stoimenovski, Joksimovic and Sukovic v. Belgium, The Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and The United Kingdom, decision of December 12, 2001.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS no. 5, entry into force 3 September 1953.

[17] Wedgwood, Ruth, 'The Case for Military Tribunals' (Wall Street Journal, 3 December 2001), seems to dispense too easily with this aspect by simply stating that, although al Qaeda suspects are not POWs, "they can be detained by the same authority for the duration of the conflict."

apprehended somewhere in the Afghan mountains. [However it may not seem unrealistic to expect that the detainees ought to have been informed, at the first sensible opportunity, of the reasons for their arrest in a language which they understand. Fox Campbell and Hartley v. UK, Article 5(2) ECHR or 9(2) ICCPR.]

So far, the fact of deprivation of liberty of the persons concerned seems not to have raised much interest. Still, it should not be regarded as unimportant. Imprisonment is a very serious interference with basic Human Rights and the interference is certainly aggravated when deprivation of liberty is combined with deportation to another Continent. It is not for me to discuss the issue of the lawfulness of such detention under American law, but the question is there and it must be answered. What must also be answered is the question regarding the proceedings which were respected in operating the arrest, deportation and imprisonment at Guantánamo.

Not withstanding the fact that Art. 9 ICCPR remains silent about the eventualities which can justify deprivation of liberty, it is necessary to decide what scope was actually pursued. The Secretary of Defence, Mr. Rumsfeld, has inter alia indicated that the aim was one of general prevention - "Let them see what happens to al Qaeda fighters". This would certainly be an arbitrary deprivation of liberty - to the extent that deprivation of liberty may have a deterrent effect, it must be detention after conviction for an offence.

Another explanation is that these persons are held for questioning. Again, this could not be regarded as a valid justification under international law. If we transpose the situation to the domestic level it is clear that no state will allow for the automatic arrest of witnesses.

In my view, the only justification one could seriously envisage is that of bringing the persons concerned to justice. As I said before, I would also accept that there are reasonable grounds, at least in general terms, to suspect the prisoners of being affiliated to a dangerous terrorist organization. In terms of criminal law, they can be regarded as participating in a criminal organization or, at the least, as being involved in a criminal conspiracy. Hence, it is my opinion that the justification of this detention must be seen in the intention of charging these persons and bringing them to trial. I believe that this assumption is correct.

This finding has practical consequences, because Art. 9 ICCPR, in para. 3, prescribes that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power" [18]. This is a very important guarantee as it protects arrested persons from ill-treatment at the hands of the police or, in the present case, military personnel[19]. It appears that so far none of those arrested have been brought before a judge. The time-span allowed by the term of "promptly" has long been exceeded. According to the European Court of Human Rights, it could never exceed four days[20].

There is a further guarantee which seems not to have been respected so far: Art. 9 § 4 ICCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" [21]. It appears that any right to habeas corpus proceedings has so far been denied to the men held at Guantánamo.

This is again a clear violation of international Human Rights law.

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[18] The same rule can be found in Art. 5 § 3 ECHR and Art. 7 § 5 of the Inter-American Convention on Human Rights.

[19] See, e.g., European Court of Human Rights (ECtHR), Aksoy v. Turkey, judgment of December 18, 1996, Reports 1996-VI, 2260, § 76 et. seq.

[20] Brogan v. United Kingdom, judgment of 29 November 1988, Series A No. 145-E.

[21] Art. 5 ECHR para. 4 covers the same guarantee.

3. The treatment of the prisoners

While not much, if any, attention was so far given to the issue of deprivation of liberty, the international community reacted rather strongly to the treatment of the persons held in the Caribbean. TV channels around the world showed men walking painfully in a crouching position or sitting uncomfortably, clad in some sort of orange coloured overall, some sort of mask over their eyes and ears, obviously handcuffed and shackled. It has also been reported that these persons were held outside, exposed to cold in the night, the mosquito bites and other elements of discomfort. There have been very widespread allegations that this constituted ill-treatment.

