

Grading Guides for past Examinations in Counterterrorism Law

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Last updated: August 30, 2015

CONTENT:

This document contains the grading guides for my past examinations in Counterterrorism Law and its predecessor course, Human Rights and Military Responses to Terrorism. The examinations were given on the following dates:

May 2, 2007
May 2, 2006
July 30, 2004

I have not taught the course since 2007.

IMPORTANT NOTES:

In accordance with the examination instructions, I have graded answers based on how well they have: (a) identified the governing legal doctrines; (b) applied these doctrines to the specific facts of the problems; (c) compared the facts of the problems to cases and other precedents considered in the course; and (d) provided other arguments, explanations, and examples as required by the questions. Answers that have done all of these things have received higher grades than those that have not. The most common mistakes usually are failing to discuss the application of legal rules to the facts of the problem and devoting too much attention to irrelevant legal doctrines at the expense of discussing more pertinent matters.

Grading Guide for Final Examination in
COUNTERTERRORISM LAW
(Course No. 383-10)

Professor Gregory E. Maggs

[Maximum of 12 points per question; 24 points per problem.]

PROBLEM I.

A. What arguments could General Pace make under international and U.S. law, and what counter-arguments might he expect?

Authorization to Use Military Force (AUMF). Discussion of whether the AUMF passed by Congress following the attacks of 9/11/2001 would authorize strikes on persons believed to be responsible for the earlier 1998 attacks on the U.S. embassies. See ACLU v. NSA (discussing the AUMF), Hamdi v. Rumsfeld (same)

Commander in Chief Power. Discussion of whether the President's constitutional status as Commander in Chief empowered him to strike at persons responsible for the attacks on the U.S. embassies even without additional Congressional authorization. Cf. Note (3), p. 162 (strikes on Sudan and Afghanistan following the 1998 embassy attacks ordered by President without Congressional authorization).

U.N. Charter article 51. Discussion of whether the United States could justify the attacks under U.N. Charter article 51 as a response in self-defense to the attacks on the U.S. embassies, see Note (3), p. 162, especially in light of the numerous objections made in the past when the United States and other nations have used military force in response to terrorism, see Iran v. United States, Israeli Separation Barrier Case, S.C. Res. 753, G.A. Res. 41/38.

Consent of Somalia. Discussion whether Somalia's transitional president's approval constitutes consents, and thus takes the action out of the general prohibition on the use of force in U.N. Charter article 2(4).

Necessity and Proportionality. Discussion of whether the use of force, even if it had some basis of authority, met the requirements of necessity and proportionality, especially given the possibility that the attacks killed persons not closely affiliated with al-Qaida.

ICCPR, GC Protocol I. Discussion of whether the ICCPR would prohibit the extra-judicial killing of persons suspected of the Embassy bombings. Report of the Special Rapporteur; Public Committee Against Torture v. Israel.

B. Might the United States face civil liability or other formal consequences in connection with the attacks?

Tort Liability and Sovereign Immunity. Discussion of how the United States has not waived its tort liability for military actions and actions occurring in foreign countries. Macharia v. United States; El-Shifa Pharmaceutical v. United States.

Takings Liability/Political Question. Discussion of whether the United States might face liability for "taking" any property destroyed. El-Shifa Pharmaceutical v. United States.

ICCPR and other treaties. Discussion of whether the ICCPR and other possibly relevant treaties provide individual rights that can be asserted against the United States.

Formal Reactions by Organs of the United Nations. Discussion of whether the strikes might prompt formal reactions from the United Nations, such as (1) a General Assembly resolution condemning the action, as occurred following the United State's strike on Libya, see Note (2), p. 162; (2) a Security Council resolution condemning the action (as has happened to other countries like Israel which lacks a veto power), see Note (1), p. 161; (3) an inquiry and report from an organ of the United States, such as the Report of the Special Rapporteur regarding the targeted killing in Yemen, p. 191; or (4) a lawsuit in the International Court of Justice, see Iran v. United States; Israeli Separation Barrier Case.

PROBLEM II.

A. In what ways does the MCA "allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders?"

Elimination of Habeas Corpus Jurisdiction. Discussion of how the MCA eliminates habeas corpus jurisdiction and how denial of access to the courts may facilitate isolation and interrogation of terrorist suspects. Syl. App. Part 5.

