

# **Assessing the Efficacy of Capital Punishment in the War on Terror through the Lenses of History, Law, and Theory**

**A Monograph  
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## **Abstract**

Assessing the Efficacy of Capital Punishment in the War on Terror through the Lenses of History, Law, and Theory by Major Mandi L. Bohrer, U.S. Army, 55 pages.

Prior to President Obama halting all ongoing military commissions, the United States charged six Guantanamo Bay prisoners with capital crimes. Further, his latest policy directive for new military commission rules has not excluded the death penalty as punishment. Application of the death penalty for convicted terrorists will draw worldwide attention. President Obama's decision to approve or disapprove a capital sentence has both domestic and international implications.

Not only will application of the death penalty draw international attention, and possibly international ire, it will prove problematic because of competing issues related to strategic communication, international expectations, domestic desires, and the overall effort in fighting global terrorism. In President Obama's early days in office, he has put great emphasis on the American identity in the international arena and on using the American identity to build relationships with other nations. Therefore, the constructivist approach to international relations is an effective tool for evaluating President Obama's decisions during the punishment phase of military commissions. Using constructivism to frame his overarching decision, an examination of history, identity, law, and strategic communication help complete the examination of his strategic outlook.

This paper provides a description of the international relations approach of constructivism as the theoretical basis for the author's evaluation. The application of this approach requires a combination of history, philosophy, and law. In essence, this approach presupposes that American national identity, as manifested through President Obama and his administration, will explain the decision whether or not to use capital punishment against terrorists and of the potential positive and negative consequences of this decision based on group identities. Because the factors that define, shape and describe a national identity are nearly infinite, this paper focuses on a broader historical, legal, and cultural analysis to measure the efficacy of using capital punishment against convicted terrorists. The author's analysis leads her to conclude that President Obama will approve a capital sentence handed down to convicted terrorists from a military commission.

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## **Introduction**

Counter to United Nations policy, the United States is the only western, industrialized, democratic country that continues to use the death penalty. This is important to the author's current research, as several alleged terrorists have been charged with capital crimes that carry with conviction the possibility of the death penalty being applied. In fact, prior to President Obama halting all ongoing military commissions, the United States was seeking the death penalty for six prisoners at Guantanamo Bay, Cuba. However, application of the death penalty will prove problematic from a political and strategic communication standpoint, as there are a number of competing issues related to a decision to conduct military executions in the war on terror. First, by conducting the executions, the United States would again defy formally codified opinion on human rights by the United Nations. Next, an extremist could spin the execution into a victory as it allows for martyrdom of the convicted terrorist. These facts juxtapose against the desire on the part of other audiences, to include attack victims, for fair punishment as part of the military judicial process. On the other hand, a decision against conducting military executions creates even more national and international questions about how and where to culminate the punishment phase. Additionally, a decision against terrorist execution may affect United States conduct in future conflicts and military tribunals.

Regardless of the forum for the trial of terrorists, the punishment phase will draw worldwide attention. Therefore, the issue of strategic communication before and after the execution is worthy of study. The message the United States, the United Nations, and Islamic nations send will affect international opinion, international relations, and the struggle against global terrorism.

## **Methodology**

In President Obama's early days in office, he has put great emphasis on the American identity in the international arena and on using the American identity to build relationships with

other nations. This emphasis seems, on the surface, to mirror an approach in the study of international relations dubbed constructivism. Constructivism is a theoretical approach to describe the international system that differs greatly from the two most well known and oft used theories of the international system: liberalism and realism. It is important to understand how important world leaders view the world and are approaching world problems in order to understand and predict the implementation and outcome of controversial but potentially beneficial policies like the application of capital punishment to convicted terrorist actors.

In this vein, this author will use constructivism to frame President Obama's decision regarding punishment for terrorists convicted in a military commission. If a military commission recommends capital punishment, based on the research of this paper, the author predicts that President Obama will approve a capital sentence for convicted terrorists. His decision will garner unique responses from American, European, Muslim, and extremist audiences, which will be explored in detail later in the paper.

This paper will provide a description of the international relations approach of constructivism as the theoretical basis for the author's evaluation. Properly applying this approach will require a combination of history, philosophy, and law. In essence, this approach presupposes that American national identity, as manifested through President Obama and his administration, will explain the decision whether or not to use capital punishment against terrorists and of the potential positive and negative consequence of this decision based on group identities. Because the factors that define, shape and describe a national identity are nearly infinite, this paper will focus on a broader historical, legal, and cultural analysis to measure the efficacy of using capital punishment against convicted terrorists.

## **Constructivist Approach**

Material gain and self-interest do not fully explain the motivations and factors that shape actor behavior in international relations theory. Constructivism is a relatively new theory in

international relations that offers an alternative explanation for individual and group behavior. “Constructivists focus on the role of ideas, norms, knowledge, culture, and arguments in politics, stressing in particular the role of collectively held or “intersubjective” ideas and understanding on social life.”<sup>1</sup> Social dynamics, in addition to material factors, shape human interaction. Shared beliefs are the most powerful ideational factors. These intersubjective beliefs construct the interests and activities of actors.<sup>2</sup> Social factors include ideas like sovereignty, rights, and freedom; people collectively believe in these guiding principles and act accordingly. These social facts influence politics.<sup>3</sup> Essentially, the constructivist approach contends that actors do not simply consider material factors. For a constructivist, ideas, identities, beliefs, and norms shape state behavior. In the constructivist approach, state identity shapes state preferences and actions.<sup>4</sup>

Wendt’s articles explain this theoretical approach for President Obama. “Anarchy is What States Make of It: The Social Construction of Power Politics” by Alexander Wendt provides the theoretical approach to garner understanding from recent international relations events. Wendt argues that a process oriented system founded upon ideas of national identity explain international relations. Identities and interests remain stable; the social relationships are very complex and dynamic. While his constructivist theory does not make any promises to predict behavior, this approach is useful. Further, this approach seems to explain recent activity by President Obama; therefore, it should be useful in partially predicting future behavior.

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<sup>1</sup> Martha Finnemore and Kathryn Sikkink, “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics,” *Annual Review of Political Science* 4 (2001): 392

<sup>2</sup> Finnemore and Sikkink, 392

<sup>3</sup> Finnemore and Sikkink, 393

<sup>4</sup> Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics," *International Organization* 46 (Spring 1992): 398.



There are a number of fundamental assumptions and ideas that underpin the constructivist approach. First, the concept of anarchy is a human construct.<sup>5</sup> While behavior is not fully predictable, via shared understanding between actors, there is some degree of expected behavior. The social nature of international relations, the roles that states play based on their identity and interests provides some order in international relations; therefore, while there is no hierarchical control mechanism, state behavior limits anarchy. Constructivism focuses on the ideas, interests and identities of the actor in order to understand behavior. Relevant actors may be nation-states, individuals, or institutions. Elite beliefs, collective norms, and social identities shape actor behavior.

There are three other core principles that define the constructivist approach. Human consciousness and the role it plays in international life is a primary concern of constructivism. “Ideational factors, such as identity and interest, and material factors, such as land and money, have value in understanding behavior. These factors explain collective and individual intentionality.”<sup>6</sup> Context gives these factors meaning; therefore, constructivism does not articulate cause-effect models. Instead, constructivism offers explanatory accounts in causal explanations.<sup>7</sup>

Constructivism has several philosophical differences with other theories such as realism and liberalism. First, the intersubjectivity of human interaction sets the foundation for the approach. Next, identities and interests are social constructs; those creations “share relevance with many other ideational and material factors of human capacity. Further, the acceptance of the

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<sup>5</sup> Wendt, 398.

<sup>6</sup> Aaron Bohrer, Mandi Bohrer, and Derek Zitko, “President Obama’s First One Hundred Days: Constructivism in Practice,” (Applied Elements of National Power essay, Advanced Military Studies Program, 2009), 2, under review with the *Washington Quarterly*.

<sup>7</sup> John Gerard Ruggie, “What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge,” *International Organization* 52 (Autumn 1998): 879.

intersubjective nature of interaction allows for collective intentionality.”<sup>8</sup> Constructivism is admittedly a weak predictive tool; however, it accepts and expects transformation at the individual and collective levels. Lastly, agents are active. Agents define national interest; they are not “merely enacting stable preferences but constructing them.”<sup>9</sup> This is why an agent’s view of the world, especially a national leader, is so important.

The constructivist approach entails a process of constant feedback and interaction between actors. Intersubjective understanding and certain expectations develop between the United States and other world actors. In the case under study in this monograph, the trial of terror suspects is a stimulus that requires action. Certain identities and interests of the United States will define the situation for the American population. President Obama, on behalf of the United States, will approve sentencing for suspects. The intersubjective understanding between institutions, communities, and nations affects and is affected by his action. For example, the Islamic community, “based on its identity and interest, will interpret President Obama’s decision; they will then create their own definition of the situation. Their own understanding and interpretation will result in action.”<sup>10</sup> Then, their counter-message to the United States’ decision to execute (or not execute) terror suspects will create a new stimulus requiring American action.<sup>11</sup>

In the constructivist approach, identity clearly plays an important role in international relations. Nevertheless, identity is not a singular construct. It is a combination of self-understanding and public acceptance of that identity. In addition, a state actor may have multiple identities. These identities fall into categories of type and role. Islamic state and democratic state are examples of type identities. Friend, enemy, and competitor are examples of role identities.

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<sup>8</sup> Bohrer, Bohrer, and Zitko, 2.

<sup>9</sup> Ruggie, 878.

<sup>10</sup> Bohrer, Bohrer, and Zitko, 2

<sup>11</sup> This is an application of Alexander Wendt’s figure on codetermination of institutions and process as published in “Anarchy is What States Make of It.”

