Recent Developments

Tyranny on Trial: Regional Courts Crack Down on Mugabe’s Land
“Reform.” By Daniel Hemel & Andrew Schalkwyk

INTRODUCTION

One night in June 2008, militants associated with Zimbabwe’s ruling ZANU-PF Party stormed a citrus farm owned by seventy-four-year-old Mike Campbell, breaking four of his ribs and his collarbone while inflicting such severe brain damage that Campbell now has difficulty in adding simple sums. In April 2009, the militants returned to seize the farm; in August, they burned down the house where Campbell and his family had lived for nearly four decades.

A much less violent—but equally dramatic—event occurred on March 30, 2010, when attorneys representing Campbell and seventy-seven other white Zimbabwean farmers attached a luxury home in Cape Town, South Africa owned by the Reserve Bank of Zimbabwe. The attachment is a far cry from full compensation for Campbell and his co-plaintiffs—and only covers the plaintiffs’ legal costs of 113,000 rand (approximately US$15,500)—but it marks a rare instance of an oppressive regime being held to account for its human rights abuses. Moreover, it shows that the Southern African Development Community (SADC) Tribunal, a court that opened for argument only three years ago, may be a much more powerful force for human rights in the region than the tribunal’s founders ever foresaw.

When Southern African leaders gathered in Windhoek, Namibia in August 1992 to sign the SADC Treaty, attendees hailed the “historic occasion” and announced the dawn of a new era of regional integration. But Article 16 of the Treaty, establishing a regional court, was an afterthought at the time; the tribunal did not come into being for nearly another decade and a half. In the meantime, SADC made modest steps toward trade liberalization but accomplished very little on the political front. Regional leaders have been unwilling to intervene in member-state affairs, and many observers have dismissed the organization as a “talking shop.”

3. Id.
5. See Hofstatter, supra note 4.
dramatic display in Zimbabwe: after years of inaction, the SADC Summit—the closed-door body of regional heads of state—finally brokered an accord between President Robert Mugabe and his political rivals in 2008, but it stood on the sidelines as Mugabe brazenly breached the agreement’s terms.\(^9\)

In contrast to the political paralysis of the SADC Summit, the new tribunal is active in the region. Over the past three years, it has issued a series of rulings condemning Zimbabwe’s land reform program and potentially affording monetary compensation to Mugabe’s victims. As with the SADC Summit, the tribunal must rely on member states to enforce its rulings. But this obstacle has not been insurmountable: the Zimbabwean Supreme Court has recognized—at least in principle—the binding effect of tribunal decisions, and South African courts are allowing private parties to enforce SADC judgments against other member states inside South Africa’s borders. The experience of the tribunal so far shows that domestic and supranational judges may be able to establish a regional human rights regime even when heads of state lack the will to act and regional political institutions are crippled by inertia.

I. MIKE CAMPBELL (PVT) LTD. V. REPUBLIC OF ZIMBABWE

Although land reform in Zimbabwe began three decades ago when the country transitioned from a white-dominated government to majority rule, the process became much more rapid—and more ruthless—in 2000, when pro-Mugabe mobs moved onto thousands of white-owned farms across the country.\(^10\) Three years later, Zimbabwe’s parliament passed Amendment 17 to the constitution, allowing presidential appointees to expropriate farms without compensation or judicial review.\(^11\) Amid these violent land grabs, production on Zimbabwe’s white-owned farms—which had accounted for three-quarters of the state’s agricultural output—ground to a halt. The violence has displaced more than 4000 of Zimbabwe’s 4500 white farm owners\(^12\) and approximately one million black farm workers.\(^13\)

Having been notified that the government intended to acquire his land, Mike Campbell brought a challenge to the validity of Amendment 17 in the Zimbabwe Supreme Court in 2006. Campbell’s counsel argued that Amendment 17 was invalid because it contravened the “core values” and “essential features” of the Zimbabwean Constitution.\(^14\) However, in March

2007, the Zimbabwe Supreme Court reserved judgment in Campbell’s case,\textsuperscript{15} and in October of that year, Campbell turned to the SADC Tribunal for an injunction to protect Campbell’s rights while his case was resolved before Zimbabwe’s courts.

