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“Trying Terrorists”

Hats off to Republican Senators John Warner, John McCain and Lindsay Graham for insisting on critical improvements to the President’s bill to authorize military commission trials for unlawful enemy combatants. Yet their alternative bill also suffers from grave deficiencies under international law, overlooked in public and congressional debate to date.

The Warner-McCain-Graham substitute is a vast improvement on the President’s proposal, which attempts to legalize essentially the same flawed system of military commission trials condemned by the Supreme Court this June in the *Hamdan* case.

Among other improvements, their substitute would bar admission of evidence obtained not only by torture, as the President proposes, but also by cruel, inhuman or degrading treatment. Their bill would also forbid convicting or sentencing an accused on the basis of evidence he has not been allowed to see and rebut. And their bill would channel appeals through the normal military appeals courts, rather than, as the President proposes, establishing a special – i.e., hand-picked -- court to review military commission decisions.

Their bill would thus go far to meet minimum international standards, avoiding further damage to our standing in the world and risk to our troops who may be captured by our adversaries.

Yet at least two fundamental issues under international law, which taint both the President’s and the substitute bill, have been largely absent from the public debate.

The first issue is whether alleged terrorists can or should be tried by military courts at all. When they are captured on a battlefield in a war, as in Afghanistan or Iraq, military trials are of course appropriate for any violations of the laws of war they have committed.

But what about alleged terrorists who are captured far from any traditional battlefield? Some prisoners at Guantanamo were captured in Bosnia or West Africa, accused of plotting to commit terrorist acts against the United States. International law treats such alleged terrorists, not as combatants, but as accused criminals who must be tried in ordinary criminal courts.

Consider, for example, the case of the leader of the Kurdish independence movement in Turkey, Abdullah Ocalan. He was accused of orchestrating a terrorist campaign that led to over 4,000 deaths in Turkey – more than the death toll from 9/11 in the US. He was tried in Turkey by a tribunal consisting of two civilian judges and one military judge. Midway through the trial, a third civilian judge, who had observed the entire proceeding, replaced the military judge.

Even so, a Grand Chamber of the European Court of Human Rights ruled that Ocalan had been denied a trial before an “independent and impartial” tribunal as required by international law. The Turkish military saw him as their enemy; how, then, could one expect a Turkish military judge to be impartial in judging his perceived enemy? Even if the judge were in fact impartial, doubts about his impartiality were reasonable. There was a lack of the appearance of impartiality, essential to a fair trial.

One may ask, then, whether any kind of US military trial of our perceived enemies will meet international standards of the appearance of impartiality. And will any resulting convictions be credible in the eyes of the world?

The second issue is one of discrimination. Both the President’s and the Warner-McCain-Graham bills allow military commission trials only for *foreigners* who are accused of being unlawful enemy combatants. A US citizen accused of committing the identical acts could not be tried by military commission, but would instead be entitled to trial by civilian courts or, at the least, by a court-martial.

How can this be rationally justified? Why should an alleged US citizen terrorist be entitled to greater fair trial protections than an alleged foreign terrorist?

The real answers are both constitutional and political: US citizens have rights under the Constitution which foreigners may not, and the public would less readily accept a military commission trial of an American citizen.

Neither reason holds water under international law. Nations may not discriminate against foreign citizens, especially in matters of fair trial, without a “reasonable and objective” basis. To say that the Constitution gives Americans greater protection is merely to admit that the Constitution discriminates. The question is whether there is any good reason for that discrimination, and in the case of accused terrorists, there is not.

In a similar case the highest court of Great Britain – the Law Lords of the House of Lords – ruled in 2004 that Britain’s system of administrative detention of suspected terrorists, which applied only to foreigners but not to British citizens suspected of terrorism, violated international standards of equal protection of the law, including the standards of the International Covenant on Civil and Political Rights, to which the US is also a party.

Britain then revised its laws to devise a system that treated citizen and non-citizen terrorist suspects equally.

If the US wishes to be seen in the world as fair and even-handed, we should not impose military commission trials on foreigners that we are unwilling to impose on our own citizens.

Fixing these defects in the Warner-McCain-Graham bill is not in the cards politically. But we should be on notice that the world will still have justifiable reservations, even if the substitute bill is enacted.

Doug Cassel’s commentaries are broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.