Case Western Reserve Journal of International Law

Volume 36 | Issue 2

2004

Foreword: Terrorism on Trial

Michael P. Scharf

Amy E. Miller

FOREWORD: TERRORISM ON TRIAL

Michael P. Scharf[†] *and Amy E. Miller*[††]

I

On December 21, 1988, Pan Am 103 exploded over Lockerbie, Scotland, killing 259 passengers and crew members as well as eleven residents of the small Scottish town. With the exception of the attacks of September 11, 2001, this was the worst case of air terrorism ever committed on Western soil and the Scottish and American authorities responded by launching the largest international criminal investigation ever undertaken. It took three years for the investigators to piece together what happened and who they believed to be responsible. At first the evidence pointed toward Iran as the culprit, then the trail seemed to lead to a Syrian based terrorist organization. But in 1991, the United States and United Kingdom issued indictments against two Libyan agents for the Lockerbie bombing, which had allegedly been undertaken in revenge for the U.S. bombing of Tripoli in 1986. It required another eight years of shuttle diplomacy to work out a deal between the United Nations, the United States, the United Kingdom, and Libya to bring the accused perpetrators to trial before a panel of three Scottish judges sitting at a retired U.S. air force base known as Camp Zeist in The Netherlands, with the case prosecuted by Scottish Barristers assisted by U.S. prosecutors.

After a nine-month trial, the Lockerbie court acquitted one of the two defendants outright, and the judgment acknowledged that there were many holes in the prosecution's case against the other defendant, Abdelbaset Al-Megrahi, who was nonetheless found guilty of the bombing of the airliner. It is noteworthy, however, that the judges unequivocally determined that the crime was committed in the course of the defendant's duties as a Libyan intelligence agent, leaving no question that they believed that the government of Libya was behind the bombing. But conspicuously absent

---

[†] Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law. Professor Scharf served as the Counsel to the U.S. State Department's Counter-terrorism Bureau during the investigation into the Pan Am 103 bombing, and as Attorney Adviser for U.N. affairs when sanctions were imposed on Libya. Professor Scharf expresses appreciation to Amos Guiora, the co-chair of the "Terrorism on Trial" Symposium Program Committee, Professor Jacqui Lipton, the Associate Director of the Cox Center, and to Gerald Korngold, the Dean of Case Western Reserve University School of Law -- for their invaluable assistance and support in this project.

[††] Editor in Chief of the Case Western Reserve Journal of International Law; BA, Smith College (1999); J.D., Case Western Reserve University School of Law (2005).

from the judgment was an indication of how high up in Libya this responsibility went, and whether other States, such as Syria and Iran, also played a role as many experts continue to suspect.

The mixed verdict and limited findings in the Lockerbie case have left the public questioning whether the trial succeeded in achieving justice and truth. But perhaps a more important measure for judging the success of the Lockerbie trial is the extent to which it contributed to peace and security.

The Lockerbie trial must be viewed in the context of the thirty-year-long, low-intensity conflict between Libya and the United States. When Colonel Muammar Gaddafi came to power in 1969, Libya nationalized U.S. corporate-owned oil wells and refineries and began to support anti-Western terrorist organizations. In the early 1980s, the Reagan administration conducted naval and air exercises off the coast of Libya, provoking the first of several minor military confrontations. Then, when terrorists detonated a bomb in the LaBelle Discotheque in Germany, killing several American servicemen, the Reagan administration claimed that Libya was behind the bombing and launched a surprise airstrike on Gaddafi's residence in Tripoli, which injured his son and killed his infant daughter.

The verdict in the Lockerbie case confirmed the U.S. government's charge that the bombing of Pan Am 103 in 1988 was undertaken by Libyan agents in retaliation for the 1986 U.S. airstrike on Tripoli. When evidence of Libyan involvement first came to light in 1991, officials throughout the U.S. government debated the best way to respond. It was generally agreed that a military operation to engineer a regime change would be too costly in terms of lives, resources, and diplomatic capital. Instead, a decision was made to employ the mechanism of criminal prosecution.

