THE CONSEQUENCES OF UNLAWFUL PREEMPTION AND THE LEGAL DUTY TO PROTECT THE HUMAN RIGHTS OF ITS VICTIMS

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This article starts from the premise that the international legal community was exposed to a hegemonic interpretation of international law even before 9/11, and questions whether this exposure shook the foundations of international law. The author concludes that this was not the case. However, the U.S. in the aftermath of 9/11 has used this unilateral interpretation of international law to subject presumed Taliban and al-Qaeda prisoners to treatment in violation of U.S. obligations under human rights treaty law and customary international law. This article considers preemption, preemptive self-defense, the Bush doctrine, the war on terror, and its consequences for human rights of its victims. It also analyzes relevant jurispredence from human rights bodies as well as from the U.S. Supreme Court and lower courts and concludes that the Bush doctrine vitiated international law, despite U.S. jurisprudential guidance. It exposes two interrogation techniques, extra territorial rendition and waterboarding which amount to torture and were frequently used by the Bush administration. Finally, the article shows the way back to adherence to international law.

EXPLANATORY NOTE

This article was originally presented to the seventy-third International Law Association (ILA) conference in August 2008 at a panel entitled *The (Mis)use of the Human Rights Argument and Preemptive Intervention in the Contemporary International Arena*. Due to important developments directly bearing on the topic of this article, including hopeful signs by the new U.S. administration, an update was considered necessary.

I. INTRODUCTION

Even before 9/11 and its aftermath, international law was exposed to a hegemonic interpretation by the U.S. The question was raised whether

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such a position would shake the foundations of current international law.[1] Although it was too early to conclude that the U.S.' attitude had indeed changed the foundations of international law, it was observed that the U.S. has moved away from traditional international law towards an increased use of its own domestic legal system, making it a tool for foreign policy. The adoption by Congress of the Patriot Act in October 2001 as well as the American Service-Members' Protection Act (ASPA) in January 2002 are clear examples in this regard. The various domestic legal proceedings regarding Guantánamo detainees and the ensuing obstructions to it by the Executive (e.g., the creation of Military Commissions in November 2001 and the Combat Status Review Tribunals in July 2004) confirm this trend.

Additionally, the U.S.' interpretation of preemptive or anticipatory self-defense in the 2002 National Security Strategy,[2] its drafting of the ill-famed torture memoranda where in the war on terror, law, and legal ethics have been sacrificed to a misguided notion of political expediency,[3] and congressional attempts to circumvent the judgments handed down by the U.S. Supreme Court in *Rasul v. Bush* and *Hamdi v. Rumsfeld*[4] through the enactment of the Detainee Treatment Act (DTA) in December 2005,[5] followed by the Military Commissions Act (MCA) signed into law in October 2006 in the wake of *Hamdan v. Rumsfeld*,[6] are all signs that, despite the repudiation of almost the entire world legal community, this trend continued.[7]

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1 *See* UNITED STATES HEGEMONY AND THE FOUNDATION OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds. 2003). *See also* Johannes van Aggelen, 48 GERMAN Y.B. INT'L L. 666 (2005) (book review) (reviewing *id.*).

2 THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, 15 (2002), *available at* merln.ndu.edu/whitepapers/USnss2002.pdf.

3 *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds. 2005). *See also* Scott Horton, *Legal Ethics and the War on Terror: The Role of the Government Lawyer: Ethics, Lawyers, and the Torture Memoranda*, 99 AM. SOC'Y INT'L L. PROC. 301 (2005).

4 *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004). *See also* Alec Walen & Ingo Venzke, *Unconstitutional Detention of Non-resident Aliens: Revisiting the Supreme Court's Treatment of the Law of War in Hamdi v. Rumsfeld*, 67 HEIDELBERG J. INT'L L. 843 (2007).

5 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 199 Stat. 2739 (2005).

6 548 U.S. 557 (2006).

7 *See generally* PHILLIPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008); PHILLIPE SANDS, TORTURE TEAM: DECEPTION, CRUELTY AND A COMPROMISE OF LAW (2008); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008). *See also* U.S. HOUSE COMM. ON THE JUDICIARY MAJORITY, REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH (2009) (providing a very detailed and critical assessment of the Bush presidency).

The U.S. Supreme Court's decision in *Medellin v. Texas* held that International Court of Justice (ICJ) decisions under the Vienna Consular Convention are not binding federal law and rejected presidential enforcement of ICJ judgments over state proceedings.[8] In my opinion, the *Medellin* opinion indicates that the U.S. was on the unilateral path in international law during the Bush administration despite three earlier cases in which the ICJ appealed to the U.S. government to adhere to international law.[9] It is within this overarching framework of the current state of international law in the international arena that this article deals with preemptive intervention and the consequences for the human rights of its victims.[10]

II. PREEMPTIVE INTERVENTION

In 1988, the U.S. Department of Defense (DOD) created a dictionary which clarified the difference between preemptive attack and preventive war.[11] The DOD defines "preemptive attack" (preemption) as "[a]n attack initiated on the basis of *incontrovertible* evidence that an enemy attack is *imminent*."[12] Preventive war is defined as "a war initiated in the *belief* that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk."[13] By analyzing these definitions, one could infer that

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8 *See* Medellin v. Texas, 128 S. Ct. 1346 (2008).

9 *See* Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 257 (Apr. 9) (Provisional Measures); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 513–14 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 33–35 (Mar. 31). On June 5, 2008, Mexico filed a request for interpretation of the Avena Judgment and asked for the urgent indication of provisional measures. By order of July 16, 2008, the court rejected the submission by the U.S. to dismiss the application and indicated provisional measures. *See* Request for the Indication of Provisional Measures (Mex. v. U.S.), 2008 I.C.J. 139 (July 16). On January 19, 2009, the court found that the matters claimed by Mexico to be at issue between the parties, requiring an interpretation, were not matters which had been decided by the court in its 2004 judgment and consequently could not give rise to the interpretation requested by Mexico. *See* Request for Interpretation of 31 March 2004 in Avena and Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 139, ¶ 61 (Jan. 19). It also found that the U.S. had breached the obligation, incumbent upon it under the Order indicating provisional measures, by executing Mr. Medellin. *Id.*

10 *See* Johannes van Aggelen, *Withering International Human Rights and Humanitarian Law: Principles at the Turn of the Millennium: Reflections on Guantanamo and Beyond*, *in* 4 TRENDS IN THE INTERNATIONAL LAW OF HUMAN RIGHTS: STUDIES IN HONOR OF PROFESSOR ANTONIO AUGUSTO CANCADO TRINDADE 67 (S. Fabris & Porto Alegre eds. 2005) (providing a detailed appraisal).

11 U.S. JOINT CHIEFS OF STAFF, DEP'T OF DEFENSE DICTIONARY OF MILITARY TERMS 428, 432 (2001) (as amended through March 2009), *available at* http://www.dtic.mil/doctrine/jel/doddict/ (emphasis added).

12 *Id.* at 428 (emphasis added).

13 *Id.* at 432. *See also* Steven J. Barela, *Preemptive or Preventive War: A Discussion of Legal and Moral Standards*, 33 DENV. J. INT'L L. & POL'Y 31, 32 (2004).

there are in fact two different levels of anticipatory self-defense. Leaving no doubt about the burden of proof for cases in which it is applied, the language used to define preemption is particularly strong. On the other hand, prevention implies a certain subjectivity that allows for interpretation in each case in which it is applied.

The DOD defines the Law of War as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.'"[14] The 2006 Operational Law Handbook supports the doctrinal concepts and principles of FM 3-0 and FM 27-100. The Handbook states that "anticipatory self-defense serves as a foundational element" in military operations, "as embodied in the concept of 'hostile intent' which makes it clear [that commanders] . . . should not have to absorb the first hit before the right and obligation to exercise self-defense arises."[15]

A. Preemptive Self-Defense and the U.N. Charter

Article 21 of the 2001 Draft Articles on State Responsibility adopted by the International Law Commission, stipulates that, "[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations."[16] The language of Article 51 of the U.N. Charter contemplates self-defense only "if an armed attack occurs against a Member of the United Nations . . . ."[17] Consequently, the unsettled issue remains as to what constitutes an armed attack.

The evolution of anticipatory self-defense in the pre-Charter era into a working customary law doctrine prescribing use of force short of war and proscribing certain conduct under its justification is accompanied by a very well-articulated set of rules for usage.[18] The classic case in this respect

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[14] U.S. Dep't of Defense Directive 2311.01E, *Dep't of Defense Law of War Program*, ¶ 3.1, at 2 (2006), *available at* http://www.fas.org/irp/doddir/dod/d2311_01e.pdf.

[15] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, OPERATIONAL LAW HANDBOOK 6 (John Rawcliffe & Jeannine Smith eds., 2006), *available at* http://www.fas.org/irp/doddir/army/law0806.pdf.

[16] *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, U.N. GAOR, Int'l L. Comm'n, 53rd Sess., art. 21, U.N. Doc. A/CN.4/L.602/Rev.1 (2001). *See also* G.A.Res. 56/83, art. 21, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (from the eighty-fifth plenary meeting on Dec. 12, 2001).

[17] U.N. Charter art. 51.

[18] *See* Michael J. Kelly, *Time Warp to 1945: Resurrection of the Reprisal and Anticipatory Self-Defense Doctrine in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1 (2003) (providing a historic approach). *See also* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, bk. II, ch. I, at 73–84 (A.C. Campell trans. 1993) (1901); EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, bk. II, ch. IV, 154–60 (1852).

is the 1837 Caroline case between the U.S. and the U.K.[19] In this case, the court held that self-defense should be restricted to dangers which are "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[20]

Like reprisal, the U.N. Charter outlawed anticipatory self-defense in 1945.[21] Traditional self-defense in response to an armed attack was the only form of self-help that made it into the Charter.[22] Although it was originally intended to fit the regional arrangements, such as the inter-American system, into the general organization that Article 51 was added to the Charter in 1945, the law of self-defense has developed well beyond that purpose over the last half a century.[23] In the latter part of the twentieth century, recourse to the right to self-defense became an important tool in the fight against international terrorism.[24] There is no indication that this development was forseen by the drafters of the Charter as there is no thorough discussion of the term "armed attack" in the records of the San Francisco Conference.[25] On the contrary, the drafting history suggests that the framers of the Charter left the concretisation of the concept of "armed attack" essentially to the interpretation of its organs and member states. This aspect was overlooked by Professor Myres McDougal who qualified Article 51 as "an inept piece of draftmanship . . . ."[26]

B. Contemporary Views on Pre-emptive Self-Defense

Though Goodrich and Hambro's book on the U.N. Charter was the leading reference during the mid-twentieth century, the book edited by Judge Bruno Simma provides references to practices in the contemporary arena. Simma concludes that an anticipatory right of self-defense would be contrary to the wording of Article 51(if an armed attack occurs) as well as

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19 Werner Meng, *The Caroline*, *in* 1 ENCYCLOPEDIA OF PUBLIC INT'L LAW 537 (Rudolf Bernhardt ed., 1992). *See also* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

20 Meng, *supra* note 19, at 538.

21 *See* U.N. Charter art. 51.

22 *Id.*

23 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 165–66 (2001).

24 *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 182 (1996); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 115–19 (2004) (providing a survey).

25 *See* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter*), 10 HOUS J. INT'L L. 25, 32–33 (1987); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788–806 (Bruno Simma et al. eds. 2002).

26 MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 234 (1961).

to its object and purpose, which is to cut to a minimum unilateral use of force in international relations.[27] Since the alleged imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the state concerned.[28] Indeed, as Anne Slaughter and William Burke-White observed, Article 51 was designed in a world where the use of force primarily involved attacks by one state against the territory of another state.[29]

However, on the bench Judge Simma appears to have changed his mind. In a separate opinion in the *Armed Activities on the Territory of the Congo* case,[30] he criticized the ICJ for avoiding its responsibility to clarify the law as to whether an attack by a non-state actor could amount to an armed attack. Simma maintained that:

> Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defense for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the "Bush doctrine" justifying the preemptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51.[31]

Nevertheless, in my opinion, the manifest risk of an abuse of that discretion, which thus emerges would *de facto* undermine the restriction to one particular case of the right to lawful self-defense. Consequently, Article 51 should be interpreted narrowly as containing a prohibition of anticipatory self-defense.

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[27] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 25, at 803–06.

[28] *Id.* at 803.

[29] *See generally* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

[30] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 369 (Dec. 19, 2005) (Simma**,** J., separate opinion).

[31] *Id.* at 370. *See also* Michael N. Schmitt,*"Change Direction" 2006: Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127 (2007).

1. The Effective Control standard

Although the doctrine often refers to the Nicaragua judgment, the ICJ did not pronounce itself on anticipatory self-defense in 1986.[32] It referred to the effective control test.[33] Although the ICJ confirmed this effective control standard in the *Congo* (2005) and *Genocide* (2007) decisions,[34] criticism has been mounting as to whether this threshold is still in conformity with contemporary international law.

In 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the effective control test in the *Tadić* case.[35] At issue was whether there existed an international armed conflict in Bosnia-Herzegovina. In finding such a conflict, the Chamber adopted a more relaxed standard than that articulated by the ICJ in 1986. The key issue was "overall control," which went beyond mere financing and equipping of armed forces and "also involved participation in the planning and supervision of military operations."[36]

Judge Peter Kooijmans in his separate opinion in the *Congo* case also questioned the effective control standard maintained by the ICJ. He argued that the ICJ had ignored the operational code evident in the international community's reactions to the 2001 Coalition attacks against the Taliban.[37] In Kooijmans' opinion, Taliban support for Al-Qaeda fell far below the bar set in either the *Nicaragua* or *Tadić* judgments. Nevertheless, most states approved Operation Enduring Freedom, with many offering material support.[38] In particular Kooijmans stated:

> If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack

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[32] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 81 (June 27). *See also id.* at 347–48 (Schwebel, J., dissenting) (clarifying that Judge Schwebel did not agree with the construction of Article 51 to read "if, and only if, an armed attack occurs," but finding that the terms of Article 51 do not eliminate the right of self-defense under customary international law, thus leaving the door ajar).

[33] *See id.* at 62–63. *See also* Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 791 (1948) (recognizing over sixty years ago that support for non-state armed groups could amount to an armed attack).

[34] *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 310 (Dec. 19, 2005); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188, ¶¶ 391–92 (Feb. 26 2007).

[35] Prosecutor v. Tadić, IT-94-1-A, Judgment, (July 15, 1999).

[36] *Id.* ¶ 145.

[37] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 357–58 (Dec. 19, 2005) (Kooijmans, J. concurring).

[38] *Id.*

> by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defense.[39]

Similarly, Professor Oscar Schachter maintained almost twenty-five years ago that one reading of Article 51 could limit self-defense to cases of armed attack.[40] However, since Article 51 is silent on the right to self-defense under customary international law (which goes beyond cases of armed attack), one could also deduct that such a right "leave[s] unimpaired the right to self-defense as it existed prior to the Charter."[41] The former president of the ICJ already in the early 1960s maintained that the framers of the Charter had drafted the wording in Article 51 broadly enough to allow for the use of self-defense against acts emanating from non-state actors, as Article 51 required simply an "armed attack" and not an "armed attack by a state." This choice would imply that the drafters of the Charter intended to cover all modes of attack "as long as it was armed."[42]

2. Determining the lawfulness of preemptive force

The current position within the U.N. regarding anticipatory self-defense is contained in the report of the Secretary-General's High-Level Panel on Threats, Challenges and Change entitled *A More Secure World: Our Shared Responsibility*, commissioned by the Secretary-General after 9/11.[43] The panel questioned whether a state, without going to the Security Council, could claim to act in anticipatory self-defense, not just preemp-

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[39] *Id.* at 358 (emphasis in original).

[40] *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

[41] *Id.* at 1634. *See* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145 (2000) (maintaining that the presence of an armed attack is one of the basis for the legitimate exercise of the right of self-defense under Article 51, but not the exclusive basis). *See also* Edward McWhinney, *International Law-Based Responses to the September 11 International Terrorist Attacks*, 1 CHINESE J. INT'L L. 280, 280–86 (2002) (defending the legitimate defence based on customary international law principles).

[42] ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 200–04 (1963); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 242 (1994); Jörg Kammerhofer, *Uncertainties of the Law on Self-Defense in the United Nations Charter*, 35 NETH. Y. B. INT'L L. 143 (2004).

[43] High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. GAOR, 59th Sess., U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld.

tively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate attack).[44] The panel concluded that the short answer would be that if there are good reasons for preventive military action, with good evidence to support them, recourse should be made to the Security Council, which could authorize action.[45] The panel also concluded that:

> For those impatient with such a response, the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action . . . .[46]

The U.N. does not favour the rewriting or reinterpretation of Article 51.[47] For our analysis, reference should also be made to two Security Council resolutions adopted in 2001 in the aftermath of the 9/11 attacks. These two resolutions are S.C. Res. 1368 and 1373.[48] Although both resolutions 1368 and 1373 referred to the inherent right of individual or collective self-defense as recognized by the Charter, one should note that the reference is made only in the preambular paragraphs.[49] It is of interest to note that the ICJ rejected Israel's justification of building the wall separating Palestinians and Israelis under Article 51 of the Charter.[50] The ICJ noted that Israel had not claimed that the attacks against it were imputable to a foreign state; consequently, the court concluded that Article 51 had no relevance in this case.[51] The court also rejected Israel's reliance on Security Council Resolutions 1368 and 1373 since the situation was different from that contemplated by those resolutions.[52] However, Judge Higgins, Judge Kooijmans, and Judge Buergenthal vehemently opposed this position.[53] They pointed out that the absence in Article 51 of any reference to a state as the originator of an "armed attack," as well as the Security Council's self-evident characterization of terrorist attacks as armed attacks in, *inter alia*, Resolutions

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44 *See id.* at 63.

