

**THE GUISE OF JUSTICE: JURISDICTION & EXTRADITION  
OF OSAMA BIN LADEN & AL QAEDA TERRORISTS**

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## I. INTRODUCTION

On September 12, 2001, the world woke up a different place. In New York, the dust had not yet settled from the World Trade Center Towers, the fires still burned within the massive mountain of twisted steel, as the world watched the horrific events unfold again and again on news stations around the world. The United States had been the victim of international terrorism. Not since a Sunday in December 1941, had the United States been attacked through the air on its own soil by foreign enemies. On September 11, 2001, nineteen men, by the order of Osama bin Laden, leader of the Al Qaeda terrorist organization, hijacked four U.S. commercial airliners bound for Los Angeles and used the planes as missiles. Within minutes, two planes hit the north and south towers at the World Trade Center complex just as people were getting to work. Moments later a plane slammed into the Pentagon in northern Virginia. A plane hijacked over Cleveland turned and headed towards Washington D.C., but the heroic passengers commandeered the plane and it plummeted into a field in Pennsylvania. By lunchtime Eastern Standard Time, 3,025 innocent people needlessly lost their lives. After the horrific attacks of September 11, 2001, the United States' "war on terrorism" had commenced. As the initial shock began to fade, bringing the persons responsible to justice became the focus of the United States as well as the feeling throughout the international community. Osama bin Laden and other high ranking Al Qaeda officials were blamed for planning, funding and executing the attacks on the United States.

The United States and the rest of the world undoubtedly have an interest in administering justice to Osama bin Laden and other high-ranking Al Qaeda members for the attacks on the World Trade Center, the Pentagon, and the flight that crashed in Pennsylvania in route to another target. George W. Bush stated in a speech to a joint session of Congress, "[w]hether we bring

our enemies to justice or bring justice to our enemies, justice will be done.”<sup>1</sup> The United Nations also condemned the terrorist attacks and vowed its support in pursuing and punishing terrorists.<sup>2</sup>

Various forums have been suggested as appropriate to bring Osama bin Laden and other Al Qaeda terrorists to justice. Some propose a trial in an international tribunal, such as the ones created by the United Nations for the atrocities committed in Rwanda<sup>3</sup> and the former Yugoslavia, or even in the International Criminal Court in the initial stages of development.<sup>4</sup> Others have suggested allowing the United States to try members of Al Qaeda in U.S. Federal District Courts; while President George W. Bush and his administration call for trial by a U.S. Military Tribunal.<sup>5</sup> All proposed forums raise numerous issues and concerns. With all the tribunals there are questions of whether jurisdiction is appropriate. Trying terrorists responsible for the attacks in the United States District Courts or by U.S. military commissions raise concerns of whether extradition would be possible if the terrorists were apprehended in another country.

Where to try persons accused of international terrorism acts, more specifically, where to try Osama bin Laden or other Al Qaeda members when they are finally apprehended? This note focuses on the requirements for jurisdiction of a few proposed forums, and the advantages and disadvantages of the proposed forums. Part II defines and applies the five recognized general principles of international jurisdiction to the proposed forums. Part III focuses on the jurisdiction of, advantages and disadvantages of United States Federal District Courts. Part IV discusses the jurisdiction of, advantages and disadvantages of the proposed use of United States Military Commissions. Part V of this note addresses the problems with extradition of captured terrorists. Part VI focuses on proposed international tribunals including: the tribunal created by

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<sup>1</sup> See George W. Bush, *Speech on September 20, 2001 concerning the terrorist attacks of September 11, 2001*, available at <http://www.september11news.com/PresidentBushSpeech.htm>.

<sup>2</sup> See G.A. Res 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (2001). The United Nations Security Council on September 12, 2001 condemned the terrorist attacks on New York, Washington, and Pennsylvania as a “threat to international peace and security,” a violation of the U.N. Charter. [hereinafter Resolution 1368].

<sup>3</sup> See Statute of the International Tribunal for Rwanda S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

<sup>4</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute].

<sup>5</sup> Military Order, Detention, Treatment, and Trial of Certain Non- Citizens in the War Against Terrorism § 2(A)(1)(i)-(iii), 66 Fed. Reg. 57,833, 57,834 (2001) [hereinafter Military Order].

the United Nations for the atrocities committed in Rwanda and the former Yugoslavia, and the International Criminal Court in its initial stage of development. Part VII concludes by finding the appropriate forum to administer justice to Osama bin Laden and other Al Qaeda terrorists for the atrocities of September 11, is to try the captured in the countries in which they are apprehended.

## II. GENERAL PRINCIPLES OF INTERNATIONAL JURISDICTION

### A. General Principles of International Law: Defined

International law recognizes five principles of extraterritorial jurisdiction: Territorial, National, Protective, Universal, and Passive Personal.<sup>6</sup> Territorial principle is satisfied when the crime takes place on a state's soil.<sup>7</sup> If a national of a state commits an act, then that state has proper extraterritorial jurisdiction.<sup>8</sup> The protective principle is based on the injury to a national interest.<sup>9</sup> For crimes that are so atrocious, any territory that has custody of the offender can exercise jurisdiction for that act; this is the universal principle.<sup>10</sup> The passive personal principle of extraterritorial jurisdiction is based on the nationality of the victim.<sup>11</sup> The basis surrounding these five principles of extraterritorial jurisdiction is the notion of state sovereignty.<sup>12</sup> The ability of a state to control conduct occurring within its territory, to protect its interests, and control its nationals and attach consequences to certain acts all relate to sovereignty.<sup>13</sup>

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<sup>6</sup> See *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991). See also Restatement (Third) of Foreign Relations §§ 402, 404 (1987); *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 435 (Supp. 1935)

<sup>7</sup> Id. See also Restatement (Third) of Foreign Relations § 402(1)(a) ("conduct that, wholly or in substantial part, takes place within its territory;" a state has jurisdiction over the offense).

<sup>8</sup> Id.

<sup>9</sup> Id. See also Restatement (Third) of Foreign Relations § 402(1)(c) (1987) ("conduct outside its territory that has or is intended to have substantial effect within its territory").

<sup>10</sup> Id. See also Restatement (Third) of Foreign Relations § 404 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present").

<sup>11</sup> Id.

<sup>12</sup> See *Harvard Research in International Law, Jurisdiction with Respect to Crime*, *supra* note 6.

<sup>13</sup> Id.

## **B. Application of General Principles**

When the acts of Osama bin Laden and other Al Qaeda members involved in the September 11 attacks are applied to these principles, international jurisdiction appears to be satisfied. The attacks took place in the territory of the United States; thus, the universally accepted principle of territorial principle is satisfied and the U.S. courts would have valid jurisdiction based on this principle. The national principle when applied would concede recognized jurisdiction to where the offender is a national. In the case of bin Laden, he was originally a national of Saudi Arabia, however, his citizenship has been revoked and he was exiled.<sup>14</sup> Thus, it does not appear that bin Laden is a national of any country, however a case could be made for Saudi Arabia having jurisdiction based on the national principle. The attacks on September 11 undoubtedly injured the United States interest, home and abroad; thus, U.S. jurisdiction would most likely be satisfied by the protective principle. However, ninety-one different countries had nationals who died on September 11.<sup>15</sup> As to each country that had nationals perish in the attacks, the degree of interests injured would have to be measured to determine proper jurisdiction under the protective principle. If the interests injured were severe, jurisdiction may be proper in any of the ninety-one countries.

The universal principle poses interesting quandaries. It is safe to say that the multiple hijackings of U.S. commercial airliners and using them as missiles, killing more than 3,000 persons in a matter of minutes would be considered an atrocious crime. Many past international agreements have failed to suppress terrorism because of the inability to define precisely what is

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<sup>14</sup>See *A Private Terrorist, Osama Bin Laden: Folk Hero, Pariah, Terrorist Kingpin*, available at [http://abcnews.go.com/sections/world/DailyNews/binladen\\_profile.html](http://abcnews.go.com/sections/world/DailyNews/binladen_profile.html) (Bin Laden was exiled from Saudi Arabia in 1994 for his activated towards the royal family as well as alleged terrorists activities, he traveled to Sudan and disappeared).

