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CASE NO. 60

THE DACHAU CONCENTRATION CAMP TRIAL

TRIAL OF MARTIN GOTTFRIED WEISS AND THIRTY-NINE OTHERS

GENERAL MILITARY GOVERNMENT COURT OF
THE UNITED STATES ZONE, DACHAU, GERMANY,
15TH NOVEMBER–13TH DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

Two charges alleged that the accused " acted in pursuance of a common design to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto, did at or in the vicinity of Dachau and Landsberg, Germany, between about 1st January, 1942, and 29th April, 1945, wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations " (charge 1) and of " captured members of the armed forces " (charge 2) " of nations then at war with the German Reich, to cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities, the exact names and numbers of such victims being unknown but aggregating many thousands. . . ."

2. EVIDENCE FOR THE PROSECUTION

(i) *General conditions in the camp*

Dachau was the first concentration camp to be established in Germany, and was in existence from March, 1933, until April, 1945. The charges, however, cover only the period from January, 1942, to April, 1945. More than 90 per cent. of the prisoners were civilians, the remainder were prisoners of war. None of them had ever been tried by a court of law previous to being sent to a concentration camp. In April,1945, about half of the total population of the camp were Slavs (mainly Russians, Poles and Czechs), the other half consisting of nationals of almost every European country, including Italy, Hungary and Germany. The main camp was equipped for approximately 8,000 inmates. In April, 1945, it contained 33,000. The entire group of concentration camps administered by Dachau and situated in a circle with Dachau in the centre, could accommodate 20,000. It contained 65,000 people in April, 1945.

The result of this overcrowding was that up to three men had to sleep in one bed, the latrines were constantly blocked, hospital blocks were proportionately crowded and prisoners were not segregated when suffering from contagious diseases, but had to share their beds with others not suffering from such diseases. A typhus epidemic was raging at the camp from December, 1944, until the liberation of the camp by American troops in April, 1945. Approximately 15,000 prisoners died of typhus during this period. No adequate measures were taken by the camp administration to

combat this epidemic. The food was grossly inadequate, especially in view of the long hours of work. The prisoners had to work 12 hours a day ; taking into account the cleaning of barracks and very prolonged parades and roll calls, this amounted to a 17–18 hour working day. When American troops entered the camp in April, 1945, a great majority of prisoners showed signs of starvation. Within the first month after the arrival of the American troops, 10,000 prisoners were treated for malnutrition and kindred diseases. In spite of this one hundred prisoners died each day during this first month from typhus, dysentry or general weakness. Clothing was insufficient to protect the prisoners from the cold. Individual clothing was not washed for periods up to 3 months. The prosecution alleged that a large warehouse full of clothing was found in the camp in April, 1945. Apart from the conditions created in the hospital blocks by overcrowding and insufficiency of medical supplies and gross lack of care, these hospitals were the scenes of numerous medical experiments, of which the prisoners were the involuntary victims. Experiments consisting of immersion of prisoners in cold water for periods of up to 36 hours, puncturing the lungs of healthy prisoners, injecting them with malaria bacteria and phlegmon matter in order to observe their reactions, were among the experiments carried out in the camp hospital. Numerous prisoners died as a result of any one of these experiments. Invalid prisoners who were considered incurably ill and those in the advanced stages of emaciation were periodically gathered into large convoys leaving Dachau for an unknown destination. It was common knowledge, according to the prisoners' testimony, that these transports of people were sent elsewhere to be killed. Prisoners were subjected to strict discipline, which was enforced by a system of severe punishments. These punishments ranged from inflicting harder work and longer hours and deprivation of food to beatings, up to 100 lashes, hanging by the wrists for long periods and confinement in the arrest blocks, to the death penalty, which was inflicted mainly for stealing.

In spring, 1942, 6,000–8,000 Russian prisoners of war were killed. Around September, 1944, 90 Russian officers were hanged in the camp. The total death roll is not known. Over 160,000 prisoners went through Dachau in the three years forming the subject of the charges. The number of recorded deaths is 25,000, but there was evidence that thousands of others perished unrecorded.

(ii) *Organisation and Responsibility of the Accused in running the camp*

All concentration camps were administered by the Central Security Office in Berlin, where the Commandants and senior officers of the staff were appointed. The Dachau group of camps contained 85 branch camps which all came under the camp commandant, who held the rank of Lt.-Colonel in the SS. In each camp there was a " Schutzhaft Lager Fuhrer " who was a kind of deputy commandant. Below this deputy commandant was a "Rapport Fuhrer," who was a kind of regimental sergeant-major, usually a senior N.C.O. of the SS. He was the most important member of the staff for disciplinary purposes. Below these were the " Block Fuhrer," who were SS men each in charge of the prisoners in one block (barrack). From the " Block " downwards, the hierarchy consisted of prisoners. There was a " block eldest " in each block, under him a " room eldest " for each room

in the block, charged with maintaining order. These prisoner functionaries were almost always German prisoners selected by the SS, most of them habitual criminals. The commandant was aided by an adjutant and the camp administration generally, including the chief food stores, clothing stores, etc., was directly under the command of his personal staff. Other departments were headed by an officer of the camp staff such as the labour officer, the chief medical officer, and others. The labour officer was an SS N.C.O who had to appoint working parties for various private factories in the vicinity. Each party was escorted by an SS man as a guard and a prisoner called a " Kapo " acted as foreman under this SS guard.

The medical department was in the charge of the chief medical officer with several SS doctors under him, and prisoner doctors to assist them. The political department, which was headed by a Gestapo officer, who received his orders directly from Gestapo headquarters at Munich, but came under the camp commandant for administration, dealt with all intelligence matters, including the compiling of lists for the experiments, and for the convoys of the sick for extermination.

Of the 40 accused, 9 had at one time been camp commandants or deputy camp commandants. Three had been " Rapport Fuhrers," 4 labour officers or deputy labour officers, 5 medical officers, 2 medical orderlies, 3 on the administrative staff of the camp commandant, 4 " Block Fuhrers " as well as being in charge of working parties, one was in charge of the political department, one an adjutant, one an officer in charge of the battalion of guards, one an officer in charge of supplies. Three accused had been guards who had also been in charge of large prisoner convoys during the evacuation from Dachau to other camps in April, 1945. Three were prisoner functionaries. Thus all accused held some position in the hierarchy running Dachau camps. Most of them held important positions as the above list shows.

(iii) *Specific instances of ill-treatment and killings*

There were numerous cases of grave ill-treatment, deliberate beating and starving of prisoners and a great number of cases of killing prisoners by the SS personnel in all camps. In most cases the names of the victims were unknown but the court were asked to take into consideration only those instances where at least the nationality of the victims was known. All those cases of ill-treatment or killing of prisoners of which detailed evidence was given, were attributed to one or more of the accused. The prosecution thus alleged against some of the accused that they held prominent positions in the hierarchy of the camps and were chiefly responsible for the conditions prevailing there, and against some of the accused acts of individual assaults or killings, against most accused, both. The case for the prosecution was that all the accused had participated in a common plan to run these camps in a manner so that the great numbers of prisoners would die or suffer severe injury and that evidence of the numerous indictments of ill-treatment and killings was only introduced to show that each individual accused took a vigorous and active part in the execution of this plan.

3. EVIDENCE FOR THE DEFENCE

There was no divergence between the prosecution and the defence with regard to the organisation of the camp and the position held by the accused

in this organisation. The defences offered by the accused resolved themselves into two parts, those concerning the general conditions and those concerning the allegations of specific ill-treatment and killings. The defence put forward with regard to the general conditions amounted to a defence of superior orders.(1)

The defence pleaded that the camp was established and run on the orders of Himmler and the Central Security Office in Berlin, that rations, clothing, medical and other supplies were in accordance with the standards prescribed by Berlin, and that Dachau was a good camp " as concentration camps go ". Of the defences put forward with regard to specific ill-treatments and killings, some were utter denials, some were denials of the circumstances or the intensity of the ill-treatment and some were explanations, such as that the hanging of the 90 Russian officers was an execution ordered by the Central Security Office, or that it was necessary in the interest of discipline to beat prisoners who had committed thefts.

4. FINDINGS AND SENTENCES

All 40 accused were found guilty and the finding was confirmed in each case. Thirty-six accused were sentenced to death, one to hard labour for life, 3 to hard labour for 10 years. The Reviewing authority commuted 3 of the 36 death sentences, one to hard labour for life, and 2 to 20 and 10 years' hard labour respectively. The sentence of one further accused was reduced by the Reviewing authority from 10 to 5 years' hard labour. The Confirming authority commuted 5 of the remaining 33 death sentences, two of them to 20 years' hard labour and 3 to 10 years' hard labour.

B. NOTES ON THE CASE (2)

1. QUESTIONS OF JURISDICTION AND PROCEDURE

(i) *Jurisdiction*

The defence, in a motion before the beginning of the hearing of the evidence, which amounted to a plea to the jurisdiction,(3) put forward the following three arguments :

(*a*) that the accused were not described as enemy nationals in the charge and as the court had a limited jurisdiction as to the person and a war crime was defined in paragraph 3 of the Circular No. 132 of Hq. USFET dated 2nd October, 1945, as " . . . including those violations of enemy nationals or persons acting with them of the laws and usages of war, of general application and acceptance . . ." the charges disclosed no offence which the court was competent to try ;

(1) For a discussion of the validity of this defence in general, see the references set out on p. 24, note 2.

(2) For the United States law and practice concerning war crimes, see Vol. III, pp. 103–20.

(3) It should be noted that paragraph 6 of the Royal Warrant (Army Order 81 of 1945), prohibits such a plea ; see Vol. I of these Reports, p. 106.

