MILITARY COMMISSIONS, THE GOLDEN RULE AND THE LAWS OF WAR: A COMMENT ON THE DETENTION POLICY TASK FORCE'S PRELIMINARY REPORT OF JULY 20, 2009 AND THE NDAA AMENDMENTS TO THE MILITARY COMMISSIONS ACT

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Editor's Note: *As The Report was going to print we received this timely contribution from Gabor Rona, Human Rights First. Our policy in The Report is to offer a diverse set of views, especially when discussing complex and controversial legal policy matters. As such, we debated the propriety of publishing this essay without also publishing an alternative viewpoint. Given our tight publication deadline and the timeliness of this essay we decided to publish the essay and will provide an alternative viewpoint in our next issue.*

There's a scene in the movie Catch-22 in which a soldier comforts a comrade who appears to have suffered a none-too-life-threatening battle wound. He does not see the real injury that has blown his comrade's guts wide open.

On July 20, 2009, the President's Detention Policy Task Force issued a Preliminary Report on its activities in the form of a Memorandum for the Attorney General and Secretary of Defense. See Detention Policy Task Force Preliminary Report, July 20, 2009, http://politics.theatlantic.com (search "Preliminary Report"). With the passage of a new Military Commissions Act, it is only fitting to scratch below the surface of the Task Force's recommendations, which fail to address the real problems that military commissions represent. See National Defense Authorization Act (NDAA), S. 1390, §§ 1031-33 (2009).

The Preliminary Report addresses two issues on which the Task Force purports that "significant policy decisions" have been made: that military commissions should continue to be available and a process for determination of prosecution forum (as between military commissions and federal courts). In doing so, the Task Force reaches wrong conclusions about when and where military commissions are appropriate because it fails to thoroughly consider the facts and applicable legal history. In addition, the protocol articulated by the Task Force for considering which forum is most appropriate for a particular case is illusory and provides no real guidance.

The Task Force is wrong, as a matter of international and domestic law, as well as of sound policy, to endorse military commissions while our federal criminal courts are open, operating, and entirely capable of handling terrorism cases.

Before explaining why, it is important to acknowledge what this is not about. It's not about whether terrorism is better treated as 'crime or war' any more than it makes sense to debate whether a dog is either brown or large. That debate generally occurs at the level of policy preferences rather than legal dictates but the choice of applicable legal frameworks is not a popularity contest. When facts on the ground (namely, degree of organization and frequency and severity of violence) trigger application of the laws of war, they must be applied. Otherwise, the laws of war have no bearing. But the 'crime vs. war' debate provides little guidance on the question of federal courts vs. military commissions even when it does focus on application of facts to law rather than on policy preferences. This is simply because war and crime are not inapposite. Targeting civilians - the quintessential act of terrorism - can occur both within and beyond the context of war. In either case, it is criminal.

So if the context is armed conflict, as I believe is the case for some, but not all, of so-called jihadist criminality, then what's wrong with using military commissions? The answer lies in the underlying architecture of the laws of war: application of the golden rule.

When considering, "Why should we have to treat people humanely who chop off our heads?" it's noteworthy that the laws of armed conflict are not predicated on principles of reciprocity, but rather on ones of humanity – that we should do unto others not as they do unto us, but as we would have them do unto us. Were it otherwise, any violation by a party to the conflict could justify abandonment of all the rules.

Elevation of the principle of humanity over that of reciprocity has a long-standing pedigree in American history. "Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren. . .," wrote General George Washington in an order concerning captured British soldiers. His admonition does not merely reflect the Founders' gentlemanly upbringing, but rather, a utilitarian strategy consistent with principles that the Revolution stood for. "I know of no policy, God is my witness, but this — Piety, Humanity and Honesty are the best Policy. Blasphemy, Cruelty and Villainy have prevailed and may again. But they won't prevail against America, in this Contest, because I find the more of them are employed, the less they succeed," wrote John Adams in a 1777 letter to his wife. "In 1776," wrote historian David Hackett Fischer "American leaders believed it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. One of their greatest achievements … was to manage the war in a manner that was true to the expanding humanitarian ideals of the American Revolution." David Hackett Fischer, Washington's Crossing 375 (2004).