<sup>15</sup> See Bush, *supra* note 1. President Bush stated that we [United States] would not forget the citizens of eighty different nations who died with our own. See also Porter Anderson, *The 'Great Struggle': Consoling the Living*, available at <http://www.cnn.com/2002/US/09/11/ar911.memorial.main/index.html>.

covered.<sup>16</sup> Recent efforts in international law by treaties, conventions, or resolutions have increased the acceptance of what crimes will be included in this principle.<sup>17</sup> Crimes such as piracy, genocide, war crimes, hostage taking<sup>18</sup>, and hijacking aircrafts<sup>19</sup> are considered universally atrocious where there is a common international goal to suppress such acts. Most of the conventions and agreements require that a state make specific terrorist acts punishable by domestic laws and that an offender found in that state's territory would either be tried under its laws or extradited to a country that has jurisdiction.<sup>20</sup>

The universal principle of extraterritorial jurisdiction would give rise to jurisdiction in many different countries. The countries that are parties to the Convention for the Suppression of Unlawful Seizure of Aircraft (“Hijacking Convention”) (175 parties), and the International Convention Against the Taking of Hostages (“Hostage Convention”) (112 parties) would have appropriate jurisdiction to try Osama bin Laden and other Al Qaeda terrorists involved in the attacks.<sup>21</sup> Osama bin Laden allegedly planned, ordered, and executed the hijackings of September 11. The plan involved the hijacking of multiple U.S. commercial aircrafts, a violation of the Hijacking Convention, which would also violate the Hostage Convention because the hijackers took hostages before the plan was fully executed. Both of these conventions calls for the immediate punishment of the offenders in the country apprehended or extradition to a country that has appropriate jurisdiction. Thus, under international law, the attacks would be

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<sup>16</sup> See Restatement (Third) of Foreign Relations § 404 cmt. a. (1987).

<sup>17</sup> European Convention on the Suppression of Terrorism, Concluded at Strasbourg, 27 January 1977. Entered into force, 4 August 1978. 1137 U.N.T.S. 93. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Concluded at New York, 14 December 1973. Entered into force, 20 February 1977. 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Conclude at New York, 17 December 1979. Entered into force, 3 June 1983. 1316 U.N.T.S. 205 [hereinafter Hostage Convention]; International Convention for the Suppression of Terrorist Bombings, Concluded at New York, 12 January 1998. Entered into force, 23 May 2001. Doc. A/RES/52/164; International Convention for the Suppression of the Financing of terrorism, Concluded at New York, 9 December 1999. Entered into force, 10 April 2002. Resolution A/RES/54/109; Convention for the Suppression of Unlawful Seizure of Aircraft, Concluded at Hague, 16 December 1970. Entered into force 14 October 1971. 860 UNTS 105 [hereinafter Hijacking Convention].

<sup>18</sup> See Hostage Convention, *supra* note 17, Article 1.

<sup>19</sup> *Id.*

<sup>20</sup> See Conventions, *supra* note 17.

<sup>21</sup> *Id.*

considered a universal crime and therefore, any country that apprehends Osama bin Laden and other Al Qaeda terrorists involved in the September 11 attacks could try them under the universal principle of extraterritorial jurisdiction.

The final extraterritorial principle recognized in international law is the passive principle. The United States could base jurisdiction on this principle because most of who died on September 11 were nationals of the U.S. However, 91 other countries lost nationals to the attacks; each of which would, arguably, have jurisdiction based on the protective principle. The protective principle is not universally recognized in international law. The Restatement (Third) of Foreign Relations states: “[t]he [protective] principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.”<sup>22</sup> Hence, the protective principle of extraterritorial jurisdiction would be appropriate over Osama bin Laden and other Al Qaeda terrorists involved in the attacks.

### **III. UNITED STATES FEDERAL DISTRICT COURTS**

#### **A. JURISDICTION OF UNITED STATES FEDERAL DISTRICT COURTS**

The United States District Courts (“U.S. courts”) would have internationally recognized jurisdiction under four of the five principles established in international law. The attacks in New York, Washington, and Pennsylvania on September 11 all took place in the United States; thus, the territorial principle is sufficient to confer jurisdiction to the U.S. courts. There is little doubt that the terrorist attacks on 9/11 caused severe injury to an interest of the United States. The U.S. has an international right to protect its interests home and abroad. Such an injury to a substantial U.S. interest a U.S. interest would confer jurisdiction under the protective principle. The United States also has an interest in protecting its Nationals. Over 3000 U.S. Nationals died,

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<sup>22</sup> Restatement (Third) of Foreign Relations § 402 cmt. g.

thus satisfying the passive principle. Crimes of terrorism are considered universal crimes, for which any country has jurisdiction to prosecute the terrorist, including the United States. Thus, the universal principle is satisfied. The protective and universal principles are controversial and not recognized by everyone in the international community.

In *United States v. Yunis*, the United States Court of Appeals, District of Columbia Circuit was faced with the problem of whether the protective and universal principles were a proper exercise of personal jurisdiction over a hijacker.<sup>23</sup> In 1985, Yunis and four other men boarded Royal Jordanian Airlines Flight 402.<sup>24</sup> Shortly before the take-off the men hijacked the plane.<sup>25</sup> Among the passengers were two American citizens who were tied up with the rest of the people on board.<sup>26</sup> After several attempts to fly to different locations, the plane ended up in Beirut.<sup>27</sup> The hijackers released the passengers, held a press conference, blew up the plane and fled.<sup>28</sup> The Federal Bureau of Investigation lured Yunis on a boat for an alleged drug deal, where he was detained as soon as the boat reached international waters.<sup>29</sup> Yunis appealed his conviction claiming the district court lacked subject matter and personal jurisdiction.<sup>30</sup>

The court held the Hostage Taking Act<sup>31</sup>, which Yunis was convicted under, was not in conflict with international law.<sup>32</sup> It noted that the U.S. Hostage Taking Act was enacted to execute the Convention Against Taking of Hostages<sup>33</sup>, under which a party state can exercise jurisdiction over persons who take nationals hostage “if that state considers it appropriate.”<sup>34</sup>

The court next discussed the five generally recognized principles of extraterritorial jurisdiction

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<sup>23</sup> *United States v. Yunis*, 924 F.2d. 1086 (D.C. Cir. 1991).

<sup>24</sup> *Id.* at 1089.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1090.

<sup>31</sup> See U.S.C. § 1203. Hostage Taking Act.

<sup>32</sup> *Yunis*, 924 F.2d at 1090.

<sup>33</sup> See Hostage Convention, *supra* note 17.

<sup>34</sup> *Yunis*, 924 F.2d at 1090.

and concluded that the protective and universal principles were satisfied.<sup>35</sup> Further the court explained that the job of the judicial system is to abide by the Constitution, laws, and treaties of the United States, “not to conform the laws of the land to norms of customary international law.”<sup>36</sup> The court stated in regards to the universal and protective principles, “Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved.”<sup>37</sup> United States courts have allowed the extraterritorial use of penal laws based on any one of the five principles of extraterritoriality.<sup>38</sup>

The United States by statute has specially conferred jurisdiction to the U.S. courts for particular crimes. For example, under the crime of Aircraft Piracy, 49 U.S.C § 46502<sup>39</sup>, the statute proclaims there is jurisdiction over the crime of aircraft piracy if<sup>40</sup> “a national of the United States was aboard the aircraft<sup>41</sup>; an offender is a national of the United States<sup>42</sup>; or an offender is afterwards found in the United States.”<sup>43</sup> By adding this section on jurisdiction Congress has instilled the protective, national, and territorial principles found under international law. Even where the intent of Congress is vague, it does not negate jurisdiction. “[U.S.] courts will not blind themselves to potential violations of international law where legislative intent is ambiguous.”<sup>44</sup> Therefore, if the statute explicitly confers jurisdiction there is little problem, but even where it is not expressly stated, a U.S. court can find jurisdiction over certain offenses.

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<sup>35</sup> *Id.* at 1091.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1092.

<sup>38</sup> *Chua Han Mow*, 730 F.2d at 1312.

<sup>39</sup> 49 U.S.C. § 46502 (1996).

<sup>40</sup> 49 U.S.C. § 46502 (b)(2).

<sup>41</sup> 49 U.S.C. § 46502 (b)(2)(A).

<sup>42</sup> 49 U.S.C. § 46502 (b)(2)(B).

<sup>43</sup> 49 U.S.C. § 46502 (b)(2)(C).

<sup>44</sup> *See Yunis*, 924 F.2d. at 1091.