(*b*) that the names and nationalities of the victims were not disclosed in the charge and were mainly unknown and that it therefore could not be seen from the charges whether or not the victims were nationals of nations who were at war with Germany at the material time. If they were not, the court had no jurisdiction to try the accused for any assaults or murders of such nationals ;

(*c*) that the accused were prisoners of war and that Article 63 of the Geneva Convention provides : "A sentence may be pronounced against a prisoner of war only by the same court and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

The motion was denied by the court. The first argument is erroneous ; though it is usual to describe accused in the charge against them as " enemy nationals " this is not necessary. All accused in this case stated in their direct examination that they were enemy nationals, but even if that had not been the case, the court would have had jurisdiction. The definition quoted by the defence does not purport to be exhaustive, as is shown by the word " including " and the words " or persons acting with them " leaving room for the argument that any neutral or allied nationals who by their conduct had identified themselves with the German staff and their way of running the camp could be tried with them. A British Military Court found 5 Poles guilty of war crimes against Allied nationals in the Belsen trial,(1)—thus upholding the principle that as a war crime is an offence against international law the nationality of the offender is irrelevant in this connection. Professor Lauterpacht advocates that a victorious belligerent should even " try before his tribunals such members of his own forces as are accused of war crimes ".(2)

With regard to the second argument the defence pointed out that in many cases the victims were Hungarians or Roumanians who were enemy nationals or Italians who were enemy nationals until 1943, and that none of them was an American citizen. The prosecutor argued that the gravamen of the charges was the common design to ill-treat and kill the inmates of the camp. Such common design may be proved by giving evidence of any ill-treatment whether the victims in the particular case had been Allied nationals or not. The court permitted evidence of cases of ill-treatment of enemy nationals to be given but it seems that the findings of the court and the sentences could be based on the allegations of ill-treatment and murder of allied nationals alone.(3)

The third argument was dealt with by the Supreme Court of the United States in re Yamashita.(4) The relevant passage from Chief Justice Stone's judgment reads : " . . . but we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence ' pronounced against the prisoner of war ' for an offence committed while a prisoner of war and not for a violation of the laws of war committed while a combatant."

(1) See Volume II, page 150, of this series.
(2) Oppenheim-Lauterpacht, 6th Edition, revised, Volume II, page 458.
(3) Cf. *Belsen Trial*, Volume II of this series, pp. 150 and 155.
(4) 66, Supreme Court Reporter 340, p. 350, and *see* Volume IV of this series, p. 46.

The jurisdiction of the court in this case—as indeed in all concentration camp cases held before such courts as this—can be based on Article 2 of the Ordinance No. 2 of the United States Military Government in Germany which gives military government courts jurisdiction over " all offences against the laws and usages of war." The offences against the laws and usages of war in the Dachau case are, with regard to the first charge, offences against Article 2 of the Geneva Convention (Prisoner of War Convention of 1929), which says that prisoners of war shall " at all times be humanely treated and protected particularly against acts of violence or insults and from public curiosity," as well as against Articles 9–14 (Accommodation, food, clothing and hygiene in prisoner of war camps) and Articles 31 and 33 of the same Convention (conditions of work for prisoners of war). The offences with regard to the second charge are offences against Article 46 of the Annex to the 6th Hague Convention of 1907 which, dealing with inhabitants of occupied territories, says : " family honour and rights, individual life and private property as well as religious convictions and worship must be respected ".

The fact that none of the victims were nationals of the nations trying the case is of no moment. Persons accused of war crimes may be tried by the belligerent power into whose hands they fall, whether that power is the one whose subjects were the victims of the alleged crimes or an allied power. For illustrations of this principle see the trial of the Commandant and staff of the Belsen Concentration Camp by a British Military Court (only a few of the tens of thousands of victims were known to be British subjects) (1) and the Hadamar trial by an American Military Government Court (none of the victims in that case was a citizen of the United States.) (2)

The Judgment " In re Yamashita " can also be quoted as an authority for the above proposition. The charge against General Yamashita was that he " while a commander of armed forces of Japan at war with the United States of America *and its allies*, unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States *and its allies* and dependencies . . . and he . . . thereby violated the laws of war ".(3) In this charge and in the court's decision there may be said to be an implicit recognition of the right of one allied power to try war criminals for offences against the subjects of another allied power.

(ii) *Definiteness of the charges.*

In a motion for an order directing the Convention to make the charges and particulars more definite the defence criticized the charges mainly on two grounds :

(*a*) that the description of the period of time as " between 1st January, 1942 and 29th April, 1945 " in the charges was so vague that they failed to inform the accused with sufficient certainty of the case they would have to answer ;

(1) See Volume II.

(2) See Volume I of this series, pp. 46 *et seq.*

(3) Italics inserted.

(*b*) that the charges were bad for duplicity as each of them disclosed plurality of offences whereas in accordance with paragraph 6, sub-para. 2 of the U.S. Military Government's Manual " each charge should disclose one offence only and should be particularised sufficiently to identify the place, the time and the subject matter of the alleged offence and shall specify the provision under which the offence is charged."

In reply to the first argument the prosecution pointed out that the offences with which the accused were charged were all of a continuing nature and that it was alleged that the common design forming the subject of the charges was in operation from January, 1942, till April, 1945. Being a continuous offence the participation of the individual accused was sufficiently clearly alleged to apprize them of what they were called upon to defend. The argument that only very few of the accused were at Dachau during the whole period from January, 1942, until April, 1945, whereas most of them either arrived later or left earlier than the dates given in the charges, was not used by the defence.

With regard to the second argument, the prosecution said that each charge set forth only one offence, i.e. subjection of prisoners to cruelties and ill-treatment. Only the forms which this subjection took varied, and therefore only a partial description of those forms of subjection was expressed in the charges, but the charges quite definitely alleged participation in the running of the camp, pursuant to a common design which included the subjection of described persons to stated wrongful acts at stated times and places.

The motion was denied.

(iii) *Motion for severance of the charges*

The defence based this motion on paragraph 7 (*b*) of the United States Manual of Courts Martial, 1928.[1] The main arguments were that there were 40 defendants and that many of them intended to call some of their co-defendants as witnesses and also that antagonistic defences would be offered by various accused which would prejudice all of them. The prosecution, in reply, argued that the defendants were not prejudiced by a joint trial. The essence of the case was a trial of the staff of Dachau Concentration Camp and the nature of offences each being committed in pursuance to a common design was such as to suggest that the defences of the accused were not antagonistic. The court denied the motion for severance of the charges. Witnhrop in his " Military Law and Precedents," page 253, says with regard to Military Commissions : " The granting of a severance at all events is largely a matter of discretion and unless the abuse of it is obviously flagrant, it should not be questioned ".

(iv) *Witnesses' immunity from testifying in war crimes trials*

One witness refused to answer a question because the matter on which he was required to give evidence was a matter which he had sworn not to divulge. The oath referred to was the oath as an official of the government of the

[1] For a similar motion in a trial before a British Military Court, see the *Belsen Trial*, Vol. II, p. 143 of this series.

German Reich. It is a generally recognised rule that the burden of proving that a matter is excluded on ground of privilege is on the person asserting it. It was thus incumbent on the witness in this case to prove that he would be divulging an official secret by answering the question. The chief reason for the protection given to witnesses with regard to official secrets is that the disclosure of them would injure the relationship between the official and the government or injure the State. In this case the oath was an oath of allegiance to the German Reich which no longer exists and there was, therefore, no interest to be preserved or injured. The court did not recognise the immunity of the witness and he was ordered to answer the question.

(v) *The right of cross examination if the accused makes an unsworn statement*

The defence objected to a question, otherwise proper, put by the prosecution to an accused who had taken the stand to make a voluntary unsworn statement. The defence argued that the accused could not be asked incrimina-ing questions in cross examination on such an unsworn statement. The regulations governing the trials before Military Government Courts do not say whether an accused can refuse to answer incriminating questions in cross examination during the course of his unsworn statement, though they provide, contrary to the procedure in Courts Martial that an accused can be cross examined on such an unsworn statement. The accused's objection was overruled by the Court and it seems, thus, that the court held that the accused's right not to incriminate himself is waived as soon as he takes the stand, even if he does so only to make an unsworn statement. The rights of the other side to cross examine seem to be the same as if the witness was giving evidence on oath.

(2) *Questions of Substantive Law*

(i) *Common Design*

(*a*) *The evidence necessary to establish common design*

The charge alleged that the accused " acted in pursuance of a common design to commit the acts hereinafter alleged as members of the staff of Dachau Concentration Camp . . did participate in the subjection of. . . (the inmates) . . . to cruelties and mistreatment ". The charges thus alleged the participation of all accused in a common design to ill-treat the prisoners.

The prosecution rested their whole case squarely on the common design. In his closing address the chief prosecutor said : " If there is no such common design then every man in this dock should walk free because that is the essential allegation in the particulars that the court is trying. As to examination of the specific conduct of each one of the accused, the test to be applied is not did he kill or beat or torture or starve but did he by his conduct, aid or abet the execution of this common design and participate in it ? " To prove this common design, the prosecution adduced evidence that Dachau Concentration Camp was run according to a system which inevitably produced the conditions described by all witnesses, and that the system was put into effect by the members of the camp staff and that every accused was at one time, though not all at the same time, a member of this staff.

To establish a case against each accused the prosecution had to show (1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct " encouraged, aided and abetted or participated " in enforcing this system.

The defence never seriously contested the existence of the system and it can be said to be common sense that it was quite impossible to belong to the staff for a substantial time, as all the accused did, without being aware of this system. The main point at issue was, therefore, the third, the connection of the individual accused with the common design. It emerges from the evidence adduced by the prosecution, from the speeches of counsel and from the findings of the court that the prosecution established the guilt of each of the accused in one of two ways :

(*a*) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,

(*b*) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.

An example may best illustrate this. If an accused held the position of a Lagerfuhrer (deputy camp commandant) or a Rapportfuhrer (Regimental Sergeant Major) or of an SS Doctor, this could in itself be said to be sufficient proof of his guilt. If, on the other hand, an accused was in charge of the bath and laundry or merely a guard or a prisoner functionary, then it became necessary for the prosecution to prove that he used this position, not illegal in itself, to ill-treat the prisoners.

The guards and prisoner functionaries (block eldest, room eldest and capos) formed the lowest grade of the hierarchy. The defence denied that members of either category could be called members of the staff.

With regard to the SS guards, the prosecution pointed out that they were the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design. The prosecution quoted from Wharton, " Criminal Law", 12th Edition, Vol. I, page 341. If any perpetrator be " outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree. No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals ".

As to the prisoner functionaries, the prosecution contended that the expression " staff " was wide enough to include all persons who were engaged in any administrative or supervisory capacity. The test was whether they were appointed by and took their orders from the SS. The evidence showed that both was the case. The court by finding the three guards and the three capos (prison functionaries) amongst the accused all guilty, seems to have upheld the prosecution's contention.

