Torturing the Rule of Law: USA and the Post 9-11 Legal World

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INTRODUCTION

For centuries, Anglo common law nations have championed the concept of “Rule of Law” as a universal. In this view, the law is considered to be an eternal, first principle, providing absolutes of right and wrong, which demand obedience from the ruled as well as the rulers. In contradistinction is the arbitrary “Rule of Men.” The Rule of Men has no absolute or fundamental principles, save the transitory whims of the Ruler. “Rule of Men” despots use their all-encompassing power for personal reasons, arbitrarily, not only to punish their enemies and reward their friends, but to create a climate of fear among their citizenry, curbing dissent and free expression.

Whereas the Rule of Men is based upon the whims of those in power, the Rule of Law is based upon a different principle—a robust view of rights. Over time a consensus has emerged that human rights are the most fundamental of all rights. In this view human rights are not rights granted by a state; rather, they are rights that pre-exist the state. As such they cannot be withheld, or denied. They can only be respected or violated. Because of their dominant, fundamental and preeminent position in democratic societies, a state’s observation of human rights
serves as an indicator or gauge of a state's respect for the Rule of law and its citizens. Observation of human rights also indicates a state's willingness to accept principle and law as more important than the expediency of short-term objectives, achieving political goals or the satisfaction of special interest constituencies.

Among the Rule of Law nations, the U.S. has stood up as the standard bearer, excoriating those rulers who use their powers vindictively, against enemies on personal basis, and beckoning those nations to return to the fold. After all, America sees itself as the embodiment of human existence at its very best.¹ This statement is consonant with a deeply rooted American faith that America is a God-ordained 'City on a Hill,' that 'stands taller and sees farther' than the rest of the world.²

The “Rule of Law” is a critical building block of democratic governments that in turn is intertwined with a strong view of human rights. To a certain extent, Rule of Law is premised on the same presumption of equality that underlies human rights. Whereas the Rule of Law subjects all parties—both the ruled and the ruler—to the Law, so too, human rights extends egalitarian principles to all humans, regardless of such distinctions as ethnicity, age, race, or sex.

The law is clear on few things, particularly when it comes to matters requiring coordination under domestic and international law. One of those few things is torture. Torture is forbidden universally. It is viewed as contrary to fundamental human rights. Human rights law dictates that the right not to be subjected to torture cannot be derogated from in any circumstances.³ As a peremptory (jus cogens) norm, the right not to be subjected to torture dictates that no situation permits a


² Id. (providing “[I]t is consistent with the more carefully-constructed declarations of many past American rulers of greater intellectual and oratorical capacity than Hutchinson (e.g., John Winthrop, James Madison, Woodrow Wilson, John F. Kennedy and Bill Clinton, to name a few)).”

government to suspend or curtail this fundamental right, not even a state of emergency. Torture is banned both in times of peace and in times of war.\textsuperscript{4}

As the self-proclaimed champion of freedom and democracy, the world has heard from the USA an un-ending homily about human rights as one of the critical building blocks of freedom and democracy. The right to freedom from torture is recognized as an important aspect in safeguarding the fundamental right to the security of the person. Torture is the polar opposite of respect for human rights. Where states condone or practice torture, torture is incontrovertible evidence of a state’s abandonment of principles in favor of expediency in the administration of government policy and the sine qua non for the abandonment of commitment to Rule of Law and human rights.

This signatory role of torture is made by the USA State Department’s annual publication evaluating each country’s human rights record including a comment on the state’s restraint from the use of torture, and condemnation in unqualified terms of those nations who utilize it.\textsuperscript{5} This evaluation is intended to serve as a kind of a ‘roll call of shame’ to expose breaches of human rights and to place countries under the glare of international scrutiny. This publication of violations, it is hoped, acts as a “soft law” mechanism in the enforcement of the human right not to be subjected to torture.

The reaction of the USA after the September 11, 2001 attacks, including its invasion of Afghanistan and subsequent unilateral military campaign in Iraq, and various executive and legislative actions have been not merely a quiet abandonment of the Rule of Law, but through its so-called “War on Terror,” a concerted attack on the Rule of Law. In this paper we shall examine that attack on those principles, through an examination of cases, executive actions, legislations, and international law. While the authors recognize the mythical nature of the Rule of Law, they maintain that it is a useful myth, in that it helps actors predict

\textsuperscript{4} See id.

with reasonable certainty the actions that will be accepted internationally (as between nations), help make good policy decisions and anticipate the actions of others. Furthermore, it operates as an ideal to aim for and a standard against which states' actions can be judged.  