## **B. Offenses Available In United States District Courts**

If Osama bin Laden or Al Qaeda members were tried in the U.S. courts, what offenses could be tried? The United States could prosecute for international violations of the law of nations, more specifically war crimes, and grave breaches of the 1949 Geneva Conventions.<sup>45</sup> The United States has enacted a wide array of federal antiterrorism acts. For example, Zacarias Moussaoui,<sup>46</sup> a French nationalist, has been charged in the United States District Court with acts connected with the September 11 terrorist attacks. Specifically, Moussaoui was charged in United States District Court with Conspiracy to Commit Acts of Terrorism Transcending National Boundaries<sup>47</sup>; Conspiracy to Commit Aircraft Piracy<sup>48</sup>; Conspiracy to Destroy Aircraft<sup>49</sup>; Conspiracy to Use Weapons of Mass Destruction<sup>50</sup>; Conspiracy to Murder United States Employees<sup>51</sup>; and Conspiracy to Destroy Property.<sup>52</sup> There is a considerable amount of antiterrorism legislation at the U.S. court's disposal, with even more proposed in response to the attacks of September 11.

## **C. Advantages: United States District Courts**

There are several advantages to prosecuting Osama bin Laden in U.S. courts. The United States has countless antiterrorism legislation at the prosecutor's discretion; thus, finding crimes that would lead to justice being served would be easier found. The international community would be more willing to accept a decision in the U.S. courts, as opposed to a secret military tribunal headed by the United States. Countries may be more willing to extradite to U.S. civilian courts rather than a military commission. In the U.S. courts, due process guarantees would be afforded to the suspects; even to the likes of bin Laden. U.S. courts have broad powers to protect

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<sup>45</sup> See 18 U.S.C. §2441 (2000); see, e.g., Regulations on the Law and Customs of War on Land, Art. 25, annex to Hague Convention on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>46</sup> Indictment of Zacaria Moussaoui, available at <http://www.usdoj.gov/ag/moussaouiindictment.htm>.

<sup>47</sup> 18 U.S.C. §§ 2332b(a)(2) & (c).

<sup>48</sup> 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B).

<sup>49</sup> 18 U.S.C. §§ 32(a)(7) & 34.

<sup>50</sup> 18 U.S.C. § 2332a(a).

<sup>51</sup> 18 U.S.C. §§ 1114 & 1117.

<sup>52</sup> 18 U.S.C. §§ 844(f), (i), (n).

information, witnesses, informants, judges, jurors, and those involved in the judicial process.<sup>53</sup>

“[T]he use of prosecutorial techniques developed in fighting organized crime has taught prosecutors that they can get testimony in return for deals with low ranking members of a conspiracy, and that putting defendants on trial together gives a great ability to show jurors the full extent of the criminal organization.”<sup>54</sup>

#### **D. Disadvantages: United States District Courts**

Prosecuting Osama bin Laden and Al Qaeda terrorists in U.S. courts has various disadvantages. Unlike the military commissions, there are strict rules of evidence which act to limit what can be presented in U.S. courts. The court proceedings would be conducted in an open forum and the record would be public. This is especially a concern of the intelligence agencies because there is classified information that may be beneficial to Al Qaeda that would be easily accessible. However, there is the 1980 Classified Information Procedures Act that provides rules on sensitive information at trial, but the proceedings are nonetheless public.<sup>55</sup> Besides classified information, there is other useful information that may come to fruition by trial in an open forum. For example, “[p]ublications, as took place in the 1993 World Trade Center bombing, of existence engineering data on the construction of the towers; such information is public but not easy to obtain, unless, for example, it is brought into open court in a trial.”<sup>56</sup> There are concerns among the international community as to whether any terrorist linked to the horrific acts of 9/11 could obtain a fair and impartial trial. It would be hard to imagine finding a person to sit on a jury whose life was not affected in some way by the attacks.

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<sup>53</sup> Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv. J.L. & Pub. Pol’y 591, 607 (2002).

<sup>54</sup> *Id.*

<sup>55</sup> See Anderson, *supra* note 53, at 609.

<sup>56</sup> *Id.*

#### IV. UNITED STATES MILITARY COMMISSIONS

##### A. Jurisdiction of United States Military Commissions

President George W. Bush and his administration have been adamant on prosecuting apprehended terrorists in a military tribunal. On November 13, 2001, President Bush, as Commander in Chief of the Armed Forces of the United States issued Military Order 57833 titled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (“Military Order”).<sup>57</sup> The Military Order proclaims in order “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order ... be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”<sup>58</sup> Individuals subject to this order are non-U.S. citizens who are or were a member of Al Qaeda<sup>59</sup>, or has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism<sup>60</sup> ...” and finally, anyone who provides safe haven to either of the former.<sup>61</sup> On March 22, 2002, the Defense Department issued its Military Commissions Order No.1, Procedures For Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (“Order 1”), which clarifies the President’s Military Order. Order 1 expounds on President Bush’s Military Order by stating the rules of evidence, the defendants choice of counsel, defendant’s right to have a public proceeding, unless the presiding officer deems it at odds with the Military Order, and the minimal due process guarantees.<sup>62</sup>

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<sup>57</sup> See Military Order, *supra* note 5.

<sup>58</sup> Military Order(e), *supra* note 5.

<sup>59</sup> Military Order(2)(a)(1)(i), *supra* note 5.

<sup>60</sup> Military Order(2)(a)(1)(ii), *supra* note 5.

<sup>61</sup> Military Order(2)(a)(1)(iii), *supra* note 5.

<sup>62</sup> U.S. Dep’t of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>

International law recognizes the use of military courts to adjudicate prisoners during armed conflict.<sup>63</sup> Article 84 of the third Geneva Convention states that, "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense."<sup>64</sup> Court-martials are a permissible forum to prosecute prisoners of war under United States law as well; however, the Uniform Code of Military Justice ("UMCJ")<sup>65</sup> limits personal jurisdiction to U.S. military personnel<sup>66</sup>, prisoners of war<sup>67</sup>, and a restricted class of civilians.<sup>68</sup> The legal basis for the creation of military commissions in the United States is vested in Congress' constitutional power to define and punish offenses against the law of nations; Congress has conferred the creation of military tribunals to the executive branch.<sup>69</sup>

In *Ex parte Quirin*<sup>70</sup>, the United States Supreme Court was faced with the question of whether the creation of military commissions by executive order, was within the scope of the President's power granted by statute or the Constitution of the United States, and whether the Fifth and Sixth Amendments would allow trial by jury. *Ex parte Quirin* was a case involving alleged German saboteurs who received training in Germany, under the cover of darkness, waded ashore in Florida from a German submarine back into the United States with the intent on destroying war industries and war installations.<sup>71</sup> All the men involved were taken into custody in New York and Chicago.<sup>72</sup> Pursuant to President Franklin D. Roosevelt's Military Order 5103,

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<sup>63</sup> Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, 96 Am. J. Int'l L. 354 (2002).

<sup>64</sup> Convention (No. IV) Relative to the Protection of Civilian Persons in the Time of War. Concluded at Geneva, 12 August 1949. Entered into force, 21 October 1950. 75 U.N.T.S. 287.

<sup>65</sup> 10 U.S.C. §§ 801-948 (2000), the Uniform Code of Military Justice can be found in the Manual for Courts-Martial United States (2000), available at <http://www.jag.navy.mil/documents/mcm2000.pdf>.

<sup>66</sup> See 10 U.S.C. § 801(2)(1).

<sup>67</sup> See 10 U.S.C. § 801(2)(9).

<sup>68</sup> See 10 U.S.C. § 801(2)(10)-(11); 18 U.S.C. §§ 3261-3267 (2000). See also Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 Am. J. Int'l L. 320, 321 (2002).

<sup>69</sup> Mundis, *supra* note 68, at 321.

<sup>70</sup> *Ex parte Quirin*, 317 U.S. 1 (1942) [hereinafter *Quirin*].

<sup>71</sup> *Id.* at 8-9.

<sup>72</sup> *Id.*

July 2, 1942<sup>73</sup>, all saboteurs were prosecuted in a military tribunal for violations of the laws of war<sup>74</sup>, Article 81, 82 of the Articles of war, and conspiracy to commit the alleged offenses.<sup>75</sup>

The Supreme Court reasoned that “[t]he Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing [offenses] against the law of nations, including those which pertain to the conduct of war.”<sup>76</sup> Congress has provided the rules and regulations of the Armed Forces under the Articles of War.<sup>77</sup> “Congress has explicitly provided...that military tribunals shall have appropriate jurisdiction to try offenders or offenses against the laws of war...”<sup>78</sup> When [President Roosevelt] issued the Executive Order proclaiming the use of military tribunals, the President was exercising the power conferred to him by Congress.<sup>79</sup> The court held that the President is authorized to order combatants tried in a military commission for violation of the law of war, and such an order is lawful exercise of his powers.<sup>80</sup> The Supreme Court was left to determine whether the Fifth and Sixth Amendments applied to prosecutions in a military tribunal. “[T]he Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by Commission without a jury.”<sup>81</sup> Consequently, those tried in military tribunals for violations of the law of war do not have the right to request a jury by its peers.

