

Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations

ROBINSON O. EVERETT*

As American forces are deployed to a variety of trouble-spots for peacekeeping and humanitarian purposes, military commanders may begin to consider the use of military tribunals to punish those who have violated international law by their aggressive conduct. The Constitution gives Congress the power to "make Rules for the Government and Regulation of the Land and Naval Forces,"¹ but this provision concerns the court-martial of American servicemembers for their misconduct, rather than the trial by American military or civilian tribunals of American military dependents or foreign nationals. The constitutional provision, then, would be relevant chiefly as a basis for statutes designed to punish servicemembers for acts that violate international law. It might also provide the basis for statutes to fill a gap in the jurisdictional reach of the federal district courts. These statutes would reach crimes—including violations of the law of war—committed by servicemembers subsequently discharged from the Armed Services,² or by civilians accompanying the Armed Forces overseas.³

* Professor of Law, Duke University, and Founder, Center on Law, Ethics, and National Security. Formerly Chief Judge, United States Court of Military Appeals (1980-90). For an article elaborating on the themes of these remarks, see Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 *Wake Forest L. Rev.* 509 (1994).

1. U.S. Const. art. I, § 8, cl. 14.

2. Cf. *Toth v. Quarles*, 350 U.S. 11 (1956) (holding that a former serviceman may not be subjected to court-martial for crime committed while in the U.S. armed services, but that Congress may constitutionally permit federal district courts to try such cases).

3. Cf. *Kinsella v. Singleton*, 361 U.S. 234 (1960) (holding that article 2(11) of the Uniform Code of Military Justice, which provides for a trial by court-martial of "all

Indeed, previously I have proposed the enactment of legislation to permit the punishment of American servicemembers who commit war crimes overseas which come to light only after their discharge from the service.⁴

The Constitution also authorizes Congress to "define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations."⁵ The nationality of the alleged offender apparently is irrelevant; and, presumably, these "offences against the Law of Nations" could be made punishable by federal district courts. Recent congressional action to make punishable in federal district courts acts of terrorism both at home and abroad may be an exercise of this power.⁶

Several leading cases allow military tribunals to punish certain "offences against the Law of Nations." In *Ex parte Quirin*, the Supreme Court upheld the jurisdiction of a military commission sitting in Washington, D.C., to try several alleged saboteurs who had landed on the Atlantic coast from a submarine.⁷ The Court reasoned that under the Articles of War—in effect at that time—Congress had empowered either general courts-martial or military commissions to try violations of the law of war, such as espionage or sabotage.⁸ Apparently, it made no difference that one of the accused claimed to be an American citizen.

In *Application of Yamashita*, the Supreme Court ruled that the Articles of War granted jurisdiction both to general courts-martial and to military commissions to try as a violation of the international law of war the alleged failure of General Yamashita to prevent mistreatment of Philippine civilians by his troops.⁹ The Court

persons . . . accompanying the armed forces" of the United States in foreign countries, cannot be applied in peacetime to the trial of a civilian who is a dependent of a servicemember serving overseas and is charged with a non-capital offense); *Guagliardo v. McElroy*, 361 U.S. 1 (1960) (holding that article 2(11) cannot be applied in peacetime to the trial of a civilian employee of the armed forces serving overseas and charged with a non-capital offense); *Reid v. Covert*, 354 U.S. 1 (1957) (holding that article 2(11) cannot be applied in capital cases to the trial of civilians who are dependents of servicemen serving overseas in peacetime).

4. See Robinson O. Everett & Larry Hourcle, *Crime Without Punishment: Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. L. Rev. 184 (1971).

5. U.S. Const. art. I, § 8, cl. 10.

6. See, e.g., Aircraft Sabotage Act, 18 U.S.C. §§ 31-32 (1988); 49 U.S.C. app. §§ 1301, 1471, 1472 (Supp. V 1987); Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (1988).

7. *Ex parte Quirin*, 317 U.S. 1 (1942).

8. *Id.* at 26-28.

9. *Application of Yamashita*, 327 U.S. 1 (1946).

in *Madsen v. Kinsella* similarly utilized the law of war to sustain the jurisdiction of military-government tribunals established in the American-occupied portion of West Germany, even when the defendants were civilians.¹⁰

In enacting the Uniform Code of Military Justice (U.C.M.J.),¹¹ Congress reaffirmed in 1950 its prior grant to military tribunals of authority to try violations of the law of war.¹² Under article 18, which defines the jurisdiction of general courts-martial, "[g]eneral courts-martial also have jurisdiction to try any person who *by the law of war* is subject to trial by a military tribunal and *may adjudge any punishment permitted by the law of war.*"¹³ Similarly, article 21 of the Uniform Code states that the provisions of the Code "conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or *by the law of war* may be tried by military commissions, provost courts, or other military tribunals."¹⁴