I. THE END OF THE RULE OF LAW: FOCUS ON THE PERSON

The blind-folded Themis is one of law's universally recognized symbols. It symbolizes the impartiality of law. It follows, therefore, that laws focused on specific types of individuals are considered prejudicial and contrary to the Rule of Law's efforts at objectivity, which draws attention to the fact that laws focused on particular individuals violate the egalitarian principle of all being equal before the law. Furthermore, one fundamental tenet of the Rule of Law is that laws must curb arbitrary behavior by government. The Rule of Law prohibits governments from abridging unreasonably the rights of the citizenry. Nevertheless, recent U.S. domestic laws, namely, the USA PATRIOT Act and the Homeland Security Act, tend to focus on certain classes of individuals, specifically, non-citizens. These two pieces of legislation, and as will be discussed below, corollary executive action, have been highly arbitrary and unreasonable abridgements of not only non-citizens' rights, but also of the rights of citizens themselves.

On November 13, 2001, U.S. President George W. Bush issued a President's Military Order (PMO). This executive action precipitated a storm of criticism from both friend and foe. The first concern is that the PMO was applicable only to non-U.S.

6 See Jennifer C. Root, The Commissioner's Clear Reflection of Income Power Under § 446(b) and the Abuse of Discretion Standard of Review: Where Has the Rule of Law Gone, and Can We Get it Back?, 15 AKRON TAX J. 69, 73 (2000) (asserting “rule of law is articulated as standing for clearly written rules that give notice to the governed in advance of their application.”).
citizens who are determined by the President to be members of Al-Qaida, to be members of, or to have played a role in international terrorism, or to have harbored any such person.\textsuperscript{10} This pragmatic purpose raised doubts about the application of due process precepts including the presumption of innocence, whether the usual criminal standard of "beyond a reasonable doubt" would apply, and whether acquittals could be reversed. The PMO further sought to marginalize and alienate courts by prohibiting judicial review.\textsuperscript{11} It allows trials to be conducted in secret, and further sealed the fate of those accused by both denying them access to the evidence used against them at trial and diluting the normal rules of evidence.\textsuperscript{12}

The Rule of Law was further undermined by the institutionalization of this discriminatory treatment when the USA Department of Defense ("DOD") subsequently formally issued its first set of Procedures for Trials by Military Commission of Certain Non-U.S. Citizens in the War Against Terrorism on March 21, 2002.\textsuperscript{13} These DOD procedures countenance intentional and per se discrimination on the basis of national or social origin, intentional and per se denial of equal protection, and 'denial of justice' to aliens in violation of various international laws. In particular, the DOD procedure allows: that aliens need may not be tried in civilian courts, accused may be detained for months without charges, detainees do not enjoy the right to be brought promptly before a judge or to file habeas corpus petitions, defense attorneys will lack access to witnesses, accused will not be able to cross-examine all witnesses against them, portions of trials can be held in secret, and accused lack the right of appeal to an independent and impartial tribunal.\textsuperscript{14}

\textsuperscript{10} Id. (defining "individual subject to this order" as non-United States persons who are or were al Qaida members, who harbored or abetted al Qaida members, or who engaged in any form of international terrorism).
\textsuperscript{11} Kevin J. Barry, Military Commissions: American Justice on Trial, 50 JUL FED. L. 24 (2003) (articulating limited applicability of PMO).
\textsuperscript{12} Id. at 25 (discussing criticisms following release of President's November 13, 2001 Military Order).
\textsuperscript{13} DEPT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-U.S. CITIZENS IN THE WAR AGAINST TERRORISM (Mar. 21, 2002).
\textsuperscript{14} Id. outlining trial procedures, which, while facially similar to standard U.S. procedure, permit courts to close any portion of proceeding to public or to accused himself for safety and/or national security concerns) (emphasis added).
The DOD General Counsel’s military commission instructions, issued on April 30, 2003, renewed the concerns that surrounded the PMO as well as the March 21, 2002 DOD procedures.\textsuperscript{15} The planned military commissions do not demonstrate fairness and nor do they meet the “exalted” American standards of justice. Establishment of the structure and regulations for the military commission trials of individuals designated for such trial by the President, like the previous directives, offers little comfort. In fact it only served to renew the criticisms created by the initial PMO of November 13, 2001,\textsuperscript{16} and to raise ire both domestically and abroad. The main criticism was that the U.S. was undermining both domestic and international set processes and mechanisms with raw power and ultimately undermining the basic standards of justice America wishes to be known for.\textsuperscript{17}

The discrimination against non-citizens by the government was brought home in the case of *Hamdi v. Rumsfeld*.\textsuperscript{18} Mr. Hamdi was captured in Afghanistan and, along with other combatants captured there, taken to Guantanamo. Mr. Hamdi, however, had the unusual status of U.S. citizenship. As soon as the U.S. found out he was a citizen, the treatment afforded him was different from those identified as combatants in Afghanistan. Rather than suffering the same treatment for the same action as his fellow Afghanistan combatants, Hamdi was promptly taken

\textsuperscript{15} DEPT OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 3: RESPONSIBILITIES OF THE CHIEF PROSECUTOR, PROSECUTORS, AND ASSISTANT PROSECUTORS (Apr. 30, 2003) (including within prosecutor’s outlined duties, prohibition against disclosing “classified information, national security information, or state secrets to any person not specifically authorized to receive such information.