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<sup>73</sup> President’s Proclamation No. 2561.

<sup>74</sup> Law of war is embodied in the law of nations. The law of nations is based on natural law and proscribes how nations are to act towards other nations, available at <http://www.pixi.com/~kingdom/lawintro.html>.

<sup>75</sup> Quirin *supra* note 70, at 8.

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* See also 10 U.S.C. §§ 1471-1593 (2000).

<sup>78</sup> *Id.*

<sup>79</sup> Quirin *supra* note 70, at 11.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> *Id.* at 19.

The Military Order issued by President Bush is similar to the order given by Franklin D. Roosevelt (“FDR”), which was at controversy in *Ex parte Quirin*.<sup>82</sup> The Supreme Court upheld FDR’s order as a constitutionally valid exercise of the President’s power. If President Bush’s Military Order were challenged, the same arguments would be trotted out in front of the Supreme Court. However, Bush’s Military Order is distinguishable from Roosevelt’s order. When President Roosevelt issued his Military Order, the United States was entrenched in the Second World War. When the attacks of September 11 occurred, the U.S. was not at war. However, it can be argued that the United States is now entrenched in a “war on terrorism,” and the Military Order is necessary to effectuate the goal suppressing international terrorism. Even though it is distinguishable, it appears that the Supreme Court would uphold President Bush’s Military Order for the same reasons the court upheld FDR’s order in *Ex parte Quirin*. “Military commissions are thus an accepted means of trying persons who commit offenses against the laws of war, such as the deliberate targeting of civilians, abuse of prisoners, and failure of combatants to distinguish themselves from the civilian population.”<sup>83</sup>

**B. Advantages: United States Military Commissions**

There are many advantages to allowing Osama bin Laden and other members of the Al Qaeda organization to be prosecuted in a U.S. military commission under President Bush’s Military Order. The United States was the country most affected by the acts of terrorism; hence it should have the right to administer justice to bin Laden. The military tribunals would not be held in a public forum; consequently sensitive U.S. intelligence information gathered for the fight against terrorism would not be exposed to the general public. The military commissions would be a quick and efficient mechanism of justice because there is no jury and the process is streamlined. The Military Order provides that the admission of evidence is at the discretion of

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<sup>82</sup> See *Quirin supra* note 70.

<sup>83</sup> Michael J. Matheson, *supra* note 63, at 356.

the presiding officer of the military commission.<sup>84</sup> Rules on hearsay would not be as stringent as in the domestic courts of the United States, which would allow more evidence to be presented and greater discretion to the judge in determining what will be entered as evidence. For example, an alleged telephone call from Osama bin Laden to his mother stating that “something big was imminent” shortly before the attacks on September 11 could be deemed admissible under the military tribunals’ informal rules of evidence.<sup>85</sup> The Military Order provides that punishment will be administered in accordance with the law, including “life imprisonment and death,” thus the punishment will be harsh.<sup>86</sup>

### **C. Disadvantages: United States Military Commissions**

The first disadvantage to the use of United States military commissions is a state that apprehends an Al Qaeda member may block extradition to the U.S. because of President Bush’s Military Order. In November 2001, Spain officials arrested eight men allegedly belonging to the Al Qaeda network.<sup>87</sup> It has been reported that Spain may deny any extradition request based on the condition of the death row prisons in the United States.<sup>88</sup> Spain asserts that the “Bush administration’s plan to try suspected foreign terrorists in military courts, which would arguably violate the guarantee of an ‘independent and impartial tribunal’ as provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’).”<sup>89</sup> Consequently, extradition from a state party to the European Convention may block extradition to the United States based on the nature of the military commissions alone, let alone any objections to capital punishment. President Bush in the Military Order did not exclude the use of capital punishment. If the United States requests

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<sup>84</sup> See Military Order(4)(c)(3), *supra* note 5.

<sup>85</sup> See Anderson, *supra* note 53, at 609.

<sup>86</sup> See Military Order(4)(a), *supra* note 5.

<sup>87</sup> See Spain Shows Suspect Terrorist Haul, CNN.com (Nov. 14, 2001), available at <http://www.cnn.com/2001/WORLD/europe/11/14/inv.spain.videos/index.html>.

<sup>88</sup> Daniel J. Sharfstein, *Human Rights Beyond the War on Terrorism: Extradition Defenses Bases on Prison Conditions in the United States*, 42 Santa Clara L. Rev. 1137, 1138 (2002).

<sup>89</sup> *Id.* at 1138.

extradition of an Al Qaeda terrorist, European countries may be reluctant to extradite to the U.S. because there is a chance the suspect would face the death penalty. Consequently, President Bush's plan to try non U.S. Al Qaeda terrorists in a military commission without outlawing the death penalty as a possible punishment may prove to be an insurmountable hurdle to extradition.

The next flaw in the use of U.S. military commissions is what is the status of the suspected terrorist. Is a detainee considered a prisoner of war ("POW") under the Third Geneva Convention ("Geneva Convention III")?<sup>90</sup> Article four of the Geneva Convention III defines in part the POW's include persons "who have fallen into the hands of the enemy," as:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.<sup>91</sup>

The terrorists who attacked the United States on September 11 do not meet the POW requirement under the Geneva Convention III because the terrorists failed to conduct "their operations in accordance with the laws and customs of war"<sup>92</sup> when they used "civilians as both the means and targets of their attacks"<sup>93</sup> .... In addition, the terrorists did not carry arms openly and had no "fixed distinctive sign recogniz[able]." The consequence is that POWs under the Geneva Convention III are entitled to due process protections.<sup>94</sup> In essence, if a detainee qualifies as a POW under the Geneva Convention III, then the country prosecuting the POW would have to provide the same safeguards as if it was trying one of its own military personnel.<sup>95</sup> The procedures to try U.S. military personnel are found under the Uniform Code of Military

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<sup>90</sup> Geneva Convention Relative to the Treatment of Prisoners of War. Concluded at Geneva, 12 August 1949. Entered into force, 21 October 1950. 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

<sup>91</sup> *Id.*, Art. 4(A)(2)(a)-(d). See also Anderson, *supra* note 53, at 614-15.

<sup>92</sup> *Id.*, Art. 4(A)(2)(d).

<sup>93</sup> Anderson, *supra* note 53, at 616.

<sup>94</sup> See Third Geneva Convention, *supra* note 90, Arts. 99-108; see also Anderson, *supra* note 58.

<sup>95</sup> See Anderson, *supra* note 53, at 616.

Justice<sup>96</sup>, and afford virtually the same constitutional protections as the United States civilian courts.<sup>97</sup> The purpose of President Bush's Military Order would be negated if international terrorists were to gain all the due process protections granted by the United States Constitution.<sup>98</sup>

The international community may not believe that a trial in United States military commissions is an impartial forum; thus, the alleged terrorist would not receive a fair trial. This is reiterated by the fact that the Military Order does not provide Fifth or Sixth Amendment protections. The Constitutional rights guaranteed to the alleged suspects are a miniscule basket of rights. The Military Order only guarantees "a full and fair trial, with which the military commission sitting as the triers of both fact and law."<sup>99</sup> A panel of three presiding officers will act as the judge, jury, and ultimately decide fate of the suspects. By the United States creating secret military tribunals to try non-citizens, then that would create a precedent allowing other countries to create secret tribunals with limited due process guarantees. Use of military tribunals to try suspects who most likely will be of the Muslim faith, would create a belief that the U.S. is on a "crusade to kill, massacre, and eradicate Muslims."<sup>100</sup> Finally, a decision rendered by a military commission created by the United States would not be given full credit under international law. It is unlikely that the world would accept the punishment administered by the commissions.

#### **IV. Extradition: Hurdle Thwarting United States Pursuit for Justice**

There is little doubt that the United States has jurisdiction in either domestic courts or in military commissions over Osama bin Laden and other high-ranking Al Qaeda terrorists for the acts of September 11. However, a formidable challenge stands in the way of the U.S. exercising

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<sup>96</sup> 10 U.S.C. §§ 801-948 (2000), the Uniform Code of Military Justice can be found in the Manual for Courts-Martial United States (2000), available at <http://www.jag.navy.mil/documents/mcm2000.pdf>.

<sup>97</sup> See Anderson, *supra*, note 53. at 616.

<sup>98</sup> *Id.* at 617.

<sup>99</sup> See Military Order (4)(c)(2), *supra* note 5.

<sup>100</sup> Charles V. Pena, *09.11.01 Blowback: The Unintended Consequences of Military Tribunals*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 119, 127 (2002).

this power: extradition. If any of the wanted terrorists were apprehended in countries other than the United States, then the U.S. would have to request extradition.

