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Terrorism and International Criminal Law After the Military Commissions Acts

Stephen I. Vladeck*

There is much that is compelling about Naomi Norberg's cogent discussion of the relationship between terrorism and international criminal law, and of her central thesis—that the two are actually quite a poor fit for each other. For starters, it strikes me as beyond dispute that many of the more heinous acts of terrorism with which we are familiar are already prohibited under international law—and even punishable in some cases in various of the international criminal tribunals, particularly the International Criminal Court (ICC). Thus, one may

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* Professor of Law, American University Washington College of Law. This article was prepared in conjunction with the Santa Clara Journal of International Law's Symposium on "The Future of International Criminal Justice," for my participation in which I owe thanks to Beth van Schaack and David Sloss. Thanks to Nutan Patel for splendid research assistance; thanks also to my co-commentators—Kathleen Dunn, Luz Nagle and Jordan Paust—and especially to Naomi Norberg for providing such a thorough and thoughtful platform for the conversation stimulating these papers. In the interest of full disclosure, I should note that I have played a recurring role on the legal team in Hamdan, particularly in the proceedings before the D.C. district court discussed herein. Needless to say, the views expressed in this response are mine alone.


2. In particular, the ICTY has recognized (albeit not without controversy) that terror against a civilian population is a war crime, and is therefore within that tribunal's jurisdiction. See Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶¶ 86–138 (Dec. 5, 2003); see also BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 555–72 (2007) (discussing Galić). The ICC has not yet reached the issue, although various scholars have argued that it would similarly be able to exercise jurisdiction over terrorism as either a war crime or a crime against
rightly question whether there is anything to gain, at least at the international level, from creating a new standalone crime of terrorism. Further, I agree with Professor Norberg that there is a danger that treating "terrorism" (however defined) as an offense under international criminal law might undermine the significance of international criminal justice for the more traditional "international" crimes going forward. The broader the class of crimes that international criminal tribunals are given the power to prosecute, the more we risk diluting the significance of the crimes over which they have exercised jurisdiction to date.

That being said, Professor Norberg's article also suggests that defining terrorism as a crime under international criminal law would negatively impact human rights, because it would provide cover for states to adopt extraordinary measures—including preventative detention and trial by military commission—in the guise of preventing this international offense. As she writes,

[E]levating the status of terrorism from internationalized to international crime may have the same effect as [various U.N. Security Council] resolutions: to incite states to take increasingly harsh measures. Many of these measures limit fundamental rights to an extent that may be considered disproportional; in some cases they lead to violations of the prohibition against torture. ICC jurisdiction [over terrorism] could be interpreted as approval of such measures, while, again, they have little in common with those taken to combat the crimes already within its jurisdiction.

At least with regard to practice within the United States, I disagree. Instead, as I argue in the short response that follows, the U.S. government’s response to September 11 has been remarkably indifferent to the actions that international criminal law both countenances and proscribes. Where it finally surfaced, international criminal law provided an important constraint on President Bush’s November 13, 2001 Military Order creating military commissions, at least for the plurality of the Supreme Court in Hamdan that concluded that conspiracy was not recognized as a crime under the laws of war—and therefore fell outside of the


4. Norberg, supra note 1, at 46.

authority for military commissions that Congress had conferred. Moreover, and as importantly, I believe that international criminal law could yet provide similar constraints on the scope of the offenses Congress made punishable by military tribunals in the Military Commissions Acts of 2006 and 2009 (which I will refer to simply as "the MCA"), at least to the extent that international criminal law is clear.

Thus, while I agree with Professor Norberg that there are a host of reasons why terrorism may today be a poor fit for international criminal law, my own view is that the U.S. experience stands in important and marked contrast to her article's suggestion that acceptance of terrorism as an international crime might tacitly condone domestic derogation from human rights norms in terrorism cases. U.S. practice since September 11 suggests, to the contrary, that international criminal law has prompted such departures only to the extent that the U.S. government has been able to exploit that body of law's prescriptive ambiguity in subjecting non-citizens detained as "enemy combatants" to trials by military commission. For that reason, clear acceptance or rejection of terrorism as an offense under international criminal law would—or at least should—have the same basic effect on domestic practice: to limit the ability of individual countries, including the United States, to decide for themselves which individuals and offenses can be subjected to the extraordinary processes of military commissions.