\textsuperscript{16} Military Order of Nov. 13, 2001, supra note 9 (declaring “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”).

\textsuperscript{17} It did not help that the action occurred in the shadow of lowered world opinion of the U.S. due to its unilateral moves regarding the environment and missile defense. The invasion of Iraq on a mish-mash of excuses also served to reinforce the fears that the international community had of a hyper-power determined to have its way whether through law or simply raw power.

to the United States for different treatment. In its essence, this case was a case of mistaken identity. He is a U.S. citizen who was initially mistaken for a non-citizen, and afforded different treatment on the basis of his citizenship, regardless of his actions. The U.S. made clear in this case that we are not all equal before the law.

II. THE END OF THE RULE OF LAW: ARBITRARY DETENTION & SHIFTING PROCEDURE

Another critical aspect of the Rule of Law is the prohibition against arbitrary detention and the right to clear, established procedure. These fundamental tenets of the Rule of Law permit the courts to subject executive action to public scrutiny. More particularly, these two standards limit the judiciary and executive’s ability to pervert the course of justice for political or economic ends and they protect the individual from the state. These Rule of Law standards have been incorporated into many human rights agreements that require trials to occur before ‘regularly constituted’ tribunals. Nevertheless, as noted in the previous section, the U.S. has decided military tribunals will try aliens. It is doubtful if a military tribunal, whether it is trying a violation of the laws of war or any other violation, would be considered a ‘regularly constituted tribunal’ under either the Geneva Conventions or the International Covenant on Civil and Political Rights. Military tribunals are ad hoc and set up


21 See e.g., First Geneva Convention; Second Geneva Convention; Third Geneva Convention; Fourth Geneva Convention (guaranteeing individual’s right to be tried and sentenced before “regularly constituted court” within each Geneva Convention, and although not expressly declared, military tribunals are not and cannot be conceived as encompassed by Geneva Convention’s language).

22 International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 360 (declaring, in Article 9, that all persons are entitled to due process before courts including
for a specific purpose; it is this type of tribunal that is specifically outlawed by these treaties. Considering that the US indicted the so-called twentieth hijacker, Moussaoui, under domestic and international terrorism laws, there does not seem to be a either a legal basis or an actual need for such military tribunals—this observation is not meant to suggest that claims of necessity should override the Rule of Law.

The USA has developed yet another strategy for evading the Rule of Law that condemns arbitrary detention and shifting procedure: that is it attempts to create a legal black hole to permit such detentions. The most obvious example of this is in Rumsfeld v. Padilla, where the Supreme Court ultimately permitted the Administration to persist in detention without charges or trial. In that case, the court permitted Padilla's application to be denied on the basis that he was in the wrong jurisdiction, thus nullifying the attempts of his lawyer's application for habeas corpus. The Court failed to take notice that the Administration had moved the applicant from one jurisdiction to another for the purpose of frustrating any writ of right to trial within reasonable time or release).

23 Warren Richey, Military Tribunals to get a Test in the Supreme Court, THE CHRISTIAN SCI. MONITOR, Nov. 8, 2005 (noting use of military tribunals to try terror suspects “mark[s] the first time in a half-century that the US government is relying on ad hoc military commissions to mete out justice rather than civil federal courts or the military justice system.”).


26 President Bush justified labeling Padilla an “enemy combatant” and detaining him in military custody by invoking his authority as “Commander in Chief of the U.S. armed forces”, relying on the congressionally enacted Authorization for Use of Military Force. See id.

27 On June 9, 2002, Padilla was detained in deferral custody within the Southern District of New York. See id. at 431. That same day, he was transported to South Carolina. On June 11, 2002, Padilla's counsel filed for habeas corpus in the Southern District of New York, naming President Bush, Secretary Rumsfeld, and Commander Melanie Marr as respondents. The Government moved to dismiss, arguing that Commander Marr was Padilla's immediate custodian and therefore the only proper respondent to the petition. The District Court held that it lacked jurisdiction over Commander Marr because she was not located within the Southern District. Id. at 432. The Supreme Court held that jurisdiction over Padilla's petition does not lie in the Southern District because it does not have jurisdiction over Marr. Id. at 442. The Court found that since both Padilla and Marr were present in South Carolina, Marr is the proper respondent and jurisdiction lies in South Carolina. Id. at 446.
habeas corpus. Any further application will likely be frustrated the day before the hearing by simply moving the applicant to yet another jurisdiction.

