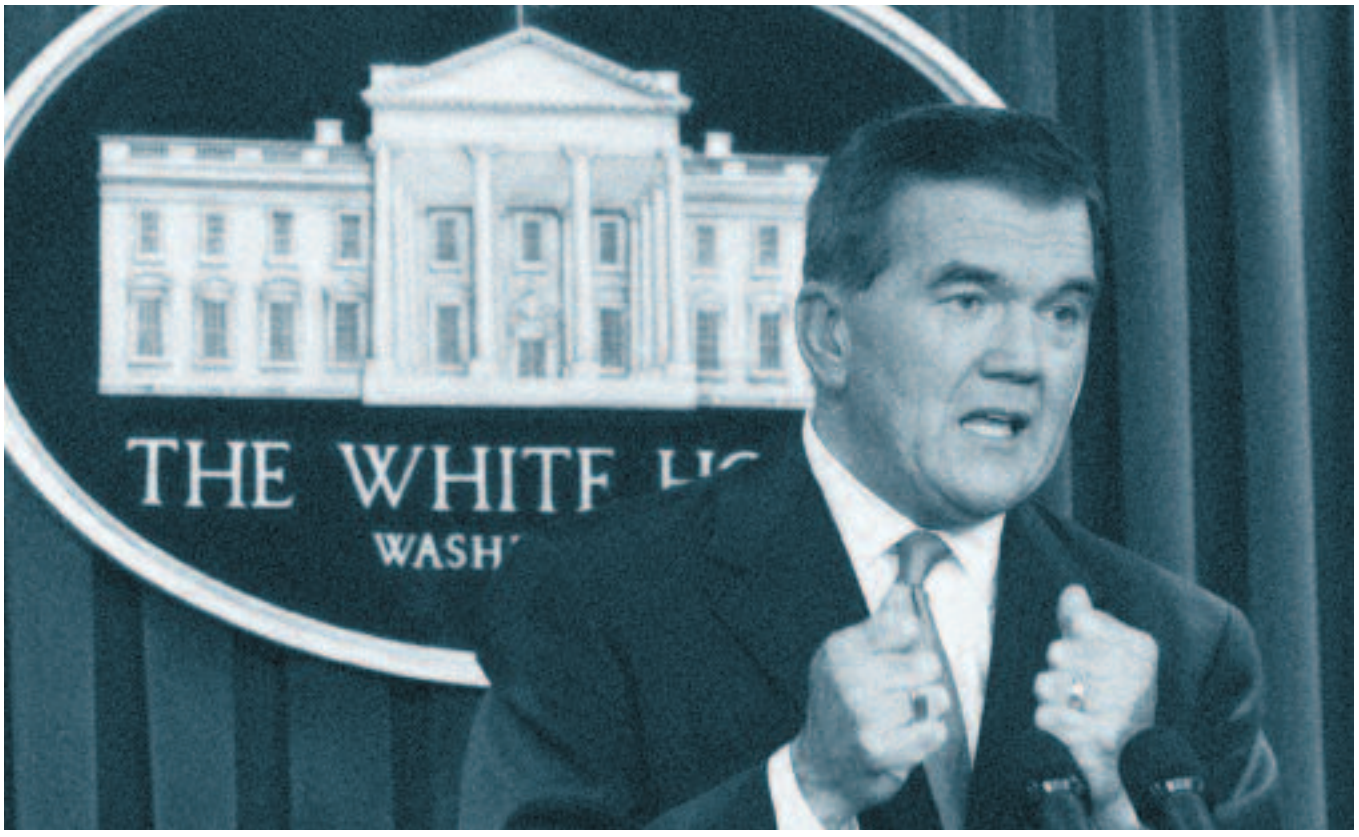

Tom Ridge: Does a new security system require a new justice system?

Tougher than Terror

To fight criminal terrorism, we need to strengthen our domestic and global system of criminal justice, not militarize it.