(b) Nature and definition of " Common Design "

The defence argued that the charges were bad in law (1) because the accused were charged with performing various acts in pursuance of a common design and " common design was not a crime ", and (2) that the phrase " common design " was too vague and did not inform the accused of whether or not they had to answer a conspiracy charge. The fallacy of the first argument is that the accused were not charged with common design, but with violations of the laws and usages of war and the manner in which these violations were alleged to have been committed was by participation in a common design to ill-treat and kill the prisoners.

As to the second objection, it appears from the evidence on which the court found the accused guilty and from the arguments put forward by the prosecution that the burden of proof which such a charge placed on the prosecution, though heavier than in a merely joint charge, is less heavy than in a conspiracy charge. The definition of common design referred to in the trial was " a community of intention between two or more persons to do an unlawful act." (Black, Law Dictionary, 3rd Edition, page 367, citing State against Hill, 273, MO 329, 201 SW 5860.)

This definition does not differ materially from the definition of conspiracy given by Kenny (Outline of Criminal Law, 15th Edition, page 335). " Conspiracy is the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it." It seems that the court did not find it necessary specifically to distinguish one offence from the other, though there must be a distinction as common design is inherent in the concept of many joint offences, all of which are not included in the general category of criminal conspiracies.

The evidence adduced by the prosecution seems to fall short of showing a conspiracy among the accused in the strictly technical sense of the term. There is no evidence that any two or more of them ever got together and agreed on a long-term policy of ill-treating and killing a great number of the inmates, and then put this agreement into operation. The accused did not all know each other, nor were they all at Dachau at the same time, but as they came and went the system remained and as each of them took over his position, he adhered to the system.

It seems, therefore, that what runs throughout the whole of this case, like a thread, is this : that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute " acting in pursuance of a common design to violate the laws and usages of war ". Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary. The degree of the participation of each accused found its expression in the sentences which ranged from 5 years' hard labour to death.

In the Mauthausen Concentration Camp case,(1) where the facts were basically the same—though the casualty figures were much higher as mass extermination by means of a gas chamber was practised—a United States General Military Government Court announced the following special findings after finding all 61 accused guilty of the charges :

> " The court finds that the circumstances, conditions and the very nature of the Concentration Camp Mauthausen, combined with any and all of its by-camps, was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, to be culpably and criminally responsible."
>
> " The Court further finds that it was impossible for a governmental, military or civil official, a guard or a civilian employee, of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by-camps, at any time during its existence, without having acquired a definite knowledge of the criminal practices and activities therein existing."
>
> " The Court further finds that the irrefutable record of deaths by shooting, gassing, hanging, regulated starvation, and other heinous methods of killing, brought about through the deliberate conspiracy and planning of Reich officials, either of the Mauthausen Concentration Camp and its attached by-camps, or of the higher Nazi hierarchy, was known to all of the above parties, together with prisoners, whether they be political, criminal, or military."
>
> " The Court therefore declares : ' That any official, governmental, military or civil, whether he be a member of the Waffen SS, Allgemeine SS, or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognised laws, customs and practices of civilised nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished."

These special findings contain two findings of fact : (1) that the running of the camp was a criminal enterprise, and (2) that every official who was employed or merely present in the camp at any time must have been aware of the common design, i.e. of the criminality of the enterprise ; and a conclusion of law, that every official who was engaged in the operation of this criminal enterprise " in any manner whatsoever ", is guilty of a violation of the laws and usages of war. By this conclusion in the special findings, together with the findings of guilty of all 61 accused in the Mauthausen Concentration Camp trial and of all 40 accused in the Dachau Concentration Camp trial, the United States Military Government Courts seem to have established a rule that membership of the staff of a concentration camp raises a presumption that the accused has committed a war crime. This presumption may—

(1) General Military Government Court of the U.S. Zone, Dachau, Germany, 29th March–13th May, 1946.

inter alia—be rebutted by showing that the accused's membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design.

(ii) *Special Findings on Group Criminality and Subsequent Proceedings against members of the group*

The directive issued by Hq, USFET, dated 26th June, 1946, provides for the trial of additional participants in mass atrocities when the principal participants have already been convicted.(1)

Paragraph 11 (*b*) (2) of this directive reads : " In such trials of additional participants in the mass atrocity the prosecuting officer will furnish the court with certified copies of the charge and particulars, the findings and the sentence pronounced in the parent case. Thereupon such intermediary military government courts will take judicial notice of the decision rendered in the parent case including the finding of the court that the mass atrocity operation was criminal in nature and that the participants therein acting in pursuance to a common design did subject persons to killings, beatings, atrocities, etc., and no examination of the record of such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."

The defence counsel in their petitions against the findings in the Mauthausen main trial raised two questions: (*a*) whether a Military court has power to announce any findings beyond the findings of guilty or not guilty of the charge, and (*b*) whether an accused in any subsequent proceedings would be prejudiced by the fact that such findings in the main trial were judicially noticed by the court in the subsequent trials. With regard to the first question, counsel argued that the findings exceeded the allegations of the particulars in the charge and were therefore improper. Winthrop, in his compendious work *Military Law and Precedents* (2nd Edition, Reprint 1920, page 385) says : " It is a peculiarity of the military procedure that a court martial in its judgment is not confined to a bare acquittal or conviction but may characterise or expand the findings or sentence or accompany it with animadversions, recommendations or other remarks . . ."

With regard to the second question, counsel maintained that the special findings were illegal as they constituted a trial *in absentia* of all those members of the camp staff who were not tried in the main trial. This is not the case. In accordance with the special findings any accused in a subsequent trial is—*inter alia*—entitled to an acquittal if he can prove that he was not aware of the criminal nature of the operation or that the nature and the extent of his participation was such that he could not be said to have furthered the common design to any substantial degree. In view of these defences it cannot be said that he had been found guilty *in absentia*.

Paragraph 11 of the directive is a provision somewhat similar to Article 10 of the Charter, defining the constitution, jurisdiction and functions of the

(1) See Volume III, pp. 114 and 117–18 of this series.

International Military Tribunal at Nuremberg.(1) Article 10 says : " In cases where the group or organisation is declared criminal by the tribunal, a competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned." Thus the declaration of the criminality of the Gestapo, SS, SD, etc., in one case and of the criminality of the camp staffs in the other, are binding on courts in subsequent proceedings and cannot be challenged by the accused in such proceedings. But whereas, according to the judgment of the International Military Tribunal(2), the prosecution in subsequent proceedings against members of criminal organisations have to prove that the accused had " knowledge of the criminal purposes or acts of the organisation ", such knowledge is to be presumed against members of the staff of a concentration camp. In the subsequent trials of such members the burden of proof with regard to *mens rea* is placed on the defendant, who has to show that he did not know of the criminal nature of the enterprise.

The paragraph quoted above from the directive of 26th June, 1946, received application in a series of trials held at Dachau in which ex-members of the concentration camp staff were accused of acting in pursuance of a common design to commit atrocities against camp inmates, the finding in the original Dachau Trial that the mass atrocity operation was criminal being accepted by the tribunals conducting these later trials.

(1) Cmd. 6903.
(2) Cmd. 6964, p. 67.

8. Guantanamo as Theatre: Military Commissions and Performance in the Court of Public Opinion, 2003–2004[1]

Fred L. Borch

Chief Prosecutor for Military Commissions:
'Mr. Secretary, I can win these cases. But convictions are not what is important.
Rather, the only important trial is the trial in the court of public opinion.'

Deputy Defence Secretary Wolfowitz:
'Do you really believe that?'[2]

8.1 Introduction

The decision to use military commissions to prosecute terrorists held at Guantanamo Bay was premised on the idea that these men had committed war crimes that should be tried by 'war courts'.[3] But the decision did not ignore the fact that the trials would be a performance on the world stage in that, for the judicial proceedings to be a success, the world must be persuaded that the terrorists received fair trials – and that justice was done.

This chapter explores the 'script' written by the prosecution in order to win its military commission cases in the court of public opinion. It focuses almost exclusively on events in the military commission process between May 2003 and May 2004, because during this twelve-month period public interest in military commissions was greatest, if for no other reason than that military trials for terrorists appeared to be imminent. It first 'sets the stage' by looking at the events leading up to the decision by President George Bush to use military commissions to try Al Qaeda members. It then discusses the 'actors' and 'stage' in the Guantanamo 'play' before examining the audience for the 'performance', i.e. the news media and public opinion.[4] The chapter then looks at the first cases selected for prosecution and the prosecution's theory of criminal liability, and how these were part of the effort to shape public opinion. A discussion of the death penalty as a possible sentence follows. Finally, this chapter raises a number of performance mistakes that occurred in the Guantanamo process in the period under consideration, and concludes with a brief analysis and critique of these early military commissions as theatre, including some comments on their judicial, political and social impact.

