

Testimony of

# **The Honorable Pierre-Richard Prosper**

December 4, 2001

Mr. Chairman, members of the committee, I thank you for this opportunity to speak with you regarding the Military Order issued by the President on November 13th in response to the tragic events of September 11th. The events remind us that we must vigorously pursue justice to ensure that the acts not go unpunished.

Mr. Chairman, members of the committee, I come before you as the Ambassador-at-Large for War Crimes Issues and also as a former prosecutor. Prior to my appointment to this post, I spent ten years in the trenches as a line prosecutor. As a deputy district attorney in Los Angeles, I prosecuted hundreds of cases and tried dozens of murder cases and multiple murder cases as a member of the Hard Core Gang Division. As an Assistant United States Attorney, I prosecuted and investigated sophisticated international drug cartels trafficking tons of cocaine into the streets of Los Angeles. And as a lead prosecutor for the United Nations International Criminal Tribunal for Rwanda, I successfully prosecuted, in a 14-month trial, the first-ever case of genocide before an international tribunal under the 1948 Genocide Convention.

With this experience, I recognize, understand, and truly believe that there are different approaches that can be used to achieve justice. I recognize that different procedures are allowed and that different procedures are appropriate. No one approach is exclusive and the approaches need not be identical for justice to be administered fairly. But in all approaches what is important is that the procedures ensure fundamental fairness. And that is what the President's order calls for.

After the tragic events of September 11th, we as a nation were forced to re-examine our traditional notions of security, our conceptions of our attackers, and our approaches to bringing the perpetrators to justice. The conventional view of terrorism as isolated acts of egregious violence did not fit. The atrocities committed by the al Qaida organization at the World Trade Center in New York, at the headquarters of our Department of Defense, and in Pennsylvania were of the kind that defied the imagination and shocked the conscience.

These atrocities are just as premeditated, just as systematic, just as evil as the violations of international humanitarian law that I have seen around the world. As the President's order recognizes, we must call these attacks by their rightful name: war crimes.

President Bush recognized that the threat we currently face is as grave as any we have confronted. While combating these war crimes committed against U.S. citizens, it is important that the President be able to act in the interest of this country to protect the security of our citizens and ensure that justice is achieved. He has repeatedly promised to use all the military, diplomatic, economic and legal options available to ensure the safety of the American people and our democratic way of life. The President should have the full range of options available for addressing these wrongs. The Military Order adds additional arrows to the President's quiver.

Should we be in a position to prosecute Bin Laden, his top henchmen, and other members of al Qaida, this option should be available to protect our civilian justice system against this organization of terror. We should all ask ourselves whether we want to bring into the domestic system dozens of persons who have proved they are willing to murder thousands of Americans at a time and die in the process. We all must think about the safety of the jurors, who may have to be sequestered from their families for up to a year or more while a complex trial unfolds. We all ought to remember the employees in the civilian courts, such as the bailiff, court clerk, and court reporter and ask ourselves whether this was the type of service they signed up for - to be potential victims of terror while justice was pursued. And we all must think also about the injured city of New York and the security implications that would be associated with a trial of the al Qaida organization.

With this security threat in mind, we should consider the option of military commissions from two perspectives. First, the President's Military Order is consistent with the precepts of international law. And second, military commissions are the customary legal option for bringing to justice the perpetrators of war crimes during times of war.

The Military Order's conclusion that we are in a state of armed conflict deserves comment. Because military commissions are empowered to try violations of the law of war, their jurisdiction is dependent upon the existence of an armed conflict, which we have.

It is clear that this series of attacks against the United States is more than isolated and sporadic acts of violence, or other acts of a similar nature. Rather, a foreign, private terrorist network, with the essential harboring and other support of the Taliban-led Afghanistan, has issued a declaration of war against the United States. It has organized, campaigned, trained, and over the course of years repeatedly carried out cowardly, indiscriminate attacks, including the largest attack in history against the territory of the United States in terms of number of persons killed and property damage.