[During debate on the issue, Senator Graham supported the removal of habeas corpus by saying, "'You can't run an interrogation with attorneys.' . . . They are going to shut off the interrogation and the information is going to stop." 10153 Cong. Rec. S2856-02, *S2868 (Sept. 28, 2006).]

Elimination of UCMJ Requirements. Discussion of how the MCA, in creating the new 10 U.S.C. § 948(d)(A) removes the speedy trial requirement allowing for longer interrogations and makes inapplicable the self-incrimination limitations during interrogations.

Elimination of Geneva Conventions as a Source of Rights. Discussion of how the MCA provides that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights" and how this may facilitate interrogations. Syl. App. Part 9.

Provision for the Admissibility of Coerced Testimony. Discussion of how the MCA continues to provide for the admissibility of some coerced testimony in 10 U.S.C. § 948r. Syl. App. 9.

- B. Notice that the President stresses first how the MCA will facilitate intelligence gathering and only secondarily mentions how it will make prosecutions possible. Why might the President have considered the ability to use military commissions to prosecute suspected terrorists to be a less significant aspect of the MCA?**

Intelligence Gathering vs. Law Enforcement. Discussion of how interrogation can be used both for preventing terrorism (i.e., intelligence gathering) and punishing captured terrorists (e.g., through trials), and the perceived relative importance of each function.

Right to Detain Enemies without Trial. Discussion of how military trials may not be very important given that the United States may detain enemies without trial for the duration of the conflict. Hamdi v. Rumsfeld.

Likelihood of Sparing Use of Military Commissions. Military commissions also may not be very important because lack of admissible evidence, political controversy, and other factors may limit the total number of detainees tried by

military commission (with a total of only 10 charged before the MCA).

Other Methods of Prosecution. Discussion of how the continuing possibility of prosecuting terrorists in state and federal court -- the way most terrorist have been prosecuted -- with or without the MCA. Also discussion of how the President could order a military commission to prosecute war criminals, even without the MCA, provided that the commission followed the laws of war and did not conflict with the UCMJ. Hamdan v. Rumsfeld.

PROBLEM III.

A. Does al-Marri have a right to habeas corpus or any other procedure for having the legality of his detention reviewed?

Statutory Habeas Corpus Jurisdiction. Discussion of whether al-Marri has a statutory right to habeas corpus review of his detention. See 10 U.S.C. 2241(e)(1), as first added by the Detainee Treatment Act of 2005 (Supp. 43-44), and then as amended by the Military Commission Act of 2006 [Syl. App. pt. 5]

Constitutional Habeas Corpus Jurisdiction. Discussion of whether al-Marri has a constitutional right to habeas corpus jurisdiction under Art. I, § 9, cl. 2 ("the privilege of the writ of habeas corpus shall not be suspended"), addressing (1) the extent to which al-Marri as an enemy combatant has constitutional rights, Johnson v. Eisentrager; (2) whether Congress has suspended the writ of habeas corpus in the DTA 2005 and MCA 2006 or merely deferred it given the possibility of judicial review of a combatant status review tribunal's determination, Hamdan v. Rumsfeld (Scalia, J., dissenting); and (3) whether Congress may suspend the writ of habeas corpus in the current circumstances, Hamdi v. Rumsfeld (Scalia, J., dissenting).

Combatant Status Review. Discussion of whether al-Marri, as an alien held in the United States, has a constitutional, statutory, or administrative right to review of his combatant status by some kind of competent tribunal. cf. Hamdi v. Rumsfeld (Due Process right for citizen held in the U.S.); Note (2), p. 264 (describing combatant status review tribunals used at Guantanamo); Detainee Treatment Act § 1005(e)(2)(C) (Supp. 22) (providing appellate review of administratively created combatant status review tribunals)

B. Does the United States have a legally sufficient basis for detaining al-Marri?

Legality of Detaining Enemy Combatants. Discussion of the legality of detaining enemy combatants during the duration of an armed conflict. Hamdi v. Rumsfeld; Authorization to Use Military Force (AUMF)

Definition of Enemy Combatant. Discussion of the definition of enemy combatant and whether Al-Marri's alleged plot to hack into computers, if sufficiently proved, would establish that Al-Marri falls within the definition. Cf. Hamdi v. Rumsfeld (detainee captured on battlefield); Padilla v. Hanft (detainee captured in the United States).