8.2 Setting the Stage

Early in the morning on 11 September 2001, fifteen Saudi Arabians and four Egyptians boarded four commercial airliners. Two of the aircraft took off from Boston. The third flight departed from Newark, and the fourth flight left from Washington, DC, for Los Angeles. At 8:46 a.m. and 9:03 a.m., the two Boston aircraft crashed into the north and south towers, respectively, of the World Trade Center in New York City. At 9:38 a.m., the Washington, DC, flight struck the Pentagon, destroying a portion of the building. The remaining Newark flight crashed into a rural area southeast of Pittsburgh, Pennsylvania, at 10:10 a.m. By mid-morning, when both World Trade Center towers had collapsed, the death toll – including the airline

passengers – was 2,753 killed in Manhattan and 189 killed in Washington, DC. The victims came from more than ninety countries from around the world.[5]

Within days of the terrorist attacks, the US government had identified Osama bin Laden and his Al Qaeda ('the Base') network as responsible for the 9/11 attacks. The nineteen Al Qaeda hijackers had entered the United States legally (on student or tourist visas) and, while they kept to themselves, tried to fit in as Americans to avoid any suspicion (e.g. they drank alcoholic beverages in bars). In formulating their plan of attack over a period of years, some of the terrorists took flying training at civilian schools. This rudimentary instruction was sufficient to allow them to pilot the American and United Airlines planes after they killed the commercial pilots or otherwise overpowered the crews. While bin Laden did not claim immediate responsibility, he released videotapes praising the 9/11 hijackers, and also threatened more attacks against America.[6]

After the Taliban as the *de facto* government of Afghanistan refused US demands to surrender Osama bin Laden and Al Qaeda operatives, the United States launched air strikes against Afghanistan in October 2001. These air operations were followed by ground combat involving US and Allied soldiers and marines. By mid-2002, Taliban and Al Qaeda forces had been driven from most areas of Afghanistan.[7]

In the meantime, one month after hostilities in Afghanistan had commenced, President George W. Bush announced that Al Qaeda's attacks on the United States had 'created a state of armed conflict' and that the 'extraordinary emergency' arising out of this new "war against terrorism' required a number of extraordinary decisions. Consequently, the president proclaimed in his 'Military Order of November 13, 2011', that he was taking the following actions. First, any Al Qaeda member or international terrorist falling into US hands would 'be detained at an appropriate location'. Second, President Bush announced that, having determined that a state of armed conflict existed, these detainees would 'be tried by military commission for any and all offenses ... that such individual is alleged to have committed'.[8] According to Bush's military order, these terrorists must be prosecuted by a military commission because only trial by a military tribunal would 'protect the United States and its citizens', ensure 'effective conduct of military operations' and prevent future terrorist attacks.[9]

This view – that a military commission was the only appropriate tribunal at which to prosecute Al Qaeda terrorists – was a radical change in the US government's perspective on terrorist acts. Prior to 9/11, the United States had insisted that attacks by international terrorists were criminal acts, and that the United States would prosecute these crimes in federal civilian court.[10] The magnitude of damage and loss of life on 9/11, however, caused President Bush to decide that these terrorist attacks against America and its citizens could no longer be categorised as criminal offences to be prosecuted in civilian courts. Rather, the nature of Al Qaeda's attack[11] meant that the United States was engaged in a 'war against terrorism', and that terrorist acts were war crimes that should be prosecuted by a special war court, i.e.the military commission.[12]

While President Bush personally decided that the military commission would now be the proper forum at which to prosecute Al Qaeda and other international terrorists, it is unlikely that he had the idea of using a military legal framework. What is known is that the idea for the Military Order of 13 November 2001 originated in the White House, and that the principal author was on the president's or vice-president's staff. This person was also familiar with American legal history, as key language used

in Bush's order was borrowed from the procedural rules for a military commission created by President Franklin D. Roosevelt in the early months of World War II.

To recall: on 2 July 1942, after eight Germans who had landed by submarine in New Jersey and Florida were caught before they could accomplish a sabotage mission on American soil, Roosevelt proclaimed that 'all persons who are subjects ... of any nation at war with the United States' and who set foot in the United States in an attempt to commit 'acts of sabotage, espionage, hostile or warlike acts', would be tried by a military commission.[13] While Roosevelt also announced that same day in a related military order that the commission had the power to make its own rules 'for the conduct of the proceedings', and that the commission might consider any evidence that had 'probative value to a reasonable man', Roosevelt also stated that the German defendants must receive a 'full and fair trial'.[14] Since this same evidentiary standard and the 'full and fair trial' language appears in Bush's Military Order of 13 November 2001,[15] there is little doubt that the author of the military order was using the trial of the German U-boat saboteurs as a template.

The White House saw the U-boat military commission as an attractive model for at least three reasons. First, Roosevelt (relying on his authority as commander-in-chief) had created a military commission that had met in secret, determined the guilt of eight Germans defendants, and sentenced most of them to death – all in less than five weeks.[16] This speedy process appealed to President Bush and his advisors because it ensured that Al Qaeda members and other terrorists who attacked the United States could expect swift and certain punishment. A speedy process would also deter others contemplating a future attack on America.

The second reason that the Roosevelt model was an attractive precedent was that it was a sort of 'rough justice'. Terrorists would get a trial that would be 'full and fair' but justice would not be perverted by evidentiary and procedural safeguards that, while appropriate for civilian defendants, had no place in a trial of international terrorists who were guilty of war crimes. This explains why, in announcing that Al Qaeda members and other terrorists would be prosecuted at a military commission, Bush expressly stated that 'given the danger to the safety of the United States and the nature of international terrorism', he had personally determined that it was not 'practicable to apply in military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts'.[17]

Third and finally, the creation of a military tribunal by the president – using his powers as commander in chief under Article II of the Constitution[18] – meant that the commission's work would be unfettered by legal precedent that had developed in US civilian courts governed by Article III of the Constitution and the Bill of Rights contained in the first ten Amendments.[19] For example, evidence obtained by coercion was admissible, as was hearsay, even though these would be barred in a civilian court. The defendant had a right to be represented by legal counsel at the commission, but only after that defence lawyer had been approved by the government. That same defendant could be convicted and sentenced to life in jail on a vote of two-thirds of the commission members; the unanimous vote required in American civilian criminal proceedings was not applicable to a tribunal created under Article II.[20] Finally, there was no appeal to a civilian court; President Bush personally would review the record and make any final decision, unless he delegated this authority to the Secretary of Defence.[21]

8.3 The Actors and the Stage

Since Bush's Military Order required that he personally approve the prosecution of a terrorist at the military commission, the President himself was a key 'actor', with a leading role in the Guantanamo performance. So, too, was Secretary of Defence Donald Rumsfeld, who was given considerable authority in the military commission framework created by the Military Order. But, when Rumsfeld later delegated his responsibilities in the legal process to Deputy Secretary of Defence Dr. Paul D. Wolfowitz, the latter became a key player, since Wolfowitz was now required to decide on a number of key issues.[22] These included issuing orders and regulations that would establish procedures for a commission to follow in any trial of any alleged terrorist; determining the number and identity of Guantanamo detainees to be recommended for prosecution; after the president had approved the trial of one or more detainees, when the trials should start; and which military officers would be appointed to serve as jurors to decide guilt or innocence and determine an appropriate sentence.[23]

At the direction of Secretary Rumsfeld (and later Secretary Wolfowitz), Mr William J. 'Jim' Haynes II,[24] the Department of Defence's top lawyer, began working on various orders that would govern the operation of the military commission. Haynes also began searching for Army, Navy, Air Force and Marine Corps lawyers to take part in the new military commission framework. While senior uniformed lawyers from all the services were considered, Haynes ultimately chose Army Colonel Frederic L. 'Fred' Borch to be the Chief Prosecutor, and Air Force Colonel William 'Will' Gunn to serve as Chief Defense Counsel for the military commissions. Both Borch and Gunn then began selecting military lawyers for their staffs. While these men and women were selected for their top-notch legal skills, both Colonels Borch and Gunn recognised that the lawyers selected to join their respective teams would be performing in the courtroom and would be the 'face' of their respective efforts. Borch, for example, selected Navy Commander Scott Lang as the Deputy Chief Prosecutor, in part because Lang had obtained a special advanced university degree in trial advocacy that included acting lessons. In the Anglo-American judicial system, the requirement to convince a jury of non-legally trained people that a defendant is guilty requires a prosecutor to present a narrative of the crime and the events surrounding it – and telling such a story is best done by a prosecutor who develops a theme and presents his evidence in a compelling and persuasive manner. Lang's special trial advocacy training would ensure that the prosecution's performance was first-rate.[25]

There were six more actors in the Guantanamo performance: Salim Hamdan, Ibrahim al Qosi, Ali Hamza al Bahlul, David Hicks, Moazzem Begg, Feroz Abbasi. They joined the troupe when President Bush selected them as the first defendants on 3 July 2003.[26] More on why these six men were chosen for the play can be learned below, in the discussion about choosing the first cases for prosecution.

Finally, although not on the Guantanamo stage, Osama bin Laden must be considered an actor in the Guantanamo play, since his efforts had caused 9/11 and he was present in the minds of everyone participating in the military commission process. The fact that bin Laden was off-stage did not make him any less important to the Guantanamo performance,[27] especially as one of the prosecution's aims was to educate the public about the evil caused by international terrorism generally and Al Qaeda in particular.

As for the location of the stage, it soon became clear that it would be in Cuba, where the United States had 'perpetual' possession of a small area of land.[28] This was because shortly after the publication of the 'Military Order of November 13, 2001', the United States announced that it would detain those individuals covered by the order at Guantanamo Bay, Cuba; the first twenty detainees arrived in January 2002.[29] With the individuals subject to the jurisdiction of the Military Order located in Cuba, it only made sense to hold the impending trials there. Moreover, this location also ensured that there was adequate security for all parties to the proceedings, as Guantanamo's geographic isolation made it difficult, if not impossible, for people wanting to disrupt the trials to travel there. At the same time, Guantanamo's location outside the United States meant that the US Article III civilian judges probably would not have jurisdiction over the military commission proceedings. As a result, the judges could not entertain petitions from the terrorist defendants or hear actions filed by civil libertarians desiring to halt or disrupt the process.

8.4 Audience: Media and Public Opinion

From the first day he reported for duty as Chief Prosecutor, Borch began preparing to speak to the news media. As the public face of the prosecution efforts, he knew that he would soon be asked by magazine, newspaper, radio and television reporters to sit for interviews, and that the Defence Department expected him to be able to explain to the American people and the world at large that the trial of the terrorists by a military commission was the right thing to do – both morally and legally.

To assist Borch in his public role, the Public Affairs Office at the Department of Defense (DoD) arranged for him to have media training ordinarily reserved for high profile DoD officials. This included classes on how to develop a theme for each interview, and mock question-and-answer sessions with intentionally aggressive questioners. The focus was on finding the right message for the prosecution efforts, and then getting that message out to the public through the news media.[30]

Borch decided that the principal theme of the prosecution would be 'full and fair trial' and he wanted these four words to be a 'Greek Chorus'[31] that would be picked up by the general public and the media in particular. But there were five other messages – of varying importance – that Borch wanted to deliver to the public, too. First, that Al Qaeda members should be tried by a military commission rather than in civilian courts because the United States was at war with Al Qaeda and its attacks were war crimes that should be tried in war tribunals. Second, that military commissions would be useful because they would educate the public about the dangers of terrorism. Third, that the military commission would serve the criminal justice purposes of retribution, punishment and deterrence. Those tried and punished by a military commission would satisfy a desire, if not a need, for revenge for the evil that befell the United States on 9/11; quick and severe punishment also would deter other terrorists from attacking Americans. Fourth, that military commissions would provide an alternative legal and moral basis for long-term detention of terrorists. Fifth and finally, that the military tribunals held in Cuba would support intelligence collection efforts (and therefore the war effort against Al Qaeda).