45 *Id.*

46 *Id.*

47 *Id.*

48 *See* S.C. Res. 1368, U.N. SCOR, Jan. 2001–July 2002, at 1, U.N. Doc S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, Jan. 2001–July 2002, U.N. Doc S/RES/1373 (2001).

49 *See* S.C. Res. 1368, *supra* note 48, at pmbl; S.C. Res. 1373, *supra* note 48, at pmbl.

50 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9, 2004), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4.

51 *Id.*

52 *Id.*

53 *See id.* at 207 (Higgins, J., separate opinion); *id.* at 219 (Kooijmans, J., separate opinion); *id.* at 240 (Buergenthal, J., separate opinion).

1368 and 1373, clearly evidenced that Article 51 could be invoked against non-state actors.[54] After the Kosovo intervention, NATO separated terrorist acts from armed attacks in a strategic concept for the Alliance adopted on April 24, 1999. Nevertheless, immediately after the attacks on 9/11, NATO invoked Article 5 of the Washington Treaty, calling 9/11 an armed attack justifying individual or collective self-defense.[55]

Neither of the Security Council resolutions nor NATO's September 12, 2001 statement attempted to establish a link between terrorist acts and a particular state. The absence of such a link does not clearly indicate whether the intention was to refer to a concept of armed attack, which would also comprise acts which are not attributable to a state. Professor Giorgio Gaja concluded that there was no armed attack according to current international law.[56] Consequently, those who argue that no armed attack is required to invoke anticipatory self-defense consider anticipatory self-defense against an imminent threat permissible.[57] Others note the danger of preemptive strikes and adhere to the view that they are unlawful.[58] A third school of thought maintains that it is in principle unlawful to exercise preemptive self-defense, but not in all circumstances.[59]

Another question is whether anticipatory or preemptive self-defense could be considered lawful in the aftermath of 9/11. However, as Professor Thomas Franck correctly noted there is nothing in the "*Travaux Préparatoires*" or in the text of the Charter to justify the claim that self-defense is

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[54] *See id.* at 215–16 (Higgins, J., separate opinion); *id.* at 229–30 (Kooijmans, J., separate opinion); *id.* at 241–43 (Buergenthal, J., separate opinion).

[55] North American Treaty Organization [NATO], *Statement by the North Atlantic Council* (Sept. 12, 2001), *compiled in* 40 I.L.M. 1267 (2001).

[56] *See* Giorgio Gaja, *In What Sense Was There An Armed Attack?*, *in* EUR. J. INT'L L. DISCUSSION FORUM, THE ATTACK OF THE WORLD TRADE CENTER: LEGAL RESPONSES, *available at* http://www.ejil.org/forum.

[57] *See* ROBERT JENNINGS, ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 534–35 (1996). *Compare* William Taft, John Yoo, Ruth Wedgwood, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 557–85 n.3 (2003) (discussing the legality of preemptive self-defense), *with* Miriam Sapiro, Tom Farer, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 599, 599–628 (2003) (opposing the legality of preemptive self-defense). *See also* Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 89–103 (2003) (considering preemptive strikes lawful).

[58] *See* Christine Gray, *The U.S. National Security Strategy and the New "Bush Doctrine" of Preemptive Self-defense*, 1 CHINESE J. INT'L L. 437, 442–43 (2002); Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, at 2–3 (Aug. 2002), *available at* http://www.asil.org/taskforce/oconnell.pdf.

[59] *See* Sarah Scheidman, *Standards to Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 270 (2000); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 565 (2002); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 564–65 (1999).

justified after an attack ends. Franck maintains that the assertion that self-defense required immediate action stems from a misunderstanding of the *Caroline* decision which deals only with anticipatory self-defense.[60] Professor W. Michael Reisman considered that the international legal test of the lawfulness of preemptive action presumably hinges on two questions: "the right to act (*jus ad bellum*); and if that were established, the necessity and proportionality of the action, as well as the capacity of the weapons chosen for the action to discriminate between belligerents and non-belligerents."[61]

It is important to distinguish between the situation immediately after the 9/11 attacks and the subsequent U.S. strategy "Enduring Freedom." The U.S.' idea of "going it alone" vitiates the Charter's provisions regarding preemptive force. In cases of lacking objective evidence of an armed attack, the Charter requires multilateral decision-making.[62] Permitting preemptive self-defense at the sole discretion of one state is fundamentally at odds with the underlying ideas of the Charter.[63] As Professor Louis Henkin wrote in 1987:

> It is not in the interest of the U.S. to reconstruct the law of the Charter so as to dilute and confuse its normative prohibitions. In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms, which go to the heart of the international order and implicate war and peace in the nuclear age, be clear, sharp and comprehensive; as independent as possible of judgements of degree and of issues of fact; as invulnerable as can be to a self-serving interpretation and to temptations to conceal, or mischaracterize events. Extending the meaning of "armed attack" and of "self-defense," multiplying exceptions to the prohibition on the use of force and the occasions that would permit military intervention, would undermine the law of the Charter and the international order in the wake of world war.[64]

Even if one were to admit that customary international law requires a certain degree of timelessness, as Professor Edward McWhinney defends,

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[60] Thomas F. Frank, *Terrorism and the Right of Self Defense*, 95 AM. J. INT'L L. 839 (2001). *See also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY *supra* note 25. *See also* C.Stahn, *Nicaragua is Dead, Long Live Nicaragua—The Right to Self-Defence Under Article 51 of the UN Charter and International Terrorism*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 827 (C. Walter et al. eds. 2003).

[61] W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 17 (1999). *See also* Steven R. Ratner, *Jus as Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905 (2002).

[62] O'Connell, *supra* note 58, at 13.

[63] *Id.*

[64] Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 69 (Louis Henkin et al. eds., 1989). *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1979).

the U.S.' legal and political strategy in the aftermath of the 9/11 attacks defeats the idea of recognition as unlawful self-defense an "indefinite war against terrorism," as former President Bush announced in his joint statement to Congress on September 20, 2001.[65]

In my opinion, Professor Michael Glennon best describes the current situation. He maintains that:

> The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.[66]

3. State of necessity

Reference has also been made to the existence of a "state of necessity" after the attacks of 9/11, which would constitute a ground for precluding the wrongfulness of an unlawful act under Article 25 of the International Law Commission (ILC) draft articles. However, this argument cannot be used to justify unlawful use of military force against the Taliban and al-Qaeda after the invasion into Afghanistan because Article 26 of the ILC draft articles excludes any justification or excuse of a breach of a state's obligation under a peremptory norm of international law such as the prohibition of the use of force enshrined in Article 2(4) of the Charter in accordance with Article 53 of the Vienna Convention on the Law of Treaties.[67] Moreover, the ICJ observed that "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis."[68] Therefore, "the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."[69]

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65 McWhinney, *supra* note 41, at 281.

66 Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherenece in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 540 (2002).

67 Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, U.N. GAOR, 56 Sess., Supp. No. 10, arts. 25, 26, U.N. Doc. A/56/10 (2001).

68 Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 40 (Sept. 25).

69 *Id.*

Finally, a legal distinction between self-defense, which consists of necessary and proportionate measures to protect oneself against future threats and reprisals, which are largely punitive in character, should be made.[70] While legitimate self-defense is permitted if it meets all the requirements mentioned above, reprisals are still prohibited under the current *jus ad bellum*.[71]

C. Preemption, Terrorism, and the "Bush Doctrine"

During a colloquium in 1989 on Terrorism as an International Crime, Professor Schachter advanced four criteria where extraterritorial force against terrorists could be considered lawful, three of which are directly relevant to assess the U.S.' hunt for terrorists in Afghanistan and elsewhere, namely "to destroy or damage terrorist bases in another country[,] to capture or kill terrorists in another country[,] [and] to attack military or governmental units in another country because its government ha[d] directly or indirectly aided terrorists."[72]

In the aftermath of 9/11, the war of words accompanied the war on terror. Could the attacks on New York and Washington be legally qualified as an act of war? President Bush stated, "Our war on terror begins with Al Qaeda, but it does not end there."[73] However, as Professor Joan Fitzpatrick declares:

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[70] HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 150 (2005).

[71] *See* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1984 I.C.J. 14, 99–100 (1986). *See generally* FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971). Brun-Otto Bryde, *Self-Defense*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 361 (Rudolf Bernhardt ed., 2000); Karl Josef Partsch, *Reprisals*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 200 (Rudolf Bernhardt ed., 2000).

[72] Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, 19 ISR. Y.B. HUM. RTS. 209, 212 (1989). *See also* Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227 (2003); Antonio Cassese, *The International Community's Legal Response to Terrorism*, 38 INT'L & COMP. L.Q. 589 (1989); G. Guillaume, *Terrorisme et Droit International*, 215 HAGUE REC. 287 (1989); Jeffrey A. McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and its Exercise*, 16 GA. J. INT'L & COMP. L. 435 (1986); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209 (2003); Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986). *But see* Federica Bisone, *Killing a Fly with a Cannon: The American Response to the Embassy Attacks*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 93 (2000).

[73] *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4, *available at* http://www.nytimes.com/2001/09/21/national/21BTEX.html?pagewanted=all. *See also* Frédéric Mégret, *War? Some Semantics and the Move to Violance*, 13 EUR. J. INT'L L. 361, 384–85 (2002) (providing a philosophical analysis). For an excellent survey of various legal analysis on combatting terrorism, please view

> Neither "war" nor "terrorism" has a fixed meaning in contemporary international law. Post-September 11 events suggest the following possible identities for the "war against terrorism":
>
> [(1)] An undeclared international armed conflict by the United States and allied states against Afghanistan
>
> [(2)] An undeclared international armed conflict by the United States and allied states against the former Taliban regime in Afghanistan
>
> [(3)] An international armed conflict in Afghanistan between the Taliban and its domestic rivals, internationalized by the intervention in October 2001 by the United States and allied states
>
> [(4)] An undeclared international armed conflict by the United States and allied states against the non-state entity Al Qaeda;
>
> [(5)] An undeclared international armed conflict by the United States and allied states against a range of non-state entities and individuals alleged from time to time to be international terrorists
>
> [(6)] A continuation of crime control activities against international terrorists, with a metaphorical use of 'war' rhetoric.[74]

By declaring the U.S.' involvement in a "war on terrorism," President Bush refocused the nation's strategic posture from one that targeted terrorists as criminals to one that treats terrorists and their supporting states capable of threatening U.S. and its allies, as threats to national security.[75] Conceived as such, the current "war on terrorism" is the resurrection of anticipatory self-defense outlawed in the Charter.

In his speech at the U.S. Military Academy at West Point on June 1, 2002, President Bush referred for the first time to preemption.[76] However, if we look at the language used in his speech, as well as the references, we will in fact see that the President seemed to be describing *preventive war, not pre-emption*. Bush stated that "our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action where necessary to defend our liberty and to defend our lives."[77] This speech turned out to be the forerunner to the so-called "Bush doctrine" and developed into the National Security strategy.[78] There is one remarkable passage in this strategy where it reads:

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the "Terrorism On Trial" symposium organized by the Case Western Reserve University School of Law in October 2004 and published in 36 CASE W. RES. J. INT'L L. 287 (2004).

[74] Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 249 (2003).

[75] Sofaer, *supra* note 72.

[76] Commencement Address at the United States Military Academy in West Point, 38 WEEKLY COMP. PRES. DOC. 944, 946 (June 1, 2002).

[77] *Id.*

[78] NATIONAL SECURITY STRATEGY, *supra* note 2.

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. . . .
>
> [. . .] To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[79]

However, in the context of preemption, the danger must be categorized as technical and with a risk of severe destruction rather than just an imminent threat. Consequently, militarily action would thus be preventive war, not preemption.

D. Restricting Preemptive Force Against Acts of Terrorism

I agree with many scholars, including Professor Michael Bothe, that the doctrine of preemptive strikes formulated in the U.S. National Security Strategy—proposing to adapt this concept to new received threats anywhere—constitutes an unacceptable expansion on the right of anticipatory self-defense. [80] It can also be conceived as a misinterpretation of the 2001 Authorization for Use of Military Force (AUMF).[81] The AUMF is not a declaration of war, but merely the very limited authorization to use necessary and appropriate force against certain persons, nations, or organizations that were either directly involved in or aided the 9/11 attacks or that had harbored such organizations or persons before or during the 9/11 attacks.[82]

Congressional use of the past tense regarding nations, organizations or persons means that the intentional aiding or harboring must have occurred before or during the 9/11 attacks.[83] The AUMF most certainly did not authorize the war against al-Qaeda. Congress actually refused to author-

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79 *Id.* at 15.

80 Bothe, *supra* note 72, at 232.

81 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

82 *See id.* (providing the President with the power "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.")

83 *Id.*

ize use of force against "acts of terrorism."[84] Moreover, the U.S. Supreme Court recognized already in an early stage that only Congress has the constitutional power to determine whether a war exists.[85] Nevertheless, the AUMF shifts away from treating terrorism as a crime to treating terrorism as an armed conflict which allows the U.S. to exercise force as a "fundamental incidence of waging war."[86] Regarding this shift, it is interesting to note that a proposed new strategy by an American think tank, under the heading Prevention of Terrorism, declares that the "broad concept of a 'war on terror'" should be retired.[87]

III. THE BUSH DOCTRINE AND THE CONSEQUENCES FOR THE HUMAN RIGHTS RECORD OF ITS VICTIMS

Although the first part of this article had a rather doctrinal approach to the questions under consideration, the second part will be more practical. However, in view of the many aspects of the human rights violations as a consequence of the Bush doctrine and the subsequent rise of the "war on terror," this section is also much more cursory.

A . Military Commissions and the Law of War

The decision to bring presumed terrorists captured during the aftermath of the 9/11 attacks and during the "Enduring Freedom" campaign before U.S. military tribunals has aroused much global debate. Already in 1911,General Henry Halleck observed that military commissions "are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war; courts martial exist in peace and war, but military commissions are war courts and can exist only in time of war."[88] Military Commissions consequently implicate a

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[84] *See* David Abramowitz, *The President, the Congress, and the Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 74 (2002) (explaining that the AUMF is not a declaration of war). *See also* Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1872–73 (2004); Jordan Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L.R. 345 (2007); JORDAN PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007); Jordan Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 535 n.3 (2002).

[85] *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

[86] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004). For a discussion of what constitutes a "fundamental incident of waging war," please see the debate transcript of Professor David D. Cole and Professor Ruth Wedgwood in 37 CASE W. RES. J. INT'L L. 509 (2006).

[87] PHILIP J. CROWLEY, SAFE AT HOME: THE NATIONAL SECURITY STRATEGY TO PROTECT THE AMERICAN HOMELAND, THE REAL CENTRAL FRONT 3 (2008).

[88] Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT'L L. 958, 965–66 (1911).

certain tension in the power of Congress to declare war and the power of the President of the U.S. as Commander-in-Chief to define offences against the law of nations in conformity with Article I of the U.S. Constitution.[89] Among these fundamental war powers is the authority to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law, rather than over only those offences defined in U.S. criminal statutes.[90]

Invoking the legal advantages of the law of war is not a one-way street, however. As Justice Anthony Kennedy noted in his concurring opinion in *Hamdan v. Rumsfeld*, which overruled the initial Guantánamo military commission procedure:[91]

> The Government does not claim to base the charges against Hamdan on a statute; instead it invokes the law of war. That law, as the Court explained in [*Ex parte* Quirin], derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission. [92]

It should be recalled that the initial Military Order confused the role of legislator, policeman, prosecutor, judge, and court of appeals, by concentrating many powers of the U.S. government in the Executive Branch.[93]

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89 *See* U.S. CONST. art. 1, § 8.

90 *See Hamdi*, 124 U.S. at 2640–41 (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2085 (2005); David Glazier, *Full and Fair by What Measures?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55 (2006); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654–58 (2005); *see also* Johannes van Aggelen, *supra* note 10, at 95–106.

91 *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

92 Hamdan v. Rumsfeld, 548 U.S. 557, 641 (2006) (Kennedy, J., concurring in part) (citations omitted). *See also* Matthias Höpfner, *Quirin, Ex Parte*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1 (2000).

93 *Supra* note 91. *See*, *e.g.*, Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defence of Military Commissions and the United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terorism*, 96 AM. J. INT'L L. 345 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002); Diane F. Orenlicher &

Professor Neal Katyal, lead counsel in the *Hamdan* case, correctly stated that, "the Bush Administration has sought to convert the singular Commander-in-Chief Clause into a textual warrant for exceptional unilateralism."[94] The initial military order was subsequently implemented by various military orders prepared by the DOD, starting with DOD Military Commission Order No.1, dated March 21, 2002.[95] On January 31, 2005, a new military order, also named "No. 1," was issued to overhaul the previous order.[96] However, it was a kind of window dressing and new wine in old bottles. As Professor David Glazier stated:

> The transition from treating terrorism as a crime to treating terrorism as an armed conflict poses a unique set of legal challenges. One particularly daunting issue is identifying specifically which rules contained in the myriad of treaties and customary provisions that comprise the corpus juris of the law of war apply to a "war on terror." Traditionally, conflicts have been characterized as either "international" or "non-international," with distinct sets of rules applicable to each. International armed conflicts are fought between nation states, while non-international armed conflicts are contests between a nation state and armed groups seeking independence or regime change within its borders. Combating terrorism, however, has a number of unique characteristics that prevent its inclusion in either category. The Bush Administration seemingly has taken full advantage of these distinctions by re-characterizing terrorism as armed conflict and attempting to avoid the application of international standards to its treatment of detainees.
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> The conduct of the Guantanamo military commissions prior to Hamdan III exemplifies this effort to avoid international law constraints.[97]

Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism and Military Commissions*, 96 AM. J. INT'L L. 328 (2002).