Art. 7 ICCPR provides that "no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" [22] Mr. Rumsfeld declared that the treatment of these persons was humane. He may have been right if he had simply affirmed that the prisoners were not being tortured. However, between being tortured and enjoying humane conditions of detention there is a wide space of graduations.

Over the last quarter of a century, considerable efforts have been made to improve the situation of persons deprived of their liberty, and to fight against torture and other forms of inhuman and degrading treatment. On the one hand, I recall the Standard Minimum Rules for the Treatment of Prisoners[23] - in Europe we have the more recent European Prison Rules[24]. More importantly, the Council of Europe has adopted a convention for the protection of all persons deprived of their liberty[25] which provides for visits by international experts to all places of detention under the jurisdiction of member states.

While the protection provided by these instruments is certainly very valuable, they are not directly linked to the guarantee currently at issue. If all the prison rules were respected, it is highly unlikely that the treatment of the prisoner would be contrary to Art. 7 ICCPR. On the other hand, even if there are shortcomings, this does not mean that the treatment is already inhuman. The threshold to treatment contrary to Art. 7 ICCPR is relatively high; this is justified in the light of the fact that this guarantee is an absolute one - no exception whatsoever is permitted under any circumstances.

So far, the European Commission and Court of Human Rights have found a violation of the inhuman treatment clause of Article 3 ECHR (corresponding to Art. 7 ICCPR) due to prison conditions in very few cases only[26]. A violation was denied in a number of rather extreme cases, e.g. in a case from the Maze Prison, where inmates had refused to ware any clothing because it was provided by the government and smeared their cells with excrements[27]. The Commission found that they were themselves to blame. Another example is that of two German terrorist arrested in Switzerland[28]. The authorities were extremely afraid of them and held them in complete isolation. In addition, their cell was lit for 24 hours and they were under the surveillance of a television camera. In this case, the Commission was close to finding a violation - the only reason why it did not do so was the fact that the authorities were aware of the extreme severity of these conditions and alleviated them successively.

It is rather difficult to assess the actual living conditions of the prisoners held at Guantánamo, because I have not been there and there have been but few and rather vague reports. At least, correspondence

[22] I give much more weight to this source of law than to the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' Adopted by General Assembly resolution 43/173 of 9 December 1988, relied on by Michael Dorf.

[23] 'Standard Minimum Rules for the Treatment of Prisoners' Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[24] Recommendation No. R (87) 3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987.

[25] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, entry into force 1 February 1989.

[26] E. g. Dougoz v. Greece, judgment of 6 March 2001; Peers v. Greece, judgment of 19 April 2001; Kalashnikov v. Russia, judgment of 15 July 2002.

[27] McFeely and Others v. United Kingdom, App. No. 8317/78, (1980) 20 DR 44.

[28] Krocher and Moller v Switzerland, App No. 8463/78, (1982) 34 DR 24.

with their families is now permitted. By European standards it would certainly be regarded as degrading if a prisoner is denied any privacy over an extended period of time. If the prisoners at Guantánamo are exposed at all times to surveillance by guards, and suffer an almost total lack of even the most minimal comfort and the imposition of sensory deprivation, these conditions would most certainly lead to a finding of a violation of Art. 3 ECHR by the European Court of Human Rights. I am quite aware of the fact that prisoners are regularly held in cages behind bars in the United States - at least this is the image spread world-wide by your film industry. However, the consequence of this is only that the standards for the treatment of prisoners in the United States are often generally below any acceptable level. This is certainly true for the institution of chain gangs which we regard as entirely unacceptable, actually degrading the American nation. However, this is not our subject here.

There are more aspects which could be discussed. Probably, to give but one example, these prisoners are denied the right to contact with consular representatives of the states of which they are nationals - it is not so long ago that the International Court of Justice found the United States in violation of the Vienna Consular Convention in the LaGrand case[29]. To make further assumptions would be speculative.