Part I introduces this argument by tracing the use of military commissions in the United States from before September 11 to Hamdan, demonstrating the relatively constraining role international criminal law played throughout. In Part II, I turn to Congress's post-Hamdan reincarnation of military commissions through the MCA. As the military commission's decision denying Hamdan's post-MCA motion to

6. See Hamdan v. Rumsfeld, 548 U.S. 557, 601–04 (2006) (plurality opinion) [hereinafter Hamdan I]. Justice Kennedy did not join Justice Stevens's opinion on this point, which he believed was unnecessary to resolve. See id. at 655 (Kennedy, J., concurring in part).


8. As this response was in production, Congress enacted the Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.). The 2009 MCA rewrites most of the relevant provisions of the 2006 MCA, albeit in ways that are largely immaterial to the discussion contained herein—since the relevant provisions of the 2009 MCA mostly re-codify the same language as the 2006 MCA.

dismiss illustrates, international criminal law’s lack of clarity has been as significant to the scope of Congress’s power as the specific content of ICL’s corpus juris.

Finally, Part II suggests how greater clarity on the part of international criminal law would in turn impose substantive constraints on the ability of the U.S. government to broadly define both the personal and subject-matter jurisdiction of military commissions, focusing on the (underappreciated) constitutional limits on Congress’s power under the Offenses Clause. As Part II concludes, if we reinvigorate the extent to which the Constitution imposes international law-based limits on Congress’s regulatory power, then clarity, rather than scope, would become the critical concern in assessing the viability of terrorism as an offense under international criminal law—and that clarity would come from international consensus, rather than American political deliberation.

I. ICL and the Pre-MCA Military Commissions

A. Pre-9/11 U.S. Military Commissions and the Laws of War

As has been well-documented, various forms of military commissions have been employed by the United States dating back to the Founding. And in its controversial 1942 decision in *Ex parte Quirin*, the U.S. Supreme Court gave legal sanction to a military commission established by President Roosevelt to try eight Nazi saboteurs, relying on an ambiguous provision of the Articles of War as providing statutory authority for the trials. That provision—Article 15—appeared to contemplate that military commissions could exercise jurisdiction over offenses and offenders triable by military commission under the laws of war, and the

10. See Ruling on Motion to Dismiss (Ex Post Facto) and Defense Request to Address Supplemental Authority on D012, United States v. Hamdan, No. D012 (Mil. Comm’n. July 14, 2008).
12. For one of the most detailed modern overviews, see LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM (2005).
14. As Article 15 then provided, “the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.” See id. at 27.
Quirin Court had little difficulty concluding that Congress had the authority to so provide.\textsuperscript{15} As Chief Justice Stone explained for the unanimous Court,

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of 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.\textsuperscript{16}

As for the specifics, \textit{i.e.}, whether the eight saboteurs were triable under the laws of war for their alleged offenses, the Court was unequivocal:

our Government has . . . recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.\textsuperscript{17}

Significantly, then, \textit{Quirin} read the Articles of War to authorize military commission jurisdiction coextensive with that recognized by the laws of war.

\textsuperscript{15} \textit{Quirin} thus seemed to limit the Court's 1866 decision in \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866), which had otherwise been understood to bar military tribunals where the civilian courts were open and their process unobstructed. For a thorough treatment of the relationship between \textit{Milligan} and \textit{Quirin}, see Carlos M. Vázquez, "Not a Happy Precedent": The Story of \textit{Ex parte Quirin}, in \textit{FEDERAL COURTS STORIES} 219 (Judith Resnik & Vicki Jackson, eds., 2009).

\textsuperscript{16} \textit{Quirin}, 317 U.S. at 27–28 (footnote omitted).

\textsuperscript{17} \textit{Id.} at 35–36 (footnote omitted). In the footnote to this passage, Chief Justice Stone cited to a host of foreign authorities and authoritative scholarship in support. See \textit{id.} at 35 n.12. To be fair, some have suggested in recent years that the offenses the saboteurs were convicted of committing were not nearly as well-established under international law as the \textit{Quirin} Court suggested. See, \textit{e.g.}, Vázquez, \textit{supra} note 15. But at the very least, the Court saw international law (whether correctly applied or not) as providing the outer limits on the commission's authority.
Thus, whether individuals could properly be tried by a military commission turned on whether they were an offender triable under international law for an offense recognized as a war crime by international law. The laws of war thereby provided the outer constraints on the jurisdiction of military commissions, a point the Court would reiterate repeatedly in their other post-war military tribunal cases.\textsuperscript{18} As a result, when Congress in 1950 re-codified Article 15 as Article 21 of the new Uniform Code of Military Justice (UCMJ), it re-confirmed \textit{Quirin}'s reading.