In *Hamdi*, the Court has given the Administration the benefit of the doubt and shifted the onus to the applicant. It is manifestly absurd that Hamdi, who has to date been incarcerated for three years, be required to produce evidence and witnesses in Afghanistan to attest to his actions at the time in question. Nevertheless, this is what the Administration has requested and what the Court acquiesced to.

One example of this is the case of the British subject held in Guantanamo. In that case, *Abbasi & Anor., v. Secretary of State for Foreign & Commonwealth Affairs*, a British national, Feroz Ali Abbasi, held at Guantanamo since January 2002, complained to British judges that he had been without access to a court or any other tribunal, or even to a lawyer, since his arrival in Guantanamo. Abbasi’s representatives sought to compel the British Foreign Office to take some action on his behalf to challenge his arbitrary detention in Guantanamo. The British court declined, striking yet another blow at the Rule of Law. The court did note, however, that although Mr. Abbasi’s detention as an ‘enemy combatant’ may ultimately be justified, the judges found it ‘objectionable . . . that Mr. Abbasi should be subject to indefinite detention in territory over which the U.S. has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.’

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28 See id. at 441 (arguing Padilla’s detention and transfer was not motivated by intent to manipulate).

29 Once the Government presents credible evidence that the applicant meets the “enemy-combatant criteria,” the burden shifts to the applicant to come forth with more persuasive evidence to demonstrate that he does not meet the criteria. “A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.” See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

30 See id. at 533. (“We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

31 (2002) EWCA (Civ) 1598, [1] (Eng.).

32 See id. (explaining that Abbasi seeks judicial review to compel the Foreign Office to take action on his behalf to remedy his arbitrary detention at Guantanamo Bay).

33 Id. at [65]-[66].
that the British tribunal expressed its deep desire that the U.S. courts assume jurisdiction so as not to leave Mr. Abbasi in arbitrary detention.\textsuperscript{34} The British court attempted to justify its avoidance of confronting the issue of the USA's attack on the Rule of Law by referring to the Inter-American Commission on Human Rights, which was investigating the detentions.\textsuperscript{35} The British Court offered lamely that it "is as yet unclear what the result of the Commission's intervention will be."\textsuperscript{36}

It is of note that America's move to create a different judicial process to deal with the Guantanamo detainees entails a process that draws on the military establishment to act in three different roles—prosecutor, judge and jury. This situation is contrary to the ordinary safeguards of due process, a fact reflected in the U.S. case law if \textit{In re Oliver}.\textsuperscript{37} In this 1948 case, the U.S. Supreme Court had the opportunity to consider the ordered liberty that signifies due process. It established emphatically that the Constitution would not tolerate a state system by which a lone official acted as accuser, committing magistrate, prosecutor, judge, and fact-finder.\textsuperscript{38} The U.S. Supreme Court also addressed an issue that underpins due process—that the judicial proceedings are public in nature. It made its point on this issue powerfully and poignantly by referring to the secrecy of the English Star Chamber and the Spanish Inquisition in the course of affirming that due process guarantees a right to public proceedings.\textsuperscript{39} Supposedly, the Star Chamber and all its trapping

\textsuperscript{34} "Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole.'" \textit{Id.} at [64]. He is in a territory entirely under the United States' control. \textit{Id.} at [66]. Any order made by the United Kingdom would not be binding on the United States, and therefore the British tribunal deemed it essential that the United States assume jurisdiction over Mr. Abbasi. \textit{Id.} at [67].

\textsuperscript{35} \textit{See id.} at [107] (asserting "Inter-American Commission on Human Rights has taken up the case of the detainees .... It is not clear that any activity on the part of the Foreign and Commonwealth Office would assist in taking the matter further while it is in the hands of that international body.").

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} 333 U.S. 257 (1948).

\textsuperscript{38} "In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776." \textit{Id.} at 266-67. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." \textit{Id.} at 270.

\textsuperscript{39} The Court articulated the traditional distrust for secret trials as stemming from these former practices, stating that "[i]n the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." \textit{Id.} at 269-70.
of crude executive fiat trumping judicial process was abolished close to a half a millennium ago. Frighteningly though, the Guantanamo detainees fall into the legal black hole the U.S. created specifically for them. It has been argued that the lack of civilian judicial review of convictions gives President Bush monarchical powers, more reminiscent of centuries ago than contemporary paradigms in which the world’s governments are constrained by law.

This approach is startling as external norms re-enforce the emphasis on the inviolability of the human person which, as noted, are is also a tenet of the U.S. rights tradition. In so doing, these universal external norms render impossible the central premise of the U.S.’s executive policy; that is, that the executive may construct a legal black-hole, a space within which no rule of law obtains.