Admissibility of Hearsay in Proving Enemy Combatant Status. Discussion of the use of hearsay evidence (like the declaration of the U.S. intelligence agent) in proving enemy combatant status. Hamdi v. Rumsfeld.

Burden of Proving Enemy Combatant Status. Discussion of the permissibility of putting the burden of proof on the detainee and al-Marri's decision not to present evidence supporting his general denial. Hamdi v. Rumsfeld.

PROBLEM IV.

A. What recurring issues faced by law enforcement officials in dealing with terrorism does this case illustrate?

Sufficient Evidence. In connection with the dispute between British and American officials over when to act and the apparent lack of evidence to support extradition, discussion of the recurring problem of needing to take action to prevent terrorism but not necessarily having enough evidence for law enforcement purposes. Compare the case of Moussaoui (not arrested and then 9/11 occurred) with that of Padilla (arrested but then apparently not enough evidence to try him for dirty bomb plot)

Specialized Terrorism Courts. In connection with the dismissal of the case against Rauf from the anti-terrorism court, discussion of the recurring issue of whether terrorist suspects should be tried by specialized terrorism courts or ordinary criminal courts. Cf. Military Commissions Act, Hamdan, etc.

Specialized Terrorism Offenses. In connection with the six charges against Rauf, discussion of the recurring issue of whether the law must define specialized terrorism offenses to address terrorism or whether ordinary criminal offenses will suffice. Cf. Kasi v. Virginia; Military Commissions Act of 2006 [10 U.S.C. § 950v].

Choice of Jurisdiction. In connection with Rauf's British citizenship and possible criminal activity in the United Kingdom but his detention in Pakistan, discussion of the recurring issue of which jurisdiction should assume responsibility over international terrorists. Cf. Application of Abassi.

B. If Pakistan turns Mr. Rauf over to U.S. custody for trial by military commission, what legal issues would arise?

Offenses Triable. Discussion of whether Rauf has committed an offense triable by military commission. Hamdan v. Rumsfeld, Military Commissions Act of 2006 [10 U.S.C. § 950v].

Persons Eligible for Trial. Discussion of whether Rauf is a person eligible for trial by military commissions act, especially in light of the Pakistani court's determination (which is not binding in the United States, but nonetheless relevant) that he has not even been charged with terrorism offenses. Hamdan v. Rumsfeld.

Evidence Obtained from Pakistan. Discussion of how the rules regarding hearsay and coerced testimony might limit the use of statements obtained or reportedly in Pakistan. Military Commissions Act of 2006 [10 U.S.C. § 948r].

Agreement with Britain. Discussion of the United States agreement with the United Kingdom not to hold British citizens at Guantanamo. Note, p. 382.

Geneva Convention art. III. Discussion of possible disagreements among the United States, the United Kingdom, and Pakistan over whether Geneva Convention III art. 3 applies and, if so whether, whether military commission is a regularly constituted court affording fundamental protections recognized by civilized nations. Hamdan v. Rumsfeld; MCA 2006 [10 U.S.C. § 948b(f) & (g)].

Grading Guide for Final Examination in

HUMAN RIGHTS AND MILITARY RESPONSES TO TERRORISM

(Course No. 836-10)

Professor Gregory E. Maggs

PROBLEM I.

A. What legal arguments can be made in support and in opposition to the positions of the officials quoted above?

Authorization to Use Military Force. Discussion of whether the President has authority to use military force in the United States against a member of al-Qaida. Authorization to Use Military Force, 115 Stat. 224; Hamdi v. Rumsfeld; Padilla v. Hanft.

Law of Armed Conflict. Discussion of whether the law of armed conflict applies and under what circumstances it would permit the killing of an enemy. Report of the Special Rapporteur (U.S. Response); cf. Public Committee Against Torture in Israel v. Israel [Note(3), pp. 195-196].

[Note: The problem appears to address both targeted killing and killing to prevent the active commission of attacks (e.g., Flight 93).]