What is of prime interest to this research is that the relationship between multiple actors defines role identities.<sup>12</sup> However, while roles shape behavior, they do not fully determine behavior.<sup>13</sup> Additionally, because actors possess multiple identities and fulfill varied roles, those roles may conflict.

In applying constructivism, the actions of President Obama reflect the interests, ideas, and identity of the United States. Therefore, the constructivist can critically examine the demonstrated ideas, proclaimed interests, and displayed and accepted identities of President Obama in order to glean the U.S. national interest. If President Obama is indeed a constructivist, then he will consider more than material concepts when crafting domestic and foreign policy. For example, ideas such as human rights, equality, environmental protection and fairness may shape his behavior as much as or more than material gain.

American culture and identity drive the behavior of American actors. As a representative of the United States, President Obama fills a number of type and role identities. An infinite number of factors define identity. However, barring a full and comprehensive examination of President Obama's identity, some of his role identities are generally accepted as accurate and beyond question, such as his being a democrat. Also, President Obama is commander-in-chief of the American armed forces, leader of a democratic nation, and African-American. His roles may be friend of western nations, aggressor, or enemy to terrorist leaders. Because of his newness in office and the need to craft his own unique international strategy, as the President of the United States, his roles are quickly developing and evolving.

Given the importance of identity and interest within the constructivist approach, it is important to frame the identity and interests of the United States. History, culture, norms, and

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<sup>12</sup> Finnemore and Sikkink, 399.

<sup>13</sup> Michael Barnett, "Institutions, Roles, and Disorders: The Case of the Arab States System," *International Studies Quarterly* 37 (September 1993): 275.

roles make up an identity. On a grand scale, civilizations have identities. The civilization identities have been postulated to hold an inherent propensity toward conflict with one another<sup>14</sup> but others have argued these macro-identities are not static and change easily over time.<sup>15</sup> Regardless, the identity of a state, actor, or institution will shape its interests.

Social identity relates to state interests. Written publications and statements articulate the interests of the United States. For example, the national security strategy and the annual State of the Union articulate domestic and international interests of the United States. Further, the actions of state actors in the form of aid, deployments, embargos, and partnership agreements confirm or contradict the stated interests.

The ideas of constructivism are important to this paper for several reasons. First, terrorism and capital punishment are emotional topics. State identities, shaped by history and norms, will initially define public opinion on the topic. What is particularly interesting is that vastly different cultures could have very similar opinions and interests in regards to terrorism and capital punishment. Further, states with similar cultures and identities, and similar interest in justice and safety, could have a very different stance on these topics. For this reason, collective norms, such as those reflected in shared history and international law provide a common ground and intersubjective understanding from which President Obama can base his decision. His decision regarding whether or not to institute capital punishment for convicted terrorists is both domestic and international, and constructivism is useful in explaining the implication of that link.

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<sup>14</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster Paperbacks, 1996), 312.

<sup>15</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism, New Edition* (London: Verso, 2006).

## Recent History of Military Executions

Prior to 2000, Army Regulation 190-55, US Army Corrections System: Procedures for Military Executions, stated that all military executions must occur at Fort Leavenworth, Kansas. However, a change in the military regulation allows the Secretary of Defense to select the location of any military execution. This policy change appeared to set conditions to allow for military executions at Guantanamo Bay, Cuba. In February 2008, military prosecutors decided to seek the death penalty for six Guantanamo detainees charged with war crimes related to the 9/11 attacks. In January 2009, President Obama signed an executive order to close the detention facility at Guantanamo Bay. In the same executive order, President Obama halted all ongoing military commissions.<sup>16</sup> Further, his order directed an interagency review in the interest of national security and foreign policy, on the detention, transfer, trial, and disposition of individuals held at Guantanamo Bay. Most recently, in May 2009, President Obama announced his intention to resume the military commissions with new rules to ensure a fair trial of detainees.<sup>17</sup>

The recent history of United States military executions is relevant to the present situation. Cases from WWII show lessons learned and constitutional precedent. WWII era cases reflect a time when justice for war criminals created emotional and passionate interest from the American population. Further, the WWII cases depict the impact of public involvement, Supreme Court decisions, and Presidential action. This recent history captures the challenges of retaining capital punishment and trial venues, particularly the military commission. Finally, examination of the recent history provides precedent and explanation for current actions and decisions.

During World War II, there were a number of German prisoners of war interred in facilities in the United States. In 1945, Fort Leavenworth held fifteen German POWs who had

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<sup>16</sup> Executive Order, "Closure of Guantanamo Detention Facilities" Federal Register 74, no. 16 (January 27, 2009): 4897-4900.

<sup>17</sup> U.S. President "Statement of President Barack Obama on Military Commissions," May 15, 2009.

been tried and sentenced to death. One case involved five prisoners convicted of killing a fellow prisoner of war at Camp Gruber, Oklahoma. Another case involved two prisoners convicted of killing another German prisoner of war at Branch Camp Aiken, South Carolina. In these two cases, President Truman had approved their sentences over one year earlier. In July 1945, approximately two months after the end of the war in Europe, President Truman signed the order to execute the sentences. Days later, the President finalized two other cases involving the remaining eight German Prisoners of War.

On 6 July 1945, the President commuted the sentence of Edgar Menschner for beating a fellow prisoner to death.<sup>18</sup> Two days later, the first five prisoners learned of their scheduled execution. On July 10, 1945, the military executed the first five prisoners. Then on the 14th, the military executed two more prisoners, Erich Gauss and Rudolf Straub.<sup>19</sup> The remaining seven death row German Prisoners of War learned their fate late on August 23, and were executed on August 25, 1945.<sup>20</sup> The military buried all prisoners in a small graveyard near the United States Disciplinary Barracks. Despite requests from the German government to recover their soldiers, over fifty years later, their graves remain at Fort Leavenworth.

Aspects of the situation are worthy of note. First, the military began using the United States Disciplinary Barracks at Fort Leavenworth as a means to correct tortuous and inhumane treatment that occurred at other camps. The Courts Martial allowed evidence gathered during tortuous interrogations at secret camps. Interestingly, the President and War Department ignored the reviewing authority's recommendation for a commuted sentence.<sup>21</sup> All executions occurred after the war with Germany ended and after the United States secured the release of American

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<sup>18</sup> Richard Whittingham, *Martial Justice: The Last Mass Execution in the United States* (Chicago: Henry Regnary Company, 1997), 260.

<sup>19</sup> Whittingham, 9.

<sup>20</sup> Whittingham, 267.

<sup>21</sup> Whittingham, x.

prisoners from Germany. High anti-German sentiment within the United States due to the horrors of Auschwitz and other German concentration camps may explain the President's actions. The last seven of those executed felt that by killing a fellow POW, whom they considered a traitor, they were performing their patriotic duty to Germany.<sup>22</sup>

Prior to the hangings at Fort Leavenworth, three other cases addressed the conduct of the military commission in WWII era commissions and served as a legal foundation to the decision to execute military prisoners. The Supreme Court addressed the constitutional basis of the military commission in *Ex Parte Quirin*. It reaffirmed its decision in a case involving Japanese General Yamashita. Finally, the Malmedy case revealed American desire for a fair process even when there is public outrage and vociferous demands for justice.

*Ex Parte Quirin* involved eight German soldiers charged with violating the laws of war.<sup>23</sup> The soldiers arrived on the east coast by submarine in order to conduct sabotage. Because the soldiers were disguised as civilians during their act, they were unlawful belligerents under the law of war. A military commission tried and convicted the eight soldiers for various violations of the law of war, including being unlawful belligerents. The defendants challenged the jurisdiction of the military commission. The Supreme Court rejected their appeal and affirmed the constitutionality and "jurisdiction of military commissions to try persons and 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."<sup>24</sup>

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<sup>22</sup> Whittingham, 10.

<sup>23</sup> To gain POW treatment the POW convention sets out four tests: 1. Commanded by person responsible for his subordinates, 2. Having a distinctive sign recognizable at a distance (uniformed), 3. Carrying arms openly, and 4. Conducting operations IAW law of laws and customs of war. The defendants really only meet the first criteria; they might meet the third criteria based upon capture circumstances. The second and fourth are not met.

<sup>24</sup> H. Wayne Elliot, "Military Commissions: An Overview," in *Enemy Combatants, Terrorism, and Army Conflict Law: A Guide to the Issues*, ed David K. Linnan (Westport, Connecticut: Praeger Security International, 2008), 126.

The Supreme Court affirmed the Quirin decision in the case of Japanese General Yamashita tried for war crimes in the Philippines. The Yamashita commission permitted depositions, affidavits, and hearsay in the case; a court-martial would have excluded such evidence. The Supreme Court determined that the military commission had lawful authority and had not violated any military, statutory, or constitutional guidelines.<sup>25</sup> Essentially, the majority ruling stated that the rights under military commissions and international law were not the same rights applicable in American domestic courts.<sup>26</sup> In this case, the Supreme Court ruled that the protections set out in the Geneva Convention did not apply to pre-capture offenses. The 1949 Geneva Prisoner of War Convention changed that rule and now provides that the defendant retain the benefits of the convention.<sup>27</sup> The Yamashita case is relevant because it demonstrates a time when Americans were “eager for revenge and scapegoats are readily available.”<sup>28</sup> Beyond that, today’s international and American audiences would not judge the elastic procedures and rules acceptable.

The 1942 German sabotage case is relevant because of the differences from the Leavenworth executions and the lessons learned. The accused German soldiers were trained to use explosives against civilian targets such as factories, railroad stations, bridges, and Jewish owned department stores. Unlike the prisoners at Fort Leavenworth, the US initiated the military commission and sought the death penalty for pre-capture offenses. In contrast, the Leavenworth cases were all post-capture crimes. President Roosevelt declared that sabotage and espionage

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<sup>25</sup> Marouf Hasian, Jr., *In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties* (Tuscaloosa, Alabama: University of Alabama Press, 2005), 177.