Campbell’s was the first case heard by the tribunal.\textsuperscript{16} According to the Protocol to the SADC Treaty, the court has “jurisdiction over all disputes . . . which relate to . . . the interpretation and application of the [SADC] Treaty,”\textsuperscript{17} but the scope of this provision had yet to be tested. Article 4 of the SADC Treaty provides that “SADC and Member States shall act in accordance with the . . . principles . . . [of] human rights, democracy, and the rule of law,”\textsuperscript{18} and Article 6 provides that “SADC and Member States shall not discriminate against any person on [the] grounds of gender, political views, race, ethnic origin, culture, or disability.”\textsuperscript{19} Campbell argued that Zimbabwe’s land reform program ran afoul of both provisions; thus, his dispute with the Zimbabwean government “relate[d] to . . . the application of the . . . Treaty.”

In December 2007, the tribunal issued an interim ruling in which it deferred judgment on Campbell’s substantive claims but confirmed that the tribunal had jurisdiction: “This is a matter that requires interpretation and application of the [SADC] Treaty,” the tribunal stated.\textsuperscript{20} Although the three-judge panel acknowledged that the Protocol requires plaintiffs to exhaust domestic remedies before bringing suit in the regional court, it issued an interim order enjoining Zimbabwe from evicting Campbell or “interfer[ing] with [his] peaceful residence” on his farm.\textsuperscript{21} Ultimately, the tribunal allowed seventy-seven other white farmers to join Campbell’s SADC suit.\textsuperscript{22}

Meanwhile, in January 2008, the Zimbabwe Supreme Court threw out Campbell’s challenge to the constitutionality of Amendment 17. The Court roundly rejected Campbell’s argument that the Zimbabwean Constitution contained essential features that could not be overridden by amendment.\textsuperscript{23} Having exhausted his domestic remedies, Campbell was now clear to proceed with his suit in the tribunal.

The SADC Tribunal, in its November 2008 4-1 judgment, concluded that the Zimbabwean government had breached its obligations under Article 4 of the SADC Treaty by denying Campbell and the seventy-seven other farmers the “right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law.”\textsuperscript{24} It also concluded that “although

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  \item \textsuperscript{17} Protocol on Tribunal and Rules and Procedures Thereof, art. 15, para. 2, Aug. 7, 2000, http://www.sadc.int/tribunal/protocol.php.
  \item \textsuperscript{18} See Treaty of the Southern African Development Community, supra note 7, art. IV.
  \item \textsuperscript{19} Id. art. VI, para. 2.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} The order is unpublished. For the judgment, see Mike Campbell (PvT) Ltd. v. Republic of Zimb., [2008] SADCT 2, http://www.saflii.org/sa/cases/SADCT/2008/2.pdf.
  \item \textsuperscript{23} Mike Campbell (PvT) Ltd. v. Minister of Nat’l Sec. Responsible for Land, Land Reform & Resettlement, [2008] ZWSC 1, http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf.
  \item \textsuperscript{24} Mike Campbell (PvT) Ltd., [2008] SADCT 2, at 26.
\end{itemize}
Amendment 17 does not explicitly refer to white farmers... its implementation affects white farmers only and consequently constitutes indirect discrimination or de facto or substantive inequality.” The tribunal ordered Zimbabwe to compensate three of the farmers who had already been evicted and “to ensure that no action [be] taken” to oust Campbell and the seventy-four others from their lands.

II. EFFORTS TO ENFORCE THE JUDGMENT

The Zimbabwean government scoffed at the SADC Tribunal’s order. Mugabe described the decision as “absolute nonsense.” In April 2009, pro-Mugabe militants forcibly evicted Campbell. The following month, Campbell filed an urgent application to the SADC Tribunal seeking to have the Zimbabwean government held in contempt of court. In June, the tribunal concluded that Zimbabwe had breached the November 2008 ruling, and it referred the matter to the SADC Summit “to take appropriate action.” At the same time, it ordered the Zimbabwean government to pay Campbell’s legal costs. But at the September SADC Summit, instead of condemning Mugabe, the heads of the SADC member states called for an end to international sanctions against Zimbabwe.

