

**A NATURAL LAW APPROACH TOWARDS THE
CONDUCT OF THE 9-11 TERROR TRIAL**

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I. INTRODUCTION

For years there has been considerable political debate over the appropriate format and location of the trial of those accused of playing a role in the horrific events of September 11, 2001. This article proposes a precedent-based approach which emphasizes the format of the trial rather than its location. This approach includes a consideration of natural law philosophy consistent with the rationale for the Nuremberg Trials that were conducted following the Second World War.

Public discussion of this issue has been largely political, if not emotional, in nature. Many have based their opinions largely on attempts to precisely define or categorize the nature of the terrorist activity as either criminal or akin to conventional war. This approach has been unproductive and it is clear that a better solution is reached through the application of legal and historical precedent.

In the present debate, conservatives have largely urged a military tribunal at Guantanamo Bay in which the defendants would be regarded as enemy combatants in the so-called “War On Terror.” The accused would not enjoy all of the rights of due process to which criminal defendants are entitled under the United States Constitution. When U.S. Attorney General Eric Holder announced on November 14, 2009 that the trial of Khalid Sheikh Mohammed, the alleged

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mastermind of the 9/11 attacks, and four other accused terrorists would be conducted in the U.S. District Court for the Southern District of New York, criticism was swift.¹

Liberal thought, including the position of the Obama Administration, has emphasized the criminal nature of the attacks as opposed to any military aspect of the scheme. When the attorney general initially announced plans to try Mohammed in criminal court in Manhattan, one of the most vocal supporters of the idea was New York City Mayor Michael R. Bloomberg, who equated the 9/11 assault with criminal conduct.² Other supporters of the idea emphasized the open nature of a civilian trial that would enable families of the victims of 9/11 to attend the trial.³

The Obama Administration subsequently announced on January 30, 2010 that the 9/11 terror trial would not take place in New York and that it was considering other options. The decision was made not on principle, but in the wake of mounting resistance arising out of the

¹ Former New York City Mayor Rudolph Giuliani's position was terse. Giuliani stated: "Khalid Sheikh Mohammed should be treated like the war criminal he is and tried in a military court." See Tony Allen-Mills, *Plan for 9/11 Trial In New York Divides the City*, THE SUNDAY TIMES, Nov. 15, 2009, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6917247.ece (last visited Aug. 4, 2010). Peter King, a New York congressman and senior Republican on the homeland security committee, said the decision to conduct a civilian trial in Manhattan 'will go down as one of the worst made by any U.S. president.' *Id.* Debra Burlingham, an advocate for victims' families, said that more than 300 families had urged President Obama not to conduct the trial in New York, proclaiming, "They're going to see a wave of fury and I don't think they are prepared for it." *Id.* There was also concern that a civilian trial would provide a forum for the accused terrorists. Matthew Waxman, a Columbia University law professor who served as a Pentagon lawyer in the George W. Bush administration, said he feared that evidence of waterboarding and intelligence-gathering might become public in a civilian trial. "We hold our trials in the open, and that gives defendants an opportunity to spew propaganda," Waxman said. "They will try to put the U.S. government on trial." See Josh Meyer & David G. Savage, *U.S. to Hold 9/11 Trial in Public Court*, LOS ANGELES TIMES, Nov. 14, 2009, available at <http://articles.latimes.com/2009/nov/14/nation/na-guantanamo14> (last visited Aug. 4, 2010).

² Bloomberg said: "It is fitting that 9/11 suspects face justice near the World Trade Center site where so many New Yorkers were murdered." *Id.*

³ Karen Greenberg, the executive director of the Center on Law and Security at New York University, and Peter Bergen, CNN's national security analyst and a senior fellow at the New America Foundation, supported the decision, making no distinction between criminal acts and acts of terrorism. They wrote: "Watching justice take place can play an incalculable role in the healing process . . . Justice meted out in New York City would be the most accessible way for the 9/11 families to witness the trial." See Peter Bergen & Karen Greenberg, *Why the 9/11 Trial Belongs in New York*, CNN.com, Feb. 4, 2010, available at <http://www.cnn.com/2010/OPINION/02/04/bergen.911.trial.nyc/index.html>. For additional arguments supporting a trial in civilian court, see Prof. Stephen I. Vladeck, *Terrorism Trials and the Article II Courts After Abu Ali*, 88 TEX. L. REV. 1501 (2010).

projected cost to New York City and the logistics of conducting a terrorism trial in Lower Manhattan.⁴

Logistics must, of course, be a consideration in determining the location of any terrorism trial. But principle, rather than logistics, should dictate whether the 9/11 defendants, and perhaps other accused terrorists, receive a criminal trial or a trial before a military tribunal. In this regard, the focus of those in favor of a U.S. military trial as well as those preferring a criminal trial has been misplaced. The fundamental flaw underlying the conservative position is its blind adherence to semantics. The argument for conducting military trials of terror suspects is a strident emphasis on the term “war” as used in the political phrase, “The War On Terror.” The effort to make us safe from terrorism, or drugs for that matter, is not a conventional war simply because politicians have labeled it as a war.