Due Process. Discussion of whether the Fifth Amendment's prohibition of depriving a person of life without due process of law would apply and whether it would permit extra-judicial killing of members of al-Qaida. Cf. Hamdi v. Rumsfeld; Ex Parte Quirin; Padilla v. Hanft.

ICCPR. Discussion of whether ICCPR would apply and whether it would permit extra-judicial killing. ICCPR art. 1; Report of the Special Rapporteur. Cf. European Convention on Human Rights art. 2; McCann v. United Kingdom; Attorney General's Reference.

Posse Comitatus Act. Discussion of whether the Posse Comitatus Act would restrict the use of military force in the United States. Padilla ex rel. Newman v. Bush; 9/11 Commission Report [Note (3), p. 178].

[Note: The problem does not say whether the President would use military forces or law enforcement personnel to kill al-Qaida suspects.]

- B. Professor Sunstein also said that "the president would be on less solid legal ground were he to order the killing of a terror suspect in the United States who was not actively preparing an attack." Is this view correct?**

Law of Armed Conflict. Discussion of whether the law of armed draws a distinction between enemies "actively preparing an attack" and other enemies. Cf. Note (2), p. 195 (government response to the question whether the government could have shot Jose Padilla at the airport).

Civilian Law Enforcement Rules (ICCPR, Due Process, etc.). Discussion of whether civilian law enforcement rules draw a distinction between persons "actively preparing an attack" and other persons (e.g., whether it would make a killing less "arbitrary" under ICCPR art. 1). Cf. McCann v. United States; Report of the Special Rapporteur (Yemen's response).

PROBLEM II.

- A. What international law theories might justify a country like Canada in using military force against members of the Taliban and al-Qaida in Afghanistan?**

U.N. article 2(4). Discussion of the general prohibition against the extra-territorial the use of force.

Consent of Afghanistan. Discussion of how the post-Taliban government of Afghanistan may have consented to the Canadian's use of force (especially given that Canada is protecting Afghan government officials and is turning over prisoners to Afghanistan).

U.N. Charter art. 42. Discussion of whether the Security Council did or could have authorize the use of force. Cf. U.N. Security Council Res. 1358.

U.N. Charter art. 51. Discussion of whether Canada could act in "collective self-defense" of the United States following attacks of September 11, 2001. Israeli

Separation Barrier Case; U.N. Security Council Resolution 1358.

Note: The discussion might consider: (1) whether an armed attack occurred, NATO Resolution [pp. 164-65]; Murphy [note (1), p. 171]; (2) whether al-Qaida, which is not a nation, is capable of an "armed attack" under art. 51, Israeli Separation Barrier Case; and (3) other factors, such as whether the United States requested Canada's defense, Nicaragua v. United States, etc.

B. Under what circumstances would Canada bear responsibility for unlawful treatment of prisoners by the United States or Afghanistan?

Convention Against Torture. Discussion of the prohibition in art. 3(1) of the Convention Against Torture on expelling, returning, or extraditing a person to another country "where there are substantial grounds for believe that he would be in danger of being subjected to torture." Bellout v. Ashcroft.

Geneva Convention III. Discussion of (1) whether Geneva Convention III might apply (especially given the assurances insisted upon by Canada), (2) how mistreatment of detainees may violate art. 25's prohibition on physical and mental torture, and (3) whether Canada could evade the Conventions requirements by handing over prisoners to another country.

PROBLEM III.

A. To what extent, if any, may the United States lawfully detain the non-combatants described in this article?

Geneva Convention IV. Discussion of (1) whether the detainees might be protected persons under Geneva Convention IV art. 5; (2) whether the U.S. could detain them under article 51; and (3) whether their indefinite detention at Guantanamo would violate art. 49. Cf. Ass'n for Civil Rights in Israel v. Minister of Defence.

Authorization to Use Military Force. Discussion of whether the President has authority to detain persons who are not terrorists. Authorization to Use Military Force, 115 Stat. 224. Cf. Hamdi v. Rumsfeld.

Law of Armed Conflict. Discussion of detention of persons who are not enemy combatants -- at least long enough "to wind up wartime detentions in an orderly fashion" -- would

violate the law of armed conflict. Cf. Marab v. Command of IDF Forces; Murray v. United Kingdom.