At this point I come to the conclusion that there have been serious violations of Art. 7 and Art. 9 ICCPR with regard to the prisoners at Guantanamo.

Let me now turn to the issue of the right to be tried by an independent and impartial tribunal established by law.

III - The military commissions

The plan to try foreigners, suspected of having been involved directly in the attacks of September 11, or more generally in terrorist activities of al Qaeda, before military "tribunals" created ex post and ad hoc, raises critical issues both of humanitarian and Human Rights law.

Art. 71 et. seq. of the fourth Geneva Convention contain guarantees which correspond to a large extent to those set out in Human Rights instruments. In order not to complicate things, I shall limit myself to the field of Human Rights.

An important question, of course, is whether the United States has competence to try these suspects. I will not discuss the issue under US law, of course. One justification could be in the principle of passive personality according to which a state has the right to try suspects for crimes committed abroad against citizens of that state. This was accepted by the PICJ by a narrow vote in the Lotus Case[30].

In Art. 14 of the International Covenant, we find the guarantee of the right to a fair trial which, in the United States, would probably be referred to as "due process". Basically, the question of whether a defendant has had a fair trial can only be answered after such trial. Still, there exist a number of rules which are generally accepted and set out in international instruments of Human Rights which can also be examined *in abstracto*. I shall limit myself to three elements: first, the right to be heard by a competent, independent and impartial tribunal established by law; second, the right to a public hearing; and third, the right to appeal.

A - The right to be tried by a competent, independent and impartial tribunal established bv law

1. The right to trial by jury

In countries which follow the Anglo-Saxon tradition, the right to be tried by jury is often regarded as a fundamental one. Universal instruments for the protection of Human Rights do not contain a similar guarantee. The introduction of the so-called Diplock-courts in Northern Ireland, where a single judge sits without jury because the general climate of terrorism made it impossible to assure the safety of jurors,

[29] LaGrand case (Germany v. United States of America), judgement of 27 June 2001 (ICJ).
[30] Lotus case, PCIJ Series A No. 10 (1927) 18.

was never regarded as being contrary to the European Convention of Human Rights. In short, there is no need to introduce a jury trial for the prisoners of Guantánamo or other suspected terrorists under international Human Rights law.

2. "Established by law"

The question as to what the Covenant means by the term "law" is a difficult one. It is so difficult because among the high contracting parties we find states with a statute law system as well as states with a common law system. The court has gone to great efforts to avoid any jurisprudence which would not be compatible with both systems. I would not hesitate to say that it has even gone too far[31]. These issues cannot be discussed here in any depth. At any rate, I am not at all certain that the establishment of tribunals by presidential decree could be regarded as equivalent to their establishment "by law". After all, the reference to "law" must be understood to be a protection against the whims of the executive.

3. "Competent"

The adjective "competent" is not found in Art. 6 of the European Convention on Human Rights but it figures in Art. 8 of the Inter-American Convention. What the Covenant wants to prohibit are exceptional tribunals, namely those formed after the facts that they will be called upon to try[32]. In such cases, there is often a strong indication that political motives are behind the creation of these tribunals. In the present case, political motives are most certainly behind the idea to institute military tribunals to deal with cases against suspected terrorists. I regard this as blatant contradiction of the rule of law.

4. "Independent and impartial"

The essential quality of a judge or tribunal or court is his, her or its impartiality. Independence from other powers is in essence necessary so as to avoid any interference by political forces with the impartiality of the judiciary. Again, we are touching upon a subject which has been abundantly discussed all over the world since Montesquieu. Important features of independence are: the methods of appointment, tenure and salary. In the United States, at least in certain states, the appointment of judges has been criticized for an excess of political influence[33]. In this area, even appearances matter[34]. The rigor of the ECtHR in this area is exemplified in Incal [35], which concerned the State Security Scourt in Turkey: Even the presence of a single military judge led to conclusions that the applicant had "legitimate cause to doubt the independence and impartiality of the Izmir National Security Court"[36]. In the present case, the military "judges", according to Sec. 4 (b) of the Presidential Order of November 13 are nominated by the Secretary of Defense. This is not compatible with international standards.