A. Inter-American Commission on Human Rights (Commission)

On February 25, 2002, a group of petitioners filed the first international legal challenge to the Guantanamo detentions with the Inter-American Commission on Human Rights (Commission). In March 2002, the commission issued a decision on “precautionary measures” requesting the U.S. “to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.” The decision read, in part:

The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures under Article 25(1) of its Rules of Procedure is, as with the practice of other international decisional bodies, a well-established and necessary component of the Commission’s processes.

See generally The Court of Star Chamber 1487-1641, http://www.britainexpress.com//History/tudor/star-chamber.htm (last visited Oct. 6, 2006) (stating that in 1641 the Long Parliament abolished the hated Star Chamber, though its name survives still to designate arbitrary, secretive proceedings in opposition to personal rights and liberty.”).
Indeed, where such measures are considered essential to preserving the Commission’s very mandate under the OAS Charter, the Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for such measures.

In light of the foregoing considerations, and without prejudging the possible application of international humanitarian law to the detainees at Guantanamo Bay, the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights.

The Commission’s request asks the U.S. government for precautionary measures to protect the detainees’ “right to personal liberty and security, their right to humane treatment, and their right to resort to the courts for the protection of their legal rights, by allowing impartial courts to determine whether the detainees have been lawfully detained and whether they are in need of protection.” This request puts the issue about as plainly as it is possible. The U.S.’s failure to even acknowledge the problem indicates that it intends to pay no heed to this basic Rule of Law requirement.

B. Denial of the Right to Judicial Review of Detention

The Rule of Law requires that detainees be brought before the court to ensure the state is not unlawfully detaining people whether objectors to the regime, journalists, political opponents, dissidents, or other parties. The USA has also taken aim at this tenet of the Rule of Law. The DOD rules reflect an intentional

denial of the customary and nonderogable human right to take proceedings before a court exercising judicial power in order to determine the lawfulness of one's detention and to order release of the person if detention is not lawful. For example, no provision exists in the President's Military Order or the DOD rules for review of detention by a federal court (the appropriate court for such cases).\(^4\)

**C. Denial of the Right to Review by a Competent, Independent, and Impartial Court**

Further, the Rule of Law requires review by competent, independent, impartial courts—again, the post-Star Chamber requirements. The U.S.'s rejection of this tenet by its invocation of military tribunal regime is also relevant to the more general and blatant denial of the customary and nonderogable right to appeal to a competent, independent, and impartial court. No such right of review exists under either the PMO or the DOD procedure.\(^5\) Indeed, a "Review Panel" under the DOD rules consists of three military officers who remain generally under orders from the President, the DOD, and various others within the military who have command authority.\(^6\)

**D. Denial of the Right to Trial Before a Regularly Constituted, Competent, Independent, and Impartial Tribunal Established by Law**

As with the previous section concerning review, the Rule of

\(^4\) Neither the President's military order (PMO) nor the DOD Military Commission Order contain any provision for an independent judicial determination of wrongful detention. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001); Department of Defense, Military Commission Order No. 1, (Aug. 31, 2005).

\(^5\) The PMO leaves only appeals within the administration, stating that "submission of the record of the trial, including any conviction or sentence, for review and final decision by me [the President] or by the Secretary of Defense if so designated by me for that purpose." Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001). The DOD likewise leaves final review to the President, with the only difference being that it is made explicit that the Secretary of Defense reviews all appeals before submitting them to the President for final review, or making the final decision himself if designated by the President. Department of Defense, Military Commission Order No. 1, 15-16 (Aug. 31, 2005).

\(^6\) The review panel requires only one member to have had experience as a judge. Department of Defense, Military Commission Order No. 1, 16 (Aug. 31, 2005).
Law also speaks to the nature of the tribunal for trial. Prosecution before the military commissions will also constitute denial of the Rule of Law standard: The customary and non-delegable right to prosecution before a regularly constituted, competent, independent, and impartial tribunal established according to law. Under the DOD rules, military commissions "shall consist of at least three but no more than seven members," all of whom must be military officers, and only one of whom, the "Presiding Officer," must be a lawyer. Under the rules, there is no procedure for challenging a member of the commission for cause, although the "Appointing Authority may remove members or alternative members for good cause." What that 'good cause' may be is unclear. Good cause may be someone whose commitment to the Rule of Law is greater than his/her blind loyalty to President Bush.