The liberal argument holds in large part that criminal trials would benefit the United States by demonstrating that our system of justice is fair and transparent. Another argument is that a criminal trial is appropriate for the 9/11 terror suspects, but not for other terror suspects detained at Guantanamo, because their conduct violated federal criminal statutes.⁵ But equating the 9/11 acts of terror to a simple homicide is simplistic and naïve.

To determine the appropriate type of trial, the Administration should consider material aspects of the acts of terror without attempting to consign them to a strict definition. The nature of

⁴ New York officials, including Mayor Bloomberg, and business leaders pressed the Administration to reverse course after New York City Police Commissioner Raymond W. Kelly revealed his plan for securing the trial of Mohammed. The plan included the use of police checkpoints, vehicle searches, rooftop snipers and canine patrols to secure lower Manhattan. See Scott Shane and Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, available at <http://www.nytimes.com/2010/01/30/nyregion/30trial.html> (last visited Aug. 4, 2010). Julie Menin, an attorney who chairs a Community Board that represents Lower Manhattan, seemed to recognize the legal issues involved in deciding the appropriate type of the trial and its location, but she emphasized the economic aspect of the decision when she supported the move. Menin stated: “The administration is in a tricky political and legal position. But it means shutting down our financial district. It could cost \$1 billion. It’s absolutely crazy.” *Id.*

⁵ See John B. Bellinger III, *Terrorism and Changes to the Law of War*, 20 DUKE J. COMP. & INT’L L. 331 (2010).

the 9/11 attacks was not military in the sense that the acts of terror were not carried out by a military organization, did not involve the use of weapons normally associated with war and were not directed against a military body.

Nor were the acts conventional street crimes by any reasonable interpretation of the concept. The conspirators did not seek to murder specific individuals for personal gain. They did not employ guns, knives or similar weapons to destroy life; rather, they transformed airplanes into missiles.

II. THE CASE FOR AN INTERNATIONAL MILITARY TRIBUNAL

A. The Nuremberg Trials as Legal and Historical Precedent

One salient characteristic of the acts of 9/11 is that the conduct was directed at civilians. Another is that the jihadists picked their human targets, to a substantial degree, on the basis of their race. The U.S. should attempt to establish an international military tribunal based on these and other aspects of the 9/11 attacks.

The legal and historical precedent for an international military tribunal is the Nuremberg Trials. The parallels between the crimes committed by the Nazis and the alleged conduct of Mohammed and other 9/11 planners are basic: both involved attacks on civilians and both were based largely on race. Much, though not all, of the focus at Nuremberg was directed towards actions taken by the Nazis to exterminate Jews. Similarly, the focus of the jihadists is to terrorize and to murder people of Western origin or those who do business with the West. It was certainly no coincidence that the first targets to be struck on 9/11 were the Twin Towers, which were occupied by thousands of people not only from the U.S., but from across the globe.

On August 8, 1945 the governments of the U.S., France, Great Britain, and the Soviet Union signed an agreement to prosecute certain Nazi military, economic and other leaders in Berlin and in Nuremberg, Germany. It is important to note that no representative of the German people signed the pact, known as the London Agreement or the London Charter. Political authority for Germany had been transferred to the Allied Control Council which had the power to punish violations of international law.