BY ANNE-MARIE SLAUGHTER

The debate over military tribunals has been largely conducted in terms of the trade-offs between national security and civil liberties. But this debate has tended to obscure an equally important issue: How does the question of where to try accused terrorists fit into the larger goals of fighting terrorism? The Bush administration has tried to prepare the public for a protracted new cold war, punctuated by occasional hot wars. New hot phases of the war on terrorism could take place in any state deemed to be supporting global terrorism—a list that might include Somalia, Sudan, Iraq, Iran, North Korea, Yemen, and Syria. Yet because of the nature of terrorist acts, a war on terrorism must be fought not simply against states but also against individuals.

So a protracted war against terror must combine military force with the resources of the criminal-justice system. And this exercise must be multilateral in two complementary senses: Military campaigns and their aftermath require the assembly of coalitions, the cooperation of allies, and the use of international peacekeeping forces and relief efforts under the aegis of international agencies. Furthermore, a war against terror necessarily requires the cooperation of many nations in hunting down and bringing to justice individual suspects. Simply to try all suspected terrorists before U.S. military tribunals intended for emergency battlefield conditions would put America at odds not only with its own domestic constitutional safeguards but with inter-

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national conventions on the treatment of prisoners of war. In the long run, this would jeopardize alliances, put Americans overseas at risk, and set back our own values as well as the war effort.

In some respects, international terror is analogous to international organized crime. Fighting more traditional organized crime poses many of the same difficulties: the tension between securing convictions and jeopardizing informants, security risks, and the difficulty of collecting sufficient evidence to convict. But we have developed laws and procedures that make it possible to hunt down and prosecute drug lords, traffickers in women and children, illicit arms traders, and money launderers—all operating through global networks. We can fight global terrorist networks the same way, by relying on greater international collaboration.

Developing a global criminal-justice response to terrorism first requires building networks of law-enforcement officials to match global criminal networks. Here the Bush administration has started well. Networks of police officers, intelligence operatives, immigration officials, and financial regulators have already yielded important dividends. Indeed, Tom Ridge's job as Office of Homeland Security director is to coordinate these networks, not only across the nation but across the world. The European Union is moving to institutionalize its law-enforcement networks even further by creating a European warrant.

Yet cooperation between the United States and its allies is still uneven. Several European countries initially hesitated when the United States asked them to freeze financial assets of organizations suspected of funneling funds to al-Qaeda. Recently, however, Interpol and U.S. officials reached agreement on a common database to which all 179 Interpol members will contribute and have access. Thus the United States is now reaching out to the world's principal international law-enforcement agency.

A related challenge is to develop a mature global court system. The "where will the terrorists be tried" debate has been miscast, because it inevitably assumes that there is one answer. The media have constructed an artificial trichotomy among military tribunals, national courts, and an international tribunal. In fact, all of these forums are likely to be necessary, at different times and for different purposes.

THE ROLE OF MILITARY TRIBUNALS

Military tribunals have been used historically to try spies and saboteurs. They have provided rough battlefield justice when no other form was practically available. Trial by military tribunal is certainly fairer than summary execution.

In Afghanistan we're actually on a battlefield. Al-Qaeda members captured under such circumstances can be tried by military tribunals if they are "unlawful combatants" under the 1949 Geneva Conventions. The convention governing prisoners of war defines unlawful combatants as participants in an armed conflict who abuse their civilian status to gain military advantage: those who do not carry arms openly and do not carry a "fixed distinctive sign" such as a uniform or other insignia that would identify them as soldiers. Terrorists appear to fall into this category almost by definition, as they depend on concealing their identity before their attacks.

If a prisoner is deemed an unlawful combatant, he or she is entitled only to a conviction pronounced by an impartial and regularly constituted court respecting the generally accepted principles of regular judicial procedures. This is a relatively low standard of due process, which military tribunals would almost certainly meet. But out of respect for our own values and traditions as well as public diplomacy, we should at least ensure that the rules governing such proceedings bring them up to minimum international standards of due process: a presumption of innocence, the right to choose counsel (although it may be from a list provided by the tribunal), a speedy trial, the right to confront and rebut adverse evidence publicly, and the right of appeal (which could be to a higher military tribunal).