Convention Against Torture. Discussion of whether the Convention Against Torture implicit permits continued detention if art. 3(1) prohibits returning the detainees to their home countries. Cf. CAT art. 3(1); Bellout v. Ashcroft.

Due Process/ICCPR. Discussion of whether Due Process or the ICCPR would apply to person who are not enemy combatants and, if so, whether indefinite detention is permissible.

B. What obstacles might the detainees have in obtaining a remedy in federal court?

Political Question Doctrine. Discussion of whether the political question doctrine would prevent the courts from ordering the President to engage in diplomatic negotiations to find another country that might take the detainees. Cf. Application of Abbasi.

Lack of Jurisdiction. Discussion of whether the Detainee Treatment Act 2005 would prevent the federal courts from exercising habeas corpus jurisdiction, unless the act is unconstitutional. Cf. Rasul v. Bush; Johnson v. Eisentrager.

Note: The Detainee Treatment Act 2005 gives the D.C. Circuit limited jurisdiction to review the Combatant Status Review Tribunal. But the facts indicate that a CSRT already has found the men not to be enemy combatants.

Sovereign Immunity. Discussion of how sovereign immunity would prevent the detainees from obtaining tort damages from the government. Macharia v. United States.

Not Self-Executing Treaties. Discussion of how the Geneva Conventions and other treaties that might give the detainees are not self-executing, meaning that a court cannot enforce them. Cf. Hamdan v. Rumsfeld; Bellout v. Ashcroft.

Deferential Review of Immigration Decisions. Discussion of the deferential review given to the government when it denies admission to aliens. Adams v. Baker.

PROBLEM IV.

A. Under what circumstances would international law permit Pakistan to use a military court to try Ramji for the charges on which he was arrested?

Personal Jurisdiction. Discussion of whether the law of armed conflict or other international law would permit a military commission or other military tribunal in Pakistan to exercise jurisdiction over a Pakistani citizen who is not in the armed forces. Cf. Hamdi v. Rumsfeld; Ex parte Quirin; Application of Yamashita.

Subject Matter Jurisdiction. Discussion of whether, under the law of armed conflict or other international law, a military commission or other military tribunal would have subject matter jurisdiction over the offenses charged (i.e., espionage and deadly acts of terrorism). Ex Parte Quirin; Application of Yamashita.

Trial and Appellate Procedures. Discussion of what requirements the law of armed conflict or other international law might impose on the trial or appellate procedures of a military commission or other military tribunal. Geneva Convention III art. 102; ICCPR 14 & 15.

Impartiality. Discussion of whether tribunals using military judges would have legally sufficient impartiality. U.N. Human Rights Committee Report [Note (1), p. 450]; Sadak v. Turkey.

B. Why might a military trial be necessary to "ensure secrecy of the information relating to defence?" What other advantages (or disadvantages) might a military trial have in comparison to a civilian criminal trial?

Secrecy. Discussion of the advantages and disadvantages of military tribunals as compared to civilian courts in terms of their possible ability to prevent public disclosure of evidence. Cf. Germany v. El-Motassadeq; U.S. v. Moussaoui.

Security. Discussion of the advantages and disadvantages of military tribunals as compared to civilian courts in terms of the difficulty of providing security. United States v. Koubriti.

Evidentiary Rules. Discussion of the advantages and disadvantages of military tribunals as compared to civilian courts in terms of the possibility of using relaxed evidentiary rules.

Procedures. Discussion of the advantages and disadvantages of military tribunals as compared to civilian courts in terms of procedural differences (lack of jury, different appellate procedures, etc.).

Grading Guide for Final Examination in

HUMAN RIGHTS AND MILITARY RESPONSES TO TERRORISM

Professor Gregory E. Maggs
The George Washington University

Given at New College, Oxford
July 30, 2004

PROBLEM I.

- A. Subsequent reports revealed that Russian security forces killed Khattab by bribing a Chechen to deliver a poisoned letter to him. Was this action lawful?**

Discussion of whether the law of armed conflict or human rights law (like the ICCPR) would govern Russia's actions on these facts.

Discussion of whether a targeted killing would violate the human rights law (if that law is applicable).

Discussion of whether a targeted killing would violate the laws of armed conflict (if that law is applicable).

Discussion of whether using a poison letter, carried by a person who presumably is not in the military, would violate the laws of war.