As if this were not enough, the Secretary of Defense shall make orders providing for "submission of the record of the 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"[37]. I cannot imagine that anybody would regard such commissions as courts - they are administrative bodies or, according to Bill Safire, a columnist for the New York Times,"kangaroo-courts"[38].

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[31] ECtHR, Huvig v. France, judgment of 24 April 1990, Series A no. 176-B, Kruslin v. France, judgment of 24 April 1990, Series A no. 176-A

[32] There is widespread agreement that such tribunals are contrary to Art. 6 ECHR, cf. Velu, Jean, and Ergec, Rusen, La Convention Européenne des Droits de l'Homme, Bruylant, 1990, p.453 Note 536 with further references.

[33] Conclusions of the UN Human Rights Committee on the First Report of the United States.

[34] Let me add in brackets that the same criticism must be levied with regard to my own country, Switzerland.

[35] Incal v. Turkey, judgment of June 9, 1998, Reports 1998-IV, 1547, § 65 et. seq..

[36] Ibid., § 73.

[37] Executive order Sec. 4 (c) (8).

[38] Quoted in Dean, John, 'The Critics are wrong: Why President Bush's Decision To Bring Foreign Terrorists To Justice Before Military Tribunals Should Not Offend Civil Libertarians', www.FindLaw.com (23 November 2001)

5. Conclusion

The above observations leave no doubt: the planned creation of military tribunals for the purpose of hearing the criminal cases against suspected al Qaeda terrorists do not comprise the features required under the International Covenant on Civil and Political Rights to constitute a tribunal. The existence of an impartial and independent tribunal is one of the most elementary guarantees of fair trial. As a rule, in the jurisprudence of the European Commission and Court of Human Rights, where there was a finding that a tribunal did not satisfy the requirements of the Convention, there was no purpose in examining whether the trial could otherwise be regarded "fair" [39]

B - Publicity of the trial

Publicity is also a very fundamental element of the administration of justice in a state based on the rule of law. It serves quite a panoply of purposes: It allows for control of the administration of justice by the citizens (including foreigners), such control in turn has a steadying effect on the justice system. It protects all participants in the trial against any abuse of power.

Perhaps the most important aspect is the demonstration of justice[40]. It is a frequently quoted adage that justice must not only be done but must also be seen to be done[41]. Thus, the publicity of trial has an important effect in that it strengthens the confidence of the people in the administration of justice and even the confidence in the state and the ruling power in general.

It is obvious that non-public trials for suspected members of al Qaeda would constitute a violation of their Human Rights. However, it appears to me that it would be short-sighted to limit consideration to this aspect. Such secret trials would be devastating for the reputation of the United States as a nation which aspires to be regarded as a state based on the rule of law. As Anne-Marie Slaughter correctly puts it: "Al Qaeda should be tried before the world"[42].

If this is not done, inevitably, rumours will arise concerning the unfairness of the proceedings.

These proceedings would probably not be regarded as an act of the administration of justice but rather as a disguise for sheer and relatively blind vengeance on possibly innocent persons.

In my view, it is of the utmost importance that the fight against terrorism be taken as an opportunity to establish in every act the moral superiority of the United States. Secret trials before doubtful tribunals would have an effect to the contrary.

De facto, to some extent, the war against terrorism can be compared to the war against guerrillas dating from the 18th century. It has been a characteristic feature of such situations that very powerful states have not succeeded in eliminating guerrilla movements. Look at Israel today: a very powerful state commanding an army which operates with advanced technology.

On the Palestinian side, there are kids who throw stones and so-called martyrs who blow themselves up in a crowd. Still, it does not appear likely that Palestinian resistance will be eliminated.