Meanwhile, two of the parties to Campbell’s SADC suit sought to register the tribunal’s decision in Zimbabwean court. Although government lawyers argued that SADC rulings were not binding in Zimbabwe because Mugabe had repudiated the tribunal’s jurisdiction, Zimbabwean High Court Judge Bharat Patel dismissed the government’s arguments as “essentially erroneous and misconceived.” To the contrary, Patel found that “the decisions of the tribunal are binding and enforceable within the territories of Member States.” However, Patel, following South African common law, stated that a foreign judgment is not enforceable in domestic court if it is “in conflict with public policy.” In light of the land reform policy pursued by the Mugabe government, Patel concluded that the SADC judgment could not be enforced by Zimbabwean courts.

Rebuffed by the Zimbabwean High Court, Campbell and two other farm owners turned to the High Court of South Africa. While acknowledging the procedure’s “novelty,” Campbell’s lawyers were confident that “the common
law on recognition and enforcement was clear enough to indicate that prospects were good," and they believed that registering the judgment in South Africa would "vindicate the rule of law in the region and end impunity." Campbell's attorneys argued that the application met all of the common law criteria for registration and noted that the Zimbabwean High Court had recognized the validity of the SADC Tribunal. Although the public policy argument against enforcement of the judgment had prevailed before the Zimbabwean High Court, they noted that "the South African domestic public policy is clearly in favour of registering the rulings," since South Africa "abhors racial discrimination [and] arbitrary expropriation." As a test run, and because quantification of the full compensation for the expropriated farms was yet to be decided by the regional court, the suit was limited to recovery of the legal fees already awarded by the tribunal.

The farmers' application went unopposed by the Zimbabwean government. In a single paragraph decision delivered on February 25, the High Court of South Africa registered the decisions of the SADC Tribunal and calculated the farmers' costs to be 112,780.13 rand (approximately US$15,500). The attachment of the Cape Town property was a first step toward enforcing this ruling.

CONCLUSION

On the one hand, the Campbell case and the parallel litigation in South African courts highlight the limits of human rights law. Nearly a year has passed since the tribunal in Windhoek instructed the SADC Summit to "take appropriate action" in the Campbell case. Courts seemingly cannot compel heads of state to act when political will is absent.

On the other hand, the tribunal's burgeoning docket demonstrates that Southern Africans of all races see the regional court as a counterweight to human rights abuses by government officials. In 2008, Luke Muyandu Tembani, a black commercial farmer in Zimbabwe whose lands were seized by a state bank because he defaulted on a mortgage, sued the Mugabe

33. E-mail from Frank Pelser, Attorney, to Andrew Schalkwyk (Mar. 15, 2010, 3:43:15 EST) (on file with authors).
35. E-mail from Frank Pelser, supra note 33.
36. Applicants' Heads of Argument, supra note 34, ¶ 55.
government in the SADC Tribunal. The following year, the regional court ruled that the state bank “had acted against the principles of natural justice” because it did not allow Tembani to contest the amount of the alleged debt before “an independent and impartial” judge. 39 Meanwhile, a small Zimbabwean political faction that was excluded from the (ill-fated) 2008 power-sharing agreement between Mugabe and the main opposition party petitioned the SADC Tribunal to set aside the 2008 accord. 40 And in early 2010, a union representing Zimbabwe’s black farm workers—who have suffered the most severe losses as a result of land reform 41—announced that it too would sue the Mugabe government before the Windhoek court. 42

As a symbolic matter, the court’s condemnations of the Mugabe government may carry greater weight than those of Western governments and NGOs who deliver the same message. Whereas the Mugabe regime has deployed anti-imperialist rhetoric effectively against the latter category of critics, 43 Mugabe’s pan-Africanist propaganda will sound even more strained when directed against an African court, especially one whose legitimacy has been affirmed by the Zimbabwean judiciary. Moreover, the possibility that South African courts will enforce tribunal orders by attaching Zimbabwean assets means that Mugabe’s victims may be able to obtain some monetary compensation—albeit not full redress—for their suffering.