E. Denial of the Rights to Fair Procedure and Fair Rules of Evidence

Rule of Law requires certain minimum standards with respect to procedure and evidence. With respect to evidence, the DOD rules permit hearsay, unsworn written statements, and other evidence that would be inadmissible in U.S. federal courts or courts-martial and deny the right to confrontation or examination of all witnesses against an accused. Witnesses can provide testimony "by telephone, audiovisual means, or other means," undermining of confrontation and cross-examination of witnesses. Cross-examination of witnesses against the accused

47 There is no provision among the enumerated "procedures accorded the accused" to challenge the qualification of the members of the commission. Id. at 6-8.
48 Id. at 3.
49 While the removal clause is preceded by the statement that the members must be "competent to perform the duties involved," there are definitions of the duties of the members of the commission given in two different section. The one given in the section is that they are to "determine the findings and sentence without the Presiding Officer" and to "vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1)." Id. at 3-4. An enumeration of the "duties of the commission during trial," appears in a later section not referenced by this part of the order, and it is in this separate section in which it states that the trial should be fair. Id. at 3-4, 9.
50 Hearsay evidence is not prohibited by the order, unsworn statements are explicitly allowed, there is no procedure to exclude evidence for being unduly prejudicial with regard to their probative value. Id. at 10-11.
51 Id. at 10.
is only authorized with respect to witnesses "who appear before the Commission."\textsuperscript{52}

Interestingly, the USA's efforts to undermine this pillar of the Rule of Law have not gone uncontested by its allies. As Mr. Downer, the Australian Foreign Minister, over a year ago in the Hick's case stated that "[w]e don't have an objection to the fact he will be tried by a military commission but we do want the military commission proceedings to be fair."\textsuperscript{53} Mr. Downer said Australia was unable to prosecute Hicks and Habib under its anti-terrorism laws because such laws did not exist when Hicks allegedly trained with Al-Qaeda in late 2000 and early 2001.\textsuperscript{54} The Australian government noted though that "[t]he proceedings should be fair and consistent with the types of proceedings we would have here with a court martial or some similar kind of judicial process. We want to make sure the military commission process is fair and meets appropriate standards of judicial fairness."\textsuperscript{55} The British Government has protested a number of the tribunals' rules. In fact, all three branches of the British government—its executive, legislative, and judicial branches—have vigorously protested the conditions of detention and proposed trial of its nationals.\textsuperscript{56}

Finally, even the U.S. appointed lawyer, Marine Corps Maj. Michael Mori, who represents Australian detainee David Hicks, has said "[t]he military commissions will not provide a full and fair trial,"\textsuperscript{57} in part because "[t]he commission process has been created and controlled by those with a vested interest only in

\textsuperscript{52} Id. at 7.
\textsuperscript{54} Tough new terrorism legislation outlawing membership of Al-Qaeda was not conceived until after the September 11, 2001, attack on the World Trade Centre, months after Hicks trained in Afghanistan. It was passed in November 2002, a year after he was captured.
According to Mori, Hicks' detention conditions have disoriented him and lowered him to the point that his main preoccupations are the most basic of human needs: food, and shelter.

III. THE END OF THE RULE OF LAW: DISCRIMINATING AMONG ALLIES

On the international level it is customary practice among nations to accept and acknowledge equality among themselves and among their citizens. Post 9-11, the USA has unilaterally abandoned this standard. The U.S. has taken to releasing its Guantanamo prisoners on an ad hoc basis, seemingly at the whim of the executive. It has released prisoners from some countries inimical to U.S. plans, prisoners who are citizens of others that have shifted in their support of U.S.'s invasion of Iraq, favored some allies while refusing basic Rule of Law rights to the citizens of others. On February 11, 2004, for example, the U.S. released Hamed Abderrahman Ahmed, a twenty-nine-year-old Spanish national to Spain. He was expected to face questioning and possibly prosecution in Spain as an alleged associate of the Al-Qaeda terrorist network.

In 2004, Ruhel Ahmed, Tarek Dergoul, Jamal Al Harith, Asif Iqbal and Shafiq Rasul, all British citizens who had been detained at Guantanamo, were released and returned to their country's custody. Significantly however, the British Government has acknowledged that due to various obstacles, for instance, the lack of grounds, the detains are not subject to prosecution, and thus, upon their return, they will be released. Accordingly, as various human rights groups and media assert, unless British police obtain legally admissible evidence, the detainees should be released just as any other citizen would be,

58 Id.
59 Id.
so as to avoid creating a special "legal limbo" for the detainees.\textsuperscript{64}

Similarly, the American Government released another detainee, Slimane Hadj Abderrahmane, to his country, Denmark.\textsuperscript{65} Just as occurred when releasing the aforementioned detainees to Britain, Abderrahmane was set free once on Danish soil, as there was neither a legal method by which, nor a legal reason for which detain him.\textsuperscript{66} Of course, the Office of the Secretary of Defense was surprised by Abderrahmane’s release, as the U.S. considered him a threat to its national security.\textsuperscript{67} Yet, the Danish government ensured that its police would monitor him.\textsuperscript{68}

Several other governments, American allies included, have pressured the United States, to release individuals who are citizens and nationals of those countries.\textsuperscript{69} Combined as of 2004, there were approximately two-hundred-and-forty-two Kuwaiti, Saudi Arabian, Yemeni, and Pakistani nationals in detention.\textsuperscript{70}

The inconsistency in U.S. policy in the detention, prosecution and release of detainees provides further demonstration of failure to follow any international law standard,\textsuperscript{71} particularly where the detainee is not to be tried by their countries.