I am not saying in a defeatist manner that the war against terrorism cannot be won, although frankly, I certainly do not believe in any total victory on that battle field. What I have no doubt about, however, is that any behaviour which is in contempt of Human Rights will rather strengthen than weaken the terrorist networks around the world. It will put the state in the wrong, awaken sympathy for suspected terrorism and give them an aura of victims and martyrdom.

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[39] Incal v. Turkey, loc cit. § 74 with further reference.

[40] Luhmann,Niklas, Legitimation durch Verfahren, Darmstadt 1975.

[41] Quoted from R. v. Sussex Justices, ex parte McCarthy, by Lord Denning, The Discipline of Law, London 1979, p. 86.

[42] New York Times, November 17. 2001

C - The right to appeal

It is planned not only to stage trials against suspected al Qaeda terrorists which are a mockery of justice, but also to deny the right to appeal to those convicted and sentenced even in cases where the death penalty has been imposed. The right of appeal, however, is not an act of grace bestowed upon convicted persons through the sheer goodness of the state. The right of appeal is a Human Right, it is set out in Art. 14 § 5 of the ICCPR, but also, even more strongly, in Art. 73 of the fourth Geneva Convention. To deny it would constitute another serious violation of Human Rights.

D - Attempt at finding an explanation

I have wondered what the reasons for this presidential order could be. I find it highly surprising that they were made in the first place. It has always been my impression that basically the states following the Anglo-Saxon legal system had a particularly acute sense of fairness. Indeed, on the books the American law of criminal procedure looks wonderful.

However, we know that there is a considerable gap between the law in books and the law in action, in the United States as elsewhere, but perhaps even a bit more so. I do not think that the following criticism is seriously contested: the right to trial by jury is a rather theoretical one. The judicial system would break down almost immediately if at a point in time every defendant were to insist that he or she be tried by jury. It seems also to be generally accepted that the famous saying that "the law like the Ritz Hotel is open to all" applies very much to United States criminal proceedings. Persons who command sufficient means to make full use of the entire arsenal of the rights of defence under American law have a much better chance of winning their case than persons without resources. To some extent, of course, this applies everywhere around the globe. Still, it appears that the situation is particularly critical in the United State.

In our continental European eyes, an American trial is an extremely intricate game with Babylonian rules and an impressive amount of loopholes, gaps and other obstacles. The system only survives thanks to the general prevalence of solutions outside a trial, mainly by means of plea bargaining.

Now, if it is envisaged to try a large number of suspects within reasonable time, it may appear that the rules which normally apply in theory might prove ineffective in dealing with an emergency situation[43]. This is my tentative explanation for these emergency measures. Does the explanation also provide a justification? This is the question I want to approach in the last part of this paper.

I am quite aware, that there are other explanations - I will not attempt to provide an exhaustive list of justifications.

IV - A state of necessity?

When states agree to bind themselves by conventions for the protection of Human Rights, they are aware of the fact that situations might arise which call for an exception to those obligations. A corresponding rule can be found, e. g., in Art. 4 ICCPR:

"**I.** In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Arts. 6, 7, 8 (§§ l and 2), 11, 15, 16 and 18 may be made under this provision.

[43] This view seems to be shared by Delmas-Marty, Mireille, Global crime requires global justice; Harold Koh seems, however, to be of a different opinion, New York Times, November 23, 2001.

3. Any state Party to the present Covenant availing itself of the right of derogation shall immediately inform the other states Parties to the present Covenant, through the intermediary of the Secretary General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made through the same intermediary, on the date on which it terminates such derogation."

Three elements of this right to derogate can be identified: First, a state of public emergency, second, limitations to any derogation from the obligation under the Covenant and third, certain formal requirements.

Can the United States claim that the derogation from fundamental rights mentioned above is justified by a state of necessity?