A good yardstick for application of the golden rule in a rights-respecting society is to do unto others as you do to your own. The rules for trials of prisoners of war, for example, require that the accused may only be sentenced by the same courts, using the same procedures, as the detaining authorities apply to their own armed forces. Art. 102, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. While prisoners of war, in the classic legal sense, exist only in wars between states, a similar rule exists in Common Article 3 of the Geneva Conventions (so-called because it appears in all four Geneva Conventions) applicable to armed conflict involving non-state armed groups.

Common Article 3 is well known for requiring trials of detainees to be conducted with respect for "all the judicial guarantees which are recognized as indispensible by civilized peoples." A less often quoted, but more relevant, requirement of Common Article 3 is that such trials be conducted by "a regularly constituted court."

In the 2006 Hamdan case, the Supreme Court rejected the Bush administration's denial of application of Common Article 3 to Guantanamo detainees, and in particular, with reference to the president's military commissions. See Hamdan v. Rumsfeld, 548 U.S. 557 (2006). The court correctly interpreted Common Article 3's "regularly constituted court" requirement for trial of non-state armed group members to mean essentially the same as the Prisoner of War Convention's "same courts/same procedures" requirement for members of enemy armed forces captured in a State-to-State war. 548 U.S. at 629-630. Specifically, the Hamdan court cites with approval the International Committee of the Red Cross' understanding of the term "regularly constituted court" to mean "established and organized in accordance with the laws and procedures already in force in a country." 548 U.S. at 632-33. In other words, the "regularly constituted court" provision of Common Article 3 is the embodiment of the golden rule and has been endorsed as such by the U.S. Supreme Court. And if the obligation is that military commissions should essentially mirror pre-existing judicial processes, then what sense does it make to have military commissions when those pre-existing processes are up and running? None.

Military necessity, not violation of the laws of war, is the proper trigger for military commissions

The Preliminary Report correctly notes the proven capability of our federal courts to try "enemy terrorists (who) have violated our criminal laws." It also correctly relates President Obama's unfortunate conclusion that "military commissions can and should continue to be available as a forum for the prosecution of our enemies for violations of the laws of war."

Military commissions can, under certain circumstances, be a proper venue for prosecution of war crimes. But those circumstances do not now exist. Also, the implication that federal courts are any less equipped than military commissions to handle either war crimes or other criminal prosecutions for unlawful conduct in armed conflict is wrong.

It is surprising, for example, that the Preliminary Report makes no mention of the U.S. War Crimes Act – the premiere law that not only defines war crimes, including those committed in armed conflict between the U.S. and non-state armed groups, but that creates jurisdiction over them in our normal, federal criminal courts. See 18 U.S.C. § 2441 (2008). The omission is particularly surprising in light of the fact that Sec. 6(b) of the Military Commissions Act of 2006 – the very law that the Task Force was writing about - recently amended the War Crimes Act to create a schedule of "grave breaches" prosecutable by federal courts and committed in precisely the kind of conflict in which the U.S. finds itself today. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2632. To the extent the Preliminary Report means to suggest that federal courts are the proper venue for prosecution of "our criminal laws" while military commissions are the proper venue for prosecution of "war crimes," the Report is incorrect.

Indeed, the proper relationship between these two methods of criminal accountability is alluded to in the Preliminary Report, which cites the observation of the U.S. Supreme Court in Hamdan that military commissions were "born of military necessity." 548 U.S. at 590.

But the Preliminary Report fails to draw the proper lesson from Hamdan and its corollary Civil War era predecessor, Ex Parte Milligan, in which the Supreme Court rejected use of military commissions while the ordinary courts were functioning without obstruction. See 71 U.S. 2 (1866). Simply put, where the ordinary courts are functioning and capable of exercising jurisdiction, there is no "military necessity" for alternatives. This, and not the distinction between "our criminal laws" and "laws of war," is the touchstone of a proper military commission. And where such "military necessity" does exist, it does not automatically justify establishing alternatives that are not "in accordance with the laws and procedures already in force" in the United States.