These two articles of the Uniform Code are derived from parallel Articles of War that were applied in *Quirin*. Presumably, they would be interpreted to confer upon the president and various military commanders the authority to convene either a court-martial or a military commission to try transgressors against the law of war. Moreover, the president as commander-in-chief might have such authority even without legislation.¹⁵

The Uniform Code contains two less explicit references to the law of war. Article 104 asserts that "any person" who aids or provides intelligence information to the enemy "shall suffer death or such other punishment as a court-martial *or military commission* may direct."¹⁶ Article 106 applies to "any person who in time of war is found lurking as a spy" or "acting as a spy in or about any place, vessel or aircraft, within the control or jurisdiction of any of the armed forces" or about certain other defense facilities.¹⁷ It

10. *Madsen v. Kinsella*, 343 U.S. 341 (1952).

11. Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1983) [hereinafter U.C.M.J.].

12. 10 U.S.C. § 818 (codifying U.C.M.J., ch. 169, art. 18, 64 Stat. 107, 114 (1950)).

13. *Id.* (emphasis added).

14. *Id.* § 821 (emphasis added).

15. *Cf. Swain v. United States*, 165 U.S. 553 (1897) (holding that it is within the power of the president, as commander-in-chief, to convene a general court-martial, even when the commander of the officer to be tried is not the accuser).

16. 10 U.S.C. § 904 (emphasis added).

17. *Id.* § 906.

authorizes trial by "general court-martial or by military commission and [provides that] a conviction *shall* be punishable by death."¹⁸ The description in articles 104 and 106 of two crimes punishable by either general court-martial or military commission does not seem intended to preclude the use of military commissions to try other violations of the law of war. Certainly, neither *Quirin* nor *Yamashita* points toward any such restrictive interpretation.

The procedure for determining whether a general court-martial or military commission is to be used for such trials involves consideration of several factors. The decision would probably be made by a senior military commander.¹⁹ If trial is by a general court-martial, the Military Rules of Evidence would probably apply, but not if trial were by a military commission. As a practical matter, American servicemembers may be tried by general court-martial if they violate the law of war. It is uncertain, however, if they could be tried by military commissions rather than courts-martial because military commission trials would deprive defendants of the procedural protection afforded by the U.C.M.J. and by the Manual for Courts-Martial. *Madsen v. Kinsella*²⁰ might suggest that trial by military commission of a servicemember for violations of the law of war would be permissible. Moreover, if taken literally, the language of articles 104 and 106 would indicate that such trials would be permissible for violations of these articles by servicemembers.²¹

It seems that the system of appellate review prescribed for court-martial of servicemembers is not applicable to trials of foreign nationals by military commissions for crimes against the law of war. As I interpret *Johnson v. Eisentrager*,²² trials of aliens by American military tribunals sitting overseas would not be reviewable in American article III courts by writ of *habeas corpus*, so long as trial, detention, and punishment have all taken place overseas. Likewise, such persons could not take advantage of the exclusionary rule derived from the Fourth Amendment.²³ Whether the Fifth or Sixth Amendments would apply is debatable. If seized overseas

18. *Id.* (emphasis added).

19. *Cf. id.* § 822 (listing in descending order, from the president to any commanding officer empowered by the president, the officers allowed to convene a general court-martial).

20. *Madsen v. Kinsella*, 343 U.S. 341, 345 (1952) (allowing conviction of servicemember's dependent by a military tribunal in U.S.-occupied Germany to stand).

21. 10 U.S.C. §§ 817-18.

22. *Johnson v. Eisentrager*, 339 U.S. 798 (1950).

23. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

by American forces for alleged violations of the law of war and brought to the United States for trial in a civil or military tribunal, an alien would be unable to contest jurisdiction—absent some heretofore unprecedented provisions in an extradition treaty between the United States and the country where the seizure occurred.²⁴

Very little attention has been paid in recent years to the possibility of using American military tribunals to enforce the law of war. Such use, however, appears to be a permissible option—probably often more feasible than trial by an international criminal court like that which the Security Council has approved for war crimes in Bosnia. One potential application of this option might occur when a military operation is undertaken for humanitarian or peacekeeping purposes under United Nations authority. In such a case, the Security Council could consider specifically authorizing the use of military tribunals of the coalition forces for the punishment of conduct clearly prohibited by international law and universally condemned. At the very least, the Security Council should make clear that it does not *prohibit* such use of military tribunals. If an international criminal court is established, however, its jurisdiction should be subordinated to the rights of national courts—military or civilian—to try violations of the law of war.

24. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).