But achieving justice was never the main objective of this scheme. The fact that the United States issued a public, rather than a sealed, indictment indicates that U.S. authorities had low expectations that the accused would ever actually be brought to trial. Instead, U.S. officials saw the indictment itself as a diplomatic tool that would help them persuade members of the Security Council to impose sanctions on Libya, thereby furthering their goal of isolating and weakening a rogue regime. The so-called money bomb ended up costing Libya more than $18 billion in lost revenue during the 1990s.

Choking under the effects of sanctions, Gaddafi ultimately agreed to surrender the two Libyan defendants to a novel Scottish court sitting in the Netherlands in a deal that would insulate Gaddafi and other high level Libyan officials from judicial scrutiny. At this point, with international support for expanding or even continuing the sanctions quickly fading and American companies clamoring to regain access to Libyan oil fields, the Clinton administration viewed a Scottish trial in the Netherlands of the two Libyan agents as a convenient way to put the Lockerbie incident behind it.

Despite its inadequacies, the judicial response did succeed in severing the cycle of violence between the United States and Libya. It prompted

Libya to terminate its support for terrorist groups, to dismantle its chemical weapons program, to acknowledge responsibility for the Pan Am 103 bombing, and to pay billions of dollars to the families of the victims to settle the pending law suits. International sanctions have been lifted against Libya, and U.S.-Libyan relations have begun to normalize. Consequently, from the standpoint of U.S. security interests, the Lockerbie trial was a tremendous success.

The United States initially viewed the Lockerbie strategy as providing a useful model for effectively dealing with other terrorist incidents without having to resort to a costly military campaign. Thus, after the bombings of the U.S. embassies in Kenya and Tanzania in 1998 and the attack on the U.S.S. Cole in Yemen in 1999, the United States issued a public indictment against Osama bin Laden and obtained Security Council sanctions against Afghanistan (from whose territory bin Laden's al Qaeda organization operated) -- the same strategy it had employed in response to the Pan Am 103 bombing. But the September 11, 2003 attacks by al Qaeda against the World Trade Center and Pentagon triggered a seismic shift in the U.S. approach to dealing with terrorists. Rather than seeking to bring terrorists to justice through indictments, economic sanctions, and criminal trials following the Lockerbie model, U.S. policy after 9/11 became, in the words of President Bush, to "bring justice to the terrorists" -- by hunting them down or detaining them indefinitely as enemy combatants or prosecuting them in military commissions.

While the Lockerbie approach is currently out of vogue, are there nonetheless lessons from Lockerbie that policy makers can draw on in determining how to best use law as a weapon against terrorism in the future? To explore this important and timely question, the Frederick K. Cox International Law Center assembled a group of high level United Nations officers, former U.S. government officials, noted prosecutors and defense counsel, and prominent journalists and scholars for a day-long symposium at Case Western Reserve University School of Law on October 8, 2004, entitled "Terrorism on Trial." The conference, which was co-sponsored by the American Society of International Law, the American Branch of the International Law Association, and the International Association of Penal Law, consisted of five panels: (1) "Use of Force Versus Use of Courts in the War on Terrorism"; (2) "Is Terrorism Worth Defining?" (3) "Lessons Learned from the Pan Am 103 Bombing Trial"; (4) "Suing Terrorists in U.S. Court"; and (5) "The Trials of al Qaeda: Federal Court Versus Military Commission." This special two volume issue of the *Case Journal of International Law* contains twenty articles generated by this conference, which we believe make a significant contribution to the literature on the legal response to terrorism.

II

The symposium began with a Keynote Address by Professor M. Cherif Bassiouni, Distinguished Research Professor of Law and President of the International Human Rights Law Institute at DePaul University College of Law. Professor Bassiouni is currently the U.N. Special Rapporteur for Afghanistan, and served previously as the Chairman of the U.N. Commission to Investigate International Humanitarian Law Violations in the Former Yugoslavia and as the Chairman of the Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court. In his article, "Terrorism: The Persistent Dilemma of Legitimacy,"[1] Professor Bassiouni provocatively observes that trials are not always held to establish the truth; sometimes they are designed to cover up the truth. Professor Bassiouni suggests that was the case with the Pan Am 103 trial, which was specifically designed, with the agreement of the United States, United Kingdom, United Nations and Libya, to avoid exposing the role that Iran and Syria, as well as high level Libyan officials, played in the bombing of the airliner. Professor Bassiouni recognizes that for both the United States and Libya the Lockerbie trial was a diplomatic success story, but questions the wisdom and legitimacy of pursuing novel judicial solutions such as the Lockerbie court on an ad hoc basis. Furthermore, he reflects on why terrorism has never been defined and calls for a more effective framework of international law so as to "integrate the several modalities of international cooperation in penal matters to make the enforcement system more effective."