8.5 Selecting the First Cases for Prosecution

While the message for the military commission process was 'full and fair trial', the theme for the first cases for prosecution was that each defendant was a 'true believer'[32] who was fanatically committed to the depths of his soul to either Al Qaeda or its terrorist goals, or both. The prosecution ultimately recommended to Secretary Wolfowitz that he request President Bush to designate six Guantanamo detainees as defendants in the first military commissions. Each of the six men selected for prosecution fitted into the true believer theme; all had met with bin Laden or were his close associates, or else had met bin Laden and supported his terrorist goals.

Salim Ahmed Hamdan was a Yemeni citizen whose close personal association with bin Laden made him an ideal defendant. Hamdan had joined Al Qaeda in 1996, when he travelled to Afghanistan with the express purpose of joining bin Laden's military group of holy warriors. Hamdan ultimately took an oath of personal loyalty ('bayat') to bin Laden, picked up and delivered weapons, and finally joined bin Laden's inner circle as a chauffeur, mechanic and bodyguard. In late November 2001, Hamdan was captured by a group of Afghan warlords near the Pakistani border and turned over to the United States for a $5,000 bounty.

While these facts alone were sufficient to convict Salim Hamdan in a trial, Borch immediately saw that Hamdan was the perfect first case for the government. Unlike many Al Qaeda members, who had never met bin Laden, Hamdan was intimately familiar with him, and had freely admitted during questioning at Guantanamo that he had worked directly for bin Laden. Additionally, unlike many jihadists, who had joined Al Qaeda after 1999, Hamdan had served bin Laden since 1996 – which meant that Hamdan was a member of bin Laden's inner sanctum during the 1998 attacks on the US embassies in Kenya and Tanzania, the 2000 bombing of the USS *Cole*, and the 9/11 attacks. Hamdan's should be the first case to be prosecuted because his trial would allow the United States to tell the story of Al Qaeda's evil-doing through the narrative of a man who not only had Osama bin Laden's trust and confidence, but had breathed the same air and eaten the same food as the 'prince of darkness'. Since one of the prosecution's goals was to educate the public about Al Qaeda as a force for evil, Hamdan's narrative was ideal.[33]

Ali Hamza Ahmad Sulayman al Bahlul, also a Yemeni citizen, was selected as one of the six defendants because his misdeeds likewise fitted into the prosecution's overall theme. Under questioning at Guantanamo, al Bahlul had boasted that he worked as bin Laden's bodyguard and as his media secretary. From late 1999 to December 2001, al Bahlul had used his computer skills to create 'instructional and motivational recruiting video tapes' for Al Qaeda, and thereby act as a mouthpiece for bin Laden's evil designs.[34] One of these tapes was an internet-based video that glorified the October 2000 suicide attack on the USS *Cole*, which had killed 17 American sailors. The video combined film footage of the damaged warship with calls by bin Laden for jihad against America.

Like Hamdan, al Bahlul also was a trusted member of bin Laden's inner circle, and had been with him on 11 September 2001. During questioning, al Bahlul revealed that bin Laden had asked him to set up a satellite connection on 11 September so that he and other Al Qaeda members 'could see news reports'.[35] In the weeks immediately following the 9/11 attacks, bin Laden tasked al Bahlul with obtaining media reports about the attacks, and 'gather[ing] data concerning the economic damage caused by these attacks'.[36]

Al Bahlul was proud of his affiliation with Al Qaeda and, as he later proclaimed, 'I will never deny any actions I did along bin Laden fighting you and your allies, the Jews.'[37] While in custody in Cuba, al Bahlul also continued to insist

that, if given the opportunity, he would kill innocent Christians and Jews. Perhaps the best proof of his evil intent was the statement he made to interrogators at Guantanamo Bay:

> I wish it had been me as the hijacker who went into the World Trade Center. I hope you Americans kill me as this will anger Usama bin Laden and there will be greater retribution. I can be a double martyr.[38]

The entire prosecution team believed that when a military commission jury heard this statement, any feelings of sympathy they might have for al Bahlul – or concerns about his guilt – would evaporate instantly.

Born in Sudan, Ibrahim Ahmed Mahmoud al Qosi also was a good choice for an early trial. He, too, was a long time bin Laden lieutenant; al Qosi had joined Al Qaeda in 1989 while the organisation was located in Sudan. Initially, al Qosi had served as a messenger, and passed information between members of terrorist cells operating in that country; al Qosi also provided food, shelter and clothing for these terrorists.

In 1990, al Qosi travelled from Sudan to Afghanistan, where he received training in military tactics and weapons. After participating for a period of time in the fighting in Afghanistan, al Qosi became an accountant in Al Qaeda's *Mektabh al Muhassiba* (accounting office) in Pakistan. From 1992 until 1994, he was put in charge of managing donated money and distributing it for salaries, travel and support of Al Qaeda operations, including terrorist training camps in Afghanistan. In the mid-1990s, after a failed assassination attempt on bin Laden in Sudan, al Qosi was handpicked to serve as a member of bin Laden's newly formed bodyguard.[39]

As for Australian-born David Matthew Hicks, his case was attractive because English was his mother tongue and he was cooperative. Although Hicks insisted that he had never been an Al Qaeda member (he admitted only to membership of Lashkar-e-Tayyiba ('Army of the Righteous')), there was proof that he had attended an Al Qaeda-run camp in Afghanistan, where he 'trained in weapons familiarization and firing, land mines, topography, field movements, and basic explosives'.[40] Hicks claimed to have engaged in hostile military operations against India and, after the 9/11 attacks, he had returned to Afghanistan to rejoin his Al Qaeda associates. Hicks was captured by Northern Alliance forces and turned over to US personnel for a $1,000 bounty.[41]

While Borch believed there was sufficient evidence to convict Hicks at a military commission, and recommended that Hicks be one of the first six defendants, Borch rejected the idea of bringing Hicks to trial quickly. His chief reason was that Hicks' was not the face of terrorism. As a white Australian with very fair skin and blue eyes, Hicks did not look like what the American public considered a typical Al Qaeda member and, if a goal of the prosecution was to educate the public about the danger posed by terrorists, a defendant at this stage of the process needed to look like the men responsible for hijacking and mass murder on September 11.

In contrast to Hicks, Moazzem Begg and Feroz Abbasi were good first cases for trial because both defendants spoke fluent English and, as men of Pakistani descent, looked like the typical Al Qaeda member.

Both men had admitted under interrogation at Guantanamo that they had trained at Al Qaeda-run military camps in Afghanistan, and had received training in close combat tactics, individual and crew-served weapons, and explosives. Begg and Abbasi also freely admitted that they were Al Qaeda members and supported that

organisation's goal of carrying out terrorist attacks on Western targets. But, as will be explained, the selection of Abbasi and Begg was a mistake, because their UK citizenship would later cause significant disruptions in the prosecution's performance strategy.

One other possible defendant who, like Hicks, Abbasi and Begg, spoke English was Canadian-born Omar Khadr. Khadr admitted that he had killed a US Special Forces soldier and was unrepentant about this homicide. This made him an attractive candidate for prosecution. But Borch decided that he would not try Khadr because Khadr had been fifteen years old at the time of the killing and his legal status as a juvenile almost certainly would cause the Canadian government to oppose the prosecution. Ultimately, it was a cost-benefit analysis, and Colonel Borch decided that Canadian resistance and possible negative publicity in the court of public opinion was not worth the value of bringing Khadr before a Guantanamo tribunal, at least during Act I of the play.

8.6 Prosecution Strategy and Theory of Criminal Liability

As soon as the prosecutorial cast was selected and assembled, the prosecutors developed their trial strategy.[42] This included the details of the trials themselves, such as determining which terrorists detained in Cuba should be tried first (and in what order), which offences should be charged, and whether the death penalty was appropriate. Of paramount concern was articulating a theory of criminal liability that would permit the military commission to find the terrorists guilty of war crimes. Additionally, it was imperative that this theory of liability be conveyed to the commission's panel members and the public if the tribunals were to win in the court of public opinion.

After some discussion, the prosecutors adopted this basic theory of criminal liability: (1) that each of the six defendants had participated in a common criminal enterprise to attack civilians, destroy civilian property, commit murder while concealing themselves amongst the population, and terrorise governments and peoples with the aim of acquiring power and changing the political order and; (2) that each of the defendants had committed one or more acts in furtherance of this enterprise.

While President Bush's Military Order was a direct result of Al Qaeda's attacks on New York City and Washington, DC, the prosecution team was careful to adopt a theory of criminal liability that did not require a defendant to be an Al Qaeda member in order to participate in the conspiracy. While it was probable that most defendants who would ultimately appear before a military commission would be affiliated in some way with bin Laden, Bush's Military Order clearly stated that *any* non-US citizen who 'engaged in, aided or abetted, or conspired to commit acts of international terrorism' could be prosecuted.[43] By way of example, the fact that David Hicks denied being a member of Al Qaeda, but admitted receiving extensive training in marksmanship, small team tactics, and intelligence gathering in training camps run by Al Qaeda in Afghanistan meant that any comprehensive theory of criminal liability must be built around a conspiracy that was *larger* than Al Qaeda, i.e. that could include Al Qaeda without being limited to it.

A diagram illustrating the prosecution theory of liability showed the scope of the conspiracy theory as a dotted line, with bin Laden ('UBL') and his associates ('Shura Council/UBL Inner Circle') as full participants in the conspiracy. Members of other terrorist organisations – the Abu Sayyaf Group,[44] Jemaah Islamiyah,[45] Lashkar-

e-Tayyiba,[46] Egyptian Islamic Jihad,[47] Armed Islamic Group (GIA)[48] and the Taliban – could be part of the conspiracy too.[49] However, the diagram showed that not *all* members of Al Qaeda or other terrorist organisations necessarily were part of the conspiracy; this was an intentional decision on the part of Borch, who wanted to avoid making mere membership a crime. Borch's decision reflected the strong precedent in Anglo-American jurisprudence against 'guilt by association', i.e., status alone is not a criminal offence.[50]

Of almost equal importance to formulating a conspiracy theory was selecting the actual crimes with which the Al Qaeda terrorists would be charged. While Military Commission Instruction No. 2, *Crimes and Elements for Trials by Military Commission*,[51] listed more than thirty possible offences, the prosecutors decided to charge each defendant with conspiracy to commit five offences: attacking civilians, attacking civilian targets, murder, destruction of property, and terrorism.

