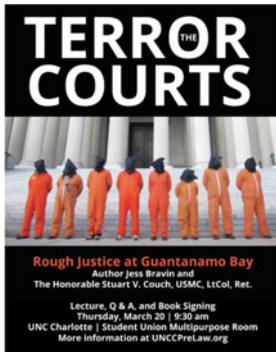


BOOK REVIEW



The terror courts: rough justice at Guantanamo Bay

Jess Bravin*

Book review by Diane Marie Amann, Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law. Email: amann@uga.edu

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Transitional justice literature tends to focus discussions of accountability on the actions of states and international organisations. Typically examined are institutional mechanisms, such as truth commissions and claims commissions, international and internationalised criminal tribunals, and whatever civil or criminal remedies may be available in national courts. On occasion, mechanisms of a less legalistic nature, like monuments, are discussed; even these, however, are often the result of official action. The extent to which popular culture can promote accountability is rarely explored. This is an unfortunate omission. Particularly in the absence of official moves toward accountability for wrongdoing, cultural production – films, plays, paintings, works of fiction and nonfiction – can make essential contributions to the public record. A prime nonfiction example is *The Terror Courts: Rough Justice at Guantanamo Bay*, Jess Bravin's gripping and comprehensive book about the trials endured by participants in US military commissions set up in the wake of the terrorist attacks of 11 September 2001, attacks frequently discussed under the shorthand term '9/11'.

Bravin, who covers the US Supreme Court for the *Wall Street Journal*, puts his journalistic skills to good use in *Terror Courts*. In rough chronological order, he traces the origins of the plan to try post-9/11 captives by military commissions, the political machinations by which the idea became the proclaimed policy of

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President George W. Bush, and the many starts and stops in the years since Bush issued his Military Order of 13 November 2001.¹ Concluding with the most recent developments, Bravin persuasively demonstrates the failings of the commissions, as a matter both of domestic law enforcement strategies and of international humanitarian law obligations. Bravin animates these familiar contours with deft character sketches of persons who played parts in the commissions' project – persons whom he has interviewed or, in some cases, observed from the vantage point of the reporter covering the proceedings at Guantánamo. By way of example, David Addington, the civilian legal counsel who helped Vice-President Dick Cheney circumvent inter-agency procedures in order to secure George Bush's approval of military commissions, is 'a secretive, dour man' disliked by military lawyers.² Neal Katyal, the Georgetown professor who spearheaded the legal challenge to the commissions, is 'cerebral, and even icy behind designer rectangular eyeglass frames.'³ Guantánamo detainees whom the United States vilified likewise become human in Bravin's telling – Salim Ahmed Salim Hamdan, the Yemeni driver of Osama bin Laden whose lawsuit against the Bush order prevailed in the Supreme Court, is 'The Man from Al Qaeda', while Australian David Hicks, who served only one year after pleading guilty in a military commission to material support for terrorism, is 'The Kangaroo Skinner'.

Torture and cruelty – the subjection of captives to techniques such as strobe-lighting, blasting of loud music, sexual humiliation, shackling, sleep deprivation, stress positions and waterboarding – is a constant motif of *Terror Courts*. Giving voice to the issue is V. Stuart Couch, a Marine lawyer-pilot and devout Christian whom the reader comes to know by his nickname of 'Tater', short for 'couch potato'. As Bravin tells it, the North Carolinian joined the Guantánamo prosecution team eager to bring to justice those responsible for 9/11, an attack that had claimed his Marine Corps 'buddy'.⁴ Couch's enthusiasm gave way to doubt and frustration when case after case proved dependent on statements obtained through coercive interrogations – interrogations often conducted by the CIA or other agencies outside of and hostile to the ordinary military structure. Couch's discoveries prompted him repeatedly to fight not for but against the prosecution of alleged Al Qaeda operatives.

At the core of the controversy was law. Bravin's Berkeley Law training is evident in his careful treatment both of the international law principles that applied and of the ways that various participants in the military commissions project responded to those principles. Common Article 3 to the Geneva Conventions of 1949 forbids 'cruel treatment', 'torture', 'taking of hostages' and 'outrages upon personal dignity, in particular, humiliating and degrading treatment,' Bravin observes, while another treaty to which the United States belongs, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

1 Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

2 *Terror Courts*, pp. 24 and 309.