David Andrews contributes a high level insider's view into the events that paved the way for the creation of the Lockerbie trial in "A Thorn on the Tulip – A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial."[2] Mr. Andrews, who is Senior Vice President for Government Affairs and General Counsel of PepsiCo, Inc., served as State Department Legal Advisor during the Clinton administration, where he received the highest civilian award of the State Department, the Distinguished Service Award, for his lead role in establishing the Pan Am 103 Court. In his article, Mr. Andrews describes the pivotal role that the Lockerbie trial played in bringing Libya back "into the fold with the community of nations" and discusses in depth the events leading up to the consideration and decision to hold a trial in a third country venue. This novel solution remedied the UN's authority which had been compromised by "sanctions fatigue." In a careful analysis, Mr. Andrews explains how the logistical and

---

[1] M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 CASE W. RES. J. INT'L L. 299 (2005).

[2] David Andrews, *A Thorn on the Tulip – A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial*, 36 CASE W. RES. J. INT'L L. 307 (2005).

political considerations of a trial in the Netherlands with a newly elected Dutch government took great effort, time, and thought to sort out.

The first panel of the symposium focused on the debate between utilizing force versus the use of the courts in fighting the war on terrorism. The panelists for this debate included: Lt. Col. Amos Guiora, former Judge Advocate General of the Israel Defense Forces and Professor of law at Case Western Reserve University School of Law; Mark Drumbl, Professor and Ethan Allen Faculty Fellow at Washington & Lee University School of Law; and Mary Ellen O'Connell, Professor at Moritz College of Law and Fellow of the Mershon Center for the Study of International Security at the Ohio State University.

In his article, "Targeted Killing as Active Self-Defense"[3] Lt. Col. Guiora examines the legality and policy reasons behind Israel's use of targeted killing as an active means of self-defense. He argues that current international law is "ill-equipped to deal with today's terrorists" and advocates for a new direction in international law that will allow States to better defend themselves against terrorist attacks, while keeping in mind the fundamental principles behind the laws of war.

In response, Professor Mark Drumbl's article, "'Lesser Evils' in the War on Terrorism"[4] discusses the possibility of responding effectively to criminal attacks by utilizing both force and the courts. Professor Drumbl keenly advises against conceptualizing the concepts of force and the courts as mutually exclusive as this creates a misleading dichotomy that does not exist in reality.

Professor Mary Ellen O'Connell's article, "The Legal Case Against the Global War on Terror"[5] focuses on the U.S.' response to terrorism under the Bush Administration and its self-proclaimed characterization of its use of force and the courts as part of a "global war." Professor O'Connell argues that the decision to portray the struggle against terrorism as a global war and the act of characterizing terrorists as "enemy combatants" possibly has an "unintended consequence for non-State actors" by exposing them to a body of international law that was intended for individuals involved in armed hostilities. Professor O'Connell reveals that this dangerous precedent has had a ripple effect with Russia also declaring its own war on terror.

The symposium's second panel discussed the virtues and problems in attempting to nail down a definition of terrorism and raised the thought provoking question of whether seeking a definition was even worthwhile.

---

[3] Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319(2005).

[4] Mark Drumbl, *'Lesser Evils' in the War on Terrorism*, 36 CASE W. RES. J. INT'L L. 335 (2005).

[5] Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349 (2005).

The panelists, Michael Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law; Alex Schmid, Senior Crime Prevention & Criminal Justice Officer for the U.N., Terrorism Prevention Branch in Vienna, Austria; and Professor Bruce Broomhall, a criminal law professor at the University of Quebec, participated in a spirited debate as they provided insight on this important question.