“Extradition is the process by which persons charged with or convicted of a crime against the law of a state and found in a foreign state are returned by the latter to the former for trial or punishment.”<sup>101</sup> Extradition is based on fundamental principles of state sovereignty, more specifically the notion that no state can violate another state’s territorial sovereignty to apprehend a criminal without consent.<sup>102</sup> Requesting and granting extradition by a state is not a right, but is a discretionary power; in other words, a state is not under any legal obligation to extradite unless there is a treaty to the contrary.<sup>103</sup> In the United States, granting or requesting extradition will only be done pursuant to a treaty.<sup>104</sup> Treaties between two or more states today govern most extraditions. These treaties usually provide that each state agrees reciprocally to surrender offenders found in its territory to the state where the crime took place.<sup>105</sup> Most extradition treaties specifically define the offenses that can be extradited, any exceptions, and the basic elements that must be met in order to extradite.<sup>106</sup>

Extradition treaties and state extradition laws usually require several elements that must be satisfied before an extradition will be deemed proper under international law. First, the criminal act must be prohibited in both the requesting state and the state where the offender is present; this is the doctrine of double criminality.<sup>107</sup> Second, the requesting state can only

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<sup>101</sup> See Marjorie M. Whiteman, 6 Digest of International Law 772-28 (1968); Restatement (Third) of Foreign Relations IV, 7, B IN; See also, *Terlinden v. Ames*, 184 U.S. 270, (1902) (defining extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender").

<sup>102</sup> See John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo L. J. 1441, 1454 (1988).

<sup>103</sup> Whiteman, *supra* note 101, at 772-28.

<sup>104</sup> See Bassiouni, *supra* note 104, at 347-61; See also, *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886) (stating that extradition is based on principally on treaties and in absent of treaties, on international comity).

<sup>105</sup> See Whiteman, *supra* note 101, at 772-28.

<sup>106</sup> For an example, See European Convention on Extradition. Concluded at Paris, 13 December 1957. Entered into force, 18 April 1960. 359 U.N.T.S. 274; Additional Protocol to the European Convention on Extradition. Concluded in Paris, 15 October 1975. Entered into force 20 August 1979. E.T.S. No. 86; Second Additional Protocol to the European Convention on Extradition. Conclude at Paris, 17 March 1978. Entered into force, 5 June 1983. E.T.S. No. 98.

<sup>107</sup> See *Harvard Research in International Law, Jurisdiction with Respect to Crime*, *supra* note 6.

prosecute for the crime or crimes for which the extradition is sought; this is the doctrine of specialty.<sup>108</sup> Third, the requesting state must produce enough evidence to establish probable cause that the fugitive committed the crime.<sup>109</sup> Finally, a state must prove that the offense does not fall into any exception for which a state can refuse extradition.

#### **A. Treaties & Capital Punishment**

The United States would have to overcome various obstacles in order to obtain extradition of Osama bin Laden or other Al Qaeda members. Absent a treaty, a state is under no legal obligation to accommodate the United States by granting extradition. The next roadblock is that the United States still has capital punishment. Finally, a state granting asylum to wanted Al Qaeda members could claim that the offense is political in nature and therefore not extraditable.

The United States has extradition treaties with roughly 106 countries.<sup>110</sup> If Osama bin Laden were found in any country without an extradition treaty, extraditing him would be very difficult. Any of those states granting asylum has the right to refuse the United States' request for extradition. However, such a denial would not be an intelligent decision given that the United States has made it clear that any state that provides asylum to any terrorist would suffer the consequences. President George W. Bush stated, "[The United States] will pursue nations that provide aid or safe haven to terrorism, [e]very nation in every region now has a decision to make; either you are with us or you are with the terrorists."<sup>111</sup> The Taliban regime refused the United States' demand to hand over bin Laden and other Al Qaeda members, for which the U.S. attacked Afghanistan toppling the Taliban government. Thus, any state brazen enough to shelter Bin Laden or any other terrorist by the means of refusing extradition would suffer harsh

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<sup>108</sup> *Id.* at 361.

<sup>109</sup> *See* Whiteman, *supra* note 101.

<sup>110</sup> *See* 18 U.S.C § 3181 (2000) (listing extradition treaties by countries, date signed, and date entered into force).

<sup>111</sup> *See* Bush, *supra* note 1.

repercussions. This is not to say that the United States are willing to attack any country that refuses to extradite, so long as the terrorists are brought to justice.

Any terrorist extradited to the United States to stand trial for their offense would, with little doubt, face the death penalty. In 1989, the European Court of Human Rights held in *Soering v. United States*<sup>112</sup> that persons charged with capital offenses violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”).<sup>113</sup> Article 3 states, “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In *Soering*, the European Court on Human Rights found the lengthy stays and harsh death row conditions constituted “inhuman” treatment or punishment.<sup>114</sup> The *Soering* case is one of many in a growing trend that signatories to the European Convention on Human Rights can refuse to extradite to the United States when terrorists are facing the death penalty because extradition would violate Article 3 of the Convention’s prevention of “inhuman” punishment and treatment.

## **B. Political Offense Exception**

The final obstacle the United States would have to hurdle is the political offense exception to extradition. Most states can refuse to extradite for offenses that are political in nature. Political offense has traditionally two meanings; first, there are “purely political” offenses that are crimes aimed directly at the state, consequently there is no common crime; second, there is a category of “relative political offense in which the political motivation behind an otherwise common crime renders the act ‘political’.”<sup>115</sup> There is not a universal excepted definition as to what constitutes a political offense, however most courts agree when describing

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<sup>112</sup> See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>113</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Concluded at Rome, 4 November 1950. Entered into force, 3 September 1953. 213 U.N.T.S. 222. [hereafter European Convention for Human Rights].

<sup>114</sup> See *supra* note 18; see also Sharfstein, *supra* note 88, at 1138.

<sup>115</sup> Bradley Larschan, *Extradition, The Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law*, 4 B. U. Int’l L. J. 231, 248 (1986).

the elements.<sup>116</sup> “The *opinio juris* conceives of ‘purely political’ offenses as acts against the security of the state.”<sup>117</sup> The crimes that fall into this category lack the essential characteristics of the common crime, such as malice or personal gain.<sup>118</sup> The intention of the person committing the offense is to cause change in the political system, thereby hurting the state’s political regime.<sup>119</sup> However, no such agreement can be found in regards to “relative political” offenses.<sup>120</sup> The degree of political motivation required making a crime a political offense and unextraditable depends on the application of the laws of the states.<sup>121</sup> There are a number of negative definitions of political offense.<sup>122</sup> Extradition treaties sometimes use negative definitions of political offense, in other words, the treaty will list specific crimes or offenses that will not be considered political, such as war crimes, genocide, or certain acts of terrorism.<sup>123</sup>

Extradition requests are subject to interpretation by the judicial branch before the executive branch renders the final decision.<sup>124</sup> Four principles used for judicial interpretation have emerged to determine whether an offense is a political offense: The Political Incident Theory, The United States Approach, The Rights Injured Approach, and The Predominance Approach.<sup>125</sup>

The Anglo-Saxon Approach: The Political Incident Theory is used primarily by the British Courts to interpret what constitutes a political offense.<sup>126</sup> This approach asserts that the act must be “incidental to and form...part of the political disturbance” and the crimes must be “in

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *In re Ficorilli*, 18 int’l L. Rep. 345 (Tribunal federale, Switzerland 1951) (holding that “[w]hat holds true for purely political offenses cannot altogether be applied to relative political offenses”).

<sup>121</sup> *See supra* note 24 at 250-51.

<sup>122</sup> Christine Van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* 1-4 (1980).

<sup>123</sup> *Id.* For an example *see* Article 1 of the European Convention on the Suppression of Terrorism, Concluded at Strasbourg, 27 January 1977. Entered into force, 4 August 1978. 1137 U.N.T.S. 93.

<sup>124</sup> *See Whiteman, supra* note 101, at 772-28.

<sup>125</sup> Linda Gerstel Feder, *In re Doherty: Distinguishing Terrorist Activities and Political Motivated Acts under the Political Offense Exception to Extradition*, 1 Temp. Int’l & Comp. L.J. 99, 108-14 (1985); Larschan, *supra* note 115, at 251-75.