3 *Ibid.*, p. 54.

4 *Ibid.*, p. 20.

or Punishment, bans both torture and the invocation of superior orders to justify committing torture.⁵ Defence lawyers, along with prosecutors like Couch, relied on these provisions to contest the use of statements extracted by coercion. But high-ranking Bush administration officials deflected such complaints, asserting that the US Constitution granted the president unreviewable discretion to act as commander-in-chief.

In the end, judges would review the president's Military Order, and in so doing they would hold the terms of Common Article 3 to be enforceable in US courts. Quoted in *Terror Courts* is the trial judge's statement, during a hearing in Hamdan's lawsuit, 'that Common Article 3 is passed into customary international law or that it is a minimum yardstick' by which military commissions procedures must be measured.⁶ The judge's reasoning eventually won favour in the Supreme Court. As Bravin recounts, Justice John Paul Stevens stated for the majority:

[M]ilitary commissions must themselves comply with the law of war, including the Geneva Conventions. Bush's commissions, he wrote, failed the lowest Geneva standard, Common Article 3, which required trial 'by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'⁷

Although the Court's judgment brought a stop to the prosecution of Hamdan pursuant to Bush's order, it did not mark the end of military commissions. *Terror Courts* thus proceeds to detail the speedy enactment of a substantially similar plan, complete with Congress' decree that the new military commissions satisfied Common Article 3 standards. Part of the 2006 legislative package, Bravin adds, was a provision effectively 'immunizing administration officials from prosecution for torture and other crimes'.⁸ Then-Senator Barack Obama voted against the statute. But three years later, President Obama pushed through legislation that revised and reinstated the commissions, on urging from the Pentagon's new general counsel, Jeh Johnson, and over the objection of Secretary of State Hillary Clinton and her legal adviser, Harold Koh.⁹ As 'consolation prizes', Bravin writes, 'the administration agreed to ask the Senate to ratify agreements expanding protections under the Geneva Conventions, including one that had been collecting dust since President Reagan signed it in 1987'.¹⁰ At the time of this writing, the agreement to which Bravin refers, Additional Protocol II to the Geneva Conventions of 12 August 1949

5 *Ibid.*, p. 144.

6 *Ibid.*, p. 216.

7 See *Hamdan v. Rumsfeld*, 548 US 557, 629-30, 2006 (Stevens, J., joined by Kennedy, Ginsburg, Breyer and Souter, J. J.) (setting forth passage paraphrased by Bravin in text, p. 303).

8 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 USC § 948-950, 18 USC § 2441, 42 USC § 2000). See *Terror Courts*, p. 311.

9 *Ibid.*, pp. 353-359, 364-365. See also Military Commissions Act of 2009, Pub. L. No. 111-84, tit. 18, 123 Stat. 2190, 2574-2614 (codified at 10 U.S.C. §§ 948a ff.). Johnson would serve in this position from 2009 to 2012; a year later, Obama nominated him to be the Secretary of the Department of Homeland Security, a post he assumed late in 2013. See 'Homeland Security's New Chief', in *New York Times*, 26 December 2013, A26; Ellen Nakashima, 'Driven by Memories of that "Darkest" Day', in *Washington Post*, 19 October 2013, A3.

10 *Terror Courts*, p. 365.

and relating to the Protection of Victims of Non-International Armed Conflicts, still languishes on the Senate's list of pending treaties, while the sibling protocol pertaining to international armed conflicts does not appear on the list at all.¹¹

More than a dozen years have elapsed since 9/11, yet verdicts have been entered against precious few of the detainees supposed to be slated for trial by military commission. Pretrial disputes mire proceedings against Khalid Sheikh Mohammed and four other remaining 9/11 defendants¹² – as Bravin explains, charges against the sixth defendant were dropped on account of torture.¹³ Most of the detainees convicted by commissions have already been released; in stark contrast, those suspects who were tried in federal criminal courts continue to serve stiff sentences in high-security penitentiaries. As if his enumeration in *Terror Courts* of these systemic failings were not enough, Bravin assails a keystone of 'all three versions' of the Guantánamo project: 'Only aliens can be tried by military commission; American citizens, no matter the war crime or terrorist act alleged against them, are exempt from commissions jurisdiction.'¹⁴ He also indicates that US actions may have risked undercutting a basic customary international humanitarian law norm; that is, that '[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.¹⁵ To be precise, Bravin warns that the practices surrounding the Guantánamo commissions 'invite reciprocal action by hostile governments'.¹⁶