<sup>26</sup> Hasian, 178.

<sup>27</sup> H. Wayne Elliot, “Military Commissions: An Overview,” in Linnan, 126.

<sup>28</sup> Stephen B. Ives Jr., “Vengeance Did Not Deliver Justice,” *Washington Post*, December 30, 2001, paragraph 1, quoted in Marouf Hasian, Jr., *In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties*, (Tuscaloosa, Alabama: University of Alabama Press, 2005), 185.



were crimes subject to military tribunals and ordered assemblage of a military commission. His order stated that the military commission would set up its own rules to ensure “a full and fair trial.”<sup>29</sup> The President of the Commission could determine what evidence had “probative value to a reasonable man.”<sup>30</sup> Interestingly, the FBI investigated the crime and collected evidence as if it would be tried in a federal court; the evidence was rather complete and included signed, unforced confessions from each soldier. Therefore, there was little need for lenient evidence rules.

The Supreme Court ruled on the appeal after conviction without issuing a written opinion. The Supreme Court heard the case for two days starting on July 29, 1942. On July 31, 1942, the Court issued an oral response that confirmed the constitutionality of President Roosevelt’s order to try the soldiers via military tribunal. The military commission ended on August 1, 1942 and sentenced all eight men to death; however, President Roosevelt conferred two sentences to life in prison. The remaining six prisoners were electrocuted seven days later. The Court released its full opinion in October and concluded, “that the secrecy surrounding the trial made it impossible” to judge “whether Roosevelt’s proclamation and order violated or were in conflict with the Articles of War.”<sup>31</sup> In hindsight, Justice Scalia and Justice Stevens admitted that this case “was not the Court’s finest hour.”<sup>32</sup>

When another U-boat with two saboteurs landed two years later, President Roosevelt revised his military commission order to match more closely with the standards of a general court martial. In this trial, President Roosevelt strengthened the rules of evidence, incorporated a legal review process, did not personally select the members of the tribunal, and moved the trial away from Washington D.C. The tribunal sentenced both men to death by hanging in February 1945.

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<sup>29</sup> The standard for evidence was less stringent than for a military court martial.

<sup>30</sup> Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Lawrence, Kansas: University Press of Kansas, 2005), 115.

<sup>31</sup> Fisher, 115.

<sup>32</sup> *Hamdi v. Rumsfeld*, 124 Supreme Court, 2004, at 2669.

President Truman assumed the Presidency before the sentences were carried out. One month after the war ended, he commuted the sentences to life imprisonment. Both men were paroled by 1960.<sup>33</sup>

The German Malmady case should offer a word of caution against shoddy process in a military commission. In 1946, a military commission convicted seventy-three German soldiers of murder-en-masse of over 100 American prisoners during the Battle of the Bulge. The trial of these soldiers began in May 1946 and public outrage and demands for justice were high. Forty-three had capital sentences, and twenty-two received life sentences. Two years later, public opinion changed when reports emerged revealing coercive practices for gaining evidence. A review led by the Secretary of the Army stated that in the interest of fairness the death sentences should be commuted, even though it appeared that the Germans were guilty.<sup>34</sup> “Despite the egregious nature of the German conduct, perceived unfairness in the American investigation and trial ultimately became the larger issue. All death sentences were eventually commuted and the last defendant was released just a decade after the trial.”<sup>35</sup>

The United States learned several lessons from these cases. First, the trials should not be spectacular events held at the nation’s capital. Second, the President should remain impartial and should not be directly involved in appointing members. In addition, there should be a legal review process before the President receives the trial record. These procedures emplace safeguards and principles essential for justice.<sup>36</sup> Regardless of actual guilt of the defendant, sacrificing fair process results in a strategic communication loss and a damaging miscarriage of justice.

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<sup>33</sup> Fisher, 128.

<sup>34</sup> David Glazier, "A Self-Inflicted Wound: A Half Dozen Years of Turmoil over the Guantanamo Military Commissions," *Lewis & Clark Law Review* (2008): 146.

<sup>35</sup> Glazier, 146.

<sup>36</sup> Fisher, 129.

President Bush's military order in November 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" followed President Roosevelt's 1942 format. It seems quite puzzling that given the benefit of Roosevelt's 1944 revision and the lessons of the Malmady case, that the United States would elect lenient trial guidelines. History has shown that official legal courts and the court-of-opinion do not accept unfair judicial process.

Fast forward nearly forty years and the United States is in a similar position in regards to seeking justice for crimes against the US. Three days after the September 11 attacks, President George W. Bush declared a state of emergency. Within one month, the United Nations Security Council declared the United States right to self-defense.<sup>37</sup> NATO declared that the event constituted an armed attack.<sup>38</sup> These declarations from international organizations and Congress' Authorization for Use of Military Force signal the decision to treat the attacks of 9/11 as an act of war. As such, the military commission is the proper venue for applying jurisdiction for law of war violations.

The events of September 11, 2001, spawned broad war powers for the President and the military. On September 18, 2001, the President signed a joint resolution into law.<sup>39</sup> The resolution stated that the events of September 11, 2001 represented a threat to national security and to United States citizens. The resolution added, "Such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States."<sup>40</sup> The resolution then authorized broad Presidential power for using military force against acts of international terrorism.

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<sup>37</sup> United Nations Security Council Resolution 1373, September 28, 2001.

<sup>38</sup> Lord Robertson, "NATO Speech, Statement by NATO Secretary General," October 2, 2001, retrieved from <http://www.nato.int/docu/speech/2001/s011002a.htm>.

<sup>39</sup> This joint resolution was the first time Congress gave the President authority against unnamed persons and organizations.

<sup>40</sup> *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 1-2.

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.<sup>41</sup>

With military action approved for the war on terror, over time the United States captured personnel involved in the attacks and detained them in Guantanamo Bay, Cuba. Technically, the prisoners do not meet combatant status as defined by the Geneva Convention and are not entitled to protections under the Geneva Prisoner of War Convention. However, beginning in 2002 the United States government informally treats the inmates as enemy combatants.<sup>42</sup>

In July 2003, President Bush initiated military commissions against six detainees at Guantanamo Bay, Cuba. The process for the first six displays the role of international politics in convening military commissions. The United Kingdom demanded, and succeeded, in the release of two British citizens because the US process for military tribunals did not “offer sufficient guarantees of a fair trial in accordance with international standards.”<sup>43</sup> Another detainee received favored treatment when the Pentagon ignored a military commission rule prohibiting foreign legal counsel for an Australian citizen held in Guantanamo Bay. Additionally, some nations received promises from the United States such as no capital charges, no classified evidence, and other preferential treatment for its citizens held at Guantanamo Bay, Cuba.<sup>44</sup>

In late August 2004, the first military commissions finally began. However, a federal petition filed on behalf of one of the defendants, Hamdan, halted the commission for over two years. While *Hamdan v. Rumsfeld* is an often-referenced contemporary case involving terrorism,

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<sup>41</sup> *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 1.

<sup>42</sup> Under the Geneva Convention, the hosting nation should apply Prisoner of War protections until it proves the prisoner is an unlawful combatant.

<sup>43</sup> Glazier, 157.

<sup>44</sup> Glazier, 167.

it is not particularly relevant for study in this monograph. The Hamdan case primarily concerned POW status and its impact on trials by military commission. The ruling of Hamdan does not exclude capital punishment and it does not void the jurisdiction of the military commission for trying foreign personnel in global contingency operations. While President Obama has set a course for commissions that correct the shortcomings in the Hamdan case, at the time, the Supreme Court ruling had little impact for other defendants in the commission.

When the commission resumed, defendant Al-Bahlul voiced the “unfairness of [a] British national being exempt from trial while those from Muslim countries were not.”<sup>45</sup> Also, like the other two defendants subject to military commission, he made an issue of his assigned American counsel. In summary, the first set of military commissions in the war on terror resulted in a Supreme Court ruling that blasted the process, new rules from the Military Commission Act of 2006, no convictions, and revealed political bias in the process. The United States government stepped up the intensity in February 2008 when it announced plans to levy capital charges against six prisoners accused of conspiring to plan and carry out the September 11th attacks.

## **Laws and Norms**

While the intent of this paper is not to examine the legal issues of executing terrorist actors, it is relevant to examine the laws related to this topic. Laws and international resolutions refine understanding of identities and reveal intersubjective beliefs. Specifically, law reveals accepted and expected norms of behavior. Additionally, law adds legitimacy to state action. However, in this case, legality of the process will be necessary but not sufficient to prove legitimacy in the eyes of the American public.

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<sup>45</sup> Glazier, 171.

## **Legal Literature**

Law references depict international norms, points of tension, and intersubjective beliefs. Law, whether it be civil, criminal, or common, is a useful guide for understanding the norms and even the collective identity of a society. William R. Slomanson, a professor of international law at Western State University, presents a textbook for the student of international law. With each particular topic, Slomanson presents the history and current posture of international law; additionally, he provides domestic and international court opinion to articulate challenges, changes, or greater understanding of the topic. His information on extraterritorial jurisdiction, use of force, and human rights is particularly useful for this paper. While his publication is over ten years old, grand ideas in international law are rather steady. Finding updates for domestic and international law requires other references.

David K. Linnan's collection of articles in "Enemy Combatants, Terrorism, and Armed Conflict: A Guide to the Issues," provides a more contemporary examination of legal issues directly related to the prisoners held at Guantanamo Bay, Cuba. While his contributors are primarily "western," he makes an effort for a more rounded legal interpretation by including representatives from Indonesia. Further, his contributors run the gamut from lawyer to philosopher. The articles primarily focus on a legal examination of the issues; however, some authors also present philosophical and religious ideas. Written post 9/11, the most useful aspect of this publication is that it examines legal issues related to the terror attack, US response in Iraq and Afghanistan, detainment and trial of terrorists and combatants, and venues for trying defendants.

