

By George Friedman

U.S. Attorney General Eric Holder has decided that Khalid Sheikh Mohammed will be tried in federal court in New York. Holder's decision was driven by the need for the U.S. government to decide how to dispose of prisoners at Guantanamo Bay, a U.S. Naval base outside the boundaries of the United States selected as the camp in which to hold suspected al Qaeda members.

We very carefully use the word "camp" rather than prison or prisoner of war camp. This is because of an ongoing and profound ambiguity not only in U.S. government perceptions of how to define those held there, but also due to uncertainties in international law, particularly with regard to the Geneva Conventions of 1949. Were the U.S. facility at Guantanamo a prison, then its residents would be criminals. If it were a POW camp, then they would be enemy soldiers being held under the rules of war. It has never really been decided which these men are, and therefore their legal standing has remained unclear.

War vs. Criminal Justice

The ambiguity began shortly after 9/11, when then-U.S. President George W. Bush defined two missions: waging a war on terror, and bringing Osama bin Laden and his followers to justice. Both made for good rhetoric. But they also were fundamentally contradictory. A war is not a judicial inquiry, and a criminal investigation is not part of war.

An analogy might be drawn from Pearl Harbor. Imagine that in addition to stating that the United States was at war with Japan, Franklin Roosevelt also called for bringing the individual Japanese pilots who struck Hawaii to justice under American law. This would make no sense. As an act of war, the Japanese action fell under the rules of war as provided for in international law, the U.S. Constitution and the Uniform Code of Military Justice (UCMJ). Japanese pilots could not be held individually responsible for the lawful order they received. In the same sense, trying to bring soldiers to trial in a civilian court in the United States would make no sense. Creating a mission in which individual Japanese airmen would be hunted down and tried under the rules of evidence not only would make no sense, it would be impossible. Building a case against them individually also would be impossible. Judges would rule on evidence, on whether an unprejudiced jury could be found, and so on. None of this happened, of course — World War II was a war, not a judicial inquiry.

It is important to consider how wars are conducted. Enemy soldiers are not shot or captured because of what they have done; they are shot and captured because of who they are — members of an enemy military force. War, once launched, is pre-emptive. Soldiers are killed or captured in the course of fighting enemy forces, or even before they have carried out hostile acts. Soldiers are not held responsible for their actions, but neither are they immune to attack

just because they have not done anything. Guilt and innocence do not enter into the equation. Certainly, if war crimes are in question, charges may be brought; the UCMJ determines how they will be tried by U.S. forces. Soldiers are tried by courts-martial, not by civilian courts, because of their status as soldiers. Soldiers are tried by a jury of their peers, and their peers are held to be other soldiers.

International law is actually not particularly ambiguous about the status of the members of al Qaeda. The Geneva Conventions do not apply to them because they have not adhered to a fundamental requirement of the Geneva Conventions, namely, identifying themselves as soldiers of an army. Doing so does not mean they must wear a uniform. The postwar Geneva Conventions make room for partisans, something older versions of the conventions did not. A partisan is not a uniformed fighter, but he must wear some form of insignia identifying himself as a soldier to enjoy the conventions' protections. As Article 4.1.6 puts it, prisoners of war include "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." The Geneva Conventions of 1949 does not mention, nor provide protection to, civilians attacking foreign countries without openly carrying arms.

The reasoning behind this is important. During the Franco-Prussian war, French franc-tireurs fired on Prussian soldiers. Ununiformed and without insignia, they melded into the crowd. It was impossible for the Prussians to distinguish between civilians and soldiers, so they fired on both, and civilian casualties resulted. The framers of the Geneva Conventions held the franc-tireurs, not the Prussian soldiers, responsible for the casualties. Their failure to be in uniform forced the Prussians to defend themselves at the cost of civilian lives. The franc-tireurs were seen as using civilians as camouflage. This was regarded as outside the rules of war, and those who carried out such acts were seen as not protected by the conventions. They were not soldiers, and were not to be treated as such.

An Ambiguous Status

Extending protections to partisans following World War II was seen as a major concession. It was done with concerns that it not be extended so far that combatants of irregular forces could legally operate using their ability to blend in with surrounding civilians, and hence a requirement of wearing armbands. The status of purely covert operatives remained unchanged: They were not protected under the Geneva Conventions. Their status remained ambiguous.