Ordinary prisoners of war, by contrast, may also be tried for war crimes but are entitled to the same standard of process that would be applied to our own soldiers: that is, a full court-martial under the Uniform Code of Military Justice. But here's the catch: How do we distinguish between lawful and unlawful combatants in the first place? Until such a determination is made, all prisoners are presumptively entitled to POW status. Membership in al-Qaeda, per se, suggests unlawful combatant status, since a lawful combatant must be a member of an organization capable of complying with the laws of war. But it's not clear who gets to make this determination—a military tribunal or a full court-martial?

In addition to these legal complexities, military tribunals are likely to present a number of unforeseen political headaches. Dozens of al-Qaeda members are being detained in Afghanistan; hundreds more could follow in Pakistan as well. Once we establish tribunals, do we have to try them all? It is one thing to detain combatants until after hostilities are over; but once tribunals are in place and in use against some defendants, where do we stop? The Bush administration emphatically does not want to conduct mass trials; the logistical difficulties are enormous and there would be no faster way to turn many of our new Afghan allies into enemies. Identifying a few notable leaders and shipping them back to the United States for trial in ordinary federal court may look better and better.

Finally, other nations will be watching how we interpret and apply the Geneva Conventions. As the world's leading military power, the United States has been a strong supporter of the 1949 Conventions, on the grounds that widespread adherence to their provisions is more likely to benefit our soldiers captured abroad than to burden us in treating those we have captured. Deviations from those provisions now, when our soldiers are in the field in substantial numbers, are likely to come back to haunt us.

NATIONAL COURTS

National courts, both in the United States and abroad, form the backbone of a global criminal-justice system. Considering the issue of military versus civilian justice during the Civil War, the U.S. Supreme Court ruled in *ex parte Milligan* that military tribunals cannot operate when civil courts are open and functioning in the normal exercise of their jurisdiction. The military's need "to furnish a substitute for the civil authority" is limited to extraordinary situations, the justices found, as "in foreign invasion or civil war, [when] the courts are actually closed, and it is impossible to administer criminal justice according to law…[amid] active military operations."

The Court modified the starkness of this holding in *ex parte Quirin*, the Nazi-saboteur case that the Bush administration has relied on so heavily in promulgating and defending the president's executive order authorizing military tribunals. It allowed the trial of eight saboteurs by military tribunal, even when the ordinary courts were open. But in reciting the facts of the case, the Court began by noting that the defendants were "admittedly citizens of the German Reich, with which the United States is at war." It then added that when the saboteurs landed, "they wore German Marine Infantry uniforms," which they quickly buried on the beach before proceeding in civilian clothes.

The difference today is not the existence of a formal declaration of war but the relative ease of identifying the enemy. In a war against terrorism, citizenship tells nothing and uniforms don't exist. Instead of trying foreign saboteurs, we may be trying permanent resident aliens allegedly involved in financing terrorist activities through purported charitable organizations. The difficulty of even identifying the proper defendant makes this a job for the federal courts. Those who want to substitute military tribunals, citing fears that defendants will become martyrs or that intelligence sources and methods will be compromised, overlook how well the federal courts work to try and convict terrorists. The government obtained convictions both in the 1993 World Trade Center attack and in the U.S. embassy bombings in Africa, and no secret intelligence was compromised.

U.S. courts should try any suspect found within the United States, unless the U.S. government chooses to extradite the accused to another country or to an international tribunal with jurisdiction. Similarly, suspects apprehended in any other country outside the theater of actual military operations should be tried in the national courts of that country or else extradited to the United States or another country that is willing to prosecute. The indictment of Zacarias Moussaoui in federal court in Virginia, the indictment in early December of eight suspected terrorists in Spain, and indictments likely to follow soon in Germany, France, and other European countries establish unequivocally the ability of national courts—and national criminal-justice systems, more generally—to tackle the problem. Indeed, if the Moussaoui case is any guide, the chief obstacle to national courts working together most effectively is a lack of clear guidelines for cooperation. In 1994, the British government denied a French investigating judge a warrant to search Moussaoui's apartment in London for lack of sufficient evidence.