## **International Law**

International law is a set of rules and principles concerning the conduct of states and international organizations. It covers the relations between states as well as their relations with

persons.<sup>46</sup> There are three themes evident in international law: universality, power, and process. If enough nations consistently recognize and practice a particular norm, the norm will become part of international law. This process results in what is known as customary law. Some scholars argue that customary law is often more powerful and binding than treaty law since the enforcement mechanism is built into the social norm that created the customary practice in the first place. Second, no single nation has the power to create international law. Lastly, “nations become bound by the norms of International Law, typically through their express or implicit consent.”<sup>47</sup> Treaties explicitly commit nations; customary international practices implicitly commit nations if they do not object.<sup>48</sup>

Initially, states were the only subjects of international law. At its inception, the law of war defined the rights and duties of states in wartime; setting rules then helped determine responsibility when a state violated a law of war. In recent history, the law of war has evolved to include the concept of individual responsibility. Now soldiers, not just nations, are subject to the law of war.<sup>49</sup> This recent development is quite relevant given the nationality and identity of today’s terror suspects.

A feature of modern international law is that individuals possess status in international law. The Nuremberg Trials depict this status. International court held senior members of the Nazi regime accountable for crimes they committed. This is only important because, while the United States will use an American court to levy justice against individual terrorists who do not represent

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<sup>46</sup> Restatement of the Foreign Relations Law of the United States 101, 22 (3<sup>rd</sup> ed. St. Paul: American Law Institute, 1987) published in William R. Slomanson, *Fundamental Perspectives on International Law, 2<sup>nd</sup> Edition* (Minneapolis, MN: West Publishing Company, 1995), 4

<sup>47</sup> William R. Slomanson, *Fundamental Perspectives on International Law, 2<sup>nd</sup> Edition* (Minneapolis, MN: West Publishing Company, 1995), 5.

<sup>48</sup> Slomanson, 5.

<sup>49</sup> Jennifer Elsea, “Terrorism and the Law of War,” In *Suspected Terrorists and What to Do With Them*, ed. by Jennifer Elsea and Louis Fisher (New York: Novinka Books, 2006), 8.

a nation-state, international opinion on the trial will be important. Adhering, as much as possible, to international standards will affect international opinion and reaction.

The ability of a state to regulate activities of its inhabitants, or those whose conduct has an effect within its boundaries, is often described as jurisdiction and sovereignty.<sup>50</sup> When an act occurs within a state, that violates that state's law, and the actor is inside the state, there is little question on the conveyance of jurisdiction and sovereignty. However, questions arise when jurisdiction crosses the sovereignty of two or more sovereign states. Extraterritorial jurisdiction occurs when two states, for different reasons, have equal rights for the exercise of power. In international law, location of act, location of the defendant, state laws, nationality of a defendant, and nationality of a victim characterize questions for jurisdiction. For example, Joe may violate the law of State X and then flee to State Y. State X has an interest because Joe violated its law; State Y, as sovereign has the "right to control activities within its borders."<sup>51</sup>

There are six principles of state jurisdiction within international law: subjective territorial, objective territorial, nationality, passive personality, protective, and universality. Subjective territorial jurisdiction occurs when individual criminal conduct begins within the state. Objective territorial jurisdiction concerns conduct that begins outside the state and has effects or is completed inside the state. The nationality principle applies based on the nationality of the individual, regardless of where the conduct occurs. Passive personality principle applies when the victim is a citizen of the concerned state, regardless of where the conduct occurs. The protective principle allows states to exercise jurisdiction over acts that threaten the security of the state, regardless of the nationality or the location of the offense.<sup>52</sup> In territorial, nationality, passive personality, and protective principles, the conduct violates the domestic law of the interested

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<sup>50</sup> Slomanson, 196.

<sup>51</sup> Slomanson, 197.

<sup>52</sup> Slomanson, 203.



state. The last principle, universality, applies when the conduct is “sufficiently heinous to violate the laws of all states” or is international in nature.<sup>53</sup> Any nation that finds the perpetrator is expected to arrest and possibly extradite the criminal. Crimes such as piracy, harming diplomats, hijacking aircraft, committing genocide, and engaging in certain wartime activities are considered universal crimes.<sup>54</sup>

*Israel v. Eichmann* is an example of the application of the universal principle. The territorial, passive personality, and protective principles did not apply because Israel was not a state at the time the crimes occurred, and the nationality principle did not apply because Germany was not prosecuting the crimes. However, the act of genocide qualified the act under the universality principle. Israel violated the sovereignty of another nation in its process to arrest Eichmann and return him to Israel for trial. This is an example of an irregular option to extradition, but it did not disqualify Israel’s right to try Adolf Eichmann.

The advent of global terrorism has gained enough attention in the United Nations and other international organizations that it falls in the universal category. In fact, United Nations Resolution 1373 binds all nations to take action against terrorism. Even if global terrorism was not a universal violation, the current defendants remain universal transgressors because of their use of hijacked aircraft or as a violation of wartime activity.

## **Law of Armed Conflict**

Issues in armed conflict law concern the legality of using force and on the treatment of combatants. *Jus ad bellum* concerns the legality of using force against or on the territory of another state. Another concept, *jus in bello*, concerns how the war should be conducted.

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<sup>53</sup> Slomanson, 199.

<sup>54</sup> Slomanson, 204.

Basically, *jus ad bellum* judges the cause for war, and *jus in bello* judges the proper conduct during war.

In a traditional sense, *jus ad bellum* serves to reconcile two states competing interests when other methods failed. In the contemporary environment, *jus ad bellum* plays a role when the United States wanted to use force in Afghanistan's sovereign territory against non-state actors (al Qaeda). UN Charter Chapter VII and in Articles 2(4) and 51 covers legal concepts on the use of force. UN Charter Article 2(4) states, "All [member states] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..."<sup>55</sup> Article 51 addresses self-defense,

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member... until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members... shall not in any way affect the authority and responsibility of the Security Council...to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>56</sup>

Philosophical ideas on the use of force include the ideas of preemptive war, terrorism, and rogue states.<sup>57</sup> Anticipatory self-defense is a concept that legitimizes the use of first strike capability under certain conditions; this concept appears in Articles 51 and 103.<sup>58</sup> Consideration of the legality (or illegality) of the United States use of force is important because it leads to a hypercritical examination of the United States conduct in armed conflict.<sup>59</sup> Specifically, the

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<sup>55</sup> David K. Linnan, "Redefining Legitimacy: Legal Issues" In *Enemy Combatants, Terrorism, and Army Conflict Law: A Guide to the Issues*, ed David K. Linnan (Westport, Connecticut: Praeger Security International, 2008), 230.

<sup>56</sup> Linnan, "Redefining Legitimacy: Legal Issues," In Linnan, 230.

<sup>57</sup> See Appendix A for more discussion on the interpretations of UN authorization for force.

<sup>58</sup> George K. Walker, "The 2006 Conflict in Lebanon, or what are the Armed Conflict Rules When Legal Principles Collide?" in *Enemy Combatants, Terrorism, and Army Conflict Law: A Guide to the Issues*, ed David K. Linnan (Westport, Connecticut: Praeger Security International, 2008), 254.

<sup>59</sup> Linnan, "Redefining Legitimacy: Legal Issues," In Linnan, 224.

questions concerning the legality of the initial use of force will draw more examination on the decision to use capital punishment against terrorists. However, the UN Security Council approved the use of armed force in Afghanistan in response to the 9/11 attacks, and “Authorization for the Use of Military Force” from Congress approved military action against states, individuals, and organizations related to acts of international terrorism.<sup>60</sup> This is a positive note since the current defendants in question are implicated for their role in the 9/11 attacks.

*Jus in bello* concepts address the treatment of combatants, methods of interrogation, rules of engagement, and protection of non-combatants. *Jus in bello* reins in the excessive behavior of actors who believe that the ends justify the means. While some rules for the conduct during war are in the Geneva Convention, such as the Treatment of Prisoners of War and Civilian Protection During Time of War, many fall under the realm of the United Nations Human Rights council. United Nations treaties and protocols breaks human rights issues further into civil and political, and social and economic categories. There is little agreement among states on the scope of human rights. In fact, the United States, who preaches the importance of human rights, has only signed (and ratified) six of the twenty biggest United Nations human rights resolutions<sup>61</sup>

## **Domestic Application of International Law**

“United States law incorporates the international law of war. The United States adheres to the law of war through incorporation of the customary rules and treaty provisions into regulations of the armed forces.” FM 27-10, Law of Land Warfare, while not binding in court, is the embodiment of the U.S. Army’s interpretation of the law of war.<sup>62</sup> The Constitution, civil laws, Congressional authorization to use military force, and 10 U.S.C. 821 and 836 authorize the

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<sup>60</sup> *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 1-2.

<sup>61</sup> Slomanson, 497-498.

<sup>62</sup> Elsea, in Elsea and Fisher, 14.

President to use military commissions for the trial of suspected terrorists.<sup>63</sup> From his power as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation, the President has the power to convene military commissions. Congress recognized this Presidential authority and delegated the authority to set rules of procedure for trial and post-trial.<sup>64</sup> However, Congress has not specifically identified offenses under the jurisdiction of military commissions.

American and international law does not specify the procedure for conducting military commissions or trying cases on violations of the law of war. International law simply states that military commissions must be fair. The Geneva Convention does not direct process; it just outlines rights and proper behavior of combatants and civilians.<sup>65</sup> “It seems necessary to conduct trials that U.S. and international standards judge as fair.”<sup>66</sup> Protocol I to the Geneva Convention provides a basic standard for due process.<sup>67</sup> These guarantees are similar to what an American citizen would expect in a domestic trial. Still, the procedure is up to the host country. In this case, President Bush used President Roosevelt’s experience in WWII as a model for developing the 2001 rules for military commissions. With lessons learned and a desire to ensure a legitimate process, President Obama rescinded President Bush’s order of military commission in January 2009.