94 Neal Katyal & Lawrence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1269 (2002).

95 U.S. Dep't of Def., Military Commission Order 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2001), *available at* www.defenselink.mil/news/Mar2002/d20020321ord.pdf. *See also* Jordan Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002) (providing a very critical analysis).

96 U.S. Dep't of Def., Military Commission Order 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.

97 Glazier, *supra* note 90, at 58 (citations omitted). *See also* Paul E. Kantwill & Sean Watts, *Hostile Protected Persons or "Extra-conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681 (2005).

Nevertheless, detainees are protected by the following Third Geneva Convention articles: 4 (categories of POWs), 5 (status), 12 (responsibility of treatment by the Detaining Power, 13 (humane treatment), 46 (conditions of transfers of prisoners of war), 84 and 102 (trial procedures and guarantees), 118 (release and repatriation), and 130 (grave breaches of the convention). In addition, the following articles of Protocol I are relevant: Arts. 43–45 (combatants prisoner-of-war status) and Article 75 (fundamental guarantees).[98]Additionally, detainees are also protected by Article 3 (Common Article 3), which is common to all four conventions and reflects customary international law. This fact was even admitted by the Bush administration in a document declassified three years after the date of issue. In a letter from J. Yoo to W. Taft IV dated March 28, 2002, reference is made to an earlier memorandum prepared by Taft where it is admitted "that all combatants are entitled, as a minimum to the guarantees of article 3" and "that it is widely recognized internationally that Common Article 3 reflects minimum customary international law standards for both internal and international armed conflicts."[99] Under the Geneva Conventions, any person not a prisoner of war has rights under the Geneva civilian convention, and there is no gap in the reach of at least some form of protection and rights of persons.[100] In the ongoing battle to obtain recognition of the so-called Geneva rights for the Guantánamo detainees, Judge Reggie Walton on March 3, 2009 called for new briefings on whether the Geneva Conventions apply to Guantánamo, and whether violation of those rights can be challenged in federal habeas cases.[101] Walton also requested briefings on whether the detainees were entitled to "a certain minimum standard of care" even if the Geneva rights do not apply, and whether a judge has any authority to decide

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[98] ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, (AM. SOC. OF INT'L LAW TASK FORCE ON TERRORISM Dec. 2002), *available at* http://www.asil.org/taskforce/goldman.pdf. *See* S. Vladeck, *Policy Comment: A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants"*, 112 YALE L.J. (2003); JENNIFER K. ELSEA, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS, at CRS-6 (Feb. 24, 2005), *available at* http://www.fas.org/sgp/crs/misc/RL31724.pdf.

[99] Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 816–17 n.19 (2005) (citation omitted).

[100] Hamdan v. Rumsfeld, 334 F. Supp.2d. 152, 161–62 (D.D.C. 2004); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 850–51 (2005); Johannes van Aggelen, *A Response to John C. Yoo, "The Status of Soldiers and Terrorists Under the Geneva Convention*" 4 CHINESE J. INT'L L. 167, 176–77 (2005).

[101] Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/a-new-test-on-geneva-rights/ (Mar. 19, 2009, 20:53).

a habeas challenge to conditions of confinement.[102] On March 19, 2009 the detainees' lawyers argued that the Conventions apply to Guantánamo, that U.S. courts may enforce those rights, and that the detainees should either be transferred to another country or sent to their home countries if the U.S. military is unwilling to obey the Conventions.[103] The document also argued that detainees are prisoners of war because even though the military designed them as "enemy combatants," that designation is insufficient to satisfy the Geneva Convention on POW rights.[104] The test and history of the habeas statute and the Supremacy Clause in addition to several tests that courts have developed for determining whether a treaty can be enforced, all show that rights under the Third Geneva Convention can be enforced in habeas cases.[105]

Lawyers for the U.S. government have constantly argued that the establishment of military commissions was a lawful implementation of Article 5 of the Third Geneva Convention, but this argument is incorrect. A legal clash between lawyers for the U.S. Department of State (DOS), the DOD, and the U.S. Department of Justice (DOJ) occurred in January 2002, where opportunistic arguments were put forth to deny protection under the Third Geneva Convention and the conflict with al-Qaeda and the Taliban. Denying protection would substantially reduce the threat of domestic criminal prosecution under the War Crimes Act.[106] The War Crimes Act prohibits the commission of war crimes by or against a U.S. citizen and also governs U.S. officials.[107] War crimes include any grave breaches of the Geneva Convention or any violation of Common Article 3.[108] Moreover, the Geneva Conventions are self-executing as the War Crimes Act explicitly incorporates the Geneva Conventions in U.S. domestic law.[109]

B. Recent Supreme Court Decisions on the Law of War

In order to better understand the implications for victims of the juggling of the U.S. administration after Supreme Court review, three landmark

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102 *Id.*

103 *See* Reply Brief of Petitioners, El Falesteny, et al. v. Obama, No. 05-02386 (D.C. Cir. Mar. 19, 2009). This is the lead case in the more than thirty six consolidated cases on this issue in the District Court for the District of Columbia.

104 *Id.*

105 *See id.*

106 *See* 18 U.S.C. § 2441 (2006).

107 *Id.*

108 *Id.*

109 *Id. See also* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 782 (1988); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 136–37 (1999).

judgments rendered in 2004, 2006, and 2008 will be discussed which have fundamentally shaken the legal parameters and twice forced Congress to adapt itself to a new situation, although it did not substantially change the fundamental violations of the law of war.

1. The *Hamdi* case

In *Hamdi v. Rumsfeld*, Yaser Hamdi, a U.S. citizen born in Louisiana from Saudi parents, was captured in Afghanistan in April 2002 by the Northern Alliance, a coalition of military groups opposed to the Taliban government, and was handed over to U.S. military forces and transported to Guantánamo Bay, Cuba.[110] When the government realized that Hamdi was born in the U.S., it transferred him to a naval station in Norfolk, Virginia.[111] He was classified by the government as an "enemy combatant"—a term absent in international law and invented by the Bush Administration[112]—and held in incommunicado detention.[113] The district court ruled that the government had insufficient proof to support his continued detention.[114] The U.S. Court of Appeals for the Fourth Circuit ruled that although it had jurisdiction to consider Hamdi's application, he had been caught in an active combat zone and, therefore, no further factual enquiry or hearing was considered necessary or proper.[115]

Hamdi subsequently appealed to the U.S. Supreme Court.[116] The two issues at stake were whether the government had any lawful power to detain U.S. citizens in circumstances such as Hamdi's and, if the government did have such a power, what rights the person so detained had to contest the lawfulness of the exercise of that power.[117] Four justices held that the government had been granted authority by Congress to detain citizens, but constitutional Due Process guarantees required that citizens so detained be given a meaningful opportunity to contest the factual basis of their detention before a neutral decision-maker and the decision of the Court of Ap-

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110 Hamdi v. Rumsfeld, 243 F. Supp.2d 527, 529 (E.D. Va. 2002).

111 *Id.*

112 *See* Gabor Rona, *Enemy Combatants in the "War on Terror?" A Case Study of How Mypoic Lawyering Makes Bad Law*, 30 SECURITY L. REP. 1, 1–8 (2008), *available at* http://www.abanet.org/natsecurity/nslr/2007/API_ABA_NSLR_Newsletter_69016.pdf; David B. Rivkin, Jr. & Lee A. Casey, *Combatant Status Under the Laws of War*, 30 SECURITY L. REP. 1, 1–8 (2008) (discussing his difference of opinion with Rona).

113 *Hamdi*, 243 F. Supp.2d. at 530.

114 *Id.* at 535–36.

115 Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002).

116 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

117 *Id.* at 515–17.

peals was set aside.[118] Two other justices held that Hamdi's detention had not been authorized by Congress and that Hamdi had to be given a meaningful opportunity to offer evidence that he was not an enemy combatant.[119] Justice Scalia dissented that the failure of the government to charge Hamdi with treason or some other criminal offence meant that he had to be released.[120] Justice Clarence Thomas held that the government had complied with the Due Process rights under the Constitution and that the Executive Branch was entitled to detain Hamdi irrespective of congressional authorization.[121]

The overall result of this somewhat complex array of opinions was that Hamdi's constitutional Due Process rights were violated because had not been given the opportunity to effectively challenge the legality of his detention. If one considers in detail the findings of the Supreme Court, one nevertheless comes to the conclusion that the court failed to define the term "enemy combatant."[122] After the DOD became clearly embarrassed with the U.S.' alleged torture practices in 2005, Senator John McCain introduced an amendment to the Defence Appropriations Bill for the 2006 fiscal year.[123] In early November 2005, two other senators, Lindsey Graham and Jon Kyl, proposed an amendment to review detention of enemy combatants, which led to an outcry as it provided that no court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus filed on behalf of an alien detained as an enemy combatant by the U.S. government or any other action challenging any aspect of the detention of an alien who was detained by the Secretary of Defense as an enemy combatant.[124] The amendment nevertheless passed with forty-nine to forty-two votes as it would strengthen Senate oversight over Guantánamo operations.[125]

The subsequent compromise linked legislation proposed by Senator Graham, which would deny detainees broad access to federal courts, with a new amendment that would grant detainees the right to appeal the verdict of a military tribunal to a federal appeals court.[126] It would imply that the constitutional right of habeas corpus be abolished, but appeals to the Circuit

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118 *Id.* at 508.

119 *Id.*

120 *Id.* at 571.

121 *Id.* at 594.

122 *See* Peter Jan Honigsbeg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L & FOREIGN AFF. 1, 54–56 (2007) (providing an excellent appraisal of the term "enemy combatant").

123 *See* Ariel Meyerstein, Note, *The Law of Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 336 (2007).

124 151 CONG. REC. S12,667 (daily ed. Nov. 10, 2005).

125 *Id.* (statement of Sen. Vitter).

126 151 CONG. REC. S12,754 (daily ed. Nov. 14, 2005).

Court for the District of Columbia would be possible to ascertain: (1) whether the status determination by the Combatant Status Review Tribunal (CSTR) applied the correct standards and was consistent with the procedures specified by the Secretary of Defense, including the requirement that the tribunal's conclusion be supported by a preponderance of evidence and allowing a rebuttable presumption in favor of the U.S. government's evidence; and (2) whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and the laws of the U.S.

Former president Bush signed the Detainee Treatment Act (DTA) into law on December 30, 2005.[127] The bone of contention became section 1005(e), which amended 28 U.S.C § 2241 by providing that "no court, justice, or judge shall have jurisdiction to hear or consider [ ] an application for a writ of habeas corpus filed by or on behalf of alien detained by the Department of Defense at Guantánamo Bay, Cuba" and that the D.C. circuit had exclusive jurisdiction to review CSTR decisions.[128]

2. The *Hamdan* case

In *Hamdan v. Rumsfeld*, Salim Hamdan, Bin Laden's alleged bodyguard and personal driver, was seized in Afghanistan in November 2001, charged with conspiring with Bin Laden and deemed by the President as eligible for trial by a military commission.[129] The Supreme Court considered three fundamental questions in *Hamdan*: (1) whether the U.S. government is bound by the Geneva Conventions when dealing with "enemy combatants"; (2) whether the Executive Branch's establishment of new judicial processes to try Guantánamo detainees was consistent with the Uniform Code of Military Justice and the AUMF; and (3) whether the conspiracy at issue could be punished as a war crime.[130] By a five to three majority decision, Supreme Court ruled in favor of Hamdan.[131] The plurality ruling, written by Justice John Stevens, contained the following conclusions: (1) the

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[127] *See* Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (2005). *See also* MICHAEL J. GARCIA, CONG. RES. SERV., CRS REPORT FOR CONGRESS: INTERROGATION OF DETAINEES: REQUIREMENTS OF THE DETAINEE TREATMENT ACT 1, n.1 (Jan. 23, 2009), *available at* http://assets.opencrs.com/rpts/RL33655_20090123.pdf.

[128] Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739 (2005).

[129] Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006).

[130] *Id.* at 598–600.

[131] *Id.* at 636. For an excellent, contextual analysis that takes into account law of war issues as well as human rights issues, *see generally* Amnesty Int'l, *United States of America: Justice at Last or More of the Same? Detentions and Trials After Hamdan v. Rumsfeld*, AI Index: AMR 51/146/2006, Sept. 18, 2006, *available at* http://www.amnesty.org/en/library/asset/AMR51/146/2006/en/150e86d3-d3f3-11dd-8743-d305bea2b2c7/amr511462006en.pdf.

Geneva Conventions protect "enemy combatants";[132] (2) President Bush did not have authority under the AUMF to create military tribunals;[133] (3) the establishment of the military commissions violated UMCJ Article 36(b) as well as Common Article 3 of the Geneva Conventions;[134] (4) the alleged conspiracy did not qualify as a war crime;[135] and (5) procedures devised for the military commissions differed from those for courts-martial, in that the former could hear evidence that is inadmissible in the latter and can also exclude defendants from the proceedings.[136]

On August 6, 2008, following a two-week military commission trial, a military judge convicted Hamdan on five of eight counts of providing material support to terrorism but acquitted him of the more serious charge of conspiracy.[137] His trial was the first to be completed under the system of military commissions authorized under the MCA of 2006.[138] Hamdan obtained a light five-month sentence due to his lengthy previous incarceration and he was released in late 2008.[139]

Unfortunately, the Supreme Court erred again in the *Hamdan* case when it accepted the administration's term "enemy combatant" without attempting to come up with a legal definition.[140] The Supreme Court's error was compounded when Congress passed the Military Commissions Act (MCA) in October 2006, statutorily defining the term "enemy combatant" for the first time.[141]

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[132] *Hamdan*, 548 U.S. at 619.

[133] *Id.* at 593–95.

[134] *Id.* at 616, 625.

[135] *Id.* at 600.

[136] Jay Dealy, *Subordination of Powers: Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006)*, 30 HARV. J.L. & PUB. POL'Y 1071, 1073 (2007). *See also* Helen Keller & Magdalena Forowicz, *A New Era for the Supreme Court After Hamdan v. Rumsfeld*, 67 HEIDELBERG J. INT'L L. 1 (2007); F. de. Londras, *U.S. Supreme Court, 29 June 2006, Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006)*, 54 NETH. INT'L L. REV. 539, 539–50 (2007).

[137] John Crook, *Contemporary Practice of the United States Relating to International Law: International Human Rights and Humanitarian Law: Hamdan Convicted of Lesser Offense in First Full Military Commission Trial, Sentenced to Time Served Plus Five Months*, 102 AM. J. INT'L L. 860, 873–74 (2008) (citing William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1; Jerry Markon, *Hamdan Guilty of Terror Support*, WASH. POST, Aug. 7, 2008, at A1).

[138] Crook, *supra* note 137.

[139] Josh White and William Branigin, *Hamdan To Be Sent To Yemen; Bin Laden Driver Spent 7 Years At Guantanamo*, WASH. POST, Nov. 25, 2008, at A1.

[140] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 606 (2006) ("The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U.S. territory in time of war . . . .").

[141] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, § 948a, 120 Stat. 2600, 2601.

As summarized in a report by Amnesty International, the main features of the MCA are the following: [142]

- It authorizes the President to establish military commissions for the prosecution of certain offenses committed by alien unlawful combatants.[143]
- It prescribes the procedure and substantive law to be applied by the commissions.[144]
- It permits civilian capture far from any battlefield to be tried by military commissions rather than civilian courts, contradicting international standards and case law.[145]
- It entitles military commissions to hand out death sentences in contravention of international standards, which only permit capital punishment after trials affording "all possible safeguards to ensure a fair trial."[146]
- It prohibits the U.S. courts from using international law to inform their decisions relating to the War Crimes Act.[147]
- It narrows the scope of the U.S. War Crimes Act by not expressly criminalizing acts that constitute "outrageous acts upon personal dignity, particularly humiliating and degrading treatment" as prohibited under Article 3 common to the four Geneva Conventions.[148]
- It retroactively eliminates the right of habeas corpus for alien enemy combatants detained by the U.S.—either lawfully or unlawfully.[149]
- It extends the prohibition under U.S. law on cruel, inhumane, or degrading treatment or punishment to encompass all those in the custody or under the physical control the U.S. regardless of their nationality or physical location.[150]
- It limits the ability of individuals to invoke the Geneva Conventions as a source of rights in certain proceedings.[151]

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142 *See* Amnesty Int'l, *United States of America: Military Commissions Act of 2006—Turning Bad Policy Into Bad Law*, AI Index AMR 51/154/2006, Sept. 29, 2006 [hereinafter Amnesty Int'l, Bad Policy], *available at* http://www.amnesty.org/en/library/info/AMR51/154/2006. *See also* George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT'L L. 427, 427–67 (2007).

143 Amnesty Int'l, Bad Policy, *supra* note 142, at 8.

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.* at 9.

148 *Id.* at 8.

149 *Id.* at 7–8.

150 *See generally id.*

151 *Id.* at 8.

- It purports to authoritatively interpret the Geneva Conventions and to delegate further authority to the U.S. Executive Branch.[152]

A subsequent amendment proposed by Senator Christopher Dodd, and introduced under the title "Effective Terrorist Prosecution Act," provided that "the term 'unlawful enemy combatant' means an individual who directly participates in hostilities as part of an armed conflict against the United States and who is not a lawful enemy combatant. The term was used solely to designate individuals triable by military commissions under this chapter." [153] In comparison to the MCA definition, the key here is the requirement of direct participation and the dropping of coverage for those engaged in conflict not against the U.S., but against the U.S. allies.