Agreement amongst the Allies for an international military tribunal had not always been unanimous. As in the case of the 9/11 defendants, there were those who regarded the Nazis as street criminals.⁶ In October 1943, the governments of the U.S., Great Britain, the Soviet Union, and China jointly stated that German officers and members of the Nazi party that participated in or consented to atrocities, massacres and cold-blooded mass executions in European countries would be “sent back to the countries in which their abominable deeds were done in order that they be judged and punished according to the [criminal] laws of these liberated countries and of free governments which will be erected therein.”⁷

By July 1945 when President Truman met with Prime Minister Churchill and General Stalin in Potsdam, the Allied Nations had turned away from the idea of conducting criminal trials. They

⁶ Winston Churchill believed that putting Nazi leaders on trial after the war would be a “farce” and that they should be treated as “outlaws.” In a cabinet meeting in 1942, Churchill said: “If Hitler falls into our hands we shall certainly put him to death...This man is the mainspring of evil. Instrument – electric chair, for gangsters...” In April 1945, just four months before the London Agreement was signed, Churchill continued to resist the idea of a war crimes tribunal. The prime minister told his cabinet: “Execute the principal criminals as outlaws.” He also called for a list to be drawn up of major Nazi criminals who may be shot when taken in the field.” Churchill made it clear that he was prepared to blunt any criticism of his policy by introducing an Act of Attainder in parliament that would have permitted politicians, instead of a court of law, to pass judgment on accused Nazis. See John Crossland, *Churchill: execute Hitler without trial*, THE SUNDAY TIMES, Jan. 1, 2006, available at <http://www.timesonline.co.uk/tol/news/uk/articles784041.ece>. Ironically, Joseph Stalin would later tease Churchill regarding his soft attitude towards Germany. Stalin proposed in 1943 to execute 50,000 to 100,000 German staff officers when the war ended. Franklin Roosevelt joked that executing 49,000 might suffice. Churchill supported the idea of punishing war criminals, but he opposed the execution of soldiers who had fought for their country. See Bohlen, *Tehran Conference: Tripartite Dinner Meeting*, available at <http://teachingamericanhistory.org/library/index.asp?document=906>.

⁷ See *The Moscow Conference; October, 1943*, available at <http://avalon.law.yale.edu/wwii/moscow.asp>.

declared in the Potsdam Agreement that war criminals and those who planned and carried out Nazi enterprises involving atrocities or war crimes would be arrested and brought to judgment. The Agreement made reference to ongoing negotiations in London that were conducted for the purpose of formulating a judicial framework for trying war criminals.⁸

Six days after the Potsdam Conference concluded, the Allied Powers signed the London Agreement. Article I of the Agreement established “an International Military Tribunal for the trial of war criminals,” but the Agreement did not limit the jurisdiction of the Tribunal to military officers and personnel. The Agreement clearly stated that “members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities” would be subject to trial and punishment. The absence of any prior German consent to war crimes trials was addressed in the Preamble to the London Agreement as follows: “Whereas the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice...”⁹

The International Military Tribunal was opened on October 18, 1945 in the Palace of Justice in Nuremberg. The prosecution entered indictments against 24 major war criminals and six criminal organizations for conspiracy, crimes against peace, war crimes, and crimes against humanity.¹⁰

⁸ See Potsdam Declaration, Aug. 2, 1945, available at http://potsdamer-konferenz.de/dokumente/protokoll_en.php.

⁹ See London Agreement of Aug. 8th 1945, available at <http://avalon.law.yale.edu/imt/imtchart.asp>. A charter annexed to the London Agreement set forth the constitution, jurisdiction and function of the International Military Tribunal. The charter defined three types of crimes that fell within the jurisdiction of the court: crimes against peace, war crimes and crimes against humanity. See Charter of International Military Tribunal, Aug. 8, 1945, available at <http://www.avalon.law.yale.edu/imt/imtconst.asp> (last viewed Aug. 10, 2010) (hereinafter “*Military Tribunal*”).

¹⁰ *Nuremberg Trial Proceedings Vol. 1 Indictment*, available at <http://avalon.law.yale.edu/imt/count.asp>. Crimes against peace were defined as “waging of a war of aggression, or a war in violation of international treaties...” (e.g., the Treaty of Versailles); war crimes were defined as “violations of the laws or the customs of war”, including murder or ill-treatment of civilians and prisoners of war and wanton destruction of cities, towns or villages; crimes against humanity included murder and extermination of civilians, before or during the war, and political, racial or religious persecutions in connection with “any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” See *Military Tribunal*, *supra* note 9.

A second set of trials involving civilians - primarily judges and physicians - was conducted separately. They, too, were tried for the types of crimes set forth in the London Agreement, not under German criminal law.