<sup>126</sup> *Id.*

furtherance” of the political disturbances.<sup>127</sup> In *Schtracks v. Government of Israel*, the court held that “the political offense must be connected with an uprising, disturbance, insurrection, civil war, or struggle for power.”<sup>128</sup> The theory is a subjective approach with little attention being paid to the actual act.<sup>129</sup> The test as it stands today is that a state may refuse to extradite if the crime was incidental to and formed a part of a political disturbance.<sup>130</sup>

If Osama bin Laden or any Al Qaeda members were apprehended in a country that interpreted the political offense under the Political Incidence Theory, could that state refuse to extradite them to the United States? The court would pay little attention to the actual crime or impact on the international community that is undoubtedly large. Was there a political uprising by the group who the perpetrator belongs? An argument could be made that Al Qaeda is in a war or struggle for power with the West as the political oppressor. The reason for the political offense exception was the concerned with returning a political offender back to his or her political advisories.<sup>131</sup> If this argument can be made successfully, then the first prong has been met. The second prong would be satisfied if the act were part of a larger political struggle. Osama bin Laden’s terrorist activities have political undertones, but in his own words he called for a “jihad,” which by definition is a “holy war,” not a political uprising. A court could find that Osama bin Laden is at war with the United States, which is requesting extradition, is the political adversary. It appears a court using the Political Incidence Theory could find that these were a political offense and unextraditable.<sup>132</sup>

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<sup>127</sup> See *In re Castioni*, 1 Q.B. 149, (1891). See also Linda Gerstel Feder, *In re Doherty: Distinguishing Terrorist Activities and Political Motivated Acts under the Political Offense Exception to Extradition*, 1 Temp. Int’l & Comp. L.J. 99, 108-14 (1985).

<sup>128</sup> *Schtracks v. Government of Israel*, 3 ALL E.R. 529 (1962). See also Linda Gerstel Feder, *In re Doherty: Distinguishing Terrorist Activities and Political Motivated Acts under the Political Offense Exception to Extradition*, 1 Temp. Int’l & Comp. L.J. 99, 108-14 (1985).

<sup>129</sup> Christine Van den Wijngaert, *The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* 116 (1980).

<sup>130</sup> Bassiouni, *supra* note 104, at 412.

<sup>131</sup> Gerstel Feder, *supra* note 125, at 108-14.

<sup>132</sup> But note that the United States and Great Britain entered into the European Convention on Extradition, *supra* note 31, where both countries agreed that certain acts would not be considered a political offense and extradition

The next interpretation of what constitutes a political offense is the United States Approach. This model developed out of the Political Incidence Theory used by British Courts.<sup>133</sup> “The two-part definition of the political offense, that the act must be committed in the course of, and incidental to the political offense, a violent political disturbance, such as war, revolution, or rebellion, has been mechanically applied.”<sup>134</sup> The United States Courts have refused to inquire into the motives behind the state requesting extradition.<sup>135</sup> A court could deny extradition of Bin Laden or Al Qaeda members because the acts could fit under this definition of political offense.<sup>136</sup>

The French Test: The Rights Injured Approach is an objective test and considers an act political only when the perpetrator’s acts “directly injure the rights of the state.”<sup>137</sup> The act gains political offense status by an injury to the state’s rights, not from the motive of the offender.<sup>138</sup> “By this formulation, the French courts severely restrict the scope of the political offense exception, limiting it to only ‘pure political’ acts and automatically excluding ‘relative political’ offense.”<sup>139</sup> The focus then is on the injury to the United States and not the motive of Osama bin Laden or Al Qaeda members. A “purely political” offense is an act directed at a state and there is no element of a common crime.<sup>140</sup> The attacks of September 11 could be considered a “purely political” act. There was no element of financial gain or motive of malice; the intent was to topple the United States as a political power. Thus, the terrorists act could be considered political under the French Test: Rights Injured Approach and therefore unextraditable.

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must be granted. This was a negative definition approach, i.e. listing explicitly what crimes would not be considered political.

<sup>133</sup> See Feder, *supra* note 125, at 108-14.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> In re Giovanni Gatti, 14 Ann. Dig. 145 (Cour d’appel, Grenoble 1947); Feder, *supra* note 125, at 108-14.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Larschan, *supra* note 40.

The final theory in defining what constitutes a political offense is The Swiss Test: The Predominance approach. The Swiss test includes the Political Incidence element of political disturbance, but adds two additional elements.<sup>141</sup> The Swiss test has three general requirements: the act must be politically motivated; proportional to the political objective desired, and must be incidental in a struggle for political power.<sup>142</sup> If Osama bin Laden or Al Qaeda members are seized in a country that interprets the political offense under the Swiss Test, the inquiry would start with the connection between the crime committed and the political purpose.<sup>143</sup> The crimes were committed to achieve a political end, that is the fall of Western values; more specifically the fall of the United States. Thus, the first element appears to be met. The acts of September 11 need to be proportional to the political goal desired. bin Laden's goal is to topple the U.S. government and any Western ideologies. An argument can be made that his acts are proportional to achieving that end; hence, the second prong could be satisfied. It could be argued that the act was committed in a struggle for political power. The struggle for political power is with the United States and its involvement in the middle east where bin Laden has stated that the U.S. should pull out of the region altogether. If the United States requested extradition from a state that applies the Swiss Test it appears that the state could refuse to extradite claiming that the September 11 attacks on the U.S. were political in nature and unextraditable. However, "it is unlikely in a situation other than one involving an escape from a totalitarian regime, that status of a political crime would be attributed to terrorists acts under the Swiss test."<sup>144</sup>

If a rigid application of the four theories on determining the definition of political offense, then a state could refuse the United States request for extradition under any of the four theories. However, most countries by convention or treaty have limited the political offense

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<sup>141</sup> See Feder, *supra* note 125, at 108-14.

<sup>142</sup> Todd M. Sailor, *the International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 Temp. Int'l & Comp. L.J. 311, 333 (1999); See also Feder, *supra* note 125, at 108-14.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* Quoting T. Carbonneau, *Terrorist Acts – Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 Hastings Int'l & Comp. L. Rev. 265, 274 (1980).

exception to extradition not to include certain acts of terrorism.<sup>145</sup> While recent conventions on terrorism require a party to extradite or punish the terrorist under its own laws. Justice will be served, nevertheless the United States may have harsher laws than the state that refuses to extradite and try them under its own laws pursuant to its right under the conventions. With more than 3,000 lives lost and an estimated \$36 Billion dollars<sup>146</sup> in damages to New York alone, it would be hard to imagine a state refusing extradition under the political offense exception.

## VI. INTERNATIONAL TRIBUNALS

Starting in August of 1945, with the creation of the Nuremberg tribunal<sup>147</sup> to prosecute members of the Nazi party for war crimes committed during the Second World War, ad hoc international tribunals were born. The second tribunal was formed in 1946 to prosecute Japanese war criminals for their atrocities.<sup>148</sup> After the creation of the Nuremberg Tribunal, the United Nations and the rest of the international community started inquiring about creating a permanent international criminal court to prosecute grave breaches of the United Nations Charter.<sup>149</sup> In 1948, the United Nations General Assembly passed resolution 260, discussing the prevention and punishment of the crime of genocide.<sup>150</sup> In the same resolution, a law commission was created

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<sup>145</sup> For an example *see* the European Convention on the Suppression of Terrorism, Hostage Convention, Hijacking Convention, *supra* note 17. *See also* European Convention on Extradition, *supra* note 31.

<sup>146</sup> Jason Bram, James Orr, and Carol Rapaport, *Measuring the Effects of the September 11 Attack on New York City*, available at [http://www.ny.frb.org/pihome/news/rsch\\_pap/2002/rp021112.html](http://www.ny.frb.org/pihome/news/rsch_pap/2002/rp021112.html). “Adding up the earnings losses, property damage, and cleanup costs, the authors estimate the direct damage of the attack on the World Trade Center to be between \$33 billion and \$36 billion.”

<sup>147</sup> *See* Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal. Concluded at London, 8 August 1945. Entered into force, 8 August 1945. 82 U.N.T.S. 279; Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal. Adopted by the U.N. General Assembly, 11 December 1946. G.A. Res. 95, 1<sup>st</sup> Sess., at 1144, U.N. Doc. A/236 (1946).

<sup>148</sup> *See* Special Proclamation Establishing an International Military Tribunal for the Far East and Charter of the International Military Tribunal for the Far East, *reprinted in* The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 Apr. 46-12 Nov. 48, at III-Annex Nos. A-4 and A-5 (Amsterdam: APA University Press, B. Rolling & C. Ruter eds. 1977).

<sup>149</sup> *See Rome Statute of the International Criminal Court – Overview*, available at <http://www.un.org/law/icc/general/overview.htm>. Discussing the creation of the International Criminal Court.