On May 15, 2009, President Obama issued a statement that encouraged the resumption of military commissions for suspects held at Guantanamo Bay, Cuba. President Obama’s most

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<sup>63</sup> Elsea, in Elsea and Fisher, 15.

<sup>64</sup> Elsea, in Elsea and Fisher, 15.

<sup>65</sup> See Appendix B for a list of Geneva Convention requirements

<sup>66</sup> Elsea, in Elsea and Fisher, 31.

<sup>67</sup> Elsea, in Elsea and Fisher, 31.

recent order tasked the Department of Defense (DoD) to establish new procedures for the military commission.

The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts.

These reforms will begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law. In addition, we will work with the Congress on additional reforms that will permit commissions to prosecute terrorists effectively and be an avenue, along with federal prosecutions in Article III courts, for administering justice. This is the best way to protect our country, while upholding our deeply held values.<sup>68</sup>

However the Department of Defense alters the military commissions, the process must be legitimate and in accordance with the rule of law. While the United States has the authority, under international and domestic law, to use military commissions, it has a responsibility to ensure the process is fair. The backlash for using the death penalty will be much greater if members of the international community feel the court was arbitrary, illegitimate, or unfair. Therefore, President Obama ordered that new military commissions exclude statements obtained from cruel interrogation methods, limit the use of hearsay, and allow defendants more latitude in selecting counsel. Each of these corrections are lessons learned from WWII and the President Bush 43 era commissions.

## **Military Commission**

The tool currently wielded in the war on terror is the military commission. A military commission is a “common law war court.”<sup>69</sup> The military commission in this case is peculiar

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<sup>68</sup> Statement of President Barack Obama on Military Commissions May 15, 2009 from [www.whitehouse.gov](http://www.whitehouse.gov) under The Briefing Room.

<sup>69</sup> Elliot, “Military Commissions: An Overview,” in Linnan, 124.

because the al-Qaeda prisoners are not uniformed state actors, who would normally benefit from protections under the Third Geneva Convention relative to the Treatment of Prisoners of War and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>70</sup> The Geneva Convention requires that trials of prisoners of war be in the same forum using the same procedures as would be used for the trial of a member of the host court. In other words, if the United States hosts a military commission, then the American commission must follow the same rules of fairness it would follow when trying an American Soldier. Specifically, Article 102, Geneva Convention on Prisoners of War states, “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the detaining power.”<sup>71</sup> Therefore, a POW can be sentenced through a military commission if an American soldier is eligible for the same sentence under the same rules in a military commission. Although it would be unusual for an American soldier to be tried under a military commission instead of a Court Martial, Article 18 of the UCMJ would allow it.<sup>72</sup> Therefore, a prisoner of war held for a war crime could face trial in a general court martial or by military commission.

Of particular note, the Geneva Convention offers more protection to prisoners of war than American courts offer to civilians. Still punishment of war criminals serves the usual purpose, deterrence of others and punishment of the guilty. While the war on terror is different from other wars fought by the United States, trials for those who violate the law of war is a necessary part of the war effort.<sup>73</sup>

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<sup>70</sup> Elliot, “Military Commissions: An Overview,” In Linnan, 121.

<sup>71</sup> Elliot, “Military Commissions: An Overview,” In Linnan, 127.

<sup>72</sup> Elliot, “Military Commissions: An Overview,” In Linnan, 128.

<sup>73</sup> Elliot, “Military Commissions: An Overview,” In Linnan, 137.

The case of trying suspects for crimes in the war on terror crosses national and international legal realms. “Nonstate actors and terrorism are not new problems... However, the legal problem is that nonstate actors do not exist in a vacuum so that problems typically spill over into relations between states.”<sup>74</sup> Legal issues appear concerning the use of force and the treatment of combatants. The national realm concerns American legal definitions for crimes and America has numerous laws relating to terrorism as a crime. The international realm includes formal signed policies such as Geneva Conventions; these are codified rules that bind nations based on expressed consent.<sup>75</sup> International Law also includes customary law, which is derived from repetitive practice and binds all nations. Further, there are laws related to the conduct of war. Whether audiences view the acts and suspects in the war on terror as criminal activities or war activities is moot. The difference between their act being criminal or military simply changes the venue and procedure of the trial. The difference does not offer immunity; the difference does not preclude using the death penalty in the punishment phase.

Section 948r(b) of the Military Commission Act of 2006 (MCA) forbids the military commission from admitting evidence gathered using torture. “Under Section 950i(b) of the MCA, the President must approve any death sentence imposed by a military commission.”<sup>76</sup> Even if the military commission imposes the death sentence, President Obama may commute the sentence to life in prison. As a senator, President Obama voted against the MCA because of flawed procedures; as President, he has already set a path to rectify the procedures and has not excluded the possibility of capital punishment.

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<sup>74</sup> Linnan “Redefining Legitimacy: Legal Issues,” In Linnan, 223.

<sup>75</sup> Kevin H. Govern, “The Legal Way Ahead Between War and Peace,” In *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues*, ed. David K. Linnan (Westport, Connecticut: Praeger Security International, 2008), 292.

<sup>76</sup> Michael C. Dorf, “Is the Bush Administration Right to Seek the Death Penalty for the 9/11 Captives?” from *FindLaw Legal News*, <http://writ.news.findlaw.com/dorf/20080213.html> (accessed on February 2, 2009).

## Disparate Identity Formation and Impact on Interpretations of Capital Punishment

If the international reaction to the hanging of Saddam Hussein is a useful predictive case, the United States can expect a very wide range of editorials, commentaries, and official state communication. Saddam Hussein was responsible for the deaths of hundreds of thousands of his own citizens. An Iraqi court, with limited support from the United States, applied Iraqi and international law in his trial. Over three years after the court first formed for his trial, the Iraqi government executed Saddam Hussein.<sup>77</sup> One cannot dispute the brutality of Saddam's acts; however, his trial elicited varied opinions praising or condemning the justice of the court.<sup>78</sup> For some critics, the decision to pursue capital punishment was so contrary that no matter what else was done differently in the trial, they would oppose it. For international human rights groups, the death penalty is unjust in any situation. The United Nations also opposes the death penalty; however, not all member nations have outlawed capital punishment.<sup>79</sup> In fact, the Iraqi decision to keep the death penalty as a sentencing option caused the court to lose assistance from the United Nations.<sup>80</sup> Similar to Iraqi and Islamic law, the United States courts allow for capital punishment. Where the Iraqi government tried one of their own, for crimes against their own population, and received heated criticism from international organizations, the United States could expect even more heated criticism for executing foreigners for terrorist or military crimes.

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<sup>77</sup> John D. Carlson, "Discerning Justice in the Trial and Execution of Saddam Hussein," in Linnan, 307.

<sup>78</sup> Carlson, "Discerning Justice in the Trial and Execution of Saddam Hussein," in Linnan, 308.

<sup>79</sup> Carlson, "Discerning Justice in the Trial and Execution of Saddam Hussein," in Linnan, 317.

<sup>80</sup> Kingsley Chiedu Moglhalu announced, "For the United Nations, Kofi Annan pronounced the world body's position in a number of media encounters that the UN would not sponsor or actively participate in a trial of Saddam that could hand down capital punishment." From Carlson, "Discerning Justice in the Trial and Execution of Saddam Hussein," in Linnan, 318.



Early in 2008, the Bush administration decided to seek the death penalty for six people suspected of playing a role in the 9/11 terrorist attacks. In general, punishment serves multiple purposes within a society. The punishment phase provides a mechanism for justice for the population, it may serve as retribution for the victim, and it possibly serves as a deterrent for future crimes. Punishments vary and extend all the way up to the ultimate punishment, capital punishment.

Critics and opponents of the death penalty appear inside the United States and all over the world. Some of those opponents emphatically condemn the death penalty as wrong in any circumstance. However, other opponents believe that there are some cases when the crime justifies capital punishment. While it is unclear if the death penalty truly serves as a deterrent for others to commit similar crimes, the deterrent argument is particularly interesting when dealing with the defendants who commit acts in order to become martyrs.

In civilian capital cases, the judge may consider any mitigating information the defendant offers. For example, the judge may hear and consider stories of abuse as a child, growing up in poverty, or finding religion and repenting of their crimes.<sup>81</sup> Even with these mitigating stories, the judge and jury may still impose the death penalty. Still, if it were to adopt this practice, it is hard to imagine that such stories from terrorists would sway a military commission. Furthermore, these protections are still insufficient in the eyes of some countries and organizations.

Most European nations, Russia, and the United Nations have abolished the use of the death penalty. By continuing to execute prisoners, the United States flies in the face of concerns and requests from the international community. The UN High Commissioner for Human Rights, Mary Robinson, stated, “The increasing use of the death penalty in the United States and in a number of other states is a matter of serious concern and runs counter to the international

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<sup>81</sup> Dorf.

community's expressed desire for the abolition of the death penalty."<sup>82</sup> By 1999, there were 68 countries that abolished the death penalty for all crimes.<sup>83</sup> Fourteen other countries abolished the death penalty except for exceptional crimes.<sup>84</sup> Twenty-three other countries have not executed anyone in the past ten years or have made a commitment not to use capital punishment.<sup>85</sup> Despite international attention, the United States is one of 90 countries that retain and use the death penalty.<sup>86</sup> The United States is in company with nations that it normally does not identify with on other human rights issues; the U.S., China, Iran, and Saudi Arabia are the top four employers of capital punishment in recent history.<sup>87</sup> Iran, Afghanistan, Egypt, Saudi Arabia, and Yemen are among the 90 that retain the use of the death penalty.<sup>88</sup> It is important to understand that the nations who abolished the death penalty view capital punishment as a human rights issue; nations, such as the United States, that continue the use of the death penalty, view it as a separate issue from international human rights.