During World War II, it was U.S. Army practice to hold perfunctory trials followed by executions. During the Battle of the Bulge, German commandos captured wearing U.S. uniforms — in violation of the Geneva Conventions — were summarily tried in field courts-martial and executed. The idea that such individuals were to be handed over to civilian courts was never considered. The actions of al Qaeda simply were not anticipated in the Geneva Conventions. And to the extent they were expected, they violated the conventions.

Holder's decision to transfer Khalid Sheikh Mohammed to federal court makes it clear that Mohammed was not a soldier acting in time of war, but a criminal. While during times of war

spies are tried as criminals, their status is precarious, particularly if they are members of an enemy army. Enemy soldiers out of uniform carrying out reconnaissance or espionage are subject to military, not civilian, justice, and frequently are executed. A spy captured in the course of collecting information is a civilian, particularly in peacetime, and normally is tried as a criminal with rules of evidence.

Which was Mohammed? Under the Geneva Conventions, his actions in organizing the Sept. 11 attacks, which were carried out without uniforms or other badges of a combatant, denies him status and protection as a POW. Logically, he is therefore a criminal, but if he is, consider the consequences.

Criminal law is focused on punishments meted out after the fact. They rarely have been preventive measures. In either case, they follow strict rules of evidence, require certain treatments of prisoners and so on. For example, prisoners have to be read the Miranda warning. Soldiers are not policeman. They are not trained or expected to protect the legal rights of captives save as POWs under the UCMJ, nor protect the chain of custody of evidence nor countless other things that are required in a civilian court. In criminal law, it is assumed that law enforcement has captured the prisoner and is well-versed in these rules. In this case, the capture was made without any consideration of these matters, nor would one expect such consideration.

Consider further the role of U.S. covert operations in these captures. The United States conducts covert operations in which operatives work out of uniform and are generally not members of the military. Operating outside the United States, they are not protected by U.S. law although they do operate under the laws and regulations promulgated by the U.S. government. Much of their operations run counter to international and national law. At the same time, their operations are accepted as best practices by the international system. Some operate under cover of diplomatic immunity but carry out operations incompatible with their status as diplomats. Others operate without official cover. Should those under unofficial cover be captured, their treatment falls under local law, if such exists. The Geneva Conventions do not apply to them, nor was it intended to.

Spies, saboteurs and terrorists fall outside the realm of international law. This class of actors falls under the category of national law, leaving open the question of their liability if they conduct acts inimical to a third country. Who has jurisdiction? The United States is claiming that Mohammed is to be tried under the criminal code of the United States for actions planned in Afghanistan but carried out by others in the United States. It is a defensible position, but where does this leave American intelligence planners working at CIA headquarters for actions carried out by others in a third country? Are they subject to prosecution in the third country? Those captured in the third country clearly are, but the claim here is that Mohammed is subject to prosecution under U.S. laws for actions carried out by others in the United States. And that creates an interesting reciprocal liability.

A Failure to Evolve

The fact is that international law has not evolved to deal with persons like Mohammed. Or more

precisely, most legal discussion under international law is moving counter to the Geneva Conventions' intent, which was to treat the franc-tireurs as unworthy of legal protection because they were not soldiers and were violating the rules of war. International law wants to push Mohammed into a category where he doesn't fit, providing protections that are not apparent under the Geneva Conventions. The United States has shoved him into U.S. criminal law, where he doesn't fit either, unless the United States is prepared to accept reciprocal liability for CIA personnel based in the United States planning and supporting operations in third countries. The United States has never claimed, for example, that the KGB planners who operated agents in the United States on behalf of the Soviet Union were themselves subject to criminal prosecution.

A new variety of warfare has emerged in which treatment as a traditional POW doesn't apply and criminal law doesn't work. Criminal law creates liabilities the United States doesn't want to incur, and it is not geared to deal with a terrorist like Mohammed. U.S. criminal law assumes that capture is in the hands of law enforcement officials. Rights are prescribed and demanded, including having lawyers present and so forth. Such protections are practically and theoretically absurd in this case: Mohammed is not a soldier and he is not a suspected criminal presumed innocent until proven guilty. Law enforcement is not a practical counter to al Qaeda in Afghanistan and Pakistan. A nation cannot move from the rules of counterterrorism to an American courtroom; they are incompatible modes of operation. Nor can a nation use the code of criminal procedures against a terrorist organization operating transnationally. Instead, they must be stopped before they commit their action, and issuing search warrants and allowing attorneys present at questioning is not an option.