Professor Michael Scharf's article, "Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects,"[6] critically examines Alex Schmid's proposal to define terrorism by reference to the laws of war. The approach is no panacea, he argues, because the laws of war establish rights as well as obligations for those over whom they apply. If terrorism is defined as the peacetime equivalent of war crimes, terrorists could rely on the combatant's privilege, the collateral damage doctrine, and the obedience to orders defense, and could assert the right to be treated as POWs.

Alex Schmid's article, "Terrorism – The Definitional Problem"[7] conducts a fascinating study into how the U.S. government and the international community currently conceptualize and define terrorism. He warns against isolating political terrorism from the general political landscape, stating that violent and non-violent political acts and activists seek to accomplish a variety of agendas: "[t]hese are all part of the general repertoire of persuasive political communications and coercive actions available to participants in the political process." Mr. Schmid emphasizes that while terrorism must be condemned, it is vital to move past mere condemnation and intently analyze how terrorism manifests itself in order to understand it. He also aptly notes that an effort to understand terrorism in no way indicates an attitude of acceptance.

Professor Bruce Broomhall voices his concern that an attempt to establish a comprehensive definition of terrorism, without considering the impact on current international humanitarian law and international human rights standards and principles, may have grave consequences by "increasing rather than reducing incoherence in the international system." In his article, "State Actors in an International Definition of Terrorism From a Human Rights Perspective,"[8] Professor Broomhall analyzes the potentially harmful effects on human rights within the context of the United Nations' efforts in negotiating the "Comprehensive Convention on International Terrorism." He primarily expresses concern that the current

---

[6] Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects,* 36 CASE W. RES. J. INT'L L. 359 (2005).

[7] Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT'L L. 375 (2005).

[8] Bruce Broomhall, *State Actors in an International Definition of Terrorism From a Human Rights Perspective*, 36 CASE W. RES. J. INT'L L. 421 (2005).

draft under discussion might obligate all States Parties to the Convention "to cooperate in the prosecution of a wide range of offences that might represent lawful acts of war committed in internal armed conflict or which might represent legitimate acts of dissent or resistance when committed in peacetime (including in states of exception)."[9] Professor Broomhall likens the Convention, as it is presently designed, to a "blunt policy instrument" and advises against adopting it for the time being in fear of the negative repercussions it would invite.

The third panel, entitled "Lessons Learned from the Pan Am 103 Bombing Trial" featured three distinguished speakers intimately familiar with the proceedings of the Lockerbie trial: Professor John Grant of the Lewis & Clark School of Law; Julian Knowles, Barrister-at-law, Matrix Chambers, London and Lockerbie Appeal Defense Counsel; and Steve Emerson who is the Executive Director of The Investigative Project and the author of the book "*The Fall of Pan Am 103*."

Professor Robert Black of the University of Edinburgh, a scheduled participant in this panel who was not able to attend the conference, authored an article for this symposium issue based on his personal experiences with the Lockerbie trial entitled, "Lockerbie: A Satisfactory Process but a Flawed Result."[10] Professor Black distills the Lockerbie trial court's ninety paragraph judgment into an informative explanation of nine factors that provided the basis for the conviction of Abdelbaset Al-Megrahi. He then goes on to discuss Megrahi's appeal and the Appeal Court's dismissal of that claim, arguing that a "shameful miscarriage of justice" persists until an Appeal Court address three fundamental issues: "(i) whether there was sufficient evidence to warrant the incriminating findings, (ii) whether any reasonable trial court could have made those findings . . . and (iii) whether Megrahi's representation at the trial and the appeal was adequate."

From another perspective, Professor John Grant suggests in his article, "Beyond the Montreal Convention"[11] that the Lockerbie trial illustrated the success that domestic criminal justice systems could achieve in adjudicating "complicated and egregious acts of terrorism."[12] In his opinion, the core philosophy of the Montreal Sabotage Convention had the opportunity to shine due to the flexibility agreed to by the parties and the Security Council's endorsement of the plan to hold a trial in a neutral third party venue with a panel of judges in lieu of a jury. Looking at the lessons of the Lockerbie trial through the lens of the September 11, 2001 tragedy, Professor Grant argues that with respect to the issues of State-sponsored terrorism and the harboring and aiding of terrorists by States, modern day

---

[9] *Id.* at 439.