During 2008, criticism of the military commission procedures at Guantánamo increased enormously as one of the Commissions' military and defense lawyers called the command structure corrupt.[154] Several legal scholars, including a former academic consultant to the Commission's chief prosecutor, Professor Gregory McNeal, maintained that the structure and rules of the commissions, as crafted by the DOD, "allowed for political manipulation of nearly all aspects of the trials."[155]

In proceedings before lower courts and rulings by judges at military commission sessions, the exchange with the administration on the definition of the term "unlawful combatant" continued. In a ruling on a defense motion to dismiss for lack of subject matter jurisdiction by the government, Military Judge Stephen Henley stated that:

> The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war. . . . In other words, that the accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the propriety of the charges in this

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[152] *Id.* at 9.

[153] S. 4060, 109th Cong. § 2 (2006), *available at* http://www.fas.org/irp/congress/2006_cr/dodd111606.html.

[154] *See, e.g.*, Andy Worthington, *New Evidence of Systemic Bias in Guantánamo Trials* (Oct. 10, 2008), http://www.andyworthington.co.uk/2008/10/10/new-evidence-of-systemic-bias-in-guantanamo-trials/ (last visited Sept. 26, 2009).

[155] *Id.* On October 8, 2009, the House of Representatives approved amendments to the MCA. It seeks to introduce limitations on the use of hearsay and coerced testimony and greater access to evidence. However, the amendments fail to address many of the flaws in the system as indicated by human rights advocates. In early November 2009, President Obama signed the 2010 National Defense Authorization Act, which included a package of changes in the rules governing military commission proceedings. *See* Joanne Mariner, *A First Look at the Military Commissions Act of 2009*, FINDLAW, Nov. 4, 2009, http://writ.lp.findlaw.com/mariner/20091104.html. Called the Military Commissions Act of 2009, the new law replaces and improves upon the Bush Military Commissions Act 2006. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

> case must be based on the nature of the act, not simply on the status of the accused.[156]

3. Boumediene and follow-up

The latest battle, where the Supreme Court once more ruled in favor of the victims of the Bush administration, concerned a writ of habeas corpus in a civilian court in the U.S. on behalf of Lakdar Boumediene, held in military detention by the U.S. at Guantánamo Bay.[157] The case challenged the legality of Boumediene's detention as well as the constitutionality of the MCA.[158] On June 12, 2008, Justice Kennedy, writing for the majority, held that prisoners had the right to habeas corpus under the U.S. Constitution and that the MCA was an unconstitutional suspension of that right.[159] The Court in particular considered Section 7 of the MCA unconstitutional, which in fact has the same effect as Section 1005(e) of the Detainee Treatment Act (DTA).[160] The Court held that, "Congress intended the DTA and the MCA to circumscribe habeas review . . . limiting the Court of Appeals' jurisdiction to assessing whether the CSTR complied with the 'standards and procedures specified by the Secretary of Defense.'"[161] Specifically, the Court explained that:

> At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore.[162]

The Court also concluded that the detainees are not required to exhaust review procedures in the Court of Appeals before pursuing habeas corpus

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156 Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction, United States v. Jawad (Military Comm'n, Guantánamo Bay, Cuba) (Sept. 24, 2008), *available at* http://www.defenselink.mil/news/RULING%20D-007%20(subject%20matter%20 jurisdiction)%20(2).pdf.

157 Boumediene v. Bush, 128 S.Ct. 2229, 2236–38 (2008).

158 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 1005(e), 120 Stat. 2600.

159 *Boumediene*, 128 S.Ct. at 2234.

160 *Id.*

161 *Id.* at 2237.

162 *Id.* at 2238.

actions in the district courts as the CSTR was considered inadequate.[163]

This third judgment against the government in almost five years hopefully has a positive bearing upon future litigation by so-called enemy combatants and other prisoners, whether taken on or off the battlefield. It is my sincere hope that Congress will no longer interfere in this matter.

Subsequently, this case was sent back to the D.C. circuit. In October 2008, the petitioners presented a memorandum regarding the definition of enemy combatant.[164] They argued that an "enemy combatant" is either a member of a state military that is engaged in hostilities against the U.S. or a civilian directly participating in hostilities against the U.S. as part of an organized armed force.[165] Only such people are on the "battlefield" and may be legitimately "removed" from it by use of military force, and the government had failed to show that petitioners fell into either category.[166] The government immediately reacted by presenting the respondent's memorandum on the definition.[167] The government requested the D.C. Circuit Court to reject the petitioners' effort to place crippling jurisdictional limits on the U.S.' authority to detain militarily members or supporters of al-Qaida's terrorist network, the Taliban, or associated forces.[168] The government argued that U.S. authority to detain individuals classified as "enemy combatants" was based on the AUMF enacted by Congress in the immediate aftermath of the 9/11 attacks, the traditional law of war principles, and the President's authority under the U.S. Constitution as Commander-in-Chief.[169] The judge assigned to the case, Judge Richard Leon, subsequently issued a memorandum order in which he stated that the issue before the court was what definition of "enemy combatant" should be employed in the upcoming hearings.[170] He referred to the definition used in the MCA where the term "unlawful enemy combatant" specifically provides that it includes persons

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163 *Id.*; *see also* Robert M. Chesney, *Judicial Review, Combatant Status Determinations, and the Possible Consequences of Boumediene*, 48 HARV. INT'L L.J. 62, 62–68 (2007) (providing a succinct appraisal of consequences of possible outcomes of the case and the role of the CSRT).

164 Petitioners' Memorandum Regarding the Definition of "Enemy Combatant", Boumediene v. Bush, Civil Action No. 04-cv-1166 (RJL) (D.C. Cir. Oct. 20, 2008), *available at* http://www.wilmerhale.com/files/upload/boumediene_enemycombatantbrief.pdf.

165 *Id.* at 2.

166 *Id.* at 21.

167 Respondents' Memorandum Addressing the Definition of Enemy Combatant, Boumediene v. Bush, Civil Action No. 04-cv-1166 (RJL) (D.C. Cir. Oct. 22, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/10/govt-memo-on-encom-10-22-08.pdf.

168 *Id.* at 2.

169 *Id.* at 2–3.

170 Boumediene v. Bush, 583 F.Supp.2d 133, 134 (D.D.C. 2008).

who had been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSTR) or another competent tribunal established under the authority of the President or the Secretary of Defense.[171] Judge Leon held that:

> An "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[172]

As has so often been the case, petitioners have to overcome another hurdle, namely the government's defense that the court lacks subject matter jurisdiction. In the recent case of *Bismullah v. Gates*, the D.C. Court of Appeals rejected a request by petitioners to review the determination by the CSTR that they were "enemy combatants."[173] The court rejected petitioners' request for review "because the provision of the [Detainee Treatment Act of 2005] that grants us subject matter jurisdiction cannot be severed from the provision eliminating habeas corpus jurisdiction, which the Supreme Court held unconstitutional in [*Boumediene v.Bush*]."[174] On January 22, 2009, Judge John Bates invited the new administration to revise the government's position on the substantive scope of the government's military detention authority.[175] The Bush administration's position, adopted by Judge Leon in the habeas petitions before him, was that the CSTR definition of "enemy combatant" sufficed. The Obama administration responded to Bates' invitation and requested the court to adjudicate the scope of the government's detention authority based on the specific facts of four cases at the merits stage, rather than attempting to abstractly define the scope of detention authority at the preliminary stage.[176] The new administration also argued that "[r]eserving legal rulings on the scope of the government's detention authority . . . until presented with concrete facts in particular cases[ ] is also consistent with the 'prudent and incremental' approach these cases should receive."[177]

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171 *Id.* (citing Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600).

172 *Id.* at 135.

173 551 F.3d 1068, 1069 (D.C. Cir. 2009).

174 *Id.* at 1070.

175 Hamlily v. Obama, Civil Action No. 05-0763 (JDB), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2378-175.

176 Government's Response to the Court's Order of January 22, 2009 Regarding the Definition of Enemy Combatant, Hamlily v. Obama, Civil Action No. 05-0763 (JDB) at 5 (Feb. 9, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/02/obama-admin-reply-re-enemy-2-9-09.pdf.

177 *Id.* at 4.

On March 13, 2009, the new administration redefined its position with regard to detainee litigation in one hundred and twenty one consolidated cases.[178] It stated that habeas petitions should be adjudicated under the following definitional framework:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[179]

The memorandum was accompanied by a declaration of the new Attorney General reiterating the content of the two relevant Executive Orders.[180]

A change with respect to the position taken by the Bush Administration is that the word "substantially" proceeds the word "supported."[181] However, the government admits that the word "substantial" is not crystal clear and concludes that "the contours of the 'substantial support' and 'associated forces' bases of detention will need to be further developed in their application to concrete facts in individual cases."[182]

There are more differences with respect to the previous administration. The President's authority to hold the detainees no longer flows from some inherent constitutional authority, but from the statute passed by Congress (the AUMF).[183] In addition, the meaning and limits of the AUMF are necessarily informed by the principles of the laws of war.[184] That means international law matters in interpreting the scope of domestic law.[185] How-

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[178] Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, Civil Action No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), *available at* http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf [hereinafter Detention Authority].

[179] *Id.* at 1–2.

[180] Declaration of Attorney General Eric H. Holder, Jr., *In re* Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (TFH), ¶¶ 3–8 (Mar. 13, 2009), *available at* http://www.usdoj.gov/opa/documents/ag-declaration.pdf.

[181] Detention Authority, *supra* note 178.

[182] *Id.* at 3.

[183] Posting of Deborah Pearlstein to Opinio Juris, http://opiniojuris.org/2009/03/13/no-more-%E2%80%9Cenemy-combatants%E2%80%9D/ (Mar. 13, 2009 16:48) (last visited Sept. 27, 2009) (discussing Detention Authority, *supra* note 178, at 6–7).

[184] Pearlstein, *supra* note 183 (discussing Detention Authority, *supra* note 178, at 6–7).

[185] Pearlstein, *supra* note 183.

ever, critics correctly point out that although the word "enemy combatants" is not used in the latest governmental submission, it seems that the current position in essence is a modified continuation of the previous administration and, therefore, it has been dubbed "old wine in new bottles."[186] This position was also taken in a joint memorandum by petitioners in reply to the respondents' memorandum of March 13, 2009.[187] This memorandum requested the Court to decline to rule that respondents' claim of detention powers was authorized by the AUMF.[188]

4. The *Al-Marri* case

A brief discussion of the Al-Marri case is warranted in view of the fact that President Obama ordered a separate review of Ali Al-Marri's detention upon taking office.[189] Obama requested this review because Al-Marri was held as the only enemy combatant by the DOD in U.S. detention facilities.[190] Since he was not held at Guantánamo Bay, Al-Marri was not covered by the review mandated in the Review and Disposition Order, "which mandate[ed] a review . . . of the status of all individuals that the Department of Defense is . . . detaining at the Guantánamo Bay Naval Base, in order to effect their prompt and appropriate disposition."[191]

Al-Marri, a citizen of Qatar and legal U.S. resident, was arrested in Illinois in 2001 as a material witness by the FBI.[192] Shortly before his criminal trial was to start in 2003, former President Bush, declared him an "enemy combatant."[193] President Obama's office of legal counsel reached the conclusion that the President could no longer detain Al-Marri militarily, and he was subsequently charged criminally. The Government's reply brief

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[186] *See, e.g., id. See also* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/us-defines-its-claim-to-detention-power/ (Mar. 13, 2009 15:04); Marko Milanovic, *The Obama Administration's Total Misinterpretation of IHL Regarding the Authority to Detain Suspected Terrorists*, EJIL: TALK!, Mar. 13, 2009, http://www.ejiltalk.org/the-obama-administrations-total-misinterpretation-of-ihl-regarding-the-authority-to-detain-suspected-terrorists/.

[187] Petitioners' Joint Memorandum in Reply to Respondents' Memorandum of March 13, 2009, Gherebi v. Obama, 609 F. Supp.2d 43, LEXIS 3469 (D.C.C. 2009).

[188] *Id.* at 24.

[189] Press Release, Memorandum for the Attorney General on Review of Detention of Ali Saleh Kahlah al-Marri (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/ReviewoftheDetentionofAliSalehKahlah/.

[190] *Id.*

[191] *Id.*

[192] *See* Al-Marri v. Hanft, 378 F. Supp. 2d 673, 674 (D.S.C. 2005); Brennan Center for Justice, Ali Saleh Kahlah al-Marri, http://www.brennancenter.org/content/resource/al_marri_v_pucciarelli/ (last visited October 1, 2009).

[193] United States v. Al-Marri, 274 F.Supp. 2d 1003, 1004 (C.D. Ill. 2003). *See also* Brennan Center for Justice, *supra* note 192.

was due on March 23, 2009 and oral arguments at the U.S. Supreme Court were rescheduled for April 27, 2009. On March 6, 2009, the Supreme Court, at the request of the Obama administration, dismissed the case as moot.[194] This unfortunate decision once more prevents the Supreme Court from pronouncing its views on the concept of what constitutes an "enemy combatant."

President Obama immediately issued three executive orders, which, at first glance, give the impression of a total change in policy. The first order, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities,"[195] contains the following important elements:

- "[W]ithin the United States and internationally, prompt and appropriate disposition of the individuals currently detained the United States . . . ."[196]
- "[C]losure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." The individuals detained at Guantánamo have the constitutional privilege of the writ of habeas corpus.[197]
- "It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted."[198]
- During the review period, "all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted."[199]

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[194] Press Release, Brennan Center for Justice, Al-Marri Detention Case Vacated (Mar. 6, 2009), *available at* http://www.brennancenter.org/content/resource/al_marri_detention_case_vacated/. A criminal charge under American law renders a civil habeas corpus action moot.

[195] Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009), *available at* http://www.fas.org/irp/offdocs/eo/eo-13492.pdf.

[196] *Id.*

[197] The case managers in the Guantánamo litigation process filed exhibits of detainees with pending habeas corpus petitions on January 21, 2009. *See* Respondents' Notice of Filing of Detainee Information Pursuant to the Court's January 14, 2009 Order, *In re* Guantanamo Bay Detainee Litigation (D.C.C. 2009), Misc. No. 08-0442 (TFH), *available at* http://www.pegc.us/archive/In_re_Gitmo_II/gov_resp_det_info_20090121.pdf.

[198] Exec. Order No. 13,492, *supra* note 195, at 4,898.

[199] *Id.* at 4,899. In a separate development, the Obama administration immediately requested on January 20, 2009 a one-hundred and twenty day suspension of legal proceedings against detainees at Guantánamo Bay, including the presumed master minds of the 9/11 attacks. The military judge subsequently granted the motion on January 21, 2009. *See* Human Rights Watch, US: Obama Calls for 120-Day Halt to Guantanamo Military Commissions, http://www.hrw.org/en/news/2009/01/21/us-obama-calls-120-day-halt-guantanamo-military-commissions?print (last visited Oct. 1, 2009).

Nevertheless, on March 10, 2009, in defiance of President Obama's order, military Judge Col. Stephen R. Henley accepted a legal pleading filed by the five master minds of the 9/11 attacks and ordered the immediate public release of the final document despite the fact that all other legal filings had been kept sealed for months by military commissions.[200]

The second order, entitled "Review of Detention Policy Options," created an inter-agency task force to:

> Conduct a comprehensive review [within 180 days] of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.[201]

The third executive order, entitled "Ensuring Lawful Interrogations," contained firm language and commitments.[202] Section 1 revoked Executive Order 13,440 of July 20, 2007: "All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued by the Central Intelligence Agency . . . from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order."[203]

It should be recalled that former president Bush had signed this order entitled "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency."[204] It is my firm opinion that this order suffered from the same deficiencies as previous military orders promulgated by President Bush in his function as Commander-in-Chief of the armed forces by the Constitution and the laws of the U.S. The Order also contravened the object and purpose of Common Article 3,[205] as section 3 of the Order stated, inter alia:

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[200] Press Release, American Civil Liberties Union, Guantánamo Judge Proceeds With Military Commissions in Defiance of Obama Order (Mar. 10, 2009), *available at* http://aclu.org/safefree/detention/38969prs20090310.html (last visited Oct. 1, 2009).

[201] Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 27, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1895.pdf

[202] Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 27, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf.

[203] *Id.*

[204] Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007), *available at* http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf.

[205] *Id.*

> I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency . . . The requirements . . . shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.[206]

Moreover, Bush determined unilaterally, without any judicial oversight, that:

> A program of detention and interrogation approved by the director of the [CIA] fully complies with the obligations of the United States under Common Article 3, provided that:
>
> (i) the conditions of confinement and interrogation practices of the program do not include:
>
> (A) torture . . . ;
>
> (B) any acts prohibited by section 2441(d) of title 18, United States Code . . . ;
>
> (D) other acts of cruel, inhumane, or degrading treatment . . . ; [and]
>
> (E) willful and outrageous acts of personal abuse.[207]

This executive order called for an immediate intensive correspondence between Oregon Senator Ron Wyden, Office of Legal Counsel, and the Department of Justice (DOJ). During this correspondence, the question of whether Common Article 3 requires that detainees be treated humanely in all circumstances led Senator Wyden to question whether or not the DOJ believed that the meaning of this Article can vary.[208] In particular, he questioned whether there are any possible instances in which the identity of a detainee, or the information that the detainee is assessed to possess, could help determine what kind of treatment could be considered humane in a particular case.[209]

Moreover, a shocking eighty-one page memorandum prepared by John Yoo, former Deputy Assistant Attorney General, dated March 14, 2003—but only declassified on March 31, 2008—and the release of an almost four-hundred page report by the U.S. Department of Justice, Office of the Inspector General containing a detailed review of the FBI's Involvement

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206 *Id.* § 3.

207 *Id.* § 3(b).

208 *See* Letter from Ron Wyden, U.S. Senator, to Steven Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, Dep't of Justice (Aug. 8, 2007) (asking for clarification on the meanings of the phrases "inhumane treatment" and "cruel, inhumane and degrading treatment."), *available at* http://graphics8.nytimes.com/packages/pdf/washington/20080427-INTEL/letter1.pdf.