While the United Nations Commission on Human Rights has criticized the United States for using the death penalty, international law does not specifically outlaw states from using the death penalty. The International Covenant on Civil and Political Rights signed December 16, 1966, states that "1. Every human being has the inherent right to life. This right shall be protected

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<sup>82</sup> Richard C. Dieter, "International Perspectives on the Death Penalty: A Costly Isolation for the U.S.," *Death Penalty Information Center*, October, 1999, <http://www.deathpenaltyinfo.org/node/569> (accessed February 2, 2009).

<sup>83</sup> Dieter, 14.

<sup>84</sup> Some sources listed "crimes under military law or during wartime" while others gave examples such as capital crimes or crimes against juveniles, as "exceptional" or "traditional" crimes.

<sup>85</sup> Dieter, 15

<sup>86</sup> Dieter, 17

<sup>87</sup> Michael Ignatieff, *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005), 57.

<sup>88</sup> Dieter, 17

by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.” On this treaty, the United States reserved its right to impose capital punishment. The terms “arbitrarily,” “for the most serious crimes,” and “competent court” leave room for criticism against nations that impose capital punishment. The perceived racial inequality in American death row cases gives the notion of arbitrariness and questions the competence of American courts. Some audiences may voice these same criticisms following a capital sentencing of the defendants.

In 1984, the General Assembly passed resolution 39/46, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Again, the United States submitted reservations to the effect that it understands cruel, inhuman, and degrading treatment as defined by the United States constitutional amendments. Also, the United States response stated that it “understands that international law does not prohibit the death penalty.”

In summary, the United States would not violate international law by utilizing the death penalty following a fair trial. The military commission, with its alleged faults, is a legal and fair venue in the eyes of domestic and international laws. The status of a defendant as enemy combatant, criminal, or unlawful combatant does not exclude death as a punishment. Further, whether the offense is criminal or under law of war violation, it does not prohibit the US government from using capital punishment. While there are a number of arguable issues on the trial of defendants in the Global War on Terror, as long as the trial is “fair” none of those issues precludes lawful use of capital punishment in the punishment phase.

## **American Identity Impact on Capital Punishment**

What is American identity? “In the United States, one’s national identity as an American is essential to national cohesion and integration.” Because of this, various groups can identify with each other. For example, “it allows for Catholics to identify with Protestants and each to

identify with Jews and Muslims.”<sup>89</sup> America’s search for acceptance between diverse populations makes defining American national identity difficult. In *The 50% American*, Stanley Renshon defines American identity as a combination of an attachment to what America stands for, the psychological characteristics that define national psychology, and patriotism.<sup>90</sup>

Societal changes have made the identification of a clear identity rather difficult. While many of these driving forces are generally considered positive, the resultant affect on national identity could be considered a crisis in some situations. “Modernization, economic development, urbanization, and globalization have led people to rethink their identities and to redefine them in narrower, more intimate, communal terms.”<sup>91</sup> The result is that sub-national identities, such as Hispanic, Catholic, or southern are taking precedence over the broad American identity. The global marketplace downplays national identities and emphasizes broader identities such as Western, capitalist, and others.<sup>92</sup>

In “Who Are We?” Samuel Huntington examines the cultural splits in American society that challenge the salience of a strong national identity. He partially defines the American identity and explains the impact of the September 11th attacks on American identity. His argument depicts the need for an “other” in defining the self. While the patriotism and collective bonding that occurred following 9/11 has declined, renewed media coverage of the quest for justice of those associated with the attack will affect American national identity.

According to Samuel Huntington, there are three primary causes for weakened American identity. First, the downfall of the Soviet Union eliminated a threat to American security and

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<sup>89</sup> Stanley Renshon, *The 50% American: Immigration and National Identity in the Age of Terror* (Washington D.C.: Georgetown University Press, 2005), 56.

<sup>90</sup> Renshon, 58.

<sup>91</sup> Samuel P. Huntington, *Who Are We?* (New York: Simon and Schuster, 2004), 13.

<sup>92</sup> The growth of the global market and global coalitions led many to “develop supranational identities and to downgrade their national identities.” From Samuel Huntington, *Who Are We?* 14.

reduced importance of national identity.<sup>93</sup> Second, the belief in multiculturalism and diversity eroded the national identity. In addition, recent waves of immigration from Asia, Latin America, and the Middle East brought culture and values that were often quite different from those cultures already prevalent in America.<sup>94</sup> Instead of feeling a stronger tie to their national identity, people are more likely to identify with others who are similar. Religion, ethnicity, and a common history unite groups.<sup>95</sup> Lastly, for the first time in history, Spanish-speaking immigrants are nearly the majority in America.<sup>96</sup> Given the weakened state of American national identity, Samuel Huntington predicts four possible future American identities: ideological, bifurcated, exclusivist, and cultural.<sup>97</sup>

Identities are important because they shape behavior. Groups and individuals possess, imagine, and construct their own identities. Also, individuals and groups have more than one identity. The identities can conflict and can change throughout time and situations. Lastly, although the individual defines the identity, identity is the product of others perceptions. In other words, if the world views America as an unlawful actor on the global stage, it is likely that America will view itself that way. However, there is the possibility that America would react against that characterization and define herself in opposition to it.<sup>98</sup>

When Osama Bin Laden attacked the World Trade Center, he accomplished a few tasks. First, he filled the void created by the downfall of the Soviet Union. His attack created a strong “other” and an enemy that could help reshape American identity. Next, he gave America an

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<sup>93</sup> Huntington, *Who Are We?* 17.

<sup>94</sup> Huntington, *Who Are We?* 18.

<sup>95</sup> Huntington, *Who Are We?* 13.

<sup>96</sup> Huntington, *Who Are We?* 18.

<sup>97</sup> Huntington, *Who Are We?* 19.

<sup>98</sup> Huntington, *Who Are We?* 23.

identity as a Christian nation.<sup>99</sup> “Muslim hostility encourages Americans to define their identity in religious and cultural terms.”<sup>100</sup> This feedback between Muslim and Christian identities is an example of the intersubjective nature of identities within the constructivist approach.

Using a constructivist approach, President Obama’s actions and messages reflect the identity of the United States. For purposes of this paper, the individual activities of the President reflect the collective identity of the United States because he is acting in the name of the state.<sup>101</sup> In other words, when acting on behalf of the United States, despite his personal identity and beliefs, his identity and role of President of the United States will outweigh other personal identities. While President Obama’s actions may only partly encapsulate the identity of a nation-state, the constructivist approach believes that elite beliefs, social identities, and collective norms shape behavior.<sup>102</sup> In other words, President Obama is the most heavily publicized and attended-to elite in the United States. As the head of state, his actions then simultaneously shape and reflect the collective national identity. In addition, for purposes of this paper, the international community is assumed to have accepted the legitimacy of actions by President Obama.

The constructivist approach, in addition to identity, heavily values state interests. States have a wide array of choices, but social structures constrain those choices. The practices, identities, and interests of other relevant actors constrain the choices of a state.<sup>103</sup> Also, US foreign policy identity, displayed by President Obama, is a product of the domestic identity of the United States. Therefore, the norms, opinions, and practices of the American population enable

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<sup>99</sup> Huntington, *Who Are We?* 358.

<sup>100</sup> Huntington, *Who Are We?* 358

<sup>101</sup> “Historical narratives employ the state-as-actor as shorthand for state officials acting in the name of the state.” From Thomas Barnett, “Institutions, Roles, and Disorders: The Case of the Arab States System,” 1993, 274.

<sup>102</sup> Ted Hopf, “The Promise of Constructivism in International Relations Theory,” *International Security* 23 (Summer 1998): 171200.

<sup>103</sup> Hopf, 179.

President Obama to act, and constrain him to act in their interest in the international community.<sup>104</sup>

Because elite beliefs shape state behavior, understanding President Obama's stance on capital punishment is relevant. "I believe there are some crimes—mass murder, the rape and murder of a child—so heinous, so beyond the pale, that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment."<sup>105</sup> As a state senator in Illinois, President Obama sponsored a bill to reform the police procedures in capital cases. He closed the wide gap between opponents by focusing on the shared common values of those involved; the bill passed without one opposition vote. Perhaps he can replay his experience in Illinois on such an emotional and divisive topic to an international audience. However, his personal opinion only partially shapes state action.

President Obama bases his foreign policy agenda on providing safety and security for the American population. The primary question then is whether executing terrorists, after a fair trial, improves or threatens the safety and security of the American population. The decision will be particularly touchy if American consensus demands justice in the form of capital punishment, but defense intelligence indicates that a decision for capital punishment could jeopardize American security.

In other words, would a decision to use capital punishment be so distasteful that international relations would degrade to a point that American security is at risk? For example, partner nations could break alliances with the United States. Global terrorists might re-energize efforts on ideological grounds. As punishment for the decision, an international alliance could cripple US economic status through an oil embargo. Each of these examples is merely

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<sup>104</sup> Hopf, 195.

<sup>105</sup> President Barack Obama, *The Audacity of Hope* (New York: Crown Publishers, 2006), 58.

speculative. However, President Obama's staff would likely consider the international reaction for such an emotional decision. On the other hand, it is important to consider the risk to the American population if President Obama were to decide against capital punishment. Adhering to the constructivist approach, international relations spring from domestic identity and elite beliefs. Because of this, American norms and ideas will heavily shape President Obama's decision.

## **World Muslim Audience**

Approval for capital punishment exists in Muslim nations, religion, and international organizations. Indonesia, Iran, Iraq, Afghanistan, Saudi Arabia, Egypt, and many others retain the use of the death penalty for traditional crimes.<sup>106</sup> In addition, Sharia Law allows for the use of capital punishment. For the Muslim community, the acceptability of a death sentence is not in question. However, the idea of the United States military carrying out the sentence may complicate matters.