<sup>150</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res., 1<sup>st</sup> Sess., U.N. Doc. A/260 (1948).

inquiring into an international criminal court.<sup>151</sup> It would be over fifty years before a U.N. created international criminal tribunal would reappear.<sup>152</sup> The United Nations in 1993, adopted resolution 827 creating the International Criminal Tribunal for Yugoslavia (“ICTY”) to prosecute crimes committed during the civil war of that country.<sup>153</sup> In 1994, the United Nations passed another resolution, 955, to create the International Criminal Tribunal for Rwanda (“ICTR”) to prosecute war crimes in Rwanda.<sup>154</sup> Finally, in 1998, the Rome Statute was set for signatures, which would create a permanent International Criminal Court.<sup>155</sup>

The United Nations has the power to extend jurisdiction of either the ICTY or the ICTR to include offenders of 9/11 and international terrorists. The recently created ICC’s subject matter jurisdiction could be extended to hear cases of international terrorism. The United Nations pursuant to Chapter VII of the U.N. Charter<sup>156</sup> has the power to create an ad hoc tribunal to try alleged terrorists. Thus, the question that is presented is whether any of the international tribunals would be an appropriate place to prosecute Osama bin Laden or other Al Qaeda members who are apprehended.

#### **A. Jurisdiction of an International Tribunal**

Jurisdiction of an international tribunal under the general principles of extraterritorial jurisdiction would be satisfied pursuant to three of the five principles. The United Nations, when it created the ICTY and the ICTR, limited the courts jurisdiction to crimes committed in the respective countries. The international tribunals would have jurisdiction based on the territorial principle because the courts specifically have power to adjudicate crimes committed in the

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<sup>151</sup> See *Rome Statute of the International Criminal Court – Overview*, *supra* note 149.

<sup>152</sup> *Id.*

<sup>153</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute].

<sup>154</sup> Statute of the International Tribunal for Rwanda S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

<sup>155</sup> U.N. Doc. A/Conf.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

<sup>156</sup> Charter of the United Nations. Concluded at San Francisco, 26 June 1945. Entered into force, 24 October 1945. 1 U.N.T.S. XVI. See also G.A. Res 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (2001) [hereinafter U.N. Charter].

former Yugoslavia and Rwanda. The protective principle can be satisfied based not on an injury to a state's interests, but rather an injury to the world as a whole. In other words, the United Nations' purposes are "the maintenance of international peace and security," thus it is a international interests being protecting by conferring jurisdiction to an international tribunal.<sup>157</sup> The U.N. instructs the ad hoc tribunals to hear only the most serious crimes; for example, the ICTY was created to combat genocide, grave breaches of the 1949 Geneva Conventions, violations of the laws of war, and crimes against humanity.<sup>158</sup> These crimes are all serious violations of international law, and are accepted as universal crimes punishable by any state that apprehends an offender. Hence, the international ad hoc tribunals satisfy the universal principle of extraterritorial jurisdiction.

#### **B. The International Criminal Tribunal for Yugoslavia**

The ICTY was created by the United Nations to combat atrocities committed during the civil war in Yugoslavia.<sup>159</sup> It is located at Hague in the Netherlands.<sup>160</sup> Its purpose is to prosecute persons for humanitarian rights violations during the war, deter further crimes in the unstable country, and continue the restoration of peace to the former Yugoslavia.<sup>161</sup> The tribunal has subject matter jurisdiction over grave breaches of the 1949 Geneva Conventions<sup>162</sup>, violations of the laws or customs of war<sup>163</sup>, genocide<sup>164</sup>, and crimes against humanity.<sup>165</sup> Jurisdiction is limited by geography as well as time.<sup>166</sup> The jurisdiction is only over crimes committed in Yugoslavia since 1991.<sup>167</sup> Personal jurisdiction is over persons only, and not

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<sup>157</sup> See U.N. Charter, *supra* note 156.

<sup>158</sup> See ICTY Statute, *supra* note 148.

<sup>159</sup> See ICTY Statute, *supra* note 148.

<sup>160</sup> See The ICTY at a Glance, available at <http://www.un.org/icty/glance/index.htm>.

<sup>161</sup> *Id.*

<sup>162</sup> See ICTY Statute Art. 2., *supra* note 148.

<sup>163</sup> ICTY Statute Art. 3., *supra* note 148.

<sup>164</sup> See ICTY Art. 4., *supra* note 148.

<sup>165</sup> ICTY Art. 5., *supra* note 148.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

organizations, political parties, or corporations.<sup>168</sup> The ICTY has concurrent jurisdiction with national courts; however, the ICTY can claim primacy over the national courts.<sup>169</sup>

As the ICTY stands today, it does not have subject matter or personal jurisdiction over Osama bin Laden or any other Al Qaeda member unless they commit a crime in the former Yugoslavia. The ICTY has limited jurisdiction over crimes committed since 1991, but only crimes that are committed in Yugoslavia. The United Nations could extend by resolution the jurisdiction of the ICTY to hear cases concerning crimes committed by Osama bin Laden and Al Qaeda members since the Security Council has already determine the attacks on September 11 to be breaches of the Charter to the United Nations.<sup>170</sup> It appears that the U.N. would not be willing to extend the ICTY's jurisdiction. There is a possibility of "tribunal fatigue" from hearing to many cases and be "reluctant to incur the political difficulties and expense of providing international prosecution in a situation where so many avenues for national prosecution are readily available."<sup>171</sup> The ICTY has tried only 31 defendants in eight years at a cost of \$400 million dollars.<sup>172</sup> It is also unlikely that the U.N. would extend jurisdiction for the acts of a single day, no matter how atrocious, and would not embrace a broader category of international terrorism to be prosecuted.<sup>173</sup> Therefore, it would seem unlikely that the United Nations would extend jurisdiction to the ICTY to adjudicate the terrorist acts committed on September 11.

### **C. The International Criminal Tribunal for Rwanda**

Acting under Chapter VII of the United Nations Charter, the United Nations created the International Criminal Tribunal for Rwanda.<sup>174</sup> "The purpose [of the ICTR] was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region,

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See U.N. Charter, *supra* note 156. The United Nations Security Council on September 12, 2001 condemned the terrorist attacks on New York, Washington, and Pennsylvania as a "threat to international peace and security," a violation of the U.N. Charter. [hereinafter Resolution 1368].

<sup>171</sup> Matheson, *supra* note 63, at 358.

<sup>172</sup> See Anderson, *supra* note 53, at 603.

<sup>173</sup> *Id.*

<sup>174</sup> See U.N. Charter, *supra* note 164.

replacing an existing culture of impunity with one of accountability.”<sup>175</sup> As with the ICTY, the U.N. limited the ICTR’s jurisdiction geographically and by reference to when the crimes took place.<sup>176</sup> The ad hoc tribunal has jurisdiction to adjudicate crimes that were committed between January 1, 1994 and December 31, 1994.<sup>177</sup> The ICTR was developed to prosecute the crimes of genocide, crimes against humanity, and violations of Article 3 common to the 1949 Geneva Conventions that occurred in 1994 in the country of Rwanda.<sup>178</sup> As with the extension of jurisdiction of the ICTY, the United Nations could extend the jurisdiction of the ICTR to prosecute the terrorist responsible for the attacks on the United States on the 11 of September. As noted under the discussion on the ICTY, it would be unlikely that the U.N. would go through the trouble of complicating the ICTR jurisdictional responsibilities. Consequently, the ICTR would not be a likely place to prosecute Osama bin Laden or other Al Qaeda members for the terrorist acts committed on 9/11.

#### **D. International Criminal Court**

On July 1, 2002, the Rome Statute to the International Criminal Court (“ICC”) was entered into force.<sup>179</sup> The ICC is a permanent tribunal located in Hague, the Netherlands, and “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”<sup>180</sup> The Court has jurisdiction provided under the Rome Statute to prosecute the crime of genocide<sup>181</sup>, crimes against humanity<sup>182</sup>, war crimes<sup>183</sup>, and the crime of aggression.<sup>184</sup> Any state that becomes party to the Rome Statute accepts the ICC’s jurisdiction

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<sup>175</sup> Tribunal at a Glance, available at <http://www.ictt.org/>.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Rome Statute, *supra* note 155. For a list of signatories, and parties that have ratified available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

<sup>180</sup> Rome Statute Art. 1, *supra* note 155.

<sup>181</sup> Rome Statute Art. 5(1)(a), *supra* note 155. Article 6 defines the crime of genocide.

<sup>182</sup> Rome Statute Art. 5(1)(b), *supra* note 155. Article 7 defines crimes against humanity.

<sup>183</sup> Rome Statute Art. 5(1)(c), *supra* note 155. Article 8 defines war crimes.