\textbf{B. ICL and the November 2001 Military Order}

Two months after the September 11 attacks—and relying heavily on a broad reading of \textit{Quirin} advanced by the Department of Justice’s Office of Legal Counsel (OLC)\textsuperscript{19}—President Bush promulgated a “Military Order” authorizing the Secretary of Defense to create military commissions to try non-citizens detained as “enemy combatants” for offenses to be defined by the Secretary.\textsuperscript{20} As authority, the order invoked the President’s constitutional authority as commander-in-chief of the military, along with three statutes: the Authorization for Use of Military Force (AUMF), pursuant to which Congress had authorized the use of force against those responsible for the September 11\textsuperscript{th} attacks), and Articles 21 and 36 of the UMCJ.\textsuperscript{21}

\textsuperscript{18.} \textit{See}, \textit{e.g.}, \textit{In re} Yamashita, 327 U.S. 1, 7–8 (1946) (“[Congress] incorporated, by reference, . . . all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.”); \textit{see also} Madsen v. Kinsella, 343 U.S. 341, 354–55 (1952) (“The ‘law of war’ in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government.”).


\textsuperscript{20.} \textit{See} Military Order, supra note 5. Specifically, section 4(a) of the order provided that “[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . .” \textit{Id.} § 4(a), at 66 Fed. Reg. 57,834.

\textsuperscript{21.} \textit{See id.} pmbl., at 66 Fed. Reg. 57,833.
Acting under the order, President Bush designated six unnamed detainees for trial by military commission in July 2003. The first formal charges were not revealed until over a year later, when Salim Hamdan was charged with the crime of "conspiracy." Hamdan brought a pre-trial habeas petition challenging the legality of the tribunal on a number of grounds, including, as relevant here, that his tribunal's procedures violated Article 36 of the UCMJ, and that, because "conspiracy" was not recognized as a war crime under the laws of war, his trial was not authorized by Article 21 of the UCMJ. Although Hamdan prevailed in the district court, the D.C. Circuit reversed, concluding, inter alia, that Hamdan lacked any rights that his trial by military commission could violate. The Supreme Court granted certiorari, and ultimately concluded that the commissions created by the Military Order were indeed unlawful.

C. Hamdan and the ICL-Based Limits on Military Jurisdiction

Although Justice Stevens's opinion in Hamdan is long and complex, the specific constraints on military jurisdiction derived from the laws of war were not addressed until near the end—and in a part of the opinion (Part V) not joined by

24. Article 36 then required that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable," 10 U.S.C. § 836 (2000), which was understood to require that military commission procedures resemble those employed for courts-martial except where it would be impracticable for them to do so.
Justice Kennedy. Writing for a four-Justice plurality, Justice Stevens explained that:

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," positively identified "conspiracy" as a war crime. As we explained in Quirin, that is not necessarily fatal to the Government’s claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.

As Stevens went on to explain, "The crime of ‘conspiracy’ has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war." Rejecting the government’s arguments based upon U.S. law to the contrary, the plurality concluded by emphasizing that "international sources confirm that the crime charged here is not a recognized violation of the law of war," invoking the International Military Tribunal at Nuremberg and subsequent decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in support. For the Hamdan plurality, then, international criminal law thereby provided an important constraint on the jurisdiction of military tribunals, at least based upon the authority that Congress had thus far conferred.

30. See Hamdan I, supra note 6 at 655 (Kennedy, J., concurring in part) (explaining why he viewed it as unnecessary to reach the validity of the conspiracy charge).
31. Id. at 601–02 (plurality opinion) (citations and footnotes omitted).
32. Id. at 603–04 (footnotes omitted).
33. Id. at 610.
34. See id. at 610–11 & n.40.
35. To be sure, Justice Thomas devoted a substantial part of his dissent in Hamdan to his opposite conclusion on the validity of the conspiracy charge. See id. at 689–705 (Thomas, J., dissenting). But my point here is not to take sides as between the plurality and the dissent; rather, it is to show how, at least for the plurality, the laws of war provided a constraint on—rather than tacit support for—the jurisdiction of the military commissions.
II. ICL and the Military Commissions Acts of 2006 and 2009

In their separate concurrences in Hamdan, Justices Kennedy and Breyer both invited Congress to provide the statutory authority for military commissions that the Court had found lacking, and Congress did not disappoint. On October 17, 2006, President Bush signed into law the Military Commissions Act, which included a host of controversial provisions—most prominently the jurisdiction-stripping provision subsequently invalidated by the Supreme Court (at least as applied to the Guantánamo detainees) in Boumediene.