209 *Id.*

in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan and Iraq, have not done much to alleviate the world's concern with the unilateral interpretation of the U.S.' obligations regarding the law of war and international human rights by the Bush administration.[210]

Section 3 of the President Obama's executive order stated that all interrogations techniques and interrogations-related treatment should be in conformity with the list of interrogations techniques contained in Army Field Manual 222.3.[211] It is probably for that reason that outside pressure on governmental departments increased over the last two months to release and declassify memoranda and opinions of the Bush presidency.[212] At the instruction of President Obama, a Pentagon report was compiled in February 2009 on the compatibility of Common Article 3 of the Geneva Conventions with the conditions of confinement at Guantánamo.[213] The report examined twenty-seven aspects of detention operations—including solitary confinement, forced-feeding of hunger strikers, the use of force by guards—and concluded that the Guantánamo operations were in compliance with the standards of Article 3.[214] However, what the report did not discuss was whether the operations at Guantánamo were in conformity with *all* applicable laws governing conditions of confinement, as the President had mentioned in section 6 of Executive Order 13,491.[215] It leaves open the larger question suggested in the President's order: what other laws apply to Guantánamo detainees? In my opinion, it would imply relevant customary international law, the International Covenant on Civil and Political Rights, and any federal rules with regard to custody.

IV. HUMAN RIGHTS AND THE WAR ON TERROR

While international humanitarian law is specifically designed to regulate the conduct of hostilities between state and non-state actors, inter-

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[210] Memorandum from John Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003) (on file with author) [hereinafter May 2008 Report]. The report was declassified only in May 2008.

[211] Exec. Order No. 13,491, *supra* note 202, § 3(b).

[212] *See* Posting of Dan Nguyen and Christopher Weaver to ProPublica, http://www.propublica.org/special/missing-memos (Apr. 16, 2009); Press Release, Dep't of Justice, Department of Justice Releases Nine Office of Legal Counsel Memoranda and Opinions (Mar. 2, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/March/09-ag-181.html; Michael Isikoff & Mark Hosenball, *Coming Soon: Declassified Bush Era Torture Memos*, NEWSWEEK, Mar. 30, 2009, *available at* http://www.newsweek.com/id/190362.

[213] The Office of the Sec'y of Defense and Joint Staff, *Review of Department Compliance with President's Executive Order on Detainee Conditions* (2009), http://www.dod.mil/pubs/foi/detainees/index.html.

[214] *Id.*

[215] *See* Exec. Order No. 13,491, *supra* note 202, § 6.

national human rights law imposes obligations on states to ensure the protection of human rights and civil liberties at all times. They complement each other and operate simultaneously in situations of armed conflict. The difference between the two categories of law is that international humanitarian law protects primarily persons associated with one party to the conflict who find themselves in the hands of the enemy, whereas the nationality of the individual or its affiliation to a party to the conflict is generally not relevant for the application of human rights law.

In addition, as Professor Jochen Frowein rightly pointed out, "[i]nternational humanitarian law takes precedence over human rights treaties as *lex specialis* in so far as it may constitute a special justification in armed conflict for interference with rights protected under human rights treaties."[216] It is a well-established rule that during conflict, the unlawful killing of a combatant does not violate the right to life, although the right to life is considered a non-derogable right.

The ICJ adopted a similar reasoning in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons where it declared: "It was suggested that the Covenant was directed at the protection of human rights in peacetime, but the questions relating to unlawful loss of life in hostilities were governed by law applicable in armed conflict."[217] The court observed:

> The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[218]

It is necessary at this stage to refer to some General Comments (GC) adopted by the Human Rights Committee. GC No. 29 on Article 4 contains one of the most important reflections by the Committee on issues which reach out to the very heart of individual protection of human rights.

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[216] Jochen Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 ISR. Y.B. HUM. RTS. 1, 16 (1998).

[217] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 239 (July 8), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf.

[218] *Id*. at 240. *See also* Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64 (1997); Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9), *avaliable at* http://www.icj-cij.org/docket/files/131/1671.pdf. The following articles of the International Covenant on Civil and Political Rights are relevant for our analysis: Articles 4, 6, 9, 10 and 14.

As Professor Fitzpatrick correctly pointed out, this comment "reflects many years of derogation jurisprudence by human rights treaty bodies."[219]

In paragraph 15, the Committee states, "[i]t is inherent in the protection of rights explicitly recognized as non-derogable in Article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees."[220] In addition, in paragraph 16, the Committee held that:

> As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.[221]

With respect to the length of detention pending trial, in GC No. 8 on Article 9 the Committee stated, "[p]re-trial detention should be an exception and as short as possible."[222] It considered that the trial should take place within a reasonable time or else the person should be released.[223] In cases of so-called preventive detention, used for reasons of public security, these detentions may not be arbitrary but must be controlled by the same provisions and based on grounds and procedures established by law.[224] Additionally, the reasons for the detention should be given and control to be exercised by a court established by law.[225]

Regarding the requirement of humane treatment of prisoners, the Committee stated in GC No. 21, "[u]ltimate responsibility for the observance of this principle rests with the state as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for

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[219] Fitzpatrick, *supra* note 93, at 351; U.N. Human Rights Committee [UNHCR], *General Comment No. 29: Article 4: Derogations During a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), *available at* http://www.unhcr.org/refworld/docid/453883fd1f.html. *See also* The Secretary-General, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 234, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f?Opendocument [hereinafter *Compilation of Human Rights Treaty Bodies General Comments*].

[220] UNHCR, *General Comment No. 29*, *supra* note 219, ¶ 15.

[221] *Id.* ¶ 16.

[222] *Compilation of Human Rights Treaty Bodies General Comments*, *supra* note 219, at 234.

[223] *Id.*

[224] *Id.*

[225] *Id.*

example, hospitals, detention camps or correctional institutions."[226] GC No.32 on Art. 14, which replaced GC No. 13 in July 2007, is considered a yardstick for procedural guarantees within the administration of justice. It states, "Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law."[227] Article 14 provides that:

> Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless nationality or statelessness, or whatever their status . . . . A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of Article 14, paragraph 1.[228]

Furthermore, the notion of a tribunal designated as a body, regardless of its denomination, established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.[229] The requirement of competence, independence, and impartiality of a tribunal in the sense of Article 14, therefore, is an absolute right that is not subject to any exception.[230] Additionally, "[t]he provisions of article 14 apply to all courts and tribunals within the scope of that Article whether ordinary or specialized."[231]

The Committee also noted that the trial of civilians by military special courts may raise serious problems as far as impartial and independent administration of justice is concerned.[232] The Committee expressed its concern about the establishment of special tribunals where irregularities could take place such as exclusion of the public or even the accused or representatives from the proceedings, restrictions of the right to a lawyer of their own choice, severe restrictions or denial of the right to communicate with lawyers, particularly when held incommunicado, and severe restrictions on the

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226 *Id.* at 180, ¶ 1.

227 *Id*. at 249, ¶ 8.

228 *Id*. at 249, ¶ 9.

229 *Id*. at 249–50.

230 *Id.* at 122, ¶ 1.

231 *Id.* at 123, ¶ 4

232 *Id*. at 249.

right to cross-examine witnesses.[233] The notion of fair trial includes the guarantee of a fair and public hearing, which should be expeditious.[234]

It is imperative at this stage to analyze the international obligations of the U.S. under the International Covenant on Civil and Political Rights (ICCPR).[235] After a protracted period of time, the U.S. finally ratified the ICCPR on June 8, 1992 and it entered into force on September 8, 1992.[236] The government immediately attached a number of reservations, understandings and declarations to its ratification.[237]

U.S. instruments of ratification for certain human rights treaties have an understanding that contains a federal clause. These clauses do not make human rights treaties inapplicable as federal law, but rather they allow for state participation, while assuring concurrent duties through federal and state legal processes and creating an overall responsibility for treaty-implementation in the federal government. In addition, states should ensure that as a minimum threshold states cannot deny human rights protection based on treaties.[238]

Arguments in favor of this legal position that a federal clause does not make human rights treaties inapplicable can be found in the Restatement (Third) of U.S. Foreign Relations Law, which reads:

> [C]ustomary law that has developed since the United States became a state is incorporated into United States law as of the time it matures into international law . . . . The Constitution declares treaties of the United States . . . to be "the supreme Law of the Land" (Article VI), and provides that cases arising under treaties are within the Judicial Power of the United States . . . . [Q]uestions of international law could be determined differently by the courts of various States and by the federal courts . . . . From the beginning, the interpretation or application of United States treaties by

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233 *Id.* ¶¶ 6–12.

234 *Id.* at 248.

235 G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316 (1966).

236 *See* INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 261 (Richard B. Lillich & Hurst Hannum eds., 1995); 138 CONG. REC. S4781-01 (daily ed. April 2, 1992).

237 *See* INTERNATIONAL HUMAN RIGHTS, *supra* note 236; U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 102nd Cong., 2d Sess., Mar. 24, 1992, *reprinted in* 31 I.L.M. 645, 645–49 (1992) [hereinafter ICCPR REPORT].

238 *See* Joan Fitzpatrick, *The Preemptive and Interpretative Force of International Human Rights Law in State Courts*, 90 AM. SOC'Y INT'L L. PROC. 262, 264 (1996). *See also* Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) (providing a convincing analysis of the supposition that customary international law and human rights treaties form part of the U.S.' legal system).

> State courts was subject to review by the Supreme Court of the United States. [239]

The *Paquete Habana* case has been interpreted to allow customary international law to prevail over executive acts.[240] A better argument in favor of the applicability of international customary law in the American legal system is the 1980 ruling in the case *Filartiga v.Pena-Irala*, where the 2nd Circuit cited the ICCPR—although the U.S. was not yet a party—in favor of the argument that torture was in violation of the Law of Nations within the meaning of 28 U.S.C 1350.[241]

Professor Jordan Paust stated that the instrument of ratification for certain human rights treaties contain a declaration that many of the articles are "non-self-executing"; such declarations function as reservations that are fundamentally inconsistent with the object and purpose of the treaties and, under international law, and are thus void *ab initio*.[242] This position is definitely influenced by GC No. 24, adopted by the Human Rights Committee in 1994.[243] In a profound interpretation of reservations, the Committee stated:

> The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty.[244]

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239 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: STATUS OF INTERNATIONAL LAW AND AGREEMENTS AS UNITED STATES LAW 41 (1987).

240 The Paquete Habana, 175 U.S. 677, 700 (1900). This, however, seems to be a "hineininterpretierung" from the ruling of Justice Gray. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 146, 149, 163–64 (1996).

241 Filartiga v. Pena-Irala, 630 F.2d 876, 883–84 (2d Cir. 1980). I beg to disagree with Professor Paust, who is of the opinion that the *Sabbatino* case is also a strong argument in favor of the validity of customary international law. *See* Paust, *supra* note 238, at 318 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)). *See also* J.P. Fonteyne, *Sabbatino Case*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 275 (2000) (confirming the U.S. Supreme Court's continued adherence to traditional policy of judicial restraint and deference to the executive branch of government in matters concerning foreign relations).

242 Paust, *supra* note 238, at 322–23. *See also* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); John Quigly, *Human Rights Defences in US Courts*, 20 HUM. RTS. Q. 555, 558 (1998).

243 *Compilation of Human Rights Treaty Bodies General Comments*, *supra* note 219, at 210–16.

244 *Id.*

In a very detailed historical analysis of the notion of non-self-execution within the American legal and political setting, Professor David Sloss noted that subsequent administrations had different views on the issue without knowing the real meaning of the term non-self-execution.[245] Even learned scholars had difficulty coming to grips with the term. For example, the late Professor Myres S. McDougal stated in 1951, "[t]his word 'self-executing' is essentially meaningless, and the quicker we drop it from our vocabulary the better for clarity and understanding."[246]

The Supreme Court's recent decision in *Medellin v. Texas* attempted to answer some of the questions surrounding the doctrine of self-execution.[247] The Court concluded, inter alia, that the intent of the U.S. treaty makers should be determinative of self-execution.[248] The Court, however, implicitly rejected the argument in the Restatement (Third) of U.S. Foreign Relations Law that there should be a strong presumption in favor of treaty self-execution.[249] Professor Curtis Bradley concludes that the judgment should best be read as requiring self-execution to be resolved on a treaty-by-treaty basis.[250] He also concludes that it is not the extent to which treaties will be determined to be non-self-executing, but the consequences of that determination.[251] When the former first Bush Administration sent the text of the ICCPR to the Senate, the bottom line became clear. It was explained that "the intent is to clarify that the [ICCPR] will not create a private course of action in U.S. courts."[252]

Indeed, when litigants raise well-founded human rights claims, U.S. courts are presented with a dilemma. As Professor David Sloss cogently pointed out:

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[245] *See generally* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

[246] *Legal Effect of Treaties in Municipal Law: Discussion*, 45 AM. SOC'Y INT'L L. PROC. 100, 101–02 (1951).

[247] *See* Medellin v. Texas, 128 S. Ct. 1346 (2008).

[248] *Id.* at 1392.

[249] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: STATUS OF INTERNATIONAL LAW AND AGREEMENTS AS UNITED STATES LAW 46–47 (1987). *See also Medellin*, 128 S. Ct. at 1357.

[250] Curtis A. Bradley, *Agora: Medellin: Intent, Presumptions and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 551 (2008).

[251] *Id.* at 541; *Medellin*, 128 S. Ct. at 1362–69.

[252] ICCPR REPORT, *supra* note 237, at 657. *See also* Malvina Halberstam, *The United States Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 64, 67–69 (1997) (stating that declarations of non-self-execution are inconsistent with the language, history, and purpose of Article VI of the U.S. Constitution and constitutionally suspect); Ryan Goodman, *Human Rights Treaties? Invalid Reservations and State Consent*, 96 AM. J. INT.'L L. 531, 545-46 (2002).

> If courts refuse to reach the merits of such claims, they risks contravening the manifest intent of the treaty makers to comply with treaty obligations, in particular, the obligation to ensure that persons who raise such claims receive an individual hearing before an impartial tribunal. On the other hand, if courts do reach the merits of such claims, they risk domestication of human rights treaties, which would be contrary to the assurances that the Executive Branch provided the Senate.[253]

This dilemma, which might willy-nilly have been artificially created, could be overcome if one goes back to the statement Chief Justice Marshall two centuries ago, namely "it is emphatically the province and duty of the judicial department to say what the law is."[254]

In a very important development for the adjudication of legal claims arising from alleged human rights violations committed against alleged 9/11 conspirators, the delegation, presenting the first U.S. report in 1995 under Article 40 of the ICCPR, informed the Human Rights Committee that the non-self-executing declaration attached to the ICCPR did not preclude its indirect judicial application.[255]

It should be clear from the above analysis that suspects held in detention camps in Guantánamo or those held in U.S. prisons are not without legal protection, and that courts have an obligation to decide on the merits of any case brought before them. It is inconceivable that a democracy can be legitimized without providing the full gamut of human rights protection. As the European Court of Human Rights already stated in 1975:

> [O]ne can scarcely concede of the rule of law without there being a possibility of having access to the courts . . . the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.[256]

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253 Sloss, *supra* note 245, at 197.

254 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

255 *See* U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995). *See also* U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, ¶ 276, U.N. Doc. A/50/40 (Oct. 3, 1995) ("Notwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law.").

256 Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser.A), at 12–14 (1975).

V. HUMAN RIGHTS TREATY BODIES

In 2006, the U.S. appeared twice before human rights bodies: the Committee Against Torture and the Human Rights Committee.

A. The Committee Against Torture

During the discussion in May 2006, the country Rapporteur noted that a U.S. report[257] was submitted against the background of the challenges posed by international terrorism, which constituted one of the greatest violation of human rights of all times.[258] He observed that visits by the International Committee of the Red Cross and journalists had found no evidence of torture as distinct from ill-treatment.[259] However, given that the Special Rapporteur on Torture had not been able to interview detainees there, and since the U.S. had included a reservation in its instrument of ratification concerning the use of coercive techniques authorized by federal law jurisprudence, he requested assurances that the interrogation techniques employed at Guantánamo would not infringe or defeat the purposes of the Convention.[260] One of the major legal issues in the dialogue between the U.S. government and human rights treaty bodies is the principle of territoriality. The U.S. government considers that Guantánamo is outside the jurisdiction of the U.S., while the treaty bodies consider it to be within its jurisdiction.[261]

In its concluding observations, adopted on May 19, 2006, the Committee Against Torture expressed serious concerns and submitted a number of recommendations for the government to act upon.[262] The Com-

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[257] *See generally* U.N. Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, annex 1, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006) (contains a large annex devoted to the consequences of 9/11).

[258] U.N. Comm. Against Torture, *Summary Record of the 703rd Meeting*, ¶ 77, U.N. Doc. CAT/C/SR.703 (May 12, 2006), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/9d89ef092b9f52b8c125718000353270/$FILE/G0641846.pdf.

[259] *Id.* ¶ 84.

[260] *Id*. *See also* U.N. Econ. & Soc. Council, Comm. On Human Rights, *Economic, Social and Cultural Rights Civil and Political Rights: Situation of Detainees at Guantánamo Bay*, ¶ 3, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) (presented on Feb. 15, 2006), *available at* http://www.universalhumanrightsindex.org/documents/844/815/document/en/pdf/text.pdf [hereinafter *Situation of Detainees at Guantánamo Bay*].

[261] U.N. Comm. Against Torture, *Consideration of Reports Submitted by Parties Under Article 19 of the Convention*, ¶ 47, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.bayefsky.com/reports/usa_cat_c_28_add.5_1999.pdf. *See also* U.N. Comm. Against Torture, *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America (CAT/C/48/Add.3)*, ¶ 44, U.N. Doc. CAT/C/USA/Q/2 (Feb. 8, 2006).