<sup>184</sup> Rome Statute Art. 5(1)(d), *supra* note 155. Crimes of aggression are not defined in the Rome Statute.

with respect to the crimes triable.<sup>185</sup> As it stands today, the Rome Statute does not have an explicit provision against terrorism. However, the attacks on 9/11 could fit into three of the four classes of crimes: crimes against humanity, war crimes, and crimes of aggression. The exact parameters will not be determined until all parties ratify the Rome Statute, which is open for ratification until June 30, 2004.

As of July 1, 2002, 139 countries have signed the Rome Statute, and 84 are actually parties.<sup>186</sup> The ICC suffered a severe blow when the United States, who signed the Rome Statute on the last possible day, issued a statement that it did not intend to be bound by its signature. On May 6, 2002, the United States informed the Security-General “that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.” In addition, the jurisdiction of the ICC is not retroactive, which means that the court could not hear any crimes committed before July 1, 2002, the day the Rome Statute entered into force.<sup>187</sup>

#### **E. Advantages: International Tribunal**

Prosecuting Osama bin Laden in an international forum has some advantages. The final verdict may be more internationally accepted than if the suspected terrorists were tried under a secret military tribunal in the United States. Islamic countries may be more likely to turnover suspected terrorists to an international ad hoc tribunal than to extradite to the United States.<sup>188</sup> European countries that are party to the European Convention on Human Rights<sup>189</sup> would be less hesitant to hand over custody to an international forum that does not rely on death as a possible sentence, as opposed to the United States in both domestic and the proposed military tribunals.

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<sup>185</sup> See Rome Statute Art. 12, *supra* note 155.

<sup>186</sup> See Rome Statute, *supra* note 155. For a list of signatories, and parties that have ratified available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

<sup>187</sup> See Rome Statute Art. 11, *supra* note 155. “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”

<sup>188</sup> Anderson, *supra* note 53, at 600. (quoting Harvard Law School professor and president-elect of the American Society of International Law Anne-Marie Slaughter arguments in favor of an international ad hoc tribunal as opposed to trial in the United States under President Bush’s Military Order).

<sup>189</sup> See European Convention on Human Rights, *supra* note 77.

A “global court” would use internationally agreed upon standards of evidence for violations of national and international law.<sup>190</sup> It is argued that an international tribunal would contain Islamic jurists and would give them an opportunity to demonstrate to the world that the Islamic faith does not condemn the acts of September 11.<sup>191</sup> The prosecution in an international tribunal would alleviate some of the caseload for United States District Courts or U.S. military commissions.<sup>192</sup> Finally, the United Nations has experience in creating ad hoc tribunals and has the wherewithal to instill proper and internationally accepted procedures and punishments.

#### **F. Disadvantages: International Tribunals**

There are disadvantages in prosecuting Osama bin Laden in an internationally created ad hoc tribunal. The ad hoc international tribunals can seldom be classified as an efficient and expedient form of justice. For example, in the ICTY, it took seven years just to indict Slobodan Milosevic.<sup>193</sup> Even with all of the conventions, treaties, and law enacted, there is not agreed upon definition of what constitutes international terrorism. A state may refuse to extradite or conceal an alleged offender from an international forum.<sup>194</sup> “[Osama] bin Laden’s sympathizers would probably view [an international] tribunal as many Serbs view the United Nations-sponsored, multi-ethnic international tribunal at The Hague: as a biased tool of western power.”<sup>195</sup> Prosecuting in an international tribunal would not bring any credibility to the proceedings, especially to those to see bin Laden as a victim. A trial before an international forum could act as a “springboard for bin Laden and his associates to portray themselves as martyrs.”<sup>196</sup> University of Chicago Law professors Jack Goldsmith and Bernard Meltzer state:

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<sup>190</sup> See Anderson, *supra* note 53, at 600.

<sup>191</sup> *Id.* at 603.

<sup>192</sup> See ICTY Statute, *supra* note 75 and ICTR Statute *supra* note 76.

<sup>193</sup> Anderson, *supra* note 53, at 601.

<sup>194</sup> See T. Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 For. Aff. 2 (Jan.-Feb. 1997).

<sup>195</sup> Anderson, *supra* note 53, at 601. Quoting University of Chicago Law professors Jack Goldsmith and Bernard Meltzer in Jack Goldsmith & Bernard Meltzer, Editorial, Swift Justice for bin Laden, FIN. TIMES (London), Nov. 7, 2001, at 15.

<sup>196</sup> *Id.* Quoting Jack Goldsmith and Bernard Meltzer.

[s]uch a trial would ... enhance Mr. bin Laden's stature and appeal. He and other terrorists would use the event as a platform to attack the US's culture, motives and policies--an attack that would reverberate throughout the Muslim world. Any dissent from a guilty verdict would weaken the judgment's legitimacy and ... increase the terrorists' power and prestige. Acquittal on grounds of insufficient evidence would ... be possible, especially if protection of intelligence sources precluded the presentation of evidence.

## VII. CONCLUSION

The United States District Courts, U.S. military commissions, and an international tribunal all potentially have valid personal and subject matter jurisdiction over Osama bin Laden and Al Qaeda terrorists for the acts perpetrated in the U.S. on the World Trade Center, the Pentagon, and Pennsylvania. An analysis of the five general principles of international extraterritorial jurisdiction demonstrates that all proposed tribunals have jurisdiction based on one or more of the principles. Specific jurisdiction in United States military tribunals and courts can be found in the United States Constitution or specifically designated within the statute. For international tribunals, specific jurisdiction is conferred via statute and restricted to specific crimes committed in a specific territory. Jurisdiction is valid, but is it proper? Justice is a vague and ambiguous concept not easily defined. The question of appropriateness in the sense of fulfilling justice as an end is charged with political and moral quandaries. Most arguments are based on political objectives and notions of equity.

Prosecuting Osama bin Laden and other suspected Al Qaeda terrorists in United States Federal courts, U.S. led military commission under President Bush's Military Order, or in ad hoc international tribunals, existing or created all have numerous advantages. However, all of the proposed forums have equally as many disadvantages. Consequently, selecting one forum as an appropriate means to administer justice is nearly impossible. Appropriateness ultimately depends on one's political and or moral objectives. In the United States, appropriate administration of justice for most would be nothing less than death for all those involved in the attacks. The terrorists massacred over three thousand innocent lives on September 11; we, the people of the United States are obligated to take their lives. However, such a narrow objective

blinds the United States to its very foundation. The U.S. Constitution is based on notions of liberty, inalienable rights, and due process. The United States political machine acting in blind rage would disregard these fundamental guarantees. Other countries and entities in the international community would deem any forum without capital punishment as the only appropriate forums. Most industrialized nations prohibit the death penalty. The world consists of people of diverse cultures and beliefs governed by equally diverse governments. An across the board consensus of what constitutes an appropriate forum to administer justice cannot possibly be found. Condemnation of the horrific attacks on September 11 seems to be where the agreement between cultures and nations ends.

Extradition of suspected terrorists is a major obstacle blocking prosecution in the United States forums and in international tribunals. The political offense exception could be used to block extradition. The political offense is interpreted by different theories, all leading to the conclusion that extradition could be blocked for the attacks on September 11, contrary to any conventions or treaties stating otherwise. Conventions and treaties have employed negative definitions which act to limit what will be covered by the political offense exception. For example, the Convention on Hostage takings specifically orders parties to the convention to extradite or prosecute the suspects in its domestic system, thus limiting hostage taking from the political offense exception. The next hurdle to extradition is capital punishment. European countries have concluded that capital punishment violates the European Convention on Human rights, consequently extradition is inappropriate in cases where it is a possibility, thus extradition would be very difficult.

The appropriate and most effective means to administer justice to Osama bin Laden and suspected 9/11 terrorists is to prosecute them in countries where they are apprehended. This solution would nullify the damaging affects of extradition. A request and denial of extradition has an adverse impact on relations between the two States. The tension could lead to splintering

of the international community, where a united front is enormously important. Allowing States to try terrorists individually would also place terrorists on notice that any crime committed will be punished by whatever country apprehends them. A global effort to eradicate terrorism country by country would be the most sufficient and efficient means of justice. The world should ban together on a single front to combat the atrocities committed on September 11 and beyond. This approach would not completely deny the United States from administering justice to bin Laden and suspected Al Qaeda members because any terrorist apprehended by the U.S. could be tried in Federal District courts. However, the United States, more specifically President Bush, would not likely stand idly by while a foreign state prosecutes Osama bin Laden or other suspected terrorists in its domestic courts since the United States has a substantial interest in administering justice for the atrocities committed September 11, 2001.