- B. The U.N. Commission on Human Rights condemned Russia's actions in Chechnya, citing "disappearances, ... torture, [and] arbitrary detentions" in violation of the Geneva Conventions and the International Covenant on Civil and Political Rights. What legal responses might Russia make about the scope of these treaties?**

Discussion of the applicability of the ICCPR to this conflict, which Russia may characterize as an armed conflict (see also above).

Discussion of the applicability of the Geneva Conventions III and IV, based on either common article 2 (an international conflict) or common article 3 (an internal conflict), to this conflict.

- C. **Russia threatened to use military force in the neighboring nation of Georgia, where persons linked to the bombings had fled. How would the legality of using force in Georgia differ from the legality of using force in Chechnya?**

Discussion of whether the UN Charter would limit the use of force in Chechnya and in Georgia.

Discussion of how domestic law might limit the use of force in Chechnya and in Georgia.

PROBLEM II.

- A. What legal challenges might be made against the trial procedures described in this article and how should they be evaluated?

Discussion of challenges to the independence of the trial (especially given the military composition of the court).

Discussion of challenges to the secrecy of the trial.

Discussion of challenges to the lack of appellate review.

Discussion of challenges to the use of coerced confessions.

- B. **How might the persons detained by Egypt for trial be classified under international law and how might their classification affect their rights?**

Discussion of possible classification of the detainees as ordinary criminal suspects, unlawful combatants, prisoners of war or presumptive prisoners of war.

Discussion of the rights of criminal suspects to charged or released, access to counsel, etc.

Discussion of the rights of POWs to combatant immunity, freedom from coerced interrogations, etc.

Discussion of how unlawful combatants might have fewer rights.

- C. **May military tribunals lawfully assert jurisdiction to try persons accused of the offense of having "planned terrorist acts?"**

Discussion of whether the military trials described are properly classified as "military commissions."

Discussion of the usual limitation of the subject matter of military commissions to violations of the law of war and other international crimes like piracy.

Discussion of whether "planning terrorist acts" fits within these categories.

PROBLEM III.

A. To what extent, if at all, does international law require judicial review procedures of the kind found in the British and Israeli laws?

Discussion of ICCPR/European Convention's prohibition on arrest other than for the purpose of bringing a person before a competent judicial tribunal. ICCPR art. 9; EC art. 5(c)

Discussion of the requirement in the Geneva Convention of a POW status determination before a "competent tribunal."

Discussion of customary international law (and the possible influence of the British, Israeli, and U.S. practices) on the need for a hearing to determine whether someone may be detained as a belligerent.

B. Does international law limit the power of legislative bodies like the British Parliament to renew authority for detaining suspected terrorists?

Discussion of how legislative power to renew authority for detention of suspected terrorist could result in their indefinite detention without trial.

Discussion of the usual requirement of a speedy trial and release upon acquittal for criminal suspects.

Discussion of the requirement of releasing belligerents at the end of the hostilities.

C. What legal and policy arguments might be made against active legislative and judicial oversight of military detentions of suspected terrorists?

Discussion of the competence of courts to review military actions.

Discussion of separation of powers between the legislative and military branches.

PROBLEM IV.

A. What legal obstacles would civilian victims like Mawiz Khan face in seeking compensation from the United States?

Discussion of how the United States does not pay compensation for property damaged in military actions, regardless whether it was an actual or supposed enemy target or it was collaterally damaged property.

Discussion of sovereign immunity and how there is no waiver for persons injured by military action.

Discussion of the possibility that there is no liability despite the damage because the government was not negligent.

Discussion about possible claims under international law that might be enforceable in international tribunals.

B. Why might the United States be reluctant to admit openly that it compensates victims of harm caused by military mistakes?

Discussion of public relations problems of compensating some people and not others.

C. Does the United States have an enforceable obligation to protect persons like Mawiz Khan from attacks by al-Qaida terrorists?

Discussion of the duty to provide security under Geneva Convention IV art. 27.

Discussion of duty to provide security under human rights law (e.g., ICCPR art. 6, customary international law).

Discussion of recurring obstacles in asking courts to require the government to provide security, including lack of standing, sovereign immunity, non-justiciability, non-self-executing treaties, and various jurisdictional limitations