[10] Robert Black, *Lockerbie: A Satisfactory Process but a Flawed Result*, 36 CASE W. RES. J. INT'L L. 443 (2005).

[11] John Grant, *Beyond the Montreal Convention*, 36 CASE W. RES. J. INT'L L. 453 (2005).

[12] *Id.* at 471.

terrorism conventions must adopt "a multi-faceted approach to what is, after all, a multi-faceted problem."[13]

In "The Lockerbie Judgments: A Short Analysis,"[14] Barrister Julian Knowles delves into the Lockerbie judgments from the point of view of one of the lawyers that argued the appeal on behalf of al-Megrahi. Similar to Robert Black, Knowles reaches the conclusion that "[u]ntil the findings of the trial court are subjected to a proper and rigorous scrutiny then doubts about the Lockerbie verdict will remain."[15] Many of Knowles' concerns regarding the trial court's conviction of al-Megrahi lie in how the court interpreted and analyzed the critical evidence offered by a key witness in the prosecution's case—Tony Gauci. Knowles remarks that the Scottish Appeals Court admitted that Mr. Gauci did not make a positive identification of al-Megrahi, yet the court still concluded that it was entitled to treat Mr. Gauci's evidence as reliable and as a "highly important element in the case."[16]

Steve Emerson states that notwithstanding the Lockerbie trial's conclusions, the number of people that believe al-Megrahi coordinated, planned and executed the Pan Am 103 attack on his own could probably fit into a phone booth. Switching the focus to another player in the Lockerbie trial, Mr. Emerson analyzes the role of the Libyan dictator Muammar Gaddafi in the events surrounding the trial. His article, "The Lockerbie Terrorist Attack and Libya: A Retrospective Analysis"[17] examines the trial from a cost-benefit perspective to determine whether, and to what capacity, the United States' interests were satisfied. Emerson highlights the fact that Gaddafi was never found criminally liable for any of the acts surrounding the bombing of Pan Am 103, and he queries whether the prosecution in the Lockerbie trial had a viable deterrent effect on Gaddafi's support of terrorism.

The conference's fourth panel addressed the topic of suing terrorists in U.S. court and featured three prominent speakers who were involved in the Lockerbie civil suit: Attorney Mark Zaid, who was the plaintiffs' counsel representing the families of victims of Pan Am 103; Attorney Robert Mirone, who was the lead defense counsel for Libya in the Pan Am 103 civil proceedings; and Alan Gerson, former Chief Counsel of the U.S. mission to the U.N., former Assistant Attorney General, and author of "*The Price of Terror,*" which tells the inside story of the Lockerbie civil proceedings.

---

[13] *Id.* at 472.

[14] Julian Knowles, *The Lockerbie Judgments: A Short Analysis*, 36 CASE W. RES. J. INT'L L. 473 (2005).

[15] *Id.* at 484.

[16] *Id.* at 481.

[17] Steve Emerson, *The Lockerbie Terrorist Attack and Libya: A Retrospective Analysis*, 36 CASE W. RES. J. INT'L L. 487 (2005).

In "Bringing Suit Against a Foreign Sovereign,"[18] Robert Mirone analyzes the steps that must be taken to wage a legitimate claim against a sovereign entity within the context of the Foreign Sovereign Immunities Act. He notes that even though a foreign sovereign may be subject to the jurisdiction of U.S. courts, it must still be determined who the proper plaintiff is and which party that plaintiff is entitled to recover damages from. Mirone critically explores the so-called "Flatow Amendment," adopted in the midst of the Pan Am 103 civil proceedings, which modifies the Foreign Sovereign Immunities Act to permit suit against States that are included in the Department of State list of terrorist-supporting countries.