A - The formal requirements

First, I cannot help noticing that the formal requirements have not been fulfilled. It is true that a state of emergency has been officially proclaimed by President Bush in his executive order of November 13. However, the other state Parties to the Covenant have not been informed of the provisions from which the United States derogates.

B - Absolute rights

The rights referred to in § 2 of Article 4 ICPPR can be referred to as "absolute rights" in the sense that no derogation from these guarantees is permissible under any circumstances. In the present case, Art. 7, the protection against torture and cruel, inhuman or degrading treatment or punishment. From the outset, therefore, no exception can be claimed for the way the prisoners from Afghanistan are treated at Guantánamo.

Art. 9, which protects personal liberty, is not mentioned here. However, without entering a debate on methods of interpretation of the Covenant, I tend to believe that the right to be brought promptly before a judge must also be regarded as non-derogable. The European Court of Human Rights has given such an interpretation to the analogous Art. 5 § 3 of the European Convention[44]. In fact, this guarantee is an essential safeguard against ill-treatment of arrested person in the hands of the police.

C - A public emergency which threatens the life of the nation?

Finally, have the horrible attacks of 11 September 2001 actually threatened the life of the nation? It is of course a highly political question whether such a state of emergency should be declared. In this area the States enjoy a considerable degree of discretion, a wide margin of appreciation[45]. Still, they remainStill, they remain under the control - to the extent they have generally submitted to such control, which the US has not - of international organs of implementation[46]. The European Court has accepted the existence of such a threat in the context of IRA and PKK terrorism[47]. In the present case, I cannot imagine that any reasonable international body of implementation would be prepared to accept that after

[44] Aksoy v. Turkey, loc. cit., n. 17.

[45] Aksoy v. Turkey, loc. cit. n. 17, § 68: 'By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.'

[46] Aksoy v. Turkey, loc. cit. n. 17, § 68 'Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.'

[47] E.g. inter alia, Brannigan and McBride v. United Kingdom, judgment of 26 May 1993, Series A No. 258-B, Lawless v. Ireland, judgment of 1 July 1961, Series A no. 3; Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, Sakik and Others v. Turkey, judgment of 26 November 1997, 1997-VII, 2609.

September 11 there was a situation which threatened the life of the American nation.

D - Even assuming that...

Even assuming that there was such a situation, it does not in any way, as I have shown, provide for an exception to the prohibition of degrading treatment or the obligation of judicial control of any arrest and detention of suspects. Furthermore, as Stavros has shown in a very careful study[48], the right to fair trial will hardly suffer any limitations either. It is significant that this right is set out in detail in the fourth Geneva Convention.

V - Final Observation

From an international point of view, the President's executive order is not compatible with the respect for Human Rights. This will not have any immediate consequences for the only Superpower left in the world at the present time. No international body has authority even to blame the US, let alone impose any sanctions or even abrogate any rules of American Law.

Yet, disregard for Human Rights could do considerable damage in the long run, it could destroy the reputation of this country as one which follows the rule of law and respects the fundamental rights of all human beings[49]. Certainly, it will create a strange impression of contrast, to see American leaders go to Christian churches where love of one's enemy is preached, and then act in a spirit of utter contempt and hatred[50]. The President's executive order of November 13 has traits of brutality. However, brutality does not signal strength, but weakness. Many people around the world hope that the US will remain a State which merits respect for its adherence to fundamental values.

[48] Stavros, Stephanos, 'The Right to a Fair Trial in Emergency Situations', 41 ICLQ 343 et. seq. (1992).

[49] On the same line, Harold Koh stresses the need for visible justice to combat terrorism, Article to be published in the American Journal of International Law, and Anne-Marie Slaughter who very rightly says that 'such trials would give the enemy a victory of enormous proportions'.

[50] How is it possible not to think of hypocrisy when one compares this presidential order with the criticism voiced by the Department of State of the administration of justice in the case of a suspected terrorist in Peru, cf. Country Reports on Human Rights, Practices for 1999, Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State.