In general, Muslim nations support the use of the death penalty. Further, as stated by the Organization of the Islamic Conference (OIC), contracting nations may punish terrorist crime according to their internal laws. Granted the United States is not a contracting nation under the OIC and is not a Muslim state. However, is it possible that the OIC's principle would be acceptable in other nations? The OIC's definition of terrorism appear on the surface to resemble the definition used by the United States and the United Nations. They define it as any act of violence or threat thereof with the aim of terrorizing people.<sup>107</sup> However, under Article 2 of this convention it states, "Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony aimed at liberation and self-determination in accordance

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<sup>106</sup> Dieter, under Retentionist.

<sup>107</sup> The Organization of the Islamic Conference "Convention of the Organisation of the Islamic Conference on Combating International Terrorism" accessed from [http://www.oic-oci.org/english/convention/terrorism\\_convention.htm](http://www.oic-oci.org/english/convention/terrorism_convention.htm) on May 29, 2009.



with the principles of international law shall not be considered a terrorist crime.”<sup>108</sup> Essentially, they base their definition of terrorism on context not on the act perpetrated.<sup>109</sup> This particular clause is interesting because members of the extremist audience could use it to justify their acts as lawful resistance against the American hegemony, not as terrorism.

The terrorists held in connection with the September 11th attacks committed their acts of violence in the name of Islam. Other Muslims do not like this; they do not agree with terrorist action in the name of their religion. However, many Muslims also have an anti-US attitude. The Anti-Americanism phenomenon springs from religious beliefs, frustration over U.S. policy (Israel), and aspects of western culture. Samuel Huntington’s research bolsters this argument claiming that the Western and Islamic civilizations are the most likely civilizations to clash.<sup>110</sup>

Arab reformists have offered insight on how to fight Islamic terrorism. Their recommendations would likely provide a vote of encouragement when considering the use of capital punishment against Islamic terrorists. Abd Al-Rahman Al-Rashed, director-general of Al-Arabiya TV criticized the United Kingdom for its apparent leniency on extremists. “It was never understood why British authorities gave safe haven to suspicious characters previously involved in crimes of terrorism. Why would Britain grant asylum to Arabs who have been convicted... or even sentenced to death?”<sup>111</sup> Reformists do not only criticize Muslim extremists, but also moderate Muslims for remaining silent and European countries for their lenient treatment of

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<sup>108</sup> The Organization of the Islamic Conference “Convention on Combating International Terrorism”

<sup>109</sup> Daniel G. Cox, John Falconer, and Brian Stackhouse *Terrorism, Instability, and Democracy in Asia and Africa* (Lebanon, New Hampshire: University Press of New England, 2009) 18.

<sup>110</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order*, 20.

<sup>111</sup> A Dankowitz “Fighting Terrorism: Recommendations by Arab Reformists” *The Middle East Media Research Institute Inquiry and Analysis* 232, July 28, 2005. Accessed from <http://memri.org/bin/articles.cgi?Page=archives&Area=ia&ID=IA23205> on June 21, 2009.

Muslim extremists. Granted, President Obama cannot assume that Al-Rashed speaks for all Muslims, but as a voice for Muslims, Al-Rashed and others, are important indicators.

In contrast with western reactions to Saddam Hussein's execution, most Muslim nations responded with indifference. Diplomatic complaints occurred, but they complained that the execution occurred on the first day of the Feast of the Sacrifice, not on the execution itself.<sup>112</sup> Arab papers and official Arab state messages shared a common theme; the "punishment was just, but the timing was problematic."<sup>113</sup> However, after western nations and organizations protested the execution, some Arab media outlets declared the trial illegal. An Egyptian editorial titled "Holiday Gift: American Style" stated, "Saddam Hussein committed crimes and mistakes, and his justifications for them are not acceptable to us. However, his execution - like this, in a way that contradicts international and human law, and with timing that reflects lack of consideration for the feelings of millions of Arabs and Muslims - is a crime."<sup>114</sup> Egypt maintains the use of the death penalty in its criminal justice system so complaints that capital punishment is illegal are shallow. One of Saddam's defense attorneys stated that the execution was illegal because of the type of rope used and the technique of the hanging, not because of the actual sentence or a mistrial of justice.<sup>115</sup> From the reaction of Muslims to Saddam Hussein's trial, it appears that other issues such as timing, manner, and customs will draw more attention than the actual execution of terrorists.

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<sup>112</sup> MEMRI Special Dispatch "Reactions to Saddam's Execution: Indifference Among Arab Regimes" *MEMRI Special Dispatch No. 1410*, January 4, 2007, accessed from <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP141007> on July 1, 2009.

<sup>113</sup> MEMRI Special Dispatch "Reactions to Saddam's Execution"

<sup>114</sup> MEMRI Special Dispatch "Reactions to Saddam's Execution"

<sup>115</sup> MEMRI Special Dispatch 1446 accessed from <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP144607> on July 1, 2009.

## Al-Qaeda

This particular audience epitomizes the idea of “damned if you do and damned if you don’t.” Executing terrorists is an extremist victory because it completes their quest for martyrdom; an unjust or unpopular process is also a victory because it weakens the perceived strength of the United States. On the other hand, the extremist could hail a decision against capital punishment as a sign that the United States is soft and unable to commit to its fight against international terrorism. A Taliban message in June 2009 stated that President Obama’s recent statements reflected “weakness” and “wavering of American policies.”<sup>116</sup>

Members of al-Qaeda and other terrorist organizations have two likely reactions to a decision to execute people in the war on terror. First, these organizations could claim that the United States is wrong, or unjust for the action. This particular audience does not adhere to, but is familiar with international and domestic law. Al-Qaeda’s robust strategic communication system will quickly broadcast and exploit any perceived violation on the part of the United States. The United States must follow procedures to ensure the process is fair and impartial.

An alternative reaction would be to celebrate the sentencing. “The Muslim loves death and [strives for] martyrdom.”<sup>117</sup> In martyrdom, they will be forgiven and spared the agony of death.<sup>118</sup> This possible reaction makes capital punishment as a deterrent worthless; however, it does not erase other reasons for leveraging capital punishment.

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<sup>116</sup> MEMRI, “Taliban Editorial: Obama's 'Contradictory Decisions' Reflect Americans' 'Weakness' and the 'Wavering of Their Failed Policies'” *Middle East Media Research Institute Report 2380*, June 2, 2009, accessed from <http://www.memrijtm.org/content/en/report.htm?report=3330&param=JT> on July 1, 2009.

<sup>117</sup> Steven Stalinsky, “Palestinian Authority Sermons 2000-2003” from *The Middle East Media Research Institute Special Report 24*, December 26, 2003, accessed from <http://memri.org/bin/articles.cgi?page=archives&area=sr&id=sr2403> on June 23, 2009.

<sup>118</sup> Stalinsky, “Palestinian Authority Sermons 2000-2003”

## President Obama

In strategic communication, it is important to understand that one event and one message will have multiple meanings as it travels to and through multiple audiences. Each audience will interpret, re-interpret, and broadcast the message. With this process, it is vital to understand that one message will not be the silver bullet across a global audience for a particular purpose.

National identity is critical in developing a strategic communication plan. According to the most recent Quadrennial Defense Review, strategic communication is “focused USG (United States Government) processes and efforts to understand and engage key audiences in order to create, strengthen, or preserve conditions favorable to advance national interests and objectives through the use of coordinated information, themes, plans, programs, and actions synchronized with other elements of national power.”<sup>119</sup> This is no small task. Today’s information world is a twenty-four-seven global system. Besides the coordination required to project into suitable mediums to reach audiences and counter enemy communication, national strategic communication requires agreement between multiple agencies on the substance of the message and its urgency.<sup>120</sup> Before the United States can venture into a strategic communication plan, it must determine what national values it wants to project.

There are many strategic communication messages issued from President Obama. In his speech to the Turkish Parliament, President Obama claimed that the US and the Muslim world would unite with shared interests beyond opposition to terrorism. In this speech and others, President Obama is developing new relationships and attempting to formulate shared beliefs between the United States and Muslim nations.

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<sup>119</sup> Dennis M. Murphy “The Trouble with Strategic Communication(s)” Center for Strategic Leadership Issue Paper (January 2008): 1.

<sup>120</sup> William M. Darley “The Missing Component of U.S. Strategic Communications” *Joint Forces Quarterly*, 47 (Fourth Quarter, 2007): 109.

On March 27, 2009, the President clarified the goal of disrupting, dismantling, and defeating al-Qaeda. Also, President Obama claims that the aim of his foreign policy is to ensure the safety of the American population. Further, he articulated that America could remain true to its values while ensuring its security.<sup>121</sup> Also, President Obama has stated that his “highest priority is the safety and security of the American people.”<sup>122</sup> He also recognized that the current threats to the American people are unconventional and transnational. Counter-terrorism efforts focused on al-Qaeda continue to be a focus for domestic and foreign policy under President Obama. To answer this threat, President Obama created a national security staff that supports all policy-making related to international, transnational, and homeland security matters.<sup>123</sup> It seems that his new national security staff, under the National Security Advisor, will be an integral aspect in informing the President on his decision whether to approve a death penalty for terror suspects.

If President Obama were to approve a death sentence from a Military Commission, his first step in justifying the decision is proving that the process was fair. Changing the rules of the Military Commission, and ensuring adherence of those rules is essential to justifying the legitimacy of the trial. Audiences will not accept a sentence as legitimate if it springs from an illegitimate court system. The military commission is a legitimate avenue in international and domestic law. With President Obama’s new rules, the Military Commission process is as fair as possible.

President Obama’s decision regarding the sentencing from a Military Commission is a message that will be received by multiple audiences. The primary audiences of consideration are the American population, the “Western” society, other terrorists, and the world Muslim

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<sup>121</sup> Whitehouse.gov under Issues: Foreign Policy

<sup>122</sup> “Statement by the President on the White House Organization for Homeland Security and Counterterrorism” May 26, 2009.