The U.S. treatment of Australia calls for particular censure. In the face of significant domestic opposition and international condemnation, the Australian government chose to support the U.S. invasion of Iraq.\textsuperscript{72} Despite this show of support in the face of

\textsuperscript{64} Id.
\textsuperscript{66} Id.
\textsuperscript{68} Id.
\textsuperscript{71} See Zagaris, \textit{supra} note 18 (chronicling conflicts of interest between U.S. national security and international laws regarding Guantanamo detainees).
\textsuperscript{72} See Benedict Sheehy, \textit{Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes}, 26 NW. J. INT’L L. & BUS. 225, 246 n.120 (2006) (providing “both historic and recent events, including Australia’s policy toward Aboriginal peoples, support of the United States’ illegal invasion of Iraq ... and refusal to investigate U.S. abuse of Australian citizen Habib in ... suggest[ ] Australia is not a Rule of Law state.”); Bush Warns Australian Pullout from Iraq Would be ‘Disastrous’, \textit{ASIAN POL. NEWS}, June 7, 2004 (describing “Australia deployed 2,000 troops to fight in the U.S.-led invasion of Iraq ... [Australian Prime Minister John] Howard’s
considerable opposition, the U.S. has refused Australia’s requests for Rule of Law standards to be applied to David Hicks and Mamdouh Habib, the two Australian citizens held at Guantanamo mentioned above. Given the Australian government’s support of the U.S. in this most unpopular of campaigns, the U.S.’s response of continued detention of these Australian citizens is manifestly absurd.

IV. THE END OF THE RULE OF LAW: RULE BY PRESIDENTIAL FIAT

As noted in the introduction, the Rule of Law’s polar opposite is the Rule of Men. The Rule of Men permits a select group of individuals to render decisions arbitrarily, that is, without guidelines or scrutiny. Thus, in essence, a government operating under this legal model has unfettered discretion. Paradigmatic of this approach is President Bush’s decision to run the justice system, at least as it applies to foreign combatants, as a personal fiefdom. He issues orders as he sees fit, without regard to the Rule of Law. The PMO, November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, declares that the president has power to designate persons as belonging to the newly created legal categories of “alleged international terrorist,” “member of Al Qaeda,” or “someone who harbors them.” Subsequently, the Secretary of Defense must detain such persons. The order goes on to mandate that “if” an individual falling within one of the aforementioned categories is tried, he must be tried by a military tribunal. However, as previously explained, these tribunals are rife with

Liberal Party, which has actively supported the U.S.-led war on terror, faces eroding support in Australia . . . (“).


President George W. Bush had declared in November 2001 that “an extraordinary emergency . . . for national defense purposes” necessitated extraordinary treatment of any non citizen whom he should determine belonged to Al Qaeda or was somehow involved in “acts of international terrorism” harmful to “the United States, its citizens, national security, foreign policy, or economy.” Bush ordered the Secretary of Defense to detain what were called “enemy aliens.” See Military Order of Nov., 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 222, 57831-36.

See id. at § 2(a).

See id.
all the Rule of Law problems inherent in such tribunals.\footnote{77 See id.}

Moreover, one must take note of what is absent from the order, namely, that such persons must actually be tried.\footnote{78 See id.} Rather, President Bush's order allows for the possibility that these persons might remain in detention, indefinitely, and without recourse to the courts, unless and until the President commands otherwise.