Ask not what military commissions can do before asking what federal courts cannot do

In light of the troubled post-9/11 history of U.S. military commissions, it would seem reasonable to acknowledge the full spectrum of challenges that have successfully been met by our regular federal courts in international terrorism prosecutions before considering, let alone settling upon, the need for alternatives. The Preliminary Report cites three considerations leading to its conclusion that military commissions are the more appropriate venue in some cases: 1) the need to protect sensitive intelligence information, 2) the need to protect participants, and 3) the challenge of gathering evidence in military operations overseas. The Preliminary Report, however, fails to provide evidence that these considerations actually pose a challenge to the use of federal courts that can be better met in a military commission that respects minimum standards of due process. Human Rights First, on the other hand, has published two

comprehensive reports authored by former federal prosecutors, analyzing these and other challenges that federal courts have successfully met in the more than 100 international terrorism cases of the last decade. See In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008); In Pursuit of Justice 2009 Update and Recent Developments (2009) *available at* http://www.humanrightsfirst.org/us_law/publications/index.aspx.

The five reforms and other proposed changes to the MCA

Reforms announced by the Administration on May 15 for military commission rule changes are, indeed, improvements. Action Memorandum from Jeh Johnson, General Counsel of the Department of Defense to the Secretary of Defense (May 13, 2009), *available at* http://media.miamiherald.com/smedia/2009/05/22/10/mcchanges.source.prod_affiliate.56.pdf. Additional suggestions have been made to import requirements of the Classified Information Procedures Act (CIPA, which provides judges in federal court with a process for protecting sensitive government information from disclosure while respecting the right of the accused to a fair trial) and other reforms into military commissions. NDAA, *supra*; CIPA, Pub.L. 96-456, 94 Stat. 2025 (1980). But none of these reforms cures the underlying flaws of military commissions:

- discrimination by virtue of the fact that the commissions only apply to aliens and exclude Americans (doing unto others differently than we do to our own);
- over-broad exercise of personal jurisdiction against people who are not combatants and may, indeed, have no connection to an "enemy" with whom the US is at war;
- inclusion of crimes that are designated as war crimes but have no basis in the laws of war;
- the continued admissibility of involuntary statements; and
- the potential use of rank hearsay in violation of the accused's right to confront the evidence and his accusers.

Where federal courts and courts martial are operational, the more that "reformed" military commissions look like federal court trials or courts martial, the less justification there is for having them. On the other hand, the more they depart from federal court and court martial rules, the less legitimate they are. This truism highlights the fact that the only legitimate use for military commissions is, as the Supreme Court has noted, in cases of "military necessity."

Prosecution forum decisions: The Protocol

The Departments of Justice and Defense have developed purported guidance for determining when a case should be prosecuted by military commission rather than in federal court. The so-called "protocol" is an attachment to the Detention Task Forces' Memorandum. See Determination of Guantanamo Cases Referred for Prosecution, July 20, 2009. It begins with a presumption that, "where feasible," cases will be prosecuted in a federal (Article III) court. This is a rule that can be followed, since "feasibility" is objectively determinable. But the protocol then goes on, immediately, to state that "where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there." The protocol then attempts to refine this alternative by noting three factors upon which the choice depends: a) strength of interest, b) efficiency, and c) other factors, including the ability of the chosen forum to provide for a "full presentation of the wrongful conduct" and an appropriate sentence.

There are several flaws in this process. First, while the presumption in favor of Article III courts "where feasible" comports with international and U.S. jurisprudence authorizing military commissions on the basis of "military necessity," the "other compelling factors" cited in justification of the choice of military

commissions all but negates the proper breadth of the presumption. Second, several of the "other compelling factors" cited provide no actual guidance on which forum is indicated by greater or lesser presence of those factors (e.g., nature of offense, gravity of conduct, identity of victim, multiple defendant trials, efficiency and resource concerns). Third, some of the "factors" appear to permit the choice of military commission merely to circumvent the due process protections of federal courts and, thereby, make for easier prosecutions and conviction (e.g., "the manner in which the case was investigated and evidence gathered" and "legal or evidentiary problems that might attend prosecution in the other jurisdiction").

Conclusion

The Preliminary Report concludes with the accurate observation that "(j)ustice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed." The delay is due, in no small part, to the misguided attempt to shift the locus of prosecution of such crimes from the tried and true federal criminal justice system to an ad hoc, untried system that confers an unwarranted "enemy in war" status upon individuals, many of whom wish nothing more than to be martyred as victims of an unjust system. In addition, the flawed military commission system will continue to be the rightful focal point of judicial challenge for a long time to come. While the Preliminary Report's conclusion declines to note the equal entitlement of the accused to justice (although it is noted elsewhere in the report) there will be no closure for anyone whose interests are determined by a discredited military commission and no honor for those who tend to mortal wounds with band aids.