The core of the 2006 MCA, though, was section 3, which provided wide-ranging statutory authority for trials by military commission. Specifically, 10 U.S.C. § 948d(a) under the 2006 MCA provided that “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.” And § 948a(1) defined “alien unlawful enemy combatant” as, inter alia, “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” As Ryan Goodman has explained, “emerging international standards appear to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals [with exceptions not here relevant].” Thus, while the first clause of § 948a(1) seems untroubling, the second clause raises the very distinct possibility

36. See, e.g., Hamdan I, supra note 6, at 636 (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine-through democratic means-how best to do so.”); id. at 636–37 (Kennedy, J., concurring in part) (“This is not a case... where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President’s authority.”).
that individuals who are (at most) indirect participants in hostilities might still be subjected to trial by military commission.41

A. The MCA and Subject-Matter Jurisdiction

In addition to its overbroad definition of who could be tried by military commissions, the 2006 MCA also codified twenty-eight separate substantive offenses triable by military commissions.42 Before defining the specific crimes, though, the statute set forth as its “purpose” to “codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.”43 And to reinforce the point, the next subsection (new 10 U.S.C. § 950p(b)) provided that “the provisions of this subchapter . . . are declarative of existing law,” and so “do not preclude trial for crimes that occurred before the date of the enactment of this chapter.”44 These two provisions seem particularly curious given that, in addition to traditional war crimes, both the 2006 and 2009 versions of the MCA include as substantive offenses the crimes of “terrorism,”45 “providing material support for terrorism,”46 and, notwithstanding Hamdan, “conspiracy.”47

The MCA thereby raises two interrelated questions: Does international law provide substantive limits on Congress’s power to define the offenses that are triable by military commission? Even if not, may Congress define such offenses retroactively? When Hamdan was re-charged under the MCA with committing the crimes of “conspiracy” and “providing material support to terrorism,” both sets of questions came to the forefront, first via a pre-trial habeas petition seeking to enjoin his trial. This time, though, the D.C. district court concluded that it should abstain from deciding Hamdan’s claims until after his trial took place.48

41. See id. at 60–63 (discussing the inappropriateness of including indirect participants within the scope of the “enemy combatant” definition).
44. Id. § 950p(b).
45. Id. § 950v(b)(24). The 2009 version moves terrorism to § 950t(24).
46. Id. § 950v(b)(25). For the 2009 version, see § 950t(25).
47. Id. § 950v(b)(28). For the 2009 version, see § 950t(29).
constitutional arguments were thus left for the trial court, or for a post-conviction appeal.\footnote{As I've explained elsewhere, at least some aspects of Hamdan's claims implicated his right not to be tried by a military commission acting without jurisdiction, a right that, by definition, cannot be vindicated post-trial. See Stephen I. Vladeck, \textit{Military Jurisdiction, the Right Not To Be Tried, and the Suspension Clause After Boumediene}, 16 No. 1 HUM. RTS. BRIEF 6 (2008).
}

\section*{B. Hamdan II and the Constitutional Limits on Military Jurisdiction}

In a pre-trial motion to dismiss, Hamdan re-asserted his claims that Congress could not subject him to trial by military commission for conspiracy or providing material support to terrorism. In denying Hamdan's motion on the eve of his trial, the trial court issued a six-page decision focusing entirely on the Ex Post Facto Clause claim—\textit{i.e.}, on whether Hamdan had been charged with offenses that were not recognized as being triable by military commission at the time they were committed. Judge Allred's answer was somewhat tautological: Invoking the assertion in § 950p that the offenses were not new crimes, he concluded that

\begin{quote}
In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a [sic] 'new crimes that did not exist before its enactment,' the Commission is inclined to defer to Congress's determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.\footnote{See \textit{United States v. Hamdan}, supra note 10, at 6.}
\end{quote}