If litigants succeed in attaching more of Zimbabwe’s nondiplomatic assets in South Africa, the impact on the Mugabe regime may be much more powerful than the sanctions imposed by the United States and the European Union. As of 2009, South Africa accounted for approximately 42% of Zimbabwe’s exports and 62% of its imports (compared to 22% and 9% respectively from the European Union). 44 Thus if litigants succeeded in attaching Zimbabwean assets across the SADC region, well over half of Zimbabwe’s international trade could be affected. Although Campbell and his co-plaintiffs so far only have targeted Zimbabwe-owned real estate, the South African human rights group AfriForum maintains that the farmers could potentially attach other assets such as Air Zimbabwe jets. 45 In short, the


40. The regional court concluded that since the faction, the United People’s Party, did not have any elected representatives in the National Assembly or Senate, its exclusion could be supported on the basis of “objective criteria,” and its application was denied. United Peoples’ Party of Zimb. v. SADC, [2009] SADCT 4, http://www.saflii.org/sa/cases/SADCT/2009/4.pdf.


SADC Tribunal—working in tandem with national courts—may be able to impose economic sanctions on the Mugabe regime for its human rights abuses. As the economic center of the region and home to an independent judiciary, South Africa might prove to be the ideal forum for the enforcement of international and regional human rights norms.

If the SADC Tribunal continues to issue anti-Mugabe rulings, and if domestic courts choose to enforce those rulings by attaching nondiplomatic assets, the political paralysis of the SADC Summit may become a blessing in disguise for Mugabe foes. In theory, the SADC leaders could curtail the tribunal by amending the court’s Protocol and limiting its jurisdiction. Alternatively, they could screen future nominees to the court with the goal of altering its ideological composition over the long term. However, amending the Protocol would require a degree of coordination among SADC heads of state that the Summit has not demonstrated in recent years. Moreover, several SADC states have taken a hard line against the Mugabe regime. Each member state can block any action by the consensus-dependent Summit. Finally, since each can nominate one of its own nationals to the court, it is unlikely that pro-Mugabe jurists will capture all of the tribunal’s seats. The inertia that has overcome the SADC Summit so far means that the tribunal cannot rely on the regional organization’s political branch to enforce its rulings. But the same inertia may mean that the court will have free rein for the foreseeable future.

Military Commissions at a Crossroads: Defining the “Law of War” on Terrorism. By Sara Aronchick Solow

The meaning of “terrorism” under U.S. domestic law and under international law differs significantly. This became strikingly clear in January 2010, when the military commission system put in place by the Military Commissions Act of 2009 wrestled with its first two cases on appeal. As the government argued before the Court of Military Commissions Review, U.S. law has a relatively low bar for what constitutes terrorism. Acts of conspiracy, “material support,” and the circulation of propaganda all qualify and are punishable by harsh sentences. Under international law, meanwhile, there is a substantially higher bar for what constitutes a terrorist act. As the defendants in the proceedings of early 2010 demonstrated, conspiracy and “material support” are not terrorism under international law, and such acts would not give rise to harsh penalties under an international or domestic court applying the international law doctrines.

Given that U.S. and international law diverge on the substance of terrorism, military commissions convened in the United States for the purpose of trying alien combatants will be forced to pick among these varying legal standards. Under the Military Commissions Acts of 2006 and 2009, Congress erected a system of Article I courts for prosecuting “unprivileged enemy belligerents,” and it directed the commissions to adjudicate alleged violations of the “law of war.” As cases before the commissions increase, the judges will be forced to resolve a yet unsettled question: what “law of war” should they apply? This Recent Development argues that in the interest of constitutional law and international comity, military commissions should draw solely from international authorities when adjudicating and defining the “law of war” on terrorism.