Critics of the Nuremberg Trials have charged that the acts of the defendants were defined as “crimes” only after they were committed and that the proceedings were illegitimate.¹¹ No less of an authority than Harlan Fiske Stone, the Chief Justice of the United States Supreme Court, called the Nuremberg Trials a fraud. He accused the chief United States prosecutor, Robert Jackson, of holding a “high-grade lynching party in Nuremberg.” Justice Stone further stated: “I don’t mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.”¹²

Associate Supreme Court Justice William O. Douglas concurred with the Chief Justice, though his words were more temperate. Justice Douglas wrote: “I thought at the time and still think that the Nuremberg trials were unprincipled...Law was created *ex post facto* to suit the passion and clamor of the time.”¹³

The fact that the definitions of crimes against peace, war crimes and crimes against humanity were refined and expanded after the Nuremberg Trials were completed – and in response to the judgment of the International Military Tribunal – supports the argument that the London Agreement created law after-the-fact. The definitions are set forth in the Nuremberg Principles, a document that was created in 1950 –four years after the International Military Tribunal concluded

¹¹ See DANILO ZOLO, VICTORS’ JUSTICE: FROM NUREMBERG TO BAGHDAD (London: Verso Books, 2009).

¹² See *Nuremberg Trials: Validity of the Court*, NEW WORLD ENCYCLOPEDIA (2010), available at http://www.newworldencyclopedia.org/entry/Nuremberg_Trials (hereinafter “*Validity of the Court*”); see also ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (New York: Viking 1956).

¹³ See *Validity of the Court*, *supra* note 12.

its work.¹⁴ It was created by the International Law Commission of the United Nations in order to codify the legal principles underlying the Nuremberg Trials. Its creation amplifies the question as to whether there was adequate legal or historical precedent for the trials.

A review of relevant international treaties and pronouncements that were issued prior to the Second World War reveals that the Nuremberg Trials were indeed based on *ex post facto* law. In 1915, the Allied Powers, Britain, France, and Russia, jointly issued a statement that clearly charged, for the first time, another government (the government of the Ottoman Empire, or Sublime Porte) of committing “crimes....against humanity and civilization.”¹⁵ The Allies were referring to the Ottoman Turks’ slaughter of millions of Armenians and Greek Christians that began during World War I. It was the first widely-disseminated reference to certain atrocities as crimes against humanity.

The London Charter makes reference to the Allied statement, but it is important to recognize that Germany was not a party to the statement. Defenders of the Nuremberg Trials have referred to subsequent international agreements to which Germany was a signatory in order to counter the *ex post facto* argument against the Trials. For instance, Germany was one of the 37 nations that signed the Articles to the Geneva Convention to Suppress the Slave Trade and Slavery in 1926.

One of the stated purposes of the Geneva Convention on Slavery was to “prevent forced Labour from developing into conditions analogous to slavery.”¹⁶ The agreement stated that the parties were to work to bring about “the complete abolition of slavery in all its forms” (Article 2)

¹⁴ See Principles of International Law Recognized in The Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, available at <http://www.icrc.org/ihl.nsf/full/390> (hereinafter “*The Charter of the Nuremberg Tribunal*”).

¹⁵ See Transcript of the State Department Telegram, Department of State, Washington, May 29, 1915, available at <http://middleeast.about.com/od/turkey/qt/me090318.htm>.

¹⁶ See Convention to Suppress the Slave Trade and Slavery (25 Sep 1926), available at <http://frank.mtsu.edu/baustin/holoslav.html>.

and to refer for decision any unresolved disputes to the Permanent Court of International Justice (Article 8).¹⁷

Germany was also a signatory to the Hague Convention of 1899¹⁸ and the 1930 Convention Concerning Forced Or Compulsory Labour.¹⁹ Yet even those who cited these agreements as the legal basis for the Nuremberg Trials recognized their shortcomings, including the failure to define and create an appropriate structure for the administration of justice under the agreements.²⁰

Citing to international agreements does not fully address the concerns of critics of the Nuremberg Trials for a variety of reasons, including the fact that the agreements did not constitute a true code of criminal conduct or provide adequate mechanisms for enforcing the principles set forth therein. Nor did they set forth the parameters of punishment. An additional concern has been expressed as follows by military historian Richard Overy, professor of history at the University of Exeter:

The category of war crime, defined under international agreements made earlier in the century, covered specific violations of the rules of war (such as the murder of prisoners of war, or the shooting of hostages), but these were enforced against the immediate perpetrators – who were in most cases junior officers and regular soldiers. What the Allied powers had in mind was a tribunal that would make the waging of aggressive war, the violation of sovereignty and the perpetration of what came to be known in 1945 as “crimes against humanity” internationally recognized offences.