In other words, because Congress specified in § 950p that it was only clarifying existing law (and not defining any new crimes), the offenses by definition could not violate the Ex Post Facto Clause.\footnote{Leaving aside the obvious grammatical problems with the passage, the legal analysis is unconvincing on its face, since the "historical basis" on which the commission relied was the very evidence the plurality in \textit{Hamdan} had found insufficient. Even if Congress \textit{could} provide that conspiracy would be triable by military commissions prospectively, it could not invalidate the plurality's analysis \textit{nunc pro tunc}.}

Perhaps more significantly, Judge Allred's opinion seized on the extent to which international law was \textit{unclear} as to whether conspiracy and material support were triable by military commissions. Quoting from a 2000 district court opinion, he appeared to agree that, "provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant
to its power to define offenses against the law of nations." That is, so long as international law is unclear as to the precise scope of offenses and offenders triable by military commissions, deference is owed to the political branches. The negative implication, though, is that Congress would have less leeway where international law's limits were more precisely defined.

C. The Offenses Clause and the Problem of Ambiguous International Law

To be sure, no Article III court has yet had to grapple with the assumption undergirding my thesis—that the laws of war, as part of the law of nations, provide the outer bounds on Congress's power to supplant civilian courts with military commissions. At least until the MCA, the question could never have arisen, since the upshot of the Quirin Court's analysis was that Congress had only authorized what the laws of war allowed. Now that Congress has appeared to sanction military jurisdiction in excess of that which is accepted practice under international law, it becomes a question of first impression—and one that may well have pressing significance going forward.

If the Offenses Clause does provide the outer limits of Congress's power to supplant the civilian courts with military commissions, then that suggests that clarity is as significant as scope, because the political branches will have less ability to subject to trial by military commission offenses that have not already been identified as such by the international community.

This leads, then, to my central concern with Professor Norberg's article. The status quo—leaving terrorism undefined—would only provide further support for analyses such as those undertaken by Judge Allred. Finding scattershot examples in both American and international practice, Congress would be able to derogate from civilian trial norms in any number of instances where international law may not be clear. In contrast, were the contours of international law more precise with


53. In a forthcoming article, I attempt to prove this assumption, or at least to provide the strongest arguments in support thereof. See Stephen I. Vladeck, The Laws of War as a Constitutional Limit on Military Jurisdiction, 4 J. NAT'L SEC. & POL'Y (forthcoming 2011). The closest support comes from Quirin itself. See Ex parte Quirin, 317 U.S. at 28 (where Chief Justice Stone noted that, through Article 15, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."). For the opposite view, see Michael Stokes Paulsen, The Constitutional Power To Interpret International Law, 118 YALE L.J. 1774, 1820–21 (2009).
respect to the offenders and offenses triable by military commission, Congress’s power “to define” would become increasingly circumscribed. And if international law clearly prohibited treating conspiracy as a war crime, I suspect that Hamdan’s post-MCA proceedings may have come out quite differently.

Conclusion

Hard questions remain with regard to the future of terrorism under international criminal law, and my colleagues in this symposium are probably better situated to answer those questions than I am. But I believe we can extrapolate two related principles from the specific context of U.S. military commissions after September 11: proscriptive ambiguity provides flexibility for military commissions to try offenses and offenders who might not actually be triable under the laws of war, whereas clarity might well constrain the ability of the political branches to deviate from accepted international law norms. Of course, if clarity in this context meant a consensus international definition of terrorism as a war crime, that would empower—rather than prohibit—domestic jurisdictions to apply that definition in military commissions. But at least then, such a result would be the product of international agreement and deliberation, rather than state-by-state derogation grounded as much in domestic politics as in fundamental principles of international law.

54. Indeed, this is the very paradox of the Offenses Clause. As Justice Story wrote in 1820, “Offences ... against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations. ... [T]here is [thus] a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.” United States v. Smith, 18 U.S. (5 Wheat.) 153, 159 (1820). At the same time, it seems abundantly clear from the record of the Constitutional Convention that the grant of power to “define” was limited to clarifying the state of international law, rather than perverting it.; See, e.g., Beth Stephens, Federalism and Foreign Affairs: Congress’s Power “To Define and Punish . . . Offenses Against the Law of Nations,” 42 WM. & MARY L. REV. 447, 472–73 (2000) (discussing the record of the Constitutional Convention that the grant of power to “define” was limited to clarifying the state of international law, rather than perverting it).

55. As it is, Hamdan was ultimately convicted and sentenced to a surprisingly short prison term (given that it included the duration of his pre-trial detention). At the end of his sentence, he was repatriated to Yemen, where he is free today.