I. “TERRORISM” UNDER INTERNATIONAL AND DOMESTIC LAW

Under international law, terrorism (or as the report puts it, the “direct participation in hostilities” by civilians) was defined by the International


2. Brief on Behalf of Appellee at 17-18, United States v. al Bahlul, CMCR Case No. 09-001 (U.S. Court of Military Comm’n Review Oct. 21, 2009).

3. Id.


Committee on the Red Cross (ICRC) in a report released in May 2009. The ICRC is a body whose “special position” in the field of armed conflict is recognized under the Geneva Conventions of 1949, and while its legal opinions are not directly binding on any international actor, they are routinely relied upon by drafting committees for treaties as well as by courts applying international law. In 2003, the ICRC sponsored a working group whose mandate would be to publish “interpretive guidance” on what activities amount to terrorism. Such a report was critical, the ICRC believed, because the international community needed clarification on who, in modern-day warfare, should be afforded civilian protections, given the range of ways that persons participate in hostilities. The ICRC group met with practitioners and scholars for five years. It surveyed Common Article 3 of the Geneva Conventions, Additional Protocol II, and a multitude of other international law authorities. In May 2009, the working group arrived at its conclusion: under international law, there are civilians, privileged combatants, and unprivileged combatants. To fall into the latter group and thus be deemed a terrorist, “the decisive criterion . . . is whether a person assumes a continuous function for [an organized armed] group involving his or her direct participation in hostilities.” Persons who contribute to armed groups “on a merely spontaneous, sporadic, or unorganized basis” do not qualify. These persons retain civilian protections, “similar to private contractors and civilian employees accompanying State armed forces.”

The United States has several terrorism statutes that sweep much broader than the ICRC’s interpretive guidance. In 1994 and 1996, Congress made it a crime to provide “material support” either to the commission of

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10. Id. at 9.

11. Id. at 33-34.

12. Id.

13. Id. at 34.
terrorist attacks\textsuperscript{14} or to terrorist organizations.\textsuperscript{15} These provisions are codified at § 2339A and § 2339B of title 18, respectively. One U.S. court has interpreted “material support” to include an act as small as contributing binoculars to a resistance movement,\textsuperscript{16} and the Obama administration has argued that providing a Kurdish separatist group training in international law also qualifies.\textsuperscript{17} In 2001 and 2004, Congress made both “material support” statutes extraterritorial in reach.\textsuperscript{18}

II. MILITARY COMMISSIONS AT A CROSSROADS: DEFINING THE “LAW OF WAR” ON TERRORISM

The United States's present system of military commissions for prosecuting terrorist aliens is the product of two statutes. First, following the Supreme Court’s holding in \textit{Hamdan v. Rumsfeld},\textsuperscript{19} Congress passed the Military Commission Act of 2006, creating a set of Article I courts to try “unlawful enemy combatants” for “violations of law of war and other offenses triable by military commission.”\textsuperscript{20} Second, in the Military Commissions Act of 2009, Congress preserved the tribunals created by the 2006 Act but made several procedural improvements at the urging of President Obama.\textsuperscript{21} To date, the congressionally chartered military commissions have convicted in only three cases, two of which are now on appeal (the cases of Mr. al Bahlul and of Mr. Hamdan).\textsuperscript{22} Even after being reconstituted under the 2009 Act, the commissions are yet to adjudicate over a substantive trial; instead, their work to date has been adjudicating over motions regarding trial procedure, evidence, etc.\textsuperscript{23} However, the Obama administration has announced that it intends to use military commissions more frequently in combating terrorism,\textsuperscript{24}

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  \item \textsuperscript{17} Brief for Respondents at 27-30, Humanitarian Law Project v. Holder, No. 08-1498 (U.S. Dec. 22, 2009).
  \item \textsuperscript{19} 548 U.S. 557 (2006) (invalidating the system of military commissions that had been created pursuant President Bush's executive order in 2001).
  \item \textsuperscript{21} Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190.
\end{itemize}

According to State Department Legal Adviser Harold Koh, these improvements—which range from making forced statements inadmissible, to restricting hearsay evidence, to requiring mandatory disclosure of exculpatory evidence—allow for the commissions’ inclusion in the administration’s “policy of prosecutions.” Harold Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama administration and International Law (Mar. 25, 2010) [hereinafter Koh Address].

\begin{itemize}
  \item \textsuperscript{23} See U. S. Dep’t of Defense, Office of Military Comm’ns, \textit{supra} note 1.
\end{itemize}
and should it try the 9/11 plotters in such commissions rather than in civilian
courts, this would be a profound step in such a direction.