Alan Gerson's article, "Merging International Human Rights Law with Personal Injury Law in the Fight Against Terrorism"[19] describes the plaintiffs' strategies and tactics in the litigation against Libya, including the political effort that resulted in the passage of the Flatow Amendment. Once the Foreign Sovereign Immunities was amended to allow suit against Libya, a settlement quickly followed, with Libya ultimately paying several billion dollars to the families of the tragedy. While some argue that the Flatow Amendment set a dangerous precedent that can be used in foreign litigation against the United States, Gerson praises the legislation as a means of ensuring increased foreign State accountability and a greater opportunity to achieve justice.

The fifth and final panel of the symposium focused on "The Trials of al Qaeda: Federal Court Versus Military Commission" with six distinguished panelists contributing to the debate. Jonathan Leiken, a former Assistant United States Attorney for the southern district of New York and adjunct professor at Case; Toni Locy, a reporter for USA Today covering the Military Commission proceedings against al Qaeda; Andrew McCarthy, a senior fellow at the Foundation for the Defense of Democracies and a former Assistant United States Attorney for the southern district of New York who prosecuted the first World Trade Center bombing case; Greg Noone, a Program Officer for the United States Institute of Peace and former U.S. Navy judge advocate; Scott Silliman, Professor and Executive Director of Duke University's Center on Law, Ethics & National Security; and Judge Evan Wallach of the United States Court of International Trade all participated in this final panel of the conference.

Each panelist drew from personal and professional experiences to contribute to the dialogue of how best to accomplish justice. Jonathan Leiken's article, "Leaving Wonderland: Distinguishing Terrorism from

---

[18] Robert Mirone, *Bringing Suit Against a Foreign Sovereign*, 36 CASE W. RES. J. INT'L L. 491 (2005).

[19] Alan Gerson, *Merging International Human Rights Law with Personal Injury Law in the Fight Against Terrorism*, 36 CASE W. RES. J. INT'L L. 495 (2005).

Other Types of Crime"[20] leads the reader through his first experience as a prosecutor in a terrorism case against the defendant Usama Sadik Ahmed Abdel Whab. He describes the reactions of the jury members to Whab's name and skin color in a post-September 11, 2001 New York, contextualizing the framework in which prosecutors find themselves when prosecuting defendants like Whab. Leiken argues that a bifurcated system must be created that separates questions of national security from accusations of terrorist activity, while dealing with both according to the Constitution. "The system should provide due process to those accused of terrorist acts: where judges participate and review the decisions of the executive branch and the military."[21]

Toni Locy offered a journalist's perspective, focusing on the problems that the United States has encountered with the new military commission system in her article, "The Trials of al Qaeda: Federal Court vs. Military Commission."[22] Ms. Locy suggests that many of the commission's problems stem from the Bush Administration's "desire to control the flow of information in the name of protecting national security."[23] She gives several examples where the U.S. approach to secrecy is both obsessive and inconsistent, and discusses a host of other problems inherent to the military commissions, including a lack of efficiency, archaic rules of military law, and a general sense of drama and confusion.

Andrew McCarthy asks a very important question in his article, "Terrorism on Trial: The Trials of al Qaeda"[24]—"[c]an we provide trials for accused terrorists that comport with American standards of justice, notwithstanding the complex challenges inherent when national security is at risk?"[25] His response is a resounding yes, based on the simple fact that the criminal justice system "works" repeatedly over and over again, and he further argues that the trials so far conducted of Islamic terrorists have fully comported with American standards of due process. Mr. McCarthy describes how he was once a member of an intellectual camp that believed that Americans best displayed their enlightenment by offering the protective cloak of the Constitution even to those who sought to destroy it. However, today he feels that this idea is a dangerous delusion. Furthermore, he argues that criminal trials alone are not the appropriate remedy for terrorists and to this end he states that "[i]t sounds nice to say

---

[20] Jonathan Leiken, *Leaving Wonderland: Distinguishing Terrorism from Other Types of Crime*, 36 CASE W. RES. J. INT'L L. 501 (2005).

[21] *Id.* at 504.

[22] Toni Locy, *The Trials of al Qaeda: Federal Court vs. Military Commission*, 36 CASE W. RES. J. INT'L L. 507 (2005).

[23] *Id.* at 508.

[24] Andrew McCarthy, *Terrorism on Trial: The Trials of al Qaeda*, 36 CASE W. RES. J. INT'L L. 513 (2005).