Al Bahlul, for example, was charged with 'willfully and knowingly' joining 'an enterprise of persons' consisting of bin Laden, Dr. Ayman al Zawahari,[52] and other 'associates of the Al-Qaeda organisation, known and unknown'. Al Bahlul then conspired with the persons in this enterprise and shared 'a common criminal purpose' to commit the five offences listed above.

What followed in the text of the charging document (or indictment) was a list of overt acts that al Bahlul and other conspirators had committed in order to bring about the aims of their criminal enterprise. These included training at Al Qaeda-sponsored training camps in Afghanistan and taking an oath of allegiance to bin Laden, which affirmed a willingness to perform any act requested by bin Laden. For al Bahlul specifically, overt acts performed by him included creating a USS *Cole* video to recruit, motivate and inspire Al Qaeda members and others to commit violent attacks against the United States and serving as a bodyguard for Osama bin Laden.

The theme in the al Bahlul case was that he was a true believer who had protected evil (as bin Laden's bodyguard), spread evil (through his media work) and continued to want to do evil (as evidenced by his statement that he wished he had participated in the 9/11 attacks). In presenting its case against al Bahlul, the prosecution's 'script' – the way it would present its evidence to the jury – would be written to support and develop these themes.

A final point: the criminal enterprise that al Bahlul and the other defendants had joined was prosecutable as a war crime because the men were engaged in an armed conflict, yet had no lawful basis for their actions under international humanitarian law or other the laws of war. As Professor Gary D. Solis explains in his authoritative treatise *The Law of Armed Conflict*, there are 'only two categories of individuals on the battlefield: combatants and civilians'. The law gives immunity from criminal liability only to combatants who are members of the armed forces of a nation-state; civilians who take part in hostilities have no immunity 'for their violent conduct and can be tried and punished under civil law for their belligerent acts'. It follows that terrorists belonging to groups like Al Qaeda, having no association with any nation-state, enjoy no combatant privilege, and a terrorist who kills a soldier is an unprivileged belligerent or unlawful combatant who is guilty of murder.[53]

8.7 Desisting from Asking for Death Penalties

Early in the military commission process, Borch informed Secretary Wolfowitz that he would not seek the death penalty for the first six defendants. This was Borch's

decision to make as the top prosecutor, and no one attempted to change his mind. While Borch personally believed that the death penalty was an appropriate punishment – and that some of the defendants might deserve it – he understood that much of the world, especially European public opinion, was hostile to the death penalty. If the prosecution announced that the defendants faced a capital sentence, the risk was that the military commission process would become an argument about the morality of the death sentence instead of a discussion about the evils of terrorism and the guilt of those being prosecuted for war crimes. Not willing to run this risk – and perhaps damage his chances of winning in the court of public opinion – Borch took the death penalty off the table.

There were other reasons to avoid the death penalty in the first six cases. There was every reason to think that some of the defendants desired martyrdom, and consequently wanted to be put to death. It follows that removing capital punishment from the process would undercut public sympathy for Al Qaeda by depriving the defendants of any prestige that might be gained from a death sentence. There was also another, albeit less important, reason to remove the death penalty from consideration: Borch believed that Colonel Gunn and his defence counsel would fight much harder if their clients faced a death sentence; taking the ultimate punishment away might encourage a more cooperative attitude and even a willingness to advise their clients to plead guilty in return for an agreed upon sentence.

8.8 Performance Mistakes

The prosecution made three major performance mistakes between May 2003 and May 2004, all of which affected the timing of the 'opening' of the play.[54] First, it failed to understand the depth of British government opposition to the trial of two British citizens, Moazzam Begg and Feroz Abbasi. Attempts to overcome this opposition delayed the trial of all defendants for months – thus damaging the overall prosecution efforts. Second, the prosecution was never able to overcome opposition from those within the Bush administration who believed that there was no good reason to prosecute Al Qaeda terrorists at military commissions. This opposition delayed the start of the trials – ensuring that there was no performance for months. Third and finally, Borch failed to convince Secretary Wolfowitz and others that the actual results of the trial in the courtroom, while important, paled in significance when balanced against the need to win in the court of public opinion.[55]

While Abbasi and Begg were ideal defendants because they spoke English and their trial would have proceeded without the aid of a translator, Lord Peter Goldsmith, the United Kingdom's Attorney General, decided that the two men could not be tried at a military commission because there were not sufficient guarantees that they would receive a fair trial. At first, Goldsmith voiced these concerns privately, but he then began making public statements about his unhappiness with the military commission process. The Defence Department General Counsel, Jim Haynes, tried to convince Goldsmith that Abbasi and Begg would enjoy a fair trial, and Haynes and a team of lawyers even flew to London to meet face-to-face with Goldsmith. But it was to no avail. Nothing Haynes said satisfied the British government's concerns. Goldsmith would not compromise and his public pronouncement that a military commission 'did not offer sufficient guarantees of a fair trial'[56] for the two UK citizens, meant that American efforts to prosecute Abbasi and Begg collapsed. For political reasons, the United States could not prosecute the men in the face of official British opposition,

and ultimately both Abbasi and Begg were released from Guantanamo (and returned to the United Kingdom). While this left four defendants still facing trial, valuable time had been lost.

A further shortcoming in the performance was the failure to convince Secretary Wolfowitz and others in leadership roles that military commissions needed to start soon or the United States risked 'losing' the trial in the court of public opinion. While the Chief Prosecutor repeatedly argued that the trial should go forward as soon as possible, others with great credibility argued the opposite. Former US Attorney General William 'Bill' Barr,[57] for example, argued vociferously against the trials – more than once in the presence of Borch. Barr insisted that there was no reason to try the detainees and advised Secretary Wolfowitz that he and the Bush administration should simply detain these alleged terrorists for the duration of the war – just as the United States had done with German and Italian prisoners of war in World War II. Given Barr's stature in the government – as a first class lawyer who had been the country's Attorney General – it was perhaps to be expected that Barr had more credibility with Paul Wolfowitz than did a career military lawyer with whom both Wolfowitz and the public were less familiar.

Particularly telling was a Pentagon conversation between Borch and Wolfowitz in late July 2003, after Rumsfeld had delegated his responsibilities as Appointing Authority to Wolfowitz and after the president had selected the first six defendants for prosecution. Secretary Wolfowitz began by asking if Borch could guarantee that the prosecution would win every case it brought to trial. Colonel Borch answered 'no', in that victory at trial could not be assured because of the nature of the process and the unpredictability of any jury. But Borch told Wolfowitz that the prosecution had selected good solid cases and that there was every reason to expect good results. Then Borch said, 'Mr. Secretary, I can win these cases. But convictions are not what is important. Rather, the only important trial is the trial in the court of public opinion.' This provoked a sceptical look from Wolfowitz, and the response, 'Colonel, do you really believe that?'[58]

How can Wolfowitz's reticence to move forward with the military commissions be explained? A producer wants to be certain of 'good reviews' from the critics before launching a play. Paul Wolfowitz was no different: he was ultimately accountable to both Rumsfeld and Bush for the success of the Guantanamo performance. Just as a producer is ultimately responsible for what happens in the theatre when the lights go out and the actors take the stage, politicians too are accountable for their decisions. It is likely that Wolfowitz decided that the uncertainty surrounding the process made it too risky to move ahead, despite the urgings of the Chief Prosecutor.

8.9 Denouement: Comments, Criticisms and 'Loose Ends'

In 2004, Salim Hamdan's defence counsel filed a writ of habeas corpus in the US District Court in Washington, DC, challenging the lawfulness of his detention in Guantanamo Bay, Cuba. Ultimately, *Hamdan v. Rumsfeld*[59] reached the US Supreme Court, which decided in June 2006 that the military commission process created by Bush's Military Order of 13 November violated both US and international law. While the court was careful not to rule that the President lacked authority under Article II of the US Constitution to create a military commission framework, it did decide that the process created by Bush's Military Order was deficient because it violated both the

Uniform Code of Military Justice (created by the US Congress to govern courts martial) and the Geneva Conventions.

The decision in *Hamdan v. Rumsfeld* meant the end of the legal framework created by the President using his authority as commander-in-chief and resulted in the US Congress creating an entirely new military commission process by statute in the Military Commissions Act of 2006.[60] That legislation, amended by Congress in 2009,[61] now controls the structure of military commissions taking place in Guantanamo today.

This legislative response to *Hamdan v. Rumsfeld* has completely remade the process. The legal basis for its existence flows from Article I of the Constitution rather than from Article II. Significant changes adopted by Congress – in order to satisfy the Supreme Court ruling in *Hamdan v. Rumsfeld* – include: the creation of pre-trial, trial, and post-trial procedures, including elements of proof (other than the requirement for a full and fair trial, there were relatively few procedural rules in the Bush military commission process); the creation of a military judge (there was no judge in the original military commission); and the right to appeal to the US Supreme Court (after appealing to a newly created Court of Military Commission Review and District of Columbia Circuit Court of Appeals). A newly created *Manual for Military Commissions, United States (2010 edition)*, consisting of more than 250 pages of text, and modelled closely on the *Manual for Courts-Martial, United States*, also had been created by the Defense Department to ensure that the new military commissions operate more like ordinary courts martial.[62]

Was the performance in Guantanamo Bay from 2003 to 2004 a 'hit' or a 'miss'? Let us hear from the critics. Given the Supreme Court's ruling in *Hamdan v. Rumsfeld*, it was a 'miss' in terms of how many terrorists were convicted of war crimes during the period. It was also a 'flop' in the sense that the military commission process created by President Bush was declared to be legally deficient. Was the performance a victory in the court of public opinion? The jury are still out and the answer to this question will have to wait until more commissions are completed at Guantanamo Bay.