As the number of prosecutions before military commissions increases,
the judges will face a yet-unanswered dilemma. What acts of terrorism
constitute "violations of [the] law of war"—law which the commissions have
been directed to apply?

The military commission judges will inevitably wrestle with the
meaning of the "law of war" for two underlying reasons. First, although the
MCA of 2009 empowers the commissions to convict "unprivileged enemy
belligerents" for thirty enumerated offenses in addition to "violations of [the]
law of war," 25 many of the enumerated offense provisions did not apply
extraterritorially before 2001, the time at which many alien detainees were
captured. For instance, providing "material support" to terrorist groups, a
triable offense in a military commission under § 950(t) of the MCA of 2009,
was only given extraterritorial effect in 2004. 26 As the petitioners in the
January 2010 proceedings argued, directly convicting combatants captured in
2001 for violating a statute not applicable extraterritorially at the time would
run afoul of the Ex Post Facto Clause. 27 Second, the shared wisdom in both
the U.S. Supreme Court and the executive branch is that under U.S. common
law and historical practice, domestic military commissions should only try
aliens for "law of war" crimes, whatever that term entails. In the three leading
Supreme Court cases involving U.S. military commissions and foreign
combatants—Ex parte Quirin, 28 In re Yamashita, 29 and Hamdan 30—the Court
directed the commissions to apply the "law of war." Assistant Attorney
General David Kris told Congress in July 2009 that "[t]he President has made
clear that military commissions are to be used only to prosecute law of war
offenses." 31 U.S. Department of State Legal Adviser Harold Koh in a March
2010 speech defended the commissions, but was careful to describe them only
as "appropriate venues for trying persons for violations of the laws of war." 32

25. For the enumerated offenses, see Military Commissions Act of 2009, Pub. L. No. 111-84,
§ 950(t)(1)-(32), 123 Stat. 2190; for the "law of war" authorization to the commissions, see id. §
948b(a).


27. Brief on Behalf of Appellant, supra note 4, at 8 ("Material support for a terrorist
organization ... was not an extraterritorial crime until 2004. Because he could not be charged with this
offense at the time of his capture in 2001, he could not be charged with it in 2008. His conviction on this
charge must therefore be reversed ... ").

28. 317 U.S. 1, 11 (1942) (holding that Congress had acted properly in establishing "military
commissions to try persons for offenses which, according to the rules and precepts of the law of nations,
and more particularly the law of war, are cognizable by such tribunals").

29. 327 U.S. 1, 7 (1946) (reaffirming that Congress has constitutional authority under the
Define and Punish Clause to "to create military commissions for the trial of enemy combatants for
offenses against the law of war").

30. 548 U.S. 557, 597 n.27 (2006) (plurality opinion) ("[A]s we recognized in Quirin ... and
as further discussed below, commissions convened during time of war but under neither martial law nor
military government may try only offenses against the law of war.").

the H. Armed Serv. Comm., 111th Cong. 3 (2009) (statement of David Kris, Assistant Att'y Gen. of the
United States).

32. See Koh Address, supra note 21 (emphasis added).
Accordingly, out of ex post facto concerns, and out of deference to historical practice, military commission judges will have trouble escaping the "law of war." But to adjudicate under that body of law, the judges will need to reconcile—or choose between—the contrasting notions of terrorism under U.S. and international law.

III. THE PROPOSAL FOR THE COMMISSIONS: STICK TO THE INTERNATIONAL LAW DEFINITION OF TERRORISM

This Recent Development proposes that when trying aliens for law of war offenses, military commissions should apply international law doctrines on terrorism, not U.S. domestic laws. This recommendation is informed both by constitutional considerations and by international comity considerations.