Unfortunately these had not previously been defined as crimes in international law, which left the Allies in the legally dubious position of

¹⁷ *Id.*

¹⁸ See *Laws of War: Laws and Customs of War on Land (Hague II)*; July 29, 1899, 32 Stat. 1803 available at http://avalon.law.yale.edu/19th_century/hague02.asp. Hague II set forth general principles respecting the treatment of prisoners of war, conduct of hostilities, military authority over hostile territories, and related issues. The signatories recognized at the time that the articles to the convention were broad and incomplete, as they wrote: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law...”

¹⁹ See *Convention Concerning Forced or Compulsory Labour* (28 Jun 30), available at <http://www.yale.edu/lawweb/avalon/un/forlab46.htm>; See also Marian Mushkat, *Nuremberg Trial*, in *ENCYCLOPEDIA OF THE HOLOCAUST*, VOL. 4, 1485-1494 (Israel Gutman ed., 1990).

²⁰ See Ben Austin, *The Nuremberg War Crimes Trials*, available at <http://frank.mtsu.edu/baustin/trials.html>.

having to execute retrospective justice – to punish actions that were not regarded as crimes at the time they were committed.²¹

B. The Application of Natural Law Theory

Nevertheless, the Allied Powers tried the Nazis at Nuremberg essentially under principles of military and criminal law. To justify what otherwise would constitute a series of trials under *ex post facto* laws, defenders of the Trials relied implicitly, if not explicitly, on natural law theory.²²

Natural law has been traced to ancient Greece, specifically to the philosopher Heraclitus of Ephesus (c. 540-475 B.C.), who stated that “all humans laws are fed by the one divine law.”²³ The concept evolved into one of both jurisprudence and political philosophy through numerous philosophers and jurists, including Aristotle, who held that what was “just by nature” was not always identical to what was “just by law”, St. Thomas Aquinas, Thomas Hobbes and John Locke.²⁴

Aquinas wrote that the natural law is one aspect of Divine Providence and that all human beings possess a basic knowledge of the principles of the natural law.²⁵ Aquinas also said that the fundamental principle of the natural law is that good is to be done and evil avoided.²⁶

²¹ See Richard Overy, *Making Justice at Nuremberg, 1945-1946*, available at http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml.

²² Professor Overy, among others, has noted the disagreements among the victor nations as to appropriate procedure and punishment of Nazis and the compromises that each nation was forced to make in order for the Nuremberg Trials to proceed. He observed that the trials were based on natural law theory. Overy wrote: “Crimes committed on the Allied side were simply ignored, because their publicity might poison inter-Allied relations. Goering was right[when he wrote, “The victor will always be the judge and the vanquished the accused”] to see international judgement as a function of Allied power and German helplessness. But for all that, the trials reflected legal norms that were embedded in the natural law tradition, and were not mere expressions of vengeance.” *Id.*

²³ See MICHAEL BERTRAM CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* (The Hague: Martinus Nijhoff, 1977).

²⁴ See Jeffrey Lehman & Shirelle Phelps, *Natural Law*, in WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed., Farmington Hills, Mich.: Thomson Gale, 2005).

²⁵ See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, IaIIae 94, 4.

²⁶ *Id.* at 94, 2.

Locke was one of the first to apply this natural law philosophy to government. He wrote as follows:

To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man...But though this be a state of liberty, yet it is not a state of licence...The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions...²⁷

Two centuries later, Emerich de Vattel, a popular Swiss philosopher, diplomat and legal expert whose volume on *The Law of Nations* was published in French, English and German, expressed a political philosophy that was based on rights that were inherent in the individual. Vattel believed that natural law determined “that liberty and independence belong to man by his very nature, and that they cannot be taken from him without his consent.” He believed that “nations can not alter it by agreement, nor individually or mutually release themselves from it.”²⁸

Natural law thought in the United States can be traced to the original Colonies, where judges often indicated their belief in the natural laws.²⁹ It was later embodied in the Declaration of Independence in which the Founding Fathers declared that men are “endowed by their Creator with certain unalienable rights that among these are Life, Liberty, and the pursuit of Happiness.”

Not long after the Nuremberg Trials were concluded, the esteemed Justice Felix Frankfurter espoused a contemporary interpretation of natural law theory in *Adamson v. California*.³⁰ There, the prosecutor in a criminal trial had argued that the defendant’s refusal to testify could be interpreted

²⁷ See JOHN LOCKE, TWO TREATISES ON GOVERNMENT 4-5 (A. Millard et. al., Hackett Publishing Company, 1980) (1690).

²⁸ See CHARLES HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 49-52 (Cambridge: Harvard University Press, 1930).