Therefore — and now we move to the political reality — it is difficult to imagine how the evidence accumulated against Mohammed could enter a courtroom. Ignoring the methods of questioning, which is a separate issue, how can one prove his guilt beyond a reasonable doubt without compromising sources and methods, and why should one? Mohammed was on a battlefield but not operating as a soldier. Imagine doing criminal forensics on a battlefield to prove the criminal liability of German commandos wearing American uniforms.

In our mind, there is a very real possibility that Mohammed could be found not guilty in a courtroom. The cases of O.J. Simpson and of Jewish Defense League head Rabbi Meir Kahane's killer, El Sayyid Nosair — both found not guilty despite overwhelming evidence — come to mind. Juries do strange things, particularly amid what will be the greatest media circus imaginable in the media capital of the world.

But it may not be the jury that is the problem. A federal judge will have to ask the question of whether prejudicial publicity of such magnitude has occurred that Mohammed can't receive a fair trial. (This is probably true.) Questions will be raised about whether he has received proper legal counsel, which undoubtedly he hasn't. Issues about the chain of custody of evidence will be raised; given that he was held by troops and agents, and not by law enforcement, the chances of compromised evidence is likely. The issue of torture will, of course, also be raised but that really isn't the main problem. How do you try a man under U.S. legal procedures who was captured in a third country by non-law enforcement personnel, and who has been in military custody for seven years?

There is a nontrivial possibility that he will be acquitted or have his case thrown out of court, which would be a foreign policy disaster for the United States. Some might view it as a sign of American adherence to the rule of law and be impressed, others might be convinced that Mohammed was not guilty in more than a legal sense and was held unjustly, and others might think the United States has bungled another matter.

The real problem here is international law, which does not address acts of war committed by non-state actors out of uniform. Or more precisely, it does, but leaves them deliberately in a state of legal limbo, with captors left free to deal with them as they wish. If the international legal community does not like the latter, it is time they did the hard work of defining precisely how a nation deals with an act of war carried out under these circumstances.

The international legal community has been quite vocal in condemning American treatment of POWs after 9/11, but it hasn't evolved international law, even theoretically, to cope with this. Sept. 11 is not a crime in the proper sense of the term, and prosecuting the guilty is not the goal. Instead, it was an act of war carried out outside the confines of the Geneva Conventions. The U.S. goal is destroying al Qaeda so that it can no longer function, not punishing those who have acted. Similarly the goal in 1941 was not punishing the Japanese pilots at Pearl Harbor but destroying the Japanese Empire, and any Japanese soldier was a target who could be killed without trial in the course of combat. If it wishes to solve this problem, international law will have to recognize that al Qaeda committed an act of war, and its destruction has legal sanction without judicial review. And if some sort of protection is to be provided al Qaeda operatives out of uniform, then the Geneva Conventions must be changed, and with it the status of spies and saboteurs of all countries.

Holder has opened up an extraordinarily complex can of worms with this decision. As U.S. attorney general, he has committed himself to proving Mohammed's guilt beyond a reasonable doubt while guaranteeing that his constitutional rights (for a non-U.S. citizen captured and held outside the United States under extraordinary circumstances by individuals not trained as law enforcement personnel, no less) are protected. It is Holder's duty to ensure Mohammed's prosecution, conviction and fair treatment under the law. It is hard to see how he can.

Whatever the politics of this decision — and all such decisions have political dimensions — the real problem faced by both the Obama and Bush administrations has been the failure of international law to evolve to provide guidance on dealing with combatants such as al Qaeda. International law has clung to a model of law governing a very different type of warfare despite new realities. International law must therefore either reaffirm the doctrine that combatants who do not distinguish themselves from noncombatants are not due the protections of international law, or it must clearly define what those protections are. Otherwise, international law discredits itself.

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