[25] *Id.*

we treat terrorists just like we treat everyone else, but if we really are doing that, everyone else is being treated worse, and that is not the system we aspire to."[26]

Greg and Diana Noone conduct an assessment of military commissions in their article, "The Military Commissions – A Possible Strength Giving Way to a Probable Weakness – And the Required Fix."[27] To provide a lens for their analysis, they posit a compelling question -- would the United States accept or condemn its own military commission system if it were the system of another country? The authors suggest several modifications in order to remedy some of the starker problems of the current system including: providing for appeals, interlocutory questions, and panel challenges to the Court of Appeals for the Armed Services; constituting a new panel with an elevated level of legal experience—ideally close to retirement in order to increase their credibility based on their "untouchable" status; and lastly a greater attention to fundamental rights required under international law.

Professor Scott Silliman traces the history of military commissions in his article, "On Military Commissions"[28] and discusses the nature of their creation, management, and general procedures with specific attention paid to the military commissions of Guantanamo Bay, Cuba. Echoing the Noones' analysis, Professor Silliman highlights a major criticism of military commissions—the lack of any provision for judicial review of convictions—and notes the Bush administration's heavy reliance on the 1950 Supreme Court *Eisentrager* case to support its position that the Constitution does not provide non-resident aliens with access to the U.S. courts. Professor Silliman reminds us that the Supreme Court has not revisited the constitutional ramifications of *Eisentrager* in light of "the war against terrorism;" however, he states that if it does, the new ruling will undoubtedly have a dramatic impact on the United States military commission system.

In the final article in this Symposium Issue, "The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib"[29] Judge Evan Wallach examines the international law principles embedded within the United States' decision to treat certain detainees as

---

[26] *Id.* at 521.

[27] Gregory P. Noone and Diana C. Noone, *The Military Commissions – A Possible Strength Giving Way to a Probable Weakness – And the Required Fix*, 36 CASE W. RES. J. INT'L L. 523 (2005).

[28] Scott Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT'L L. 529 (2005).

[29] Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541 (2005).

unprotected by the 1949 Third Geneva Convention. In addition, Judge Wallach conducts an in-depth analysis of the interrogation methods employed at the Abu Ghraib prison and argues that the tactics used on detainees may violate both international and domestic law.

We are extremely grateful to our distinguished panelists for their participation in the "Terrorism on Trial" conference and contributing to this Symposium Issue of the *Case Journal of International Law*. Our appreciation also goes out to the student editors of this volume who worked diligently on the preparation of this publication.

III

The "Terrorism on Trial" Symposium was also significant in that it kicked off the establishment of Case School of Law's new Institute for Global Security Law and Policy. Under the leadership of its Director, Professor Amos Guiora, and Associate Director, Professor Jessie Hill, the Institute, which will work in partnership with the Cox International Law Center, seeks to become a leading research and resource center both nationally and internationally concerning the defining issue of the day—terrorism—thereby significantly contributing to an on-going commitment to globalization.

The Institute reflects Case's determination to stimulate and influence public debate on the issues of security and counter-terrorism. The Institute will address a wide variety of issues including the legal, financial, political, social, religious, and cultural ramifications in this field, and will offer a uniquely comprehensive hub for addressing these issues through a multi-faceted approach that will blend theory with practical applications.

Under the auspices of the Institute, Case students have been providing legal research memos to the Military Commissions prosecuting al Qaeda, in an effort to address difficult legal issues and bring about the types of reforms discussed in this Symposium Issue. In October 2005, the Institute will co-sponsor a major conference with the Cox Center entitled "Torture and the War on Terror," and in March 2006 the Institute, Cox Center, and Law and Medicine Center will collectively host a unique simulation-based bio-terrorism conference, with the articles from both events to be published in upcoming issues of the *Case Journal of International Law*. Furthermore, the Institute will launch a cutting edge web-site and perform research on a project basis for NGO's and government agencies on issues such as methods of interrupting terror financing; the effectiveness and limitations of counter-terrorism; the role of intelligence in counter-terrorism; the balance between civil liberties and domestic counter-terrorism activities; bio-terrorism; and religion and terrorism.