²⁹ *Id.*

³⁰ 332 U.S. 46 (1947).

as an admission of guilt under a California law that permitted the jury to infer guilt in such cases. The Supreme Court held that while the defendant's rights may have been violated had the case been tried in federal court, the rights guaranteed under the Fifth Amendment did not necessarily extend to state courts.

In a concurring opinion, Justice Frankfurter stated that judicial review of whether the Due Process Clause of the Fourteenth Amendment incorporated certain federal rights imposed an exercise of judgment on the part of the Court. Frankfurter believed that the Court must determine whether the course of criminal proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."³¹

It was precisely this type of thought – that individuals were born with natural rights and that it was natural and acceptable to punish those who violate those rights – that served as the underpinning to the Trials at Nuremberg. The use of judges from all four signatory nations was a clear sign of international acceptance of this reasoning and of global support for bringing to justice those accused of crimes against humanity.

Although natural law theory would find its detractors later in the 20th Century, the Nuremberg Trials served as a precedent for significant international treaties. These include the following: The Genocide Convention (1948)³²; The Universal Declaration of Human Rights

³¹ See, *id.*, at 67-68. An articulate rejection of natural law theory may be found in the dissenting opinion of Justice Hugo Black, who rejected the assertion that the Supreme Court "is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice." *Id.* at 69.

³² See Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, available at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/a2ec826e5d083098c125641e0040690d?OpenDocument>. The Convention agreed to outlaw genocide, stating in Article 1 as follows: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law

(1948)³³; The Nuremberg Principles (1950)³⁴; The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968)³⁵; and, The Geneva Conventions of 1949³⁶ and its supplementary protocols (1977).³⁷

III. CONCLUSION

The Obama Administration should use the Nuremberg Trials as a model for the 9/11 trials. The decision to convene an international military tribunal with judges from several nations would be a principled one, based on legal and historical precedent. Judging the accused in a civilian court or before a U.S. military tribunal would be the result of an unprincipled and arbitrary decision.

The 9/11 trials should be based on crimes committed against humanity. As previously discussed, the parallels between the events of 9/11 and World War II crimes are readily apparent. But, in a sense, there is an even greater justification for an international military tribunal in this

which they undertake to prevent and to punish.” The contracting parties specifically defined acts of genocide and conferred enforcement authority on the United Nations and the International Court of Justice.

³³ See The Universal Declaration of Human Rights (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>. A portion of the Preamble impliedly references some of the judgments rendered at Nuremberg as follows: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...”

³⁴ See “*The Charter of the Nuremberg Tribunal*”, *supra* note 14. The seven principles address several issues that confronted the judges at Nuremberg, including the imposition of liability for acts that are criminal under international law, but not under the internal law of a nation (Principle II). Another example is found in Principle III, which addresses the defense raised by some defendants at Nuremberg as follows: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”

³⁵ See European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Dec. 9, 1948, available at http://untreaty.un.org/unts/144078_158780/3/7/11782.pdf. The Convention agreed that no statutory limitation shall apply to war crimes and crimes against humanity as defined in the Charter of the International Military Tribunal at Nuremberg.

³⁶ See The Geneva Conventions of 1949, available at http://avalon.law.yale.edu/subject_menus/lawwar.asp. There were four conventions that addressed the conduct of war and afforded protection to wounded soldiers, prisoners of war, civilians, and others. The attempt to protect civilians is significant because prior Geneva Conventions were concerned with combatants only, but the events of World War II demonstrated the need to protect civilians as well. A summary of the Conventions is available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions>.

³⁷ See Protocol 1, Additional to the Geneva Conventions, 1977, available at <http://deoxy.org/wc/wc-proto.htm>.

case than there was in post-war Germany. First, there is the international nature of the conduct involved. While the 9/11 attacks occurred solely on U.S. soil, one of the primary targets, the World Trade Center, was international in nature. It was no coincidence that the terrorists chose a global symbol where individuals from throughout the West were located.

In addition, the destruction of the World Trade Center had a global impact, making office buildings throughout the world less safe. Subsequent subway bombings in Europe have made subways everywhere less safe. Also relevant is the fact that the 9/11 attacks, though obviously substantial, were not isolated incidents. The attacks were part of a progression of terrorist attacks against western interests around the globe. As the attacks have been directed against civilians, they are crimes against humanity.

In addition to constituting a course of action based on principle, an international military tribunal would carry with it the additional benefit of sending an important message to the jihadists that the civilized nations are united against terrorism.