The Epilogue to the 2013 hardback edition of *Terror Courts* concludes with the news that a 'seismic blow came just as this book was going to press': the conviction of Hamdan, the so-called Man from Al Qaeda, had been vacated in a federal appellate decision which called into question all military commission prosecutions for material support of terrorism.¹⁷ As revised in the 2014 paperback edition, the Epilogue explains that by dint of a subsequent judgment, it now encompasses convictions for conspiracy as well.¹⁸ More fits and starts seem

11 See US Department of State, *Treaties Pending in the Senate*, available at: www.state.gov/s/l/treaty/pending/; White House, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, 7 March 2011 (urging Senate to act on Protocol II but writing that 'the Administration continues to have significant concerns with Additional Protocol I, even as it states that Article 75 of the latter treaty 'is consistent with our current policies and practice and is one that the United States has historically supported'), available at: www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy.

12 See, e.g., Billy Kenber, 'Official: 9/11 Attorneys Were Improperly Queried', in *Washington Post*, 21 September 2013, A2.

13 *Terror Courts*, pp. 252–259, 322–323.

14 *Ibid.*, p. 372.

15 International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005, Rule 140.

16 *Ibid.*, p. 373.

17 *Ibid.*, pp. 377–378 (2013 hardback edition). Except for this part of the Epilogue, pagination and content are the same in both editions.

18 *Ibid.*, pp. 377–379 (2014 paperback edition), discussing *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (reversing detainee's conviction in recognition of holding in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012)), available at 2013 WL 297726). See also Linda Greenhouse, 'Fish or Cut Bait', in *New York Times Opinionator*, 3 October 2013 (reporting on consequent *en banc* oral argument in

inevitable, and Bravin's chronicle of the first dozen years represents an invaluable resource for understanding the military commissions project going forward.

It is also invaluable to understanding what has occurred in the past, given that no official accountability process is in the offing. As Bravin reports, in a 2009 speech restarting the commissions, the incumbent president squelched proposals for such a process:

Despite his scathing critique of the Bush administration's bizarre legal claims and the institutionalized cruelty they enabled, Obama said that no one would be held accountable. 'I have no interest in spending all of our time re-litigating the policies of the last eight years,' he said. Rather than 'pointing our fingers at one another . . . we need to focus on the future.'¹⁹

That announcement, Bravin continues, precluded 'any accountability or even an independent inquiry, like the 9/11 Commission, that could authoritatively establish what had taken place.'²⁰

Through vivid prose and painstaking reportage, Bravin himself constructs a record of official responses to fundamental principles of international humanitarian law. *Terror Courts* thus contributes to a trove of cultural production exploring errors and excesses in the United States' post-9/11 campaign against terrorism – artefacts as varied as Karen J. Greenberg's *The Least Worst Place: Guantanamo's First 100 Days* (Oxford University Press, 2009) and Fernando Botero's *Abu Ghraib* series of drawings and paintings.²¹ At a time when officials do not pursue persons responsible for admitted wrongdoing, works like these constitute, in the short term, a crucial component of accountability. In the longer term, they may encourage the adoption of effective and transparent accountability mechanisms. Such a process could do much to entrench – in the United States and elsewhere – compliance with international humanitarian law.

Al Bahlul, an argument also described in *Terror Courts*, p. 379 (2014 paperback edition), available at: <http://opinionator.blogs.nytimes.com/2013/10/02/fish-or-cut-bait/>.

¹⁹ *Terror Courts*, p. 358.

²⁰ *Ibid.*

²¹ See Kenneth Baker, 'Abu Ghraib's Horrific Images Drove Artist Fernando Botero into Action', in *San Francisco Chronicle*, 29 January 2007, E1.