[262] U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006),

mittee strongly urged the state party to adopt clearer legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogation.[263] The Committee regretted the state party's opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the law of armed conflict is the exclusive *lex specialis* applicable.[264] The Committee recommended that the government "recognize and ensure that the Convention applies at all times, whether in peace, war, or armed conflict, in territory under its jurisdiction."[265]

The Committee expressed its concern "that detaining persons indefinitely without charges constitutes *per se* a violation of the Convention."[266] It added that detainees are held for a protracted period of time "at Guantánamo, without sufficient legal safeguards and without traditional assessment of the justification for their detention" as is required by Articles 2, 3, and 16 of the Convention.[267] It recommend that the U.S. "should cease to detain any person in Guantánamo and close the detention facility, permit access by the detainees to judicial process or release them as soon as possible."[268] Additionally, the U.S. should ensure "that they [the detainees] are not returned to any State where they could face a real risk of being tortured."[269]

The Committee noted with concern "that the Detainee Treatment Act of 2005 (DTA) aims to withdraw jurisdiction of the state party's federal courts with respect to habeas corpus petitions, or other claims by or on behalf of Guantánamo Bay detainees."[270] It also expressed its concern about the independence of the Combatant Status Review Tribunal (CSRT) and the Administrative Review Boards.[271]

The U.S. government subsequently provided comments on the conclusions and recommendations of the Committee.[272] The government reacted strongly to the Committee's recommendation to "cease to detain any

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available at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf [hereinafter *Article 19*].

263 *Id.* ¶ 13.

264 *Id.* ¶ 14.

265 *Id.*

266 *Id.* ¶ 22.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.* ¶ 27.

271 *Id.* ¶ 30.

272 U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/U.S.A/CO/2/Add.1 (Nov. 6, 2007).

person at Guantánamo Bay,"[273] "permitting judicial access by enemy combatants in that facility," and not returning individuals to countries where they "face a real risk of being tortured."[274] The U.S. went on to explain that

> The United States is in an armed conflict with al-Qaeda, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war or to hold them until the end of hostilities. The law of war, and not the Convention, provides the applicable legal framework governing these detentions. [275]

The U.S. further stated that:

> The United States does permit access by Guantanamo detainees to judicial process. Every detainee in Guantanamo is evaluated by a Combatant Status Review Tribunal (CSRT), which determines whether the detainee was properly classified as an enemy combatant and includes a number of procedural guarantees. A CSRT decision can be directly appealed to a United States domestic civilian court, the Court of Appeals for the District of Columbia Circuit. Providing such an opportunity for judicial review exceeds the requirements of the law of war and is an unprecedented and expanded protection available to all detainees at Guantanamo. These procedural protections are more extensive than those applied by any other nation in any previous armed conflict to determine a combatant's status.[276]

It should be clear, as demonstrated above, that all procedures established by the Bush administration since November 2001, including appeal procedures, do not attest to the necessary impartiality and independence required by the law of war, but instead accompany many procedural and substantial violations of human rights.

B. The Human Rights Committee

During its summer session in July 2006, the Human Rights Committee combined the second and third periodic reports of the U.S.[277] The representative of the U.S. informed the Committee that the U.S. "did not consider questions concerning the war on terrorism, and detention and interrogation outside United States territory to fall within the scope of the Cove-

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[273] *Id.* ¶ 10.

[274] *Id.*

[275] *Id.* ¶ 11.

[276] *Id.* ¶ 13.

[277] *See* U.N.H.C.R., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005); U.N.H.C.R., *List of Issues to be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America*, U.N. Doc. CCPR/C/USA/Q/3 (Apr. 26, 2006); U.N.H.C.R., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

nant."[278] The representative "agreed that measures taken to combat terrorism should not compromise human rights principles,"[279] but he repeated the position taken before the Committee Against Torture that the Covenant only applies "to treatment of prisoners in domestic United States prisons," and that "the law of armed conflict governs United States detention operations in Guantánamo Bay" and other places.[280] The representative continued to reject the Committee's position that the scope of Article 2(1) of the Covenant covered the situation in Guantánamo.[281] However, the U.S. Supreme Court in the *Boumediene* case clearly stated, "[n]o Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of United States applies to the naval station."[282] Nevertheless, in a gnat straining analysis, the representative of the U.S. maintained that "his delegation found it difficult to accept that the conjunction in the phrase 'within its territory and is subject to its jurisdiction' could be interpreted as meaning 'and/or'."[283] It "was particularly implausible given that the Covenant negotiators had rejected the proposal to substitute the word 'or' for 'and'."[284] In his opinion, "parties to a treaty were generally empowered to give a binding interpretation of its provisions unless the treaty provided otherwise."[285] However, this "was not the case in the Covenant, nor did it authorize the International Court of Justice (ICJ) to issue legally binding interpretations of its provisions."[286]

One of the members of the Committee, Sir Nigel Rodley, in a meticulous analysis explained the reasons for the Committee's position. He maintained that the Committee's interpretation of article 2 "coincided with that of the ICJ, namely that States parties were required to ensure rights for all individuals within it their territory and to all individuals subject to their jurisdiction."[287] He stated that:

> The primary rule of interpretation under the Vienna Convention on the Law of Treaties was contained in article 31, which stated that a treaty was to be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of article 2 was the one given to

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278 U.N. Human Rights Comm., 87th Sess., 2380th mtg., ¶ 2, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006) [hereinafter Summary Record of the 2380th Meeting].

279 *Id.*

280 *Id.* ¶ 3.

281 *Id.* ¶ 8.

282 Boumediene v. Bush, 128 S. Ct. 2229, 2251 (2008).

283 Summary Record of the 2380th Meeting, *supra* note 278, ¶ 8.

284 *Id.*

285 *Id.*

286 *Id.*

287 *Id.* ¶ 65.

> it by the Committee, and the context included any subsequent practice in the application of the treaty which established the agreement of the States parties regarding its interpretation. [288]

He continued stating that:

> It did not include the *travaux préparatoires*, which were supplementary means of interpretation under article 32 of the Vienna Convention. The object and purpose were laid down clearly in the preamble to the Covenant and consisted in protecting persons from the overreaching power of States. If the *travaux préparatoires* were to be consulted at all, the main reasons for nervousness at the time of drafting the Covenant about the principle of extraterritoriality were that it was difficult to apply the Covenant in another person's country, an issue that did not, however, arise since the persons concerned must be under the State party's control, and to avoid certain situations involving occupation.[289]

He expressed the hope that the U.S. government would "revisit the question of whether the extraterritorial application was so manifestly excluded."[290]

Guidance on the issue of extra-territoriality issue could be found in *General Comment No. 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant*.[291] The Committee observed that "while article 2 is couched in terms of obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations."[292] "This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations . . . ."[293] "The obligations of the Covenant in general and article 2 in particular are binding on every state party as a whole."[294] In addition, "the beneficiaries of the rights recognized by the Covenant are individuals,"[295] and "states parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and all persons subject to their jurisdiction."[296] "This means that a State party must respect and ensure

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288 *Id.*

289 *Id.*

290 *Id.*

291 U.N. Human Rights Comm., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* http://www.unhcr.org/refworld/pdfid/478b26ae2.pdf.

292 *Id.* ¶ 2.

293 *Id.*

294 *Id.* ¶ 4.

295 *Id.* ¶ 9.

296 *Id.* ¶ 10.

the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[297]

In the list of issues, a number of pertinent questions were put to the state party. Regarding counter-terrorism measures and the respect for Covenant rights, the Committee requested to "comment on the compatibility with the Covenant of the definition of terrorism under national law and of the Congress' Authorization for Use of Military Force Joint Resolution (AUMF), which provides the President with all powers 'necessary and appropriate to protect American citizens from terrorist acts."[298] It also requested "updated information on the identity, place of origin, place of deprivation of liberty and number of persons held at Guantánamo," and the interrogations techniques authorized and practised there.[299] Additionally, it requested information "on the significance of Section 1005 of the Detainee Treatment Act of 2005" for the detainees and "what guarantees ensure the independence of the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Boards (ARBs).[300]

In its concluding observations, the Committee expressed its concern about the potentially overbroad reach of the definition of terrorism under domestic law and recommended that:

> The State party should ensure that its counter-terrorism measures are in full conformity with the Covenant and in particular that the legislation adopted in this context is limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it.[301]

"The Committee noted with concern that Section 1005(e) of the Detainee Treatment Act bars detainees at Guantánamo from seeking review in cases of allegations of ill-treatment or poor conditions of detention," reviews permitted under articles 7 and 10 of the Covenant.[302] It recommended that the government should amend Section 1005 so as to allow detainees in

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297 *Id.*

298 U.N. Human Rights Comm., *List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the U.S.*, ¶ 3, U.N. Doc. CCPR/C/USA/Q/3 (Apr. 26, 2006), *available at* http://tb.ohchr.org/default.aspx?country=us.

299 *Id.* ¶ 5.

300 *Id.*

301 Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, ¶ 11, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), *available at* http://tb.ohchr.org/default.aspx?country=us.

302 *Id.* ¶ 15.

Guantánamo to seek a review of their treatment or conditions of detention before a court.[303] The Committee also expressed concern that:

> [F]ollowing the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to determine and review the status of detainees, may not offer adequate safeguards of due process, in particular due to: (a) their lack of independence from the executive branch and the army, (b) restrictions on the rights of detainees to have access to all proceedings and evidence, (c) the inevitable difficulty CSRTs and ARBs face in summoning witnesses, and (d) the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainee Treatment Act, to weigh evidence obtained by coercion for its probative value.[304]

The Committee recommended that the state parties should ensure, in accordance with Article 9(4) of the ICCPR, that persons detained in Guantánamo "are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard."[305]

VI. ILLEGAL PRACTICES AMOUNTING TO TORTURE

I would like to comment on two phenomena practiced by the American administration in the war against terrorism, namely extraordinary rendition and water boarding. These phenomena present a whole gamut of violations of human rights under many human rights instruments but in particular under the Convention Against Torture and the ICCPR.

A. Extraordinary Renditions

The term "extraordinary rendition" is used, in conjunction with irregular rendition, to describe the apprehension and extrajudicial transfer of a person from one state to another.[306] The term "torture by proxy" is also used by some critics to describe situations in which the U.S. has reportedly trans-

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303 *Id.*

304 *Id.* ¶ 18.

305 *Id.*

306 MICHAEL JOHN GARCIA, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE 2 (CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS Jan. 22, 2009), *available at* http://ftp.fas.org/sgp/crs/natsec/RL32890.pdf.

ferred suspected terrorists to countries known to employ harsher interrogation techniques that may rise to the level of torture.[307]

The U.S. extraordinary rendition program has raised a series of moral, judicial, and political allegations, prompting several official European Union investigations. A June 2006 report from the Council of Europe estimated that thirty to fifty people had been kidnapped by the CIA on EU territory and subsequently rendered to other countries, often after having transited through secret detention centers, so-called black sites, used by the CIA in cooperation with other governments.[308] According to a European Parliament report of February 2007, the CIA had conducted 1,245 flights into European airspace, many of them to destinations where suspects could face torture in violation of international human rights law.[309] A large majority of the European Union Parliament endorsed the report's conclusion that many member states tolerated extraordinary rendition and criticized several European governments and intelligence agencies for their unwillingness to co-operate with the investigation.[310]

The CIA was granted permission to use rendition in a Presidential directive signed by President Clinton in 1995.[311] However, the frequency of extraordinary rendition has grown sharply since the 9/11 attacks. Modern

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[307] Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of N.Y. & Ctr. for Human Rights and Global Justice, N.Y. Univ. Sch. of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 23 (2004), *available at* http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf.

[308] Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States*, Parliamentary Assembly, Comm. on Legal Affairs and Human Rights, AS/Jur (2006), ¶ 13 (Jun. 7, 2006), *available at* http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf (The report called inter alia for the closure of Guantánamo and for European countries immediately to seek the return of their citizens and residents who are being held illegally by the U.S. authorities).

[309] Press Release, EU Justice and Home Affairs, CIA Activities in Europe: European Parliament Adopts Final Report Deploring Passivity From Some Member States (Feb. 14, 2007), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20070209IPR02947&language=EN.

[310] *See* Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Parliamentary Assembly, Comm. on Legal Affairs and Human Rights, Doc. 11302 rev. (Jun. 11, 2007), *available at* http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

[311] PRESIDENTIAL DECISION DIRECTIVE 39 U.S. POLICY ON COUNTERTERRORISM (Jun. 21, 1995), *available at* http://www.fas.org/irp/offdocs/pdd39.htm. *See* R. Bonner, *The CIA's Secret Torture*, N. Y. REV. BOOKS, Jan. 11, 2007 (a recent article on the illegal practice of extra ordinary rendition). *See also* Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); CIA, EXTRAORDINARY RENDITIONS, FLIGHTS, TORTURE AND ACCOUNTABILITY—A EUROPEAN APPROACH (European Center for Constitutional and Human Rights, Jan. 2009); Margaret Satterthwaite, *The U.S. Program of Extraordinary Rendition and Secret Detention Past and Future*, *in id.* at 18–27.

forms of rendition include taking suspects into U.S. custody but delivered to a third-party state, often without ever being on U.S. soil and without involving the rendering country's judiciary. Such detainees, subjected to those practices, are called "ghost detainees."

The prohibition against torture is not only a principle of treaty law, but it has generally been considered to be a peremptory norm of customary international law from which no derogation is permitted.[312] The U.S. government commented on the recommendations by the Committee Against Torture, which had expressed its concern about extraordinary rendition and the principle of non-refoulement. In paragraph twenty of its recommendations, the Committee stated:

> The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of *refoulement*.[313]

The state party replied that these conclusions and recommendations raised two issues:

> The first issue is the *evidentiary standard* that would trigger application of CAT Article 3. As the United States described to the Committee, pursuant to a formal understanding the United States filed at the time it became a State Party to the Convention, the United States determines whether it is more likely than not that a person would be tortured, rather than whether a person faces a "real risk" of torture.[314]

However, in my opinion, because the "more likely than not" standard is framed as an "understanding" as opposed to a "reservation" because presumably it was not intended to actually modify U.S. obligations under the treaty.

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[312] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 883–84 (2d Cir. 1980); Prosecutor v. Furundžija, IT-95-17/1-TA, Judgment, Judicial Supplement 18 (July 21, 2000), *available at* http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e663/e2678/e2731/e2880/files2886/FurundzijaFallICTY_ger.pdf; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); PRINCETON PROJECT ON UNIVERSAL JURISDICTION (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf; Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006).

[313] *Article 19*, *supra* note 262, ¶ 20.

[314] *See* United States Response to Specific Recommendations Identified by the Committee Against Torture, 2, http://www.state.gov/documents/organization/100843.pdf (footnote omitted) [hereinafter U.S. Response]; U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36, 198 (1990).

The state party went on to declare that:

> The second issue addresses the *territorial scope* of Article 3. Although the United States and the Committee hold differing views on the applicability of the non-refoulement obligation in Article 3 of the Convention outside the territory of a State Party, as the United States explained to the Committee at length, with respect to persons outside the territory of the United States as a matter of policy, the United States government does not transfer persons to countries where it determines that it is more likely than not that they will be tortured. This policy applies to all components of the government, including the intelligence agencies. Although there is no requirement under the Convention that individuals should have the possibility to challenge refoulement, United States practice in the different areas in which this provision comes into play is designed to ensure that any torture concerns, whenever raised by the individual to be transferred, are taken into account.[315]

Regarding paragraph 24, the Committee had recommended that:

> The State party should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding," "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.[316]

The U.S. government replied by informing the Committee that the U.S. is in an armed conflict with al-Qaeda, the Taliban, and their supporters.[317] The U.S. government further responded that:

> As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Convention, is the applicable legal framework governing these detentions. Moreover, as the Committee is aware, the United States disagrees with the Committee's contention that "de facto effective control" is equivalent to territory subject to a State party's jurisdiction for the purposes of the Convention.[318]

Additionally, the U.S. government pointed out that:

> In September 2006, the Department of Defense released the updated DoD detainee program directive 2310.01E, and the Army released its revised Field Manual on Interrogation. These documents are attached in Annexes 2 and 3, respectively. They provide guidance to military personnel to en-

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315 *See* U.S. Response, *supra* note 314, at 2–3.

316 *Id.* at 7.

317 *Id.*

318 *Id.*

> sure compliance with the law, and require that all personnel subject to the directive treat all detainees, regardless of their legal status, consistently with the minimum standards of Common Article 3 until their final release, transfer out of DoD control, or repatriation. Of course, certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed by Common Article 3.[319]

It is necessary to comment on *Mohamed v. Jeppesen Dataplan, Inc.*, a case which strained the relationship between the U.S. and the U.K. regarding intelligence sharing. The case concerned detainees who were allegedly tortured during interrogations after being subjected to extraordinary rendition.[320] Plaintiffs, who were foreign nationals, brought suit because of alleged damages inflicted upon them in the so-called rendition program operated under the auspices of the U.S. government.[321] The plaintiffs alleged that under that program they were unlawfully apprehended, transported, imprisoned, and interrogated and—in some instances—tortured under the direction of the U.S. defendant, Jeppesen Dataplan, Inc.[322] The U.S. government intervened to assert the state secret privilege and to move the court for dismissal of the action or alternatively for a summary judgment.[323]

The trial court agreed with the defendant and stated that the government had complied with the procedures for invoking the privilege.[324] Consequently, the trial court found that the issues involved in that case were non-justiciable because the very subject matter of the case was a state secret.[325] In particular, *Mohamed v. Jeppesen Dataplan, Inc.* made political and legal waves between the U.S. and the U.K. because at the time of the plaintiff's unlawful rendition he was a legal resident of the U.K.[326] He was

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319 *Id.* at 8. *But see* OMS GUIDELINE ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION (Dec. 2004), *available at* http://documents.nytimes.com/c-i-a-reports-guidelines-for-interrogators#p=2; INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf (also known as the Schlesinger Report); ANTHONY R. JONES & GEORGE R. FAY, INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB (2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf (concentrating entirely on operations in Iraq); May 2008 Report, *supra* note 210.