The victory for those in the administration who wanted to try Moussaoui in federal court rather than before a military tribunal is enormous. Practically speaking, this choice suggests that issues of protecting sensitive sources, preventing a public circus and a propaganda opportunity for the defendants, and assuring the safety of U.S. jurors can be resolved within our existing system. But much more fundamentally, this choice recognizes that ordinary courts are open. In a fight purportedly pitting the values of democracy, the rule of law, liberty, tolerance, and justice against fanaticism (whether religious, ethnic, or cultural), supplanting civilian justice with martial justice in any but the most extreme circumstances should be unthinkable.

INTERNATIONAL TRIBUNALS

To many Americans, the international-adjudication option seems naively utopian. But the 1990s witnessed enormous strides for international criminal justice—strides unthinkable even a decade previously. First came the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Widely regarded as little more than political window-dressing at first, they have earned the respect of domestic and international lawyers and judges around the world. They have also handed down an increasingly important body of uniform rules interpreting international treaties and customary law governing war crimes, crimes against humanity, and genocide.

Then came the successful conclusion to the treaty establishing an International Criminal Court (ICC). As disfavored as it may now be in Washington, President Clinton did sign it. And all of our NATO allies will be helping to bring it into existence as early as next summer. As presently constituted, the ICC will not have jurisdiction over terrorism. But a United Nations Security Council resolution, necessarily with U.S. consent, could designate a chamber of the ICC or indeed the entire ICC as an ad hoc tribunal charged with hearing selected cases related to the terrorist attacks of September 11, with the addition of at least one U.S. judge. This option would be consistent with the U.S. position throughout the ICC negotiations, which was to establish a permanent criminal court whose jurisdiction would be triggered only if the Security Council referred a case or set of cases. At the same time, it would not establish a new ad hoc tribunal that could undercut the ICC, a change the Europeans and many other nations would oppose.

Many other international options are also possible. To bring any one into existence will require a livelier appreciation of both the practical and symbolic advantages of having an international alternative to military tribunals and national courts, as one, albeit only one, dimension of a fully effective global criminal-justice system. From a practical perspective, the existence of such a tribunal will facilitate extradition of suspects found in moderate Islamic countries such as Egypt, Jordan, or even Pakistan. These are nations whose governments are unlikely to want to stage terrorist trials at home but will face strong political opposition against extradition to the United States or Western Europe. Symbolically, as President Bush said in his very first major address to the nation after September 11, this is not just America's fight. It is the world's fight. Not only did victims from more than 80 nations die in the attacks, but the hideous visions of those attacks that replay in all our minds also remind us daily of a deeper violation of values, the values that define our common humanity.

WAR AND LAW

It is possible to see September 11 as an act of war and still claim a useful role for the system of criminal justice. The most terrifying lesson of September 11 and of the ensuing anthrax scare is that it is possible to threaten the security of a nation and the liberty of its citizens without ever attacking an army. The enemy can leapfrog perimeter defenses and target civilians directly. Other countries have long known this; the United States required September 11 to drive it home.

Yet a purely military approach tends to create its own self-perpetuating logic. The distinguished military historian Michael Howard identified this problem, based in part on the long

experience of the British in Northern Ireland. In a speech to the Royal United Services Institute, he worried that declaring "war on terrorists immediately creates a war psychosis that may be totally counterproductive to the objective." It creates "inevitable and irresistible pressure to use military force as soon, and as decisively, as possible," which then puts the terrorists "in a win-win situation. Either they will escape to fight another day, or they will be defeated and celebrated as martyrs." These arguments may seem unduly pessimistic as al-Qaeda fighters flee through the Afghan mountains. But the long and painful experience of countries from Britain to Sri Lanka to Israel suggests that many will rise to fight again, with renewed fervor.