Tracing the criminal history of the organization further confirms the state of armed conflict. A decade's worth of hostile statements by Bin Laden over and over and over again state that he is at war against the United States. He has instructed his followers to kill each and every American civilian. We should also consider the intensity of the hostilities and the systematic nature of the assaults. Consider the fact that al Qaida is accused of bombing the World Trade Center in 1993 and attacking U.S. military service personnel serving in Somalia in the same year. Consider that Bin Laden and al Qaida are accused of attacking and bombing our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Remember that al Qaida is accused of perpetrating last year's bombing of the U.S.S. Cole. And of course, added to this history are the horrifying and unprovoked air assaults on the twin towers in New York, the Pentagon, and the airplane tragedy in Pennsylvania.

It is clear that the conduct of al Qaida cannot be considered ordinary domestic crimes, and the perpetrators are not common criminals. Indeed, one needs to look no further than the international reaction to understand that September 11 was perceived as an armed attack on the United States. NATO's North Atlantic Council declared that the attack was directed from abroad and "regarded as an action covered by Article V of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered

an attack against them all." The Organization of American States, Australia and New Zealand activated parallel provisions in their mutual defense treaties. UN Security Council Resolutions 1368 and 1373 recognized our inherent right to exercise self-defense. And UN Security Council Resolution 1377 added: "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century."

We can also look at our domestic response, including the joint resolution passed by this Congress authorizing "the use of all necessary and appropriate force" in order to prevent any future acts of international terrorism.

Mr. Chairman, members of the committee, we are at war, an unconventional war conducted by unconventional means by an unprecedented aggressor. Under long established legal principles, the right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization and the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. In waging war the participants become unlawful combatants.

Because the members of al Qaida do not meet the criteria to be lawful combatants under the law of war, they have no right to engage in armed conflict and are unlawful combatants. And because their intentional targeting and killing of civilians in time of international armed conflict amount to war crimes, military commissions are available for adjudicating their specific violations of the laws of war. As the U.S. Supreme Court unanimously stated in *Ex Parte Quirin*: "by universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

In this campaign against terrorism, it is important that the President have the full range of available forums for seeking criminal accountability against persons for their individual and command responsibility for violations of the law of war. The military commission provides a traditionally available mechanism to address these unconventional crimes.

Military commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. They were used by General Winfield Scott during his operations in Mexico, in the Civil War by President Lincoln, and in 1942 by President Roosevelt. They are an internationally accepted practice with deep historical roots. The international community has utilized military commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The tribunals which tried most of the leading perpetrators of Nazi and Japanese war crimes were military tribunals. These tribunals were followed by thousands of Allied prosecutions of the lower-level perpetrators under the Control Council Law No. 10.

By the end of 1958, the Western Allies had used military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by

U.S., Australian, British, Chinese, Dutch, and French forces for their atrocities committed during the war.

Today, the commissions as envisioned by the President in the Military Order, while different from those found in our Article III courts, are in conformity with these historical precedents and the world's current efforts to prosecute war crimes through the United Nations in the International Criminal Tribunals for the Former Yugoslavia and Rwanda. To understand this it may be helpful for me to articulate the commonalities. Like its predecessors, in the Nuremberg and Far East International Military Tribunals, the Allied Control Council Law No. 10 proceedings, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the judges sit as both triers of law and of fact. In addition, decisions such as judicial orders, judgments, and sentences are reached by a majority vote and not unanimity. Evidence of a probative value is admitted. And in the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, portions of the proceedings have been and are authorized to be closed, just as is contemplated by the President's military order.

Mr. Chairman, members of the committee, since September 11th I have been asked about our criticisms of foreign military tribunals. In these cases, we criticized the process and not the forum.

Since September 11th I have also been asked why we do not create an international tribunal? In our view, the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and Cambodia. International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis as in Rwanda and Yugoslavia. That is not the case in the United States.

Our goal should be and this administration's policy is to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times. The President understands our sovereign responsibility and has taken action to fulfill his duty to the American people. In creating an additional option, the nation is now prepared and will have an additional forum to address these wrongs when needed.

I thank you for your consideration in this matter and I am prepared to answer any questions you may have.