320 *See* No. 08-15693, 2009 U.S. App. LEXIS 19647 (9th Cir. Aug. 31, 2009).

321 *Id.* at 3–4.

322 *Id.* at 4–5.

323 *Id.* at 10.

324 *See id.* at 10–11.

325 *Id.*

326 *Id.* at 5.

arrested in Karachi in April 2002 and was turned over to the CIA.[327] After several months of interrogation, CIA agents blindfolded him, strapped him to the seat of a plane, and flew him to Morocco.[328] He was subsequently secretly detained, interrogated, and tortured by agents of the Moroccan intelligence services.[329] In January 2004, agents flew him to the secret U.S. detention facility known as "dark prison" in Kabul, Afghanistan.[330] He was again tortured, and in September 2004 he was transferred to Guantánamo Bay.[331]

Lawyers for the detainees appealed arguing, inter alia, that the very subject matter of this suit was not a state secret.[332] On February 9, 2009, a hearing took place in which the lawyer for the Department of Justice stated that the current Administration keeps the same position on state secrecy.[333] However, it was the policy to invoke this privilege only when necessary and in the most appropriate cases consistent with U.S. Supreme Court jurisprudence.[334] The new U.S. Attorney General ordered on the same day a review of all government claims invoking the state secrets privilege.[335]

In view of the fact that the plaintiff was a legal resident, the U.K. Foreign Secretary considered that he had an arguable case that he had been subjected to torture and cruel, inhumane, and degrading treatment by or on behalf of U.S. authorities during his two-year period of incommunicado detention. On February 4, 2009, the U.K. High Court of Justice rendered judgment in Mohamed's case.[336] The issue was whether the court should restore to its first judgment[337] "paragraphs containing a gist of reports made by the United States Government to the United Kingdom Government in relation to the detention and treatment of the claimant . . . ."[338] The court

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327 *Id.* at 4–5.

328 *Id.*

329 *Id.* at 5–6.

330 *Id.* at 6–7.

331 *Id.*

332 Reply Brief of Plaintiffs-Appellants at 7, Mohamed v. Jeppesen Dataplan, Inc., No. 08-15693, 579 F. Supp. 2d 943 (9th Cir. 2008), *available at* http://www.aclu.org/files/pdfs/safefree/jeppesen_replybrief.pdf.

333 *See* John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009, at A12, *available at* http://www.nytimes.com/2009/02/10/us/10torture.html?_r=1&partner=permalink&exprod=permalink (last visited Oct. 9, 2009).

334 *Id.* (quoting Justice Department spokesman Matt Miller).

335 *Id.*

336 Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, Feb. 4, 2009, High Court of Justice, Queen's Bench Division, Case No: CO/4241/2008, *available at* http://www.judiciary.gov.uk/docs/judgments_guidance/mohamed-judgment4-04022009.pdf.

337 *Id.* ¶ 1.

338 *Id.*

deplored that the U.S. government had refused to allow documents to be made available for use by Mohamed's lawyers[339] and that the issue was to balance the "public interest in national security with the public interest in open justice, the rule of law and democratic accountability."[340] The most shocking paragraph was that the U.S. attempted to threaten the U.K. if those redacted paragraphs were made public by re-evaluating its intelligence sharing relationship with the U.K. and possibly reduce the intelligence it provided.[341] The court concluded that the balance between the interests was better served by maintaining the paragraphs in its first judgment on the issue despite concern by the Foreign Secretary.[342]

The case and the judgment stirred up the media and forced the U.S. government to release Mohamed, who arrived back in Britain on February 23, 2009.[343] Only one month later it was disclosed that he was offered a plea bargain requiring him to sign a statement saying he had never been tortured, promising never to speak to the media, promising never to sue the U.S. or any U.S. ally (including Britain), and pleading guilty to terror charges.[344] Mohamed refused the plea bargain, and, eventually, all charges against him were dropped.[345]

B. Waterboarding

Waterboarding is a form of torture that consists of immobilizing a person on his back with the head angled downwards and pouring water over the face. Waterboarding carries the risk of extreme pain, injury, and even death.

Some commentators have argued that waterboarding as an interrogation method should not qualify as torture in certain circumstances, while others such as Professor John Yoo and Attorney General Mukasey have refused to state whether they would consider waterboarding to be torture

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339 *See id.* ¶¶ 6–7.

340 *Id.* ¶ 18.

341 *Id.* ¶ 62. *See also* Scott Horton, *Bush Administration Threatened Britain over Torture Disclosures*, HARPER'S MAGAZINE, Feb. 4, 2009, http://harpers.org/2009/02/hbc-90004343 (providing further discussion on threats by the U.S. to the U.K.) (last visited Oct. 9, 2009).

342 Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs, Feb. 4, 2009, High Court of Justice, Queen's Bench Division, ¶¶ 106–07, Case No: CO/4241/2008, *available at* http://www.judiciary.gov.uk/docs/judgments_guidance/mohamed-judgment4-04022009.pdf.

343 Sam Greenhill, *'Guantanamo Brit' Was Offered Freedom Only if He Promised Not to Sue the British Government*, MAIL ONLINE, Mar. 23, 2009, http://www.dailymail.co.uk/news/article-1164194/Guantanamo-Brit-offered-freedom-promised-sue-British-Government.html (last visited Oct. 9, 2009).

344 *Id.*

345 *Id.*

without knowing the specific facts of the situation. U.S. legal scholars have questioned the legality of waterboarding as an interrogation technique.[346] At confirmation hearings for the position of Deputy Attorney General, the Attorney General commented that the legal question was currently being reviewed.

Although historical analysis demonstrates that U.S. courts have consistently held artificial drowning interrogation to be torture, which, by its nature violates U.S. statutory law,[347] a memorandum prepared by then Deputy Assistant Attorney General John Yoo and drafted after top officials had discussed special methods for captives who refused to co-operate with U.S. authorities showed that the acceptable methods of interrogation included waterboarding, or dropping water into a suspect's face, which can feel like drowning.[348] It is my firm conviction that the Obama administration, based on his Executive Order dealing with interrogation practices, henceforth prohibits this technique.

VII. RETURNING TO INTERNATIONAL LAW AS AN APPROPRIATE REMEDIAL ACTION

The U.N. has faced the problem of terrorism for decades, and thirteen international conventions relate to specific terrorist activities.[349] It is, however, rather recent, although before 9/11, that the General Assembly adopted a resolution in relation to terrorist prevention and human rights protection.[350] In addition, members of relevant human rights organizations, including U.N. Special Rapporteurs and human rights treaty bodies, have unwaveringly maintained that basic human rights cannot be suspended while countering terrorism.[351]

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346 Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007); Wilson R. Huhn, *Waterboarding Is Illegal*, 86:6 WASH. U. L. REV. (Online Supplement) (2008), *available at* http://lawreview.wustl.edu/slip-opinions/waterboarding-is-illegal/.

347 Wallach, *supra* note 346.

348 *See* THE TORTURE PAPERS, *supra* note 3, at 218 (implicitly authorizing waterboarding by approving of interrogation methods used on captured al-Qaeda operatives).

349 U.N. Action to Combat Terrorism, *available at* www.un.org/terrorism.

350 G.A. Res. 48/122, U.N. Doc. A/Res/48/122 (Dec. 20, 1993).

351 A detailed list (over twenty pages) is available at the OHCHR homepage. *See* Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 32: Human Rights, Terrorism and Counter-Terrorism, Annex I, http://www.ohchr.org/EN/Publications Resources/Pages/FactSheets.aspx (last visited Aug. 30, 2009); s*ee generally Situation of Detainees at Guantánamo Bay*, *supra* note 260; Human Rights Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism: Report of the Sessional Working Group to Elaborate Detailed Principles and Guidelines with Relevant Commentary, Concerning the Promotion and Protection of Human Rights when Combating Terrorism*, U.N. Doc.

The General Assembly has unanimously adopted the Global Strategy to Combat Terrorism, which contains four over-arching provisions, one of which refers to "[m]easures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism."[352] The strategy outlines the need to support the Office of the High Commissioner for Human Rights and highlights the role of the Special Rapporteur on the promotion and protection of human rights while countering terrorism in advising states of their international human rights and other legal obligations.[353] Furthermore, it clearly reaffirms that any counter-terrorism measures taken by states "must comply with our obligations under international law, . . . in particular human rights law, refugee law and international humanitarian law."[354] The Security Council has also adopted resolutions to protect human rights while countering terrorism.[355] The World Summit, held in September 2005, also recognized that international cooperation to fight terrorism "must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols."[356] Special Rapporteurs of the then Commission on Human Rights, the work of which was carried over to the Human Rights Council and the then Sub-Commission on Promotion and Protection of Human Rights, have also been very active on the issue. The fact that the 1993 World Conference On Human Rights had expressed concern about human rights in the context of

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A/HRC/Sub.1/58/26 (Aug. 25, 2006); Human Rights Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism: An Updated Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, U.N. Doc. A/HRC/Sub.1/58/30 (Aug. 3, 2006) (*prepared by* Kalliopi K. Koufa); Human Rights Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Working Paper on International Judicial Cooperation*, U.N. Doc. A/HRC/Sub.1/58/Corr.1 (Aug. 22, 2006) (*prepared by* Françoise Hampson).

[352] The United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, Annex (I), U.N. Doc. A/RES/60/288 (Sept. 20, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement [hereinafter Global Counter-Terrorism Strategy]. *See also* The Secretary-General, *Report of the Secretary General on Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, U.N. Doc. A/60/825 (Apr. 27, 2006). *See also* The Secretary-General, *Report of the Secretary-General on United Nations Global Counter-Terrorism Strategy: Activities of the United Nations System in Implementing the Strategy*, G.A. Res. 62/272, U.N. Doc. A/RES/62/272 (Sept. 15, 2008) (requesting inter alia an updated report on progress made in the implementation of the Strategy to the 64th Session of the General Assembly in 2010 and calling upon all states to make every effort to conclude a comprehensive convention on terrorism).

[353] Global Counter-Terrorism Strategy, *supra* note 352, at Annex Pt. IV, ¶¶ 7, 8.

[354] *Id.* at Annex pmbl., ¶ 3.

[355] *See* S.C. Res. 1456, U.N. DOC. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1535, U.N. DOC. S/RES/1535 (Mar. 26, 2004); S.C. Res. 1624, U.N DOC. S/RES/1624 (Sept. 14, 2005); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

[356] G.A. Res. 60/1, ¶85, U.N. DOC. A/RES/60/1 (Oct. 24, 2005).

terrorism[357] gave impetus to other U.N. bodies to deal with human rights aspects in the fight against terrorism. At its forty-eighth session in 1996, the Sub-Commission on Promotion and Protection of Human Rights entrusted one of its members, Kalliopi Koufa, with a comprehensive study on human rights and terrorism.[358]

The Special Rapporteur submitted a working paper in 1997, followed by five subsequent progress reports and annexes, and a final report in 2004.[359] In these reports she addressed many issues related to terrorism and human rights such as the legal definition, application of the term to acts committed in armed conflict and the overlap of international human rights and humanitarian law, typologies of terrorism whether committed by states or non-state actors, and activities undertaken by international and regional bodies.[360] The reports do not, however, address counter-terrorism in depth and do not consider specific national counter-terrorism measures. Nevertheless, her last two reports shifted their emphasis of the study in the wake of the 9/11attacks. It became clear that fundamental human rights were at stake in the struggle against terrorism. Consequently, her final report was entitled *Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism*.[361] Her final report set forth policy concerns and articulated the vital importance of the international legal community in encouraging states to diligently work on counter-terrorism, while ensuring that these matters do not create fear within societies.[362] Additionally, the Special Rap-

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[357] Vienna Declaration and Programme of Action, ¶ 30, U.N. Doc. A/CONF.157/23 (July 12, 1993), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en.

[358] Office of the High Comm'r for Human Rights Res. 1996/20, U.N. Doc. E/CN.4/SUB.2/RES/1996/20 (Aug. 29, 1996).

[359] *See generally* U.N. Econ & Soc. Council, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Terrorism and Human Rights*, U.N. Doc. E/CN.4/Sub.2/1997/28 (June 26, 1997), *available at* http://www2.ohchr.org/english/issues/terrorism/rapporteur/index.htm (*prepared by* Kalliopi K. Koufa) [hereinafter *Terrorism and Human Rights*]; U.N. Econ & Soc. Council, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1999/27 (June 7, 1999) (*prepared by* Kalliopi K. Koufa); U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001) (*prepared by* Kalliopi K. Koufa); U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2002/35 (July 17, 2002) (*prepared by* Kalliopi K. Koufa); U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/WP.1 (Aug. 8, 2003) (*prepared by* Kalliopi K. Koufa); U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism*, U.N. Doc. E/CN.4/Sub.2/2004/40 (June 25, 2004) (*prepared by* Kalliopi K. Koufa) [hereinafter *Specific Human Rights Issues*].

[360] *See Terrorism and Human Rights*, *supra* note 359.

[361] *Specific Human Rights Issues*, *supra* note 359.

[362] *Id.* ¶ 71.

porteur recommended that "mechanism[s] for effective periodic review of national counter-terrorism measures and practices be adopted and that ways be developed to ensure modification of those measures and practices that violate human rights or humanitarian law norms."[363] She also submitted in a separate document—as a result of seven years of study—a preliminary framework of draft principles and guidelines concerning human rights and terrorism.[364] As a result of that report, the Sub-Commission decided to establish a sessional working group in 2005 with a mandate to "elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism."[365]

In the year the Sub-Commission finished its work on the issue, the Commission took over and appointed for one year an independent expert on the protection of human rights and fundamental freedoms while countering terrorism.[366] In his report, the expert focused inter alia on the role of civilian judiciary in supervising national counter-terrorism measures and discussed the applicability and relevance of international humanitarian law when confronting terrorism in armed conflict, the relationship between international human rights and international humanitarian law during armed conflict, the principle of *nullem crimen sine lege*, the right to due process and to a fair trial, the establishment of military tribunals, the right to humane treatment, the principle of non-refoulement, and the transfer of detainees, including rendition of terrorist suspects.[367]

In one of his conclusions, the expert, "given the gaps in coverage of the monitoring systems of the special procedures and treaty bodies and the pressing need to strengthen human rights protection while countering terror-

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[363] *Id.* ¶ 70.

[364] *See* U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, In Particular Terrorism and Counter-Terrorism; A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, U.N. Doc. E/CN.4/Sub.2/2004/47 (Aug. 11, 2004), *available at* http://www2.ohchr.org/english/issues/terrorism/rapporteur/index.htm (*prepared by* Kalliopi Koufa).

[365] *See* U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues—New Priorities, In Particular Terrorism and Counter Terrorism: Working Group to Elaborate Detailed Principles and Guidelines, with Relevant Commentary, Concerning the Promotion and Protection of Human Rights When Combating Terrorism*, U.N. Doc. E/CN.4/Sub.2/2005/L.44 (Aug. 8, 2005), *available at* http://www.icj.org/IMG/pdf/Resolution_Sub-Com.pdf.

[366] U.N. Econ & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, Res. 2004/87, ¶ 10, 60th Sess., 58th mtg., U.N. Doc. E/CN.4/2004/127 (2004), *available at* http://www.unhcr.org/refworld/docid/43f31391f.html.

[367] *See* U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 13–35, 44–55, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005).

ism,"[368] recommended that the "Commission on Human Rights should consider the creation of a special procedure with a multidimensional mandate to monitor states' counter-terrorism measures and their compatibility with international human rights law."[369] In view of the fact that the Commission on Human Rights was replaced by the Human Rights Council in 2006, this procedure was never created. However, the Counter Terrorist Committee (CTC), established by Security Council resolution 1373, was subsequently revitalized by Security Council resolution 1535 in which a Counter-Terrorism Committee Executive Directorate (CTED) was established.[370] The CTC became operational on July 1, 2005, and includes a human rights adviser who liaises with the Office of the High Commisioner for Human Rights (OHCHR) in Geneva.

In this context it should be mentioned that the second High Commissioner for Human Rights had called for direct contact with the CTC. She submitted a detailed note to the Chair of the CTC in which she stated that the "the struggle against terrorism must take place within the framework of the rule of law, both nationally and internationally; and second, that human rights must be safeguarded in the struggle against terrorism."[371]

After the next High Commissioner started to make statements to the CTC in October 2002,[372] regular contacts continued with the office of the OHCHR. The current Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, appointed after the independent expert had presented his report,[373] made a statement to the CTC in October 2008 in which he commented on his visit to Guantánamo Bay.[374]

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368 *Id.* ¶ 91.

369 *Id.*

370 S.C. Res. 1535, U.N. SCOR, U.N. Doc. S/RES/1535 (2004).

371 Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures, Sep. 23, 2002, http://www.un.org/sc/ctc/documents/ohchr1.htm (last visited Oct. 9, 2009) [hereinafter Note to the Chair].

372 *See id.*

373 *See* Office of the High Commissioner for Human Rights, *Protection of Human Rights and Fundamental Freedoms While countering Terrorism*, Res. 2005/80, ¶ 18, U.N. Doc. E/CN.4/2005/L.10/Add.17 (Apr. 21, 2005) (approving the decision of the Commission to appoint a Special Rapporteur on the promotion and protection of human rights while countering terrorism for a period of three years). The Human Rights Council decided to extend the mandate of the Special Rapporteur for a period of three years on December 14, 2007. *See* U.N. Human Rights Council, Res. 6/28, ¶ 2, U.N. Doc. A/HRC/RES/6/28 (Dec. 14, 2007).

