

Replies and Comments:

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Focus

Quirin, US Supreme Ct., 1942: German saboteurs on territory of the US may be tried by military commission for alleged violations of the law of war.

Yamashita, US Supreme Ct, 1946: Japanese General, commander of forces in the Philippines, a POW, may be tried by a US military commission for alleged violations of the law of war.

Trial by court-martial is preferable to trial by military commission because the usual panoply of rights of an accused is preserved.

The established system of court-martial meets the requirements for trial of any violations of the law of war, (IHL), alleged in IRAQ, included any violations alleged against Saddam Hussein.

Articles pro and con appear in the April 2003 edition of the American Journal of International Law (vol 96).

R.O.Everett, 34 VA J Int'l Law 289 (1994), Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations (re: Bosnia)

What might be the forum for trying violations of IHL in Iraq?

Can the cases of WW II be a model for Iraq?

The US prepares to wage war against IRAQ. Its purpose? Regime change. Will Saddam Hussein be held to answer for alleged violations of IHL and other international law? Could the existing US system of courts-martial be used to try alleged violations of IHL?

During and after WW II, military commissions were used by the US to try alleged violations of the law of war. In Quirin, 1942, the Supreme Court of the US approved such a mechanism for the trial of alleged German saboteurs. In 1946, the same court approved the trial by military commission of Japanese General Yamashita for alleged violation of the laws of war and said that jurisdiction to try such offenses lay both with a general court-martial and a military commission.

I propose that the system of courts-martial better fits the needs of today and would eliminate all the criticism of the military commission system proposed by the Bush administration.

The system of courts-martial is well-established and developed .

Under US law the substantive law governing courts-martial is contained in the Uniform Code of Military Justice (UCMJ), US Code title 10, sections 891-940, adopted by Congress in 1950 and the successor to the Articles of War. Courts-martial under US law are far improved from the days of summary justice in the 18th, 19th, and perhaps even first half of the 20th centuries. Today the procedure of the court-martial is not very different from trials in the civilian courts of the US.

First, those involved as judges and as lawyers acting as prosecutors or defense counsel, must be trained lawyers, graduates of a US accredited law school and admitted to the bar of a state of the US.

Second, judges and defense counsel are assured of independence by the UCMJ and are free from „command influence“, by not being within the normal line of command. Both judges and defense counsel are assigned to cases throughout their branch of the armed services, i.e., they are not assigned to cases at one specific base.

A judge may be challenged for cause by defense counsel and if justified, will be removed from the case. Members of a panel (jury) can be challenged for cause. In addition, the accused has 1 peremptory (without cause) challenge.

Third, the accused is assigned military counsel free of charge and may hire civilian defense counsel at his/her own expense.

Fourth, in a general court-martial, the accused is usually tried by a jury, in the military called a panel. The panel is composed of at least five officers for a general court-martial. The general court-martial has general jurisdiction. An accused may waive trial by jury and be tried by the judge alone, a system which is more familiar to those from civil-law jurisdictions

Fifth, rights of the accused are the same as under civilian law: the right to remain silent, the right to be informed of the charges against him, the right to obtain and produce witnesses and other evidence in his favor, rights of appeal, including to the US Court of Military Appeals with counsel free of charge, the prohibition against double jeopardy. One difference from criminal trial in many states is that conviction can be upon a vote of 2/3 of the members of a panel (jury).

In summary, the military justice system is well developed and would suit the needs of justice in IRAQ quite well.

Responsibility

BOFAXEs are published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum: IFHV, NA 02/33 Ruhr-Universität Bochum, 44780 Bochum. Tel: 0049234/3227366, Fax: 0049234/3214208.

BOFAXEs are supported by the German Red Cross. **The writer is solely responsible for the content.**