First, under Article I of the U.S. Constitution, the jurisdiction of non-martial law military commissions is rightly understood as limited to applying the law of war that is embraced by the international community. The constitutional license for the government to erect military commissions in the first place traces back to the Define and Punish Clause, under which Congress may "define and punish . . . Offenses against the Law of Nations." Congress invoked the Define and Punish Clause in 2006 when it enacted the Military Commissions Act, and the Clause has been cited in the past as the source of authority for other non-martial law commissions. But as the text of the Define and Punish Clause makes clear, Congress’s authority—which it can surely delegate to judges in military commissions if it chooses—is to define the "Law of Nations," not to create it.

The Supreme Court has repeatedly held that the Define and Punish Clause limits the jurisdiction of "Law of Nations" military commissions to conduct tribunals according to the international law of war. In Ex parte Quirin, for instance, the Supreme Court sustained the convictions of eight German nationals by a military commission because it held that the defendants were rightly found guilty of war crimes according to "universal agreement and practice." The Court surveyed the Hague Convention, war manuals from Great Britain and Germany, and even treatises from Italy to confirm that first, "combatants [who] do not wear ‘fixed and distinctive emblems’" lose prisoner-of-war privileges, and second, that plotting to "destroy certain war industries" is a substantive war crime, punishable by

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33. The term "martial law military commissions" refers to tribunals established during periods of military occupation or military government for the purposes of imposing law and order. As the Supreme Court explained in Hamdan v. Rumsfeld, these military commissions are created to replace the traditional court system, and the executive's authority to convene them traces to constitutional sources other than the Define and Punish Clause. 548 U.S. at 596-98 (plurality opinion). This Recent Development is concerned with non-martial law military commissions, namely, commissions established pursuant to the Define and Punish Clause.
34. U.S. CONST. art. I, § 8, cl. 10.
36. See supra notes 28, 29.
37. See In re Yamashita, 327 U.S. 1, 16-17 (1946) ("We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.").
38. 317 U.S. 1, 29-31 (1942).
death under international law. In *In re Yamashita*, the Court similarly surveyed international law authorities to confirm that a military commission's jurisdiction over a Japanese commander had been proper. In *Hamdan*, a plurality of the Supreme Court invalidated the jurisdiction of a military commission over a foreign combatant precisely because it found that "conspiracy," the crime for which the combatant was to be tried in the commission, was not a "plain and ambiguous" offense under the international law of war.

Not only the Supreme Court but also Congress, at least until recently, had always acknowledged the constitutional limitations that the Define and Punish Clause placed on "Law of Nations" military commissions. The Uniform Code of Military Justice from its passage in 1950 through 2006 had authorized the President to convene military commissions, but only insofar as those commissions complied with the international law of war and with the four Geneva Conventions. It was deeply unsettling to many international lawyers when the Bush administration proposed, in 2001, to create a system of military commissions for prosecuting foreign terrorists that departed significantly from the international law of war.

Beyond the constitutional limitations laid out in Article I, the second reason why "Law of Nations" military commissions should remain faithful to the international law of terrorism is to preserve comity. If the United States expects other states to respect the Geneva Conventions, the Hague Conventions, and other international norms when dealing with U.S. detainees, then the United States should afford foreign detainees the same treatment. Mr. Hamdan's lawyers invoked this reasoning in their oral argument before the