<sup>123</sup> “Statement by the President on the White House Organization for Homeland Security and Counterterrorism” May 26, 2009.

population. Multiple audiences will have distinct opinions and interpretations of one decision, whether to accept or reject a capital sentence. Even within a particular audience, there will be variances in opinion on the message. A modification of Robert Entman's cascading model is useful in understanding message stages and it also shows how diverse audiences and mediums affect the message. When the United States releases a message related to the war on terrorism, the "Messages interact with national and/or cultural traditions that result in different types of message interpretation."<sup>124</sup>

The creation of the national security staff communicates that the United States understands the reciprocal nature of international and domestic policy; counter-terrorism and military commissions are domestic and foreign policy issues. This is a proper step because the message will have a local and global audience. Regardless of the audience, a critical ingredient in the message is displaying the fairness of the military commission in bringing about justice.

President Obama will consider advice from the Secretary of Defense, the Secretary of State, the National Security Advisor and other trusted staffers on whether to approve an execution and how to release his decision. Other elites, such as Senators and press secretaries, communicate the information to the press. For such an emotional issue, it is likely that the President would issue a statement himself. The media will package the decision into a marketable message. At this point in the process, differing markets will spin the message. They will emphasize certain information and exclude other details based on the audience. Administration elites, including President Obama, will pay attention to the various news messages and adjust the official message as necessary. The various markets take in the information through television news, web sources, radio transmissions and other outlets. The feedback from the public response provides another

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<sup>124</sup> Z.S. Justus and Aaron Hess, "One Message for Many Audiences: Framing the Death of Abu Musab al-Zargawi," *Consortium for Strategic Communication* Report 0605 (June 2006): 2.

opportunity for President Obama and his representatives to construct a more appropriate message. The diverse global audience makes it impossible for the administration to release one message that results in a singular interpretation across the public spectrum. The massive reporting venues are beyond the control of the United States government; they will interpret and report information in their own way.<sup>125</sup>

President Obama should consider the experience from releasing the photos from the death of Abu Musab al-Zarqawi. Publishing the photos of his corpse was an information loss for the United States because members of the western audience thought the practice was barbaric. It was a victory for Islamic extremists because it verified his ascension to martyrdom status.

The decision to use capital punishment will be a global message; domestic media outlets, jihadi outlets, political blogs, and many other outlets will blast the message lightning fast. To increase the credibility of the decision, the United States should use “third-party credible sources to release controversial information and images and to confirm the validity of the diplomatic and military acts.”<sup>126</sup> In this case, statements from the International Criminal Court, the United Nations Security Council, respected Islamic scholars, or leaders of Islamic states would be quite powerful in justifying the American decision. The third party does not have to agree with the outcome; simply stating that the United States was fair and judicious will suit American needs. It will be very difficult, but the United States must avoid messages and images that support ascension to martyrdom or allow comparisons between the United States and terrorist organizations.<sup>127</sup>

In all of this, President Obama will continue his constructivist approach to international relations. His decision will not simply be a strategic communication message. He will maximize

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<sup>125</sup> Justus and Hess, 5-9.

<sup>126</sup> Justus and Hess, 10.

<sup>127</sup> Justus and Hess, 10.

the dialogue and relationships he has had with other world leaders. He will not be able to ignore complaints about human rights violations. However, ideas of justice, fairness, and legitimacy will be the intersubjective beliefs he focuses upon. In this vein, if he believes the trial process was fair and just, he would approve a capital sentence. Western audiences already have an expectation concerning capital punishment in the United States so there will not be a transaction cost there. However, a decision to use capital punishment against terrorists will be unpopular and would likely reinvigorate anger from western European abolitionists. The world Muslim audience would be supportive of a decision to use capital punishment; however, other aspects of the sentence may stimulate criticism. Despite any anti-Americanism they may feel, they still accept the concept of retributive justice. Further, an audience will perceive decision to forgo capital punishment as weak and lenient, whether the audience approves or disapproves of Islamist extremism.

## **Conclusion**

Although the United States has encouraged other nations in other situations to use the international court system to try transgressors for violations, international law does allow the United States jurisdiction to try detainees at Guantanamo Bay, Cuba. Moreover, the military commission is a suitable venue for the trial. While unpopular, in international and American perspectives, the death penalty is a lawful and legitimate punishment for law of war violations. President Obama has set a course for the military commission to be fair. While the errors made up to this point will make a conviction difficult, it is possible that a military commission will find the defendant guilty and sentence him to death. President Obama's decision and his strategic communication are fantastically interesting.

Such a fiery issue will ignite emotional and political debate within the United States and among the global audience. While sentencing in court is, in essence, purely a legal issue, the decision for or against implementing capital punishment in this case will end up being a political



one. The decision will signal and disturb the various national, sub-national, and international identities as they exist today.

If President Obama does not approve capital punishment, there are a number of possible outcomes. Domestic response will be negative because a portion of the American audience is emotionally vested in the 9/11 attacks and will be dissatisfied with the decision. One portion will outright want the death penalty, and another portion will be bothered about the costs and means for life imprisonment. Since the DoD does not, and is not mandated to carry out life sentences for enemy combatants or belligerents, the Department of Justice will likely assume responsibility of the prisoners. If the Department of Justice carries out the sentence, then the Federal Bureau of Prisons will garner responsibility. States resisted housing prisoners for detention in order to close the DoD facility at Guantanamo Bay, Cuba Their resistance to carrying out a life sentence will probably be even more pronounced. Of course, a portion of the American population will laud his humane decision. While the challenge in carrying out a life sentence does not justify a capital sentence, the logistics of life imprisonment will be challenging. Muslim reformists will criticize his decision and lump him into the lenient European population. Muslim extremists will likely be unhappy with a life sentence, but will still twist the decision for their benefit. While the decision prevents ascension to martyrdom, they will publicize it as victory because they used America's freedoms to change American way of life. They will have taken another chip out of American power. Other western nations and organizations will likely praise the decision as a small step toward bringing America in line with other western ideals on human rights. Their praise will be short before resuming criticism of other American human rights violations. While there is mixed reaction to a decision for life imprisonment, there will be varied reactions to a decision for capital punishment.

A decision to approve a capital sentence will also net mixed reactions from American and foreign audiences. Following a fair trial, a preponderance of Americans will see the sentence as just and fair for the cost of terrorist attacks against America. Approval of a capital sentence will

result in condemnation from the United Nations, some European allies, and other abolitionists. Other terrorists will capitalize on the decision in two ways. They will celebrate their new martyrs and simultaneously condemn the United States for barbaric actions that liken the execution to a crusade against Muslims. Each of these responses nullifies any direct deterrent effect and serves as a recruitment tool.

There will undoubtedly be mixed reactions to a decision for or against using capital punishment; therefore, the prime question is whether any of those reactions will threaten or enhance the safety and security of the American population. President Obama stated that his fundamental objective in foreign policy is to ensure the safety and security of the United States. Given all of this information, it is still very difficult to predict what President Obama will do if faced with the task of approving a capital sentence. While distancing himself from the policies from and perceptions of the previous administration, President Obama still retains the American identity of being dominant and strong. The military commission is a lawful venue for trying the terrorists. While unpopular to some, capital punishment is a legal sentence. Additionally, President Obama is enacting new procedures to ensure the justness of the process. His decision, either way, will have no concrete affect against terrorists, but it will display that he remains firm against those who threaten the safety of American citizens. Therefore, if the military commission convicts and recommends a death sentence, President Obama will likely approve the sentence of the military commission.

## **Appendix A: UN Charter on Force**

States may not use force aggressively. However, the UN Charter does not define “force.” Again, according to the United Nations, states may use force defensively when there is an “armed” attack. The UN Security Council claims through the UN Charter to possess the legal monopoly on the use of force. A broad interpretation of the UN Charter occurs because terms such as “force” “threat of force” or “aggression.” On the other hand, some observers take a very narrow view of the Charter; their interpretation justifies the use of debilitating economic embargoes because trade policy is not “force.” Further, for a state to have the right to self-defense there must be an armed attack underway. While not in policy, in customary rules, there is a restricted right to anticipatory self-defense. The debate on the legitimacy of US operations is relevant because some believe that a just war cannot spring from an unjust military operation. While there is still much debate on the legitimacy of U.S. actions, UN Resolution 1373 and vagueness in the UN Charter provide sufficient justification for the purposes of this paper.

## Appendix B: Geneva POW Convention<sup>128</sup>

### *Geneva Convention Relative to the Treatment of Prisoners of War,( Selected Articles)*

#### *Chapter III, PENAL AND DISCIPLINARY SANCTIONS*

##### *I. General provisions*

###### *Article 82*

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

###### *Article 83*

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

###### *Article 84*

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

###### *Article 85*

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<sup>128</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Geneva Convention Relative to the Treatment of Prisoners of War*, United Nations, held in Geneva from 21 April to 12 August, 1949, October 21, 1950, [http://www.un.org/preventgenocide/rwanda/text-images/Geneva\\_POW.pdf](http://www.un.org/preventgenocide/rwanda/text-images/Geneva_POW.pdf) (accessed August 31, 2009).

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

*Article 86*

No prisoner of war may be punished more than once for the same act, or on the same charge.

*Article 87*

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

***III. Judicial proceedings***

*Article 99*

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

*Article 100*

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

*Article 101*

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

*Article 102*

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

*Article 103*

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

*Article 104*

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

1. Surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;
2. Place of internment or confinement;
3. Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;
4. Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

#### *Article 105*

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

#### *Article 106*

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

#### *Article 107*

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the

sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

1. The precise wording of the finding and sentence;
2. A summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;
3. Notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing subparagraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

#### *Article 108*

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.



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