Despite these theatrical failures, however, it is clear that the Guantanamo performance succeeded in at least three areas. First, the selection of Hamdan, al Bahlul, al Qosi and Hicks as defendants was a success, in that all four men were eventually tried and convicted. Second, the theory of liability adopted by the prosecution remains intact. Third and finally, the United States government continues to support the legality of military commission trials for terrorists who attack the United States and its allies; the administration of President Barack Obama appears just as committed as its Republican predecessor to holding military tribunals for terrorists (albeit not at Guantanamo Bay).

What happened to the defendants initially selected for prosecution? In March 2007, David Hicks pleaded guilty and was sentenced to seven years in jail. He served nine months in Australia and was released.[63] In August 2008, Salim Hamdan was convicted by a military commission of providing material support to terrorism and sentenced to five and a half years' imprisonment. He returned to Yemen to serve his sentence and was released in 2009.[64] Al Bahlul was convicted by a military commission in 2008, and sentenced to life imprisonment.[65] As for al Qosi, he pleaded guilty in July 2008 and was sentenced the following month to fourteen years in jail.[66] Finally, in October 2010, Canadian citizen Omar Khadr pleaded guilty to murder in

violation of the law of war and other related offences and was sentenced to fourty years' imprisonment. He will serve all but one year of his sentence in Canada.[67]

Colonel Borch was dismissed from his position after one year in the job. Two Air Force lawyers, Major Rob Preston and Captain John Carr, convinced that the military commission process was unfair and mismanaged, accused Borch of wrongdoing. In an email message sent to the Chief Prosecutor, the two attorneys 'accused fellow prosecutors of ignoring torture allegations, failing to protect exculpatory information, and withholding information from superiors'.[68] An investigation into their allegations concluded that their claims were without merit, but retired Major General John D. Altenburg, Jr., who had recently replaced Wolfowitz as the Appointing Authority, decided that it would be best for the prosecution team if Preston, Carr and Borch went elsewhere.[69] Colonel Borch retired from active duty the following year.

Some final thoughts about 'Guantanamo as Theatre'. Regardless of what happened between 2003 and 2004, the basic questions remain: how do we balance freedom with safety? How do we design a legal system that balances the requirement for full and fair trials with national security needs in an on-going war on terrorism? The new military commissions created by the US Congress will have to wrestle with these questions and try to arrive at a satisfactory answer.

Notes

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[1] This article is an expanded version of a lecture presented on 30 March 2011, at the University of Leiden's Centre for Terrorism and Counterterrorism in Den Haag, Netherlands. The author thanks Prof. Dr. Beatrice A. de Graaf for suggesting to him that the Guantanamo Bay terrorist prosecutions have much in common with a theatre performance, and Colonel Patrick D. O'Hare for improving this article with his insightful comments and suggestions.

[2] Conversation between Deputy Secretary of Defence Paul Wolfowitz and Chief Prosecutor Fred Borch, Office of the Deputy Secretary of Defence, Pentagon, Washington, DC, July 2003.

[3] Military commissions are war courts, and have been the traditional tribunal for the trial of the enemy for war crimes. After World War II, for example, Australia, Canada, France, Great Britain, the Netherlands, Norway, Poland, and the United States convened 2,116 military commissions or similar war courts to try German, Italian and Japanese defendants for war crimes committed during the war. John A. Appleman, *Military Tribunals and International Crimes* (Westport/Connecticut: Greenwood Press, 1971) p. x. - In contemporary American jurisprudence, a military commission is a war court with extremely narrow subject matter jurisdiction, in that it has cognizance only over violations of the law of war that occur during armed conflict. Additionally, the US military commission established by President George W. Bush in the aftermath of the 9/11 attacks had very narrow *in personam* jurisdiction, in that only non-US citizens could be tried by it. For an exhaustive historical examination of the military commission in US legal history, see David Glazier, 'Precedents Law: The Neglected History of the Military Commission', *Virginia Journal of International Law,* 46:1 (2005) pp. 5-82. See also: Wigall Green, 'The Military Commission', *American Journal of International Law,* 42:1 (1948) p. 832.

[4] While the relationship between the news media and public opinion is important to a discussion of the Guantanamo 'audience', it is beyond the scope of this article to delineate where the news media stops reporting and starts creating public opinion.

[5] For a comprehensive history of 9/11, see Stephen E. Atkins, *The 9/11 Encyclopedia* (Westport, Connecticut: Praeger, 2008). For casualties, see Jesse Green, 'Accounting of the Dead', *The Encyclopedia of 9/11* (date unkown), http://nymag.com/news/9-11/10th-anniversary/number-of-deaths/. Retrieved 10 January 2012.

[6] Even prior to 9/11, Osama bin Laden was 'the public face of anti-American terrorism'. He and Al Qaeda were responsible for the terrorist bombings of the US embassies in Dar-es-Salam and Nairobi that occurred in August 1998; 224 people were killed and more than 5,500 injured. See:

Michael Grunwald and Vernon Loeb, 'Charges Filed Against bin Laden', *Washington Post* (5 November 1998), p.A17.

[7] While Taliban elements continue to wage 'jihad' against US and North Atlantic Treaty Organisation forces in Afghanistan, the country is no longer a major haven for terrorists waging war against the United States.

[8] Military Order of 13 November 2001, 'Detention, Treatment, and Trial of Certain Non-U.S. Citizens in the War Against Terrorism', *Federal Register*, 66:222 (16 November 2001) 57833. In the preamble to this order, Bush stated that he derived his authority for ordering the detention and trial of terrorists from his powers under the US constitution as commander in chief and from the joint resolution enacted by the US Congress authorising him to use military force against those responsible for the 9/11 attacks on the World Trade Centre and Pentagon.

[9] Ibid., Section 1(e). Note that only non-US citizens were subject to the Military Order of 13 November 2001; the rights guaranteed American citizens under the US Constitution made it problematic for them to be detained by the military and tried by a military commission.

[10] For example, Sheik Omar Abdel Rahmen, along with several other men, was convicted in a US District Court in New York City of conspiring to wage war against the United States in bombing the World Trade Center in 1993. *United States v. Rahmen*, 189 Federal Reporter 3d 88 (2d Circuit, 1999), *certiorari denied*, 528 United States 1094 (2000). Similarly, those responsible for the bombings of the US embassies in Tanzania and Kenya were tried for murder in federal courts. *United States v. Bin Laden*, 92 Federal Supplement 2d 189 (Southern District New York, 2000). Note also that even after Bush's decision to prosecute Al Qaeda members at military tribunals, one high-profile Al Qaeda member, Zacharias Moussaoui, was indicted in December 2001 and subsequently tried and convicted in a U. civilian court. See *United States v. Moussaoui*, 333 Federal Reporter 3d.509 (2003). See also: Seymour M. Hersh, 'The Twentieth Man', *The New Yorker* (30 September 2002), p. 64.

[11] The scope of the 9/11 attacks was so great that all serious legal scholars believe they qualified as an 'armed attack', permitting self-defence under Article 51 of the United Nations Charter. See generally: Yoram Dinstein, *War, Aggression and Self Defence*. 3rd ed. (New York: Cambridge University Press, 2001), pp. 165-183.

[12] For a good discussion of 'some of the legal and practical implications of treating terrorist acts as war crimes', see Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (Washington, DC: Congressional Research Service Report for Congress, 2001).

[13] Proclamation 2561, 'Denying Certain Enemies Access to the Courts', *Federal Register*, 7: 5101 (1942).

[14] 'Order Establishing a Military Commission to Try Eight Captured German Saboteurs, *Federal Register*, 7: 5103 (2 July 1942).

[15] Military Order of 13 November 2001, Sec. 4(c) (1) & (2).

[16] Roosevelt created the military commission on 2 July; the military commission met from 8 July 1942 until 1 August 1942; the commission members sentenced all eight defendants to death on 1 August; six of the eight were executed on 8 August 1942 (Roosevelt commuted the sentences of two of the eight German accused to life imprisonment). For more on the trial of the U-boat saboteurs, see *Ex parte Quirin*, 317 United States 1 (1942). See also Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law*. 2nd ed. (Lawrence: University of Kansas Press, 2003).

[17] Ibid., Section 1(f).

[18] U.S. Constitution, Article II, Sec. 2 ('The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States...').

[19] The U. Constitution creates a three-part government. Article I sets out the authority of Congress. Article II creates an Executive Branch headed by the president. Article III establishes the Judiciary, with the Supreme Court at the top and 'such inferior Courts as the Congress may ... establish'. As a general proposition, the *co-equal* and *independent* status of each of the three branches means that court decisions arising out of Article III courts have no applicability to a military court created by the President under Article II. For a discussion of this 'separation of powers', see generally Pauline Maier, *Ratification: The People Debate the Constitution* (New York: Simon & Schuster, 2010). Perhaps even more importantly, the Bill of Rights contained in the first ten Amendments to the Constitution arguably applies only to courts operating under Article I and Article III, and not to the military commissions established by Bush under Article II. The extent to which the Bill of Rights applies outside Article III tribunals is uncertain. See Frederic Lederer and Frederic Borch, 'Does

the Fourth Amendment Apply to the Armed Forces?', *William and Mary Bill of Rights Journal*, 3:1 (1994), p. 219.

[20] Two thirds of the panel members at a military commission had to agree that an accused was guilty for him to be convicted, and a two-thirds vote was required for any sentence, including death. Military Order, Sec. 4.(c)(7).

[21] Military Order, Sec. 4.(c)(8).

[22] Rumsfeld delegated his authority to Wolfowitz on 21 June 2003. Department of Defence, *Military Commission Order No. 2*, subj.: Designation of Deputy Secretary of Defence as Appointing Authority (21 June 2003).

[23] Under Military Order, Sec. 4.(b), Secretary Rumsfeld was required to promulgate 'orders and regulations' governing the operation of any tribunal that would prosecute Al Qaeda members, to include 'orders for the appointment of one or more military commissions'. After a short period of time, however, Rumsfeld decided that his work as Defence Secretary left him with insufficient time to perform as the 'Appointing Authority'. Consequently, as permitted by Sec. 6.(b), he delegated his appointing authority powers to the Deputy Secretary of Defense.