39. *Id.* at 35-37.
40. 327 U.S. at 17-18. The charge against the Japanese commander had been failure "to take such appropriate measures as [were] within his power to control the troops under his command." *Id.* at 14-15. The Supreme Court concluded that this charge was grounded in the international law of war "by any reasonable standard." *Id.* at 17-18.
41. 548 U.S. 557, 600-02 (2006) (plurality opinion). The *Hamdan* plurality held that unless the Define and Punish Clause was read in conformity with international law, military commissions would be granted a "degree of adjudicative and punitive power in excess of that contemplated . . . by the Constitution." *Id.* at 602; *see also* Transcript of Oral Argument at 22, *Hamdan*, 548 U.S. 557 (No. 05-184) (Neal Katyal) ("What you can’t do is use the standalone offense of conspiracy. And here’s why. Because the standalone offense of conspiracy is rejected by international law . . . . And this Court has said that the test for a violation of the laws of war is when universal agreement and practice make it a violation.").
42. 10 U.S.C. § 821 (2000) (stating that military commissions may try offenses under "the law of war"); *Hamdan*, 548 U.S. at 613 (holding that the UCMJ "conditions the President’s use of military commissions on compliance . . . with 'the rules and precedents of the law of nations,' including, inter alia, the four Geneva Conventions signed in 1949" (emphasis added)).
43. *See* Nat’l Assoc. of Criminal Defense Lawyers, Position of the National Association of Criminal Defense Lawyers on the Draft Military Commission Instruction, in I NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSIONS INSTRUCTIONS SOURCEBOOK 30, 30 (2003), http://www.wcl.american.edu/nimj/documents/NIMJVOLI.pdf (arguing that the Bush administration’s instructions for the newly convened military commissions should be rejected because they were not anchored in customary international law nor in “any of the Geneva or other Conventions on War”); Jordan J. Paust, *Antiterritorialism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 2 (2001) ("In its present form and without appropriate congressional intervention, the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges."); *id.* at 26-27 (arguing that one of the problems with President Bush’s order is that the commissions would not be limited to trying offenses under the international law of war).
Supreme Court in 2006. Citing Thomas Paine, they concluded their testimony: "He who—that would make his own liberty secure must guard even his enemy from oppression, for if he violates that duty, he establishes a precedent that will reach unto himself."\(^4\) Here too, should U.S. military commissions define and apply the law of war with reference solely to domestic doctrines, Paine's prophetic warning could be realized.\(^5\)

In the two cases on appeal before the Court of Military Commissions Review, the federal government rejected the notion that the commission need adhere to international law doctrines. The government did not refer to the ICRC's May 2009 report as a relevant legal authority, nor did it limit its arguments to international law precedents. Rather, the government urged the commission to first apply U.S. statutes governing terrorism,\(^6\) and second, apply precedents established in martial-law tribunals during the Civil War, regardless of whether those precedents have been adopted by international law or jurisprudence.\(^7\) Because these authorities deem conspiracy, solicitation, and "material support" to violate the law of war, the government claims, the appellate review tribunal should sustain the convictions below. The problem, of course, is that the government's argument ignores the directives of the Define and Punish Clause and forgets the importance of international comity. Should the commissions follow the federal government's suggestion in forthcoming cases, the consequences for U.S. constitutional order, for relationships between the U.S. and foreign states, and for the international rule of law, would be grave.

\(^4\) Transcript of Oral Argument, supra note 21, at 83.
\(^5\) Cf. Sean D. Murphy, Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants," 75 GEO. WASH. L. REV. 1105, 1163-64 (2007) (arguing that the United States should look for guidance to international law, and specifically to the Geneva Conventions and the Additional Protocols, in determining its detention policies).
\(^6\) See Brief on Behalf of Appellee, supra note 2, at 17-18.
\(^7\) Id. at 25-30 (urging the commissions to apply precedents from martial-law tribunals established during the Civil War). The government does also invoke the work of Francis Lieber, id. at 22-24, whose treatises have unquestionably influenced international law, to argue that "systematic terrorism" is a war crime. Here, the government's arguments are on firmer footing with respect to international law. However, the key question before the commissions is not whether al Qaeda as an organization has offended the international law of war. Rather, the question is which individual activities in conjunction with terrorist groups render a combatant in violation of the law of war—for example, does material support, conspiracy, or solicitation for terrorist groups qualify? In the sections of the brief where the federal government addressed those questions regarding individual acts, it referred not to Francis Lieber's treatises but to decisions by Civil War military commissions. Id. at 25-30. Those decisions are not reflected in contemporary international law; they are miles away from the ICRC's Interpretive Guidance.