Rather than fighting them wherever they stand, we should keep them on the run. Members of al-Qaeda are not military combatants except in their own understanding of their cause. They are criminals, a threat to every society in which they move. Their acts are prohibited under all national legal systems. And under international law, the attacks of September 11 qualify as crimes against humanity, rendering their perpetrators global outlaws, like pirates, slave traders, and torturers.

Focusing on criminal justice also regains our edge in public diplomacy. By defining a limited role for the use of military force as part of a larger strategy for fighting a global criminal network, we unequivocally reject the al-Qaeda vision of an Islamic war against America. And by trying suspects in national and possibly international courts in addition to military tribunals, we can shift the focus of attention from war crimes to crimes such as mass murder, hijacking, kidnapping, and destruction of property.

Furthermore, framing the fight against terrorism primarily in criminal-justice terms will make it easier to marshal the continued support of our coalition members, who are unlikely to wage war at our side, or even in less visible supporting roles, in perpetuity. But they will fight crime, in increasingly cooperative ways. And with their cooperation, we will be able to obtain and make public evidence of terrorist criminal-activity over years and even decades, cementing public condemnation of attacks against civilians by any actor, state or nonstate, for any cause. If terrorists are seen as a global criminal conspiracy, subject to a criminal-justice system, we will have an easier time persuading other nations to extradite suspects.

Finally, thinking about fighting a global criminal network through a global criminal-justice system helps us begin to answer questions that currently seem unanswerable. If we're fighting a military war, when will it be "won"? How do we operate during lulls? According to *The Financial Times* (which relied on outside sources as well as Western intelligence agencies), al-Qaeda has operations in 40 to 60 countries, with as many as 70,000 operatives who have been trained in al-Qaeda camps spread throughout the world. Bombs and even ground troops cannot target and destroy this kind of decentralized, dispersed enemy. Intelligence operations and criminal prosecutions must be part of a prolonged struggle.

Western Europe has lived with intermittent acts of terror for a quarter-century. Europe has minimized them by tightening security and by relying on better police and intelligence work—and courts. War in the usual sense is not a practical option. For Americans, the rhetoric and psychology of war, as well as the necessary military operations against al-Qaeda, are a more satisfying response to the enormity and horror of September 11. But as we move into a phase of protracted struggle with intermittent incidents, a purely military response, or psychology, is no solution.

Critics of the criminal-justice approach argue that it trivializes the gravity and magnitude of the attacks—essentially equating Osama bin Laden with Al Capone. We are not fighting organized crime but, rather, a religious war. The better comparison, in this view, is the struggle against Nazism in World War II. Would we have sent law-enforcement agents after Hitler? Clearly not, or not only. He waged aggressive war against all of Europe and had to be stopped. Over the ensuing decades, however, we have come to see his evil through a different lens. He is universally reviled not only for aggression but also, and more intensely, for what have come to be understood as his crimes against humanity. A Nuremberg prosecution today would try him for precisely those crimes.

Al-Qaeda prisoners: Whose jurisdiction?

AP/WIDE WORLD PHOTO

The growth of the international criminal-justice system has been an important achievement. The international tribunal for Yugoslavia has tried 38 high-ranking generals and commanders; these trials have been widely seen as fair, and they have cemented international support for the basic justice of the military campaign to protect civilian Bosnians and ethnic Albanians and for its legal aftermath. Although the United States took the lead in the Yugoslavia campaign, these international trials have made the process of bringing Yugoslavian war criminals to justice less of an American show and more of an effort on behalf of humanity.

The new realities of war, with undeclared terrorist attacks by stateless attackers, call for refinements in how we think about war and criminal justice. Paradoxically, a stronger system of criminal justice will help us prosecute this new form of war. And it vindicates one of our greatest political and military