[24] For more on Haynes and his role in military commissions, see Vanessa Blum, 'Pentagon's Law Man', *Legal Times* (10 December 2001). For a decidedly negative view of Haynes' role as Defence Department General Counsel, see Scott Horton, 'Jim Haynes's Long Twilight Struggle', *Harper's Magazine* (8 February 2008), http://harpers.org/blog/2008/02/jim-hayness-long-twilight-struggle/. Retrieved 13 January 2012.

[25] Lang's master of laws degree in advanced litigation techniques was from Temple University's Beasley School of Law, Philadelphia, Pennsylvania.

[26] Neil A. Lewis, 'Threats and Responses: The Tribunals, Six Detainees May Soon Face Trial', *New York Times* (4 July 2003), p.A1. Another potential actor, Canadian Omar Ahmed Khadr, was considered by the prosecution for the role of defendant in the Guantanamo play but, as will be explained, was ultimately rejected as unsuitable because his trial would not further the goals of the performance.

[27] Just as Godot is a central character in Samuel Beckett's absurdist play *Waiting for Godot*, despite the fact that he never appears on the stage. Samuel Beckett, *Waiting for Godot: A Tragicomedy in Two Acts* (New York: Grove Press, 1994).

[28] In 1903, the Government of Cuba granted the United States a *perpetual* lease of territory for a naval station at Guantanamo Bay, Cuba. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations (23 February 1903), http://avalon.law.yale.edu/20th_century/dip_cuba002.asp. Retrieved 27 December 2011.

[29] 'A Guantanamo Timeline', *The Washington Post* (date unkown) http://www.washingtonpost.com/wp-srv/world/daily/graphics/guantanomotime_050104.htm. Retrieved 23 November 2011.

[30] The Chief Defense Counsel also received the same public affairs training, and developed a theme for his defence efforts. Colonel Gunn's theme was that the defence of these men was both legally and morally correct, and that his defence counsel should be applauded for agreeing to defend unpopular (if not despised) defendants. For an example of Gunn's use of the media to get his theme out, see Jeffrey Toobin, 'Annals of Law: Inside the Wire: Can an Air Force colonel help the detainees at Guantanamo?', *The New Yorker* (4 February 2004), pp. 36-52.

[31] In ancient Greek drama, a group of actors who 'served as ... commentators on ... the main action of the drama', *Webster's Unabridged Dictionary*. 2nd ed. (New York: Random House, 1998), p.367. In terms of the Guantanamo drama, the idea was that all prosecutors and other actors supporting the prosecution would include the words 'full and fair trial' in every public pronouncement they made to the news media.

[32] The term 'true believer' comes from Eric Hoffer's treatise on the psychological causes of fanaticism and explores why individuals enthusiastically embrace a group's ideology. Eric Hoffer, *The True Believer: Thoughts on the Nature of Mass Movements* (New York: Harper & Row, 1951).

[33] For more on Hamdan, see Jonathan Mahler, 'The Journey of Salim Hamdan', *New York Times Magazine* (8 January 2006), p. 44.

[34] Indictment, United States v. Ali Hamza Ahmad Sulayman Al Bahlul, See also, Stephen Hodges, 'Military indicts 2 Guantanamo terror suspects', *Chicago Tribune* (25 February 2004), p.1.

[35] 'Indictment of al Bahlul', *Office of military commissions* (23 February 2004), http://www.mc.mil/CASES/MilitaryCommissions.aspx. Retrieved 31 December 2011.

[36] Ibid.

[37] 'Alleged al-Qaida video maker's trial opens at Guantanamo Bay', *The Guardian UK* (28 October 2008), p. 1.

[38] Notes, Statement by Ali Hamza al Bahlul, Chief Prosecutor's files.

[39] Indictment, *United States v. Ibrahim Ahmed Mahmoud al Qosi*, Charge: Conspiracy. See also Department of Defence News Release No. 0179-08, *Charges Referred Against Detainee Al Qosi* (5 March 2008), www.defence.gov/Releases/Release.aspx?ReleaseID=11735. Retrieved 12 December 2011.

[40] Indictment, *United States v. David Matthew Hicks*, June 2004, reprinted in Leigh Sales, *Detainee 002: The Case of David Hicks* (Melbourne: Melbourne University Press 2007), Appendix II, pp. 256-260.

[41] Sales, *Detainee 002*, pp. 26-27.

[42] The members of the Office of the Chief Prosecutor who were chiefly involved in formulating the prosecution strategy were Navy Commander Scott M. Lang (serving as Deputy Chief Prosecutor), Marine Corps Majors Kurt J. Brubaker and Stuart Couch, Air Force Majors Thomas A. Dukes and Robert J. Preston, and Army Captain Ronald Sullivan.

[43] Military Order, sec. 2(a)(1)(ii).

[44] The Abu Sayyaf Group (ASG) is located in the Philippines and emerged in the 1990s when it split off from the larger Moro National Liberation Front. The ASG's goal is to establish an independent Islamic state in areas of the southern Philippines heavily populated by Muslims. The group carries out kidnappings, bombings and assassinations to further its aims.

[45] Jemaah Islamiya ('Islamic Congregation') was founded in Indonesia in 1993. Its goal is to establish an Islamic caliphate in Southeast Asia. Jemaah Islamiya is best known for carrying out a terrorist car bombing on the island of Bali in October 2002; this attack killed more than 200 people.

[46] Lashkar-e-Tayyiba (LET) operates mainly from Pakistan and has training camps in Pakistan-controlled Kashmir. LET's primary goal is to liberate Muslims living in Indian Kashmir; its members have carried out numerous terrorist attacks against India.

[47] Formed in Egypt as the Islamic Jihad (EIJ), the group was created to overthrow the Egyptian government and replace it with an Islamic state. In the 1990s, the EIJ was led by Dr. Ayman al-Zawahiri, a surgeon who later became bin Laden's personal physician. After the death of bin Laden, al-Zawahiri took command of Al Qaeda.

[48] The Armed Islamic Group (GIA) was organised to overthrow the government of Algeria and replace it with an Islamic state. Between 1992 and 1998, the GIA killed hundreds of civilians by assassination and bombings in Algeria.

[49] The terrorist groups identified here were representative only; other groups (not known or in existence) could be members of the conspiracy, or join it.

[50] In Anglo-American jurisprudence, criminal liability generally requires *mens rea* (intent) plus an act; mere status is insufficient. For example, the US Supreme Court has held that while it is lawful to make using drugs a crime, it is not lawful to make it a crime to be addicted to drugs. See *Robinson v. California*, 370 United States 666 (1962). Similarly, at the Nuremberg war crimes prosecutions, while the United States concurred with the Soviets and others that the Nazi Schutzstaffel (SS) was a 'criminal organisation', it resisted efforts to punish individual SS members simply for membership of the SS and instead looked for a criminal act or acts by an SS member as a predicate for criminal liability.

[51] Military Commission Instruction No. 2 specified the offences triable by a military commission created pursuant to Bush's Military Order of 13 November 2001. The instruction was published on 30 April 2003.

[52] Al-Zawahari, also known as 'The Doctor' was born in Egypt in 1951. He merged his Egyptian Islamic Jihad organisation with bin Laden's Al Qaeda in 1998 and is sometimes described as the 'brains' of Al Qaeda. After the death of bin Laden in May 2011, Zawahari took command of Al Qaeda.

[53] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), p. 206.

[54] No one knows better than William Shakespeare that bad timing can cause an actor, director or producer to miss his moment:

We at the height are ready to decline.
There is a tide in the affairs of men
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries.
On such a full sea are we now afloat,
And we must take the current when it serves,
Or lose our ventures.

Julius Caesar, Act IV, Scene iii, lines 215-221.

[55] This failure to convince Wolfowitz and others in authority that the Guantanamo performance must start without delay if public opinion was going to accept both the legal and moral correctness of having military commissions was a performance mistake from which the Guantanamo play has yet to recover.

[56] Joshua Rozenberg, 'Guantanamo Bay trials unfair, says Attorney General', *The Telegraph* (26 June 2004), p. 1.

[57] William Pelham Barr served as U.S. Attorney General from 1991 to 1993. He served under President George H.W. Bush.

[58] Conversation between Deputy Secretary of Defence Paul Wolfowitz and Chief Prosecutor Fred Borch, Office of the Deputy Secretary of Defence, Pentagon, Washington, D.C., July 2003.

[59] *Hamdan v. Rumsfeld*, 548 United States 557 (2006).

[60] Military Commissions Act of 2006 (17 October 2006), Public Law 109-336, Title 10, United States Code, Sections pp. 948-949.

[61] Military Commissions Act of 2009 (8 October 2009), Public Law 111-84, Title 10, United States Code, Sections pp. 948-949.

[62] Department of Defence, *Manual for Military Commissions*. 2010 edition, http://www.defence.gov/news/d2010manual.pdf. Retrieved 27 December 2011.

[63] Sales, *Detainee 002*, pp. 254-55.

[64] Jerry Markon, 'Hamdan Guilty of Terror Support', *Washington Post* (7 August 2008) p.A1.

[65] On 9 February 2008, al Bahlul was re-charged under the military commission process created by Congress; he was convicted in November 2008 of conspiring with Al Qaeda, soliciting murder and providing material support for terrorism, and sentenced to life in prison. Al Bahlul remains incarcerated at Guantanamo Bay, Cuba. see Peter Finn, 'Guantanamo Jury Sentences bin Laden Aide to Life Term', *Washington Post* (4 November 2008) p. A1.

[66] Department of Defence, 'News Release No. 718-10; 'Al Qosi Sentence Announced'' (11 Augustus 2010), http://www.defence.gov/utility/printitem.aspx?print=http://www.defence.gov/releases/release.aspx?releaseid=13792. Retrieved 16 December 2011.

[67] Department of Defence, 'News Release No. 1002-10, "DoD Announces Sentence for Detainee Omar Khadr"' (31 October 2010), http://www.defence.gov/utility/printitem.aspx?print=http://www.defence.gov/releases/release.aspx?releaseid=14023. Retrieved 16 December 2011.

[68] Jess Bravin, 'Two Prosecutors At Guantanamo Quit in Protest', *Wall Street Journal* (1 August 2005), p. B1.

[69] For more on Borch's firing, see Sales, *Detainee 002*, pp. 157-65.