374 *See* Note to the Chair, *supra* note 371. *See also* U.N. Sec. Council, *Letter Dated 3 February 2009 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council*, U.N. Doc. S/ 2009/71 (Feb. 4, 2009).

The Special Rapporteur also presented a number of reports to the Human Rights Council and the General Assembly and has conducted a number of country visits. [375] The most interesting country visit, which took a long time to prepare, was to the U.S. In a press conference, the Special Rapporteur presented some preliminary findings.[376] The Special Rapporteur stated in his report:

> It was disappointing that the Special Rapporteur was not provided access to places of detention, including at Guantánamo Bay, with guarantees permitting private interviews of detainees. It is a part of the Standard Terms of Reference of all United Nations Special Rapporteurs that any visits to detention centres involve unmonitored interviews with detained persons. This is a universally applied term of reference, which in many parts of the world is essential for the protection of individuals against abuse. It would give a wrong message to the world if the Special Rapporteur were to deviate from this standard condition in respect of the United States.[377]

Similarly, this problem also haunted the four Special Rapporteurs, including the one on torture, who had made requests since early 2002 to visit Guantánamo. The U.S. government finally refused access and the four Rapporteurs subsequently submitted a report to the last session of the Commission.[378] The report was heavily criticized by the U.S. government as containing only secondary sources of information.[379] The Special Rapporteur expressed the hope to be able to visit Guantánamo in the near future.[380] He was subsequently allowed to visit Guantánamo Bay from December 3 through December 7 in 2007 for the purpose of observing hearings under

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375 *See, e.g.*, The Secretary-General, *Note by the Secretary-General: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/63/223 (Aug. 6, 2008); U.N. Human Rights Council, *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/10/3/Add.1 (Feb. 24, 2009), *available at* http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.html; U.N. Human Rights Council, *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (Addendum)*, U.N. Doc. A/HRC/10/3/Add.2 (Dec. 16, 2008).

376 Statement by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Oct. 29, 2007, http://www.eyeontheun.org/assets/attachments/documents/5677.pdf.

377 U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, ¶ 2, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) [hereinafter *Report of the Special Rapporteur*].

378 *See Situation of Detainees at Guantánamo Bay*, *supra* note 260.

379 *See id.* at annex.

380 *Report of the Special Rapporteur*, *supra* note 377, ¶ 2.

the 2006 Military Commission Act.[381] This visit supported concerns reflected in his report presented to the sixth session on Human Rights Council in December 2007 in which he announced rather strong worded conclusions and recommendations.[382]

In his conclusions, the Special Rapporteur identified serious incompatibilities between international human rights obligations and U.S. counter terrorism law.[383] Such incompatibilities included the "prohibition against torture, or cruel, inhuman or degrading treatment; the right to life; and the right to a fair trial."[384] The Special Rapporteur also detected deficiencies in U.S. law and practice concerning the principle of non-refoulement, the rendition of persons to places of secret detention, and the unlawful surveillance of persons.[385]

In his fourteen strongly-worded recommendations, the Special Rapporteur recommended inter alia that the categorization of persons as "unlawful enemy combatants" be abandoned.[386] He called on the government to release or to put on trial those detained under that category.[387] The Special Rapporteur declared:

> Notwithstanding the primary responsibility of the United States to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection, the Special Rapporteur recommends that other States be willing to receive persons currently detained at Guantánamo Bay. The United States and the United Nations High Commissioner for Refugees should work together to establish a joint process by which detainees can be resettled in accordance with international law, including refugee law and the principle of non-refoulement.[388]

The Special Rapporteur also concluded that the interrogation techniques—which are not explicitly prohibited in the U.S. Army Field Manual—"involve conduct that may amount to a breach of the prohibition against torture and any form of cruel, inhuman or degrading treatment."[389] He recommended that "that the [U.S. Army Field Manual] be revised to

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381 The Secretary-General, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 5, U.N. Doc. A/63/223 (Aug. 6, 2008).

382 *See id. See also Report of the Special Rapporteur, supra* note 377, ¶¶ 53–68.

383 *Report of the Special Rapporteur, supra* note 377, ¶ 53.

384 *Id.*

385 *Id.*

386 *Id.* ¶ 55.

387 *Id.*

388 *Id.* ¶ 57.

389 *Id.* ¶ 62.

expressly state that only enumerated techniques are permissible."[390] Importantly, he recommended that the CIA practice of extraordinary rendition should be completely discontinued.[391] He repeated his recommendations in his latest reports to the General Assembly.[392]

As the government had promised to the members of the Committee Against Torture, the Field Manual was revised in September 2006.[393] The General Assembly subsequently adopted a resolution on the issue in which it deplored the "occurrence of violations of human rights and fundamental freedoms in the context of the fight against terrorism, as well as violations of international refugee law and international humanitarian law."[394] It urged states to fully respect non-refoulement obligations under international refugee and human rights law. It also urged states to ensure due process guarantees while fighting terrorism consistent with all relevant provisions of the Universal Declaration of Human Rights, the ICCPR, and the Geneva Conventions of 1949.[395]

In the annual report of the High Commissioner for Human Rights, presented to the eighth session of the Human Rights Council in June 2008, it was emphasized that the need to protect and promote all human rights in counter-terrorism measures forms part of states' duties.[396] These are two complementary and mutually reinforcing objectives.[397] The report also referred to a recent judgment by the European Court of Human Rights in the case *Saadi v. Italy* where the court:

> [R]eaffirmed that the ban on deporting individuals to countries where they are at risk of torture or ill-treatment is absolute and unconditional. The judgement also addressed whether a State's duty not to deport where there is a risk of torture or ill-treatment can be mitigated by promises of humane treatment from the State to which the individual is to be deported. The court held that such assurances do not automatically offset an existing risk, emphasizing "that the existence of domestic laws and accession to treaties

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390 *Id.*

391 *Id.*

392 *See* The Secretary-General, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 54–55, 61, U.N. Doc. A/62/263 (Aug. 15, 2007).

393 *See* U.S. Response, *supra* note 314.

394 G.A. Res. 62/159, pmbl., U.N. Doc. A/Res/62/159 (Mar. 11, 2008).

395 *Id.* ¶ 9.

396 U.N. Human Rights Council, U.N. High Commissioner for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General: Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/8/13, ¶ 13 (June 8, 2008) [hereinafter Annual Report].

397 *Id.* at pmbl.

> were not sufficient to ensure adequate protection against the risk of ill-treatment."[398]

In the concluding paragraphs of the High Commissioner's report, "the importance of placing human rights at the core of international cooperation in counter-terrorism" was underlined, and so was the "obligation of all states to ensure that measures taken to combat crimes of terrorism comply with their obligations under international human rights law, in particular the right to recognition as a person before the law, due process, and non-refoulement."[399] Compliance with international human rights standards is essential, especially when counter-terrorism measures involve the deprivation of individual liberty.[400]

It should be clear that the international community, represented in the U.N. and civil society, firmly believes that respect for international law, international human rights law, and international humanitarian law is the only way forward. However, in the wake of the Supreme Court decision in *Boumediene v. Bush*, discussed in some detail above,[401] the Justice Department under the Bush administration still showed its disregard for international law.

On July 10, 2008, the Justice Department urged the D.C. Circuit Court to set up a fast schedule leading to a ruling that should reject the power of federal courts to examine detainees' complains of mistreatment at Guantánamo.[402] Congress had taken away any such authority, and the Supreme Court did not second-guess Congress' actions in its new ruling on detainees rights.[403] In a motion filed in *Paracha v. Bush*,[404] the Justice Department stated that no detainee had any right to contest his condition of confinement.[405] This legal move has apparently now been superseded by the

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398 *Id.* ¶ 33 (citing Saadi v. Italy, App. No. 37201/06 (Feb. 28, 2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited Oct. 10, 2009)).

399 Annual Report, *supra* note 396, ¶ 57.

400 *Id.*

401 *See supra* notes 159–74.

402 Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/us-no-court-review-of-gitmo-conditions/ (July 11, 2008 20:11) (last visited Oct. 10, 2009) [hereinafter Lyle Denniston, No Court Review].

403 *Id.*

404 *See* Respondent's Motion to Govern Further Proceedings, Paracha et al. v. Bush, No. 05-5194 (D.C. Cir. 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/07/paracha-mtn-to-govern-7-10-08.pdf [hereinafter Motion to Govern Further Proceedings].

405 Lyle Denniston, No Court Review, *supra* note 402. *See also* Motion to Govern Further Proceedings, *supra* note 404, at 7.

action undertaken by the new administration as has been demonstrated above.

In addition, the Justice Department urged the D. C. Circuit Court to restore government authority to transfer Guantánamo prisoners without Court permission.[406] It argued also that the DTA and the MCA expressly took away the right to challenge transfers as part of claims against detention. These latest developments sharply contrast with the opinion of some federal judges. For example, Justice Hogan declared that

> [t]he government has got to get across the message that we are going to move these cases forward, and not in the normal course of business; this is an extraordinary situation . . . . The government has to set aside every other case pending before them and get these cases moving first . . . . People in all levels of government should understand that.[407]

The position by the Justice Department is an aberration of the separation of powers guaranteed by the U.S. Constitution. Moreover, it shows once again the unilateral approach towards international law by the different governmental departments under the previous administration.[408]

Finally, reference should be made to the important work undertaken by the International Commission of Jurists regarding counter-terrorism, human rights, and the rule of law over the last five years. On August 28, 2004, one-hundred and sixty lawyers from all regions of the world met at the ICJ biennial conference in Berlin and adopted a declaration on upholding human rights and the rule of law in combating terrorism.[409] This declaration "highlights the grave challenge to the rule of law brought about by excessive counter-terrorism measures, reaffirms the most fundamental human rights violated by those measures, and delineates methods of action for the worldwide ICJ network to address the challenge."[410]

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[406] Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/us-seeks-new-ruling-on-detention-powers/ (July 9, 2008 17:08) (last visited Oct. 10, 2009). *See also* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 658 (2006).

[407] Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/sense-of-urgency-on-detainees/ (July 8, 2008 18:41) (last visited Oct. 10, 2009).

[408] For an in-depth analysis, *see* Peter-Tobias Stoll, *Compliance: Multilateral Achievements and Predominant Powers*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 456, 468–76 (2003). *See also* Johannes van Aggelen, *Note 1*, 48 GERMAN Y.B. INT'L L. 666, 666–69 (2005).

[409] International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, pmbl. (Aug. 28, 2004), *available at* http://www.icj.org/news.php3?id article=3503?=en.

[410] *Id. See also* INTERNATIONAL COMMISSION OF JURISTS (ICJ), LEGAL COMMENTARY TO THE ICJ BERLIN DECLARATION; COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW—HUMAN RIGHTS AND RULE OF LAW SERIES NO.1 (2008).

Subsequently, in the adoption of the declaration, the ICJ "called for the establishment of a high level panel mandated to conduct a detailed study on the global impact of counter-terrorism measures on human rights."[411] In 2005, the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights convened and engaged in a broad-based consultative process to learn directly about the impact of terrorism and counter-terrorism measures on human rights and the rule of law around the world. Members of the panel travelled to take testimony directly from witnesses in sixteen regional, subregional, and national hearings from around the world.[412] Evidence relating to more than forty countries was considered.[413] Most of the hearings were public, but several sessions were private.[414] Members of the panel met with politicians, government officials, NGOs, judges and lawyers, journalists, intelligence and security personnel, and victims on both terrorist violence and counter-terrorism measures.[415]

On February 16, 2009, the current president of the ICJ and former second High Commissioner for Human Rights Mary Robinson presented the report of the panel. The report explored important legal issues raised by the war paradigm applied by the U.S. in the current struggle against terrorism.[416] The panel concluded that the U.S. paradigm, by conflicting and confusing acts of terrorism with acts of war, is legally flawed and sets a dangerous precedent.[417] The laws of war only apply when there is a situation of armed conflict according to objective criteria recognized under international law. Consequently, when terrorist acts are committed outside of such situations, they are not governed by international humanitarian law, but rather by domestic criminal law and international human rights law.[418] Accordingly, individuals who are suspected of terrorist offences committed outside of situations of armed conflict cannot be legally labelled, tried, and/or targeted as combatants. When Guantánamo terrorist acts occur during armed conflict, such acts may well be considered war crimes, and they are governed by international humanitarian law together with international human rights law. Persons suspected of having perpetrated such offences outside armed conflict cannot legally be placed beyond the protection of the law.[419]

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411 INTERNATIONAL COMMISSION OF JURISTS, EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE, URGING ACTION, at v (2009), http://ejp.icj.org/IMG/EJP-Report.pdf.

412 *Id.*

413 *Id.* at 1.

414 *Id.*

415 *Id.* at 9.

416 *Id.* at 49–64.

417 *Id.* at 49.

418 *See id.* at 51–52.

419 *See id.* at 51.

The overall findings of the panel were the following:

- Terrorism is a reality and States have a duty to counter the threat posed, but many current counter-terrorist measures are illegal and even counterproductive.[420]
- The legal framework that existed prior to 9/11 is extremely robust and effective: international human rights and international humanitarian law were elaborated precisely to guarantee people's security. The Panel concluded that this legal framework is sufficiently adaptable to meet the current threats.[421]
- The Panel found that the framework of international law is being actively undermined, and many States are reneging on their treaty or customary law obligations. The failure of States to comply with their legal duties is creating a dangerous situation wherein terrorism, and the fear of terrorism, are undermining basic principles of international human rights law.[422]
- The Panel was particularly concerned at the evidence worldwide showing that the erosion of international law principles is being led by some of those liberal democratic States that in the past have loudly proclaimed the importance of human rights.[423]
- Specifically, the Panel rejects the claim that any "war" on terror excuses States from abiding by international human rights law and, in armed conflict situations, international humanitarian law.[424]
- Intelligence agencies around the world have acquired new powers and resources, but legal and political accountability have often not kept pace.[425]
- Criminal law is the primary vehicle to be used to address terrorism; preventive measures and adaptations of the legal framework that are not in conflict with international human rights principles are acceptable, and may indeed be required if States are to comply with their duty to protect life and the security of persons.[426]

Those conclusions were also shared by the European Parliament, which adopted a resolution on the return and resettlement of the Guantánamo detention facility inmates. The resolution stated, in particular, that it invites "the United States to ensure that Guantánamo detainees are

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420 *Id.* at 14.

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.*

425 *Id.*

426 *Id.* at 15.

granted their human rights and fundamental freedoms, on the basis of international and United States constitutional law."[427] In addition, "any detainee against whom the United States has sufficient evidence is properly tried without delay in a fair and public hearing by a competent, independent, impartial tribunal and, if convicted, imprisoned in the United States[.]"[428] Moreover, "any detainee who is not to be charged and who chooses voluntarily to be repatriated is returned to his home country as quickly and expeditiously as possible."[429] Detainees who are not charged "but cannot be repatriated due to a real risk of torture or persecution in their home country" should be given the opportunity to be admitted to U.S.[430]

VIII. CONCLUSION

What Professor Koh observed in 2002 is still valid today, namely

> We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law. If we are at war, that war will affect our children's future, and that future—I submit—is far too important for us, as lawyers, to leave to the politicians and the generals.[431]

The many recommendations contained in the report of the House Committee on the Judiciary to the new U.S. administration, if implemented, may result in an enormous step forward regarding respect for international law. Coming back to the essential question of whether 9/11 has fundamentally shaken the foundations of international law, I am more inclined to believe, with the conclusions of the ICJ's eminent panel, that it has not. Others authors, however, are more inclined to believe that it has.[432]

It is my firm conviction that the international community cannot continue to act unilaterally. It is indispensable that there will be a permanent inter-action between the state and the individual. At a conference in New York in March 2007, I had the privilege to present as a panellist a paper

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427 European Parliament Resolution on the Return and Resettlement of the Guantánamo Detention Facility Inmates, ¶ 3, Eur. Parl. Doc. P6_TA(2009)0045 (Feb. 4, 2009), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0045+0+DOC+XML+V0//EN.

428 *Id.*

429 *Id.*

430 *Id.*

431 Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 39 (2002).

432 *See, e.g.*, PAUL EDEN & THÉRÈSE O'DONNELL, SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW? (2005); HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW (2005).

entitled *A U.N. Human Rights Call for Guantánamo: Fact or Fiction*. At that time I was totally convinced that it would remain a fiction. With the new administration I hope it will become a fact.

I would like to conclude referring to a renown correspondence between Einstein and Freud about the motives of war, in which Einstein questioned:

> How is it that these devices succeed so well in rousing men to such a wild enthusiasm, even to sacrifice their lives? Only one answer is possible. Because men has within him lust for hatred and destruction . . . . Is it possible to control man's mental evolution so as to make him proof against the psychoses of hate and destructiveness? [433]

In a prophetic manner he added, "[b]ut I am well aware that the aggressive instinct operates under other forms and in other circumstances."[434] Indeed, the question has been put forward: "Will war one day disappear from the face of the earth?" The reply was: "Yes, when mankind understands justice, and practices the law of God; all men will then be brothers."[435]

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[433] ALBERT EINSTEIN & SIGMUND FREUD, WHY WAR?: OPEN LETTERS BETWEEN EINSTEIN AND FREUD DATED JULY 30, 1932, *reprinted in* 6 THE NEW COMMONWEALTH 7 (1934).

[434] *Id.*

[435] ALLAN KARDEC, THE SPIRITS BOOK 307–09 (Anna Blackwell trans., 2001) (responding to question number 743).