Two notorious examples of Rule by Presidential Fiat are the cases of Yaser Hamdi and Jose Padilla.\footnote{79 See Hamdi v. Rumsfeld, 294 F.3d 598, 599 (4th Cir. 2002) (denying writ of habeas corpus as next of friend petition of Federal Public Defender for Eastern District of Virginia and Christian Peregrim, private citizen, for petitioner Hamdi, classified as enemy combatant and detained at by U.S. military because neither Public Defender nor Peregrim satisfied prerequisites for “next of friend” standing); Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002) (granting petition of Donna R. Newman acting as next of friend seeking writ of habeas corpus for Jose Padilla, alleged enemy combatant by U.S. and Department of Defense’s detainee for his alleged involvement with Al-Qaeda).} Following the filing of a federal petition for habeas corpus on behalf of named detainees at Guantanamo, the Australian Government, in support of Hamdi, furnished a letter to the petitioning entities based upon information from the U.S. that stipulated that the detainees were being held pursuant to the PMO.\footnote{80 See Human Rights Damaged by Australian Government Stance on Guantanamo Bay, INT’L COMM’N OF JURISTS AUSTRALIAN SECTION, Sept. 1, 2003, http://www.icj-aust.org.au/no=17 (last visited Oct. 10, 2006) (criticizing “Australia’s following of the United States’ proposals without question); see also Robyn E. Blumner, Unjust, Unwise and Un-American, ST. PETERSBURG TIMES, Aug. 3, 2003 at http://www.sptimes.com/2003/08/03/news_p/Columns/_Unjust_unwise_and_u.shtml (last visited Oct. 10, 2006) (characterizing “[jurisdictional] limit [of the PMO as] a political move designed to make military proceedings more palatable to the public”).} In doing so, the Australian Government hoped to compel the USA to follow the Rule of Law.\footnote{81 See id.} Nevertheless, once the challenge to the detentions was in proceedings, the U.S. shifted its position, and vaguely suggested that the detainees are held pursuant to the laws and usages of war. Out of fear and anger—or perhaps, as supposed by Justice Rutledge, out of convenience—the U.S. executive deliberately constructed “a new legal regime” for treatment of the Guantanamo detainees.\footnote{82 In re Oliver, the U.S. Supreme Court’s 1948 consideration of the ordered liberty that signifies due process, established that the Constitution would not tolerate a state system by which a lone official acted as accuser, committing magistrate, prosecutor, judge, and fact-finder. In re Oliver, 333 U.S. 257, 281 (1948). Justice Wiley Rutledge}
As a practical matter, “only U.S. courts possess the power to issue enforceable judgments regarding acts of the U.S. executive.” In this regard, Professor Diane Marie Amann in a concise analysis observes: “in recent decades, extraterritorial action by the U.S. executive, often pursuant to express direction from Congress, has become routine. Somewhat less routinely, the U.S. judiciary has reviewed the validity of such action and, at times, conferred constitutional protections on overseas individuals whose liberty U.S. officials had restrained.” However, Professor Amann notes that U.S. case law on extraterritoriality is erratic, leaving considerable discretion to each court. The U.S. courts today have exercised their discretion in favor of the executive.

In a bid to counter US executive fiat, opponents of the Guantanamo detentions have invoked international law. Notwithstanding the Atlantic split, some proponents of the indefinite detention sought support in European law permitting derogation of rights in time of emergency. The US executive, however, failed to find any necessity for seeking to anchor its experiment in law anywhere outside its own whims. It argued that it had no obligation at all to prove to any court, not even U.S. courts that its designate-and-detain policy obeyed U.S. law let alone any internationally accepted standard.

By way of a plan drafted by the executive branch with no

stressed that resemblance to criminal justice procedures on the European continent could not save the state’s scheme. Id. (Rutledge, J., concurring).

83 See Diane Marie Amann, Guantanamo, 42 COLUM. J. TRANSNAT’L L. 263, 347 (2004) (providing “[a]s a matter of fundamental fairness, therefore, courts must shun undue deference and instead exercise the option, available to them under internal jurisprudence, to engage in searching review of executive actions within and without U.S. territory.”).

84 See id. at 314.

85 See generally U.S. v. Balsys, 524 U.S. 666 (1998) (finding respondent alien could be held in civil contempt during his deportation hearing and privilege against self-incrimination could not be claimed, because fear of criminal prosecution by foreign governments did not apply to privilege); U.S. v. Alvarez-Machain, 504 U.S. 655 (1992) (declaring respondent’s abduction from Mexico to United States, where he was subsequently arrested, did not violate previous extradition treaty with Mexico, and thus did not prohibit his trial in a court in United States); Verdugo-Urquidez, 494 U.S. 265 (1990) (holding protections against unreasonable searches and seizures under Fourth Amendment did not extend to aliens outside U.S. borders).

legislative input, the military, the executive arm most affected by events since September 11, is to act as prosecutor and primary defender, as judge and jury, as custodian and, potentially, as executioner. As Justice Rutledge said of an analogous scheme in Oliver:

This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. There is no semblance of due process of law in the scheme when it is used for those ends.

V. THE END OF THE RULE OF LAW: CONTEMPT FOR INTERNATIONAL LAW CONVENTIONS

To get a sense of the extent of the USA’s rejection of the Rule of Law, consider that it was only after considerable pressure that the U.S. accepted that the Third Geneva Convention applies to persons it captured in Afghanistan and subsequently detained in special purpose military prisons in Guantanamo. Although the U.S. finally agreed that the Geneva Conventions (GCs) applied, it then failed to implement its provisions. In other words, its acknowledgement of the Geneva Conventions’ application was an acknowledgement that there is no legal black hole and that the Rule of Law has a role to play. Given the USA’s decision to ignore the implications of the GC’s application, its acknowledgement of the GCs appears to be nothing more than a publicity stunt.


88 333 U.S. 257, 279 (1948).


A brief explanation of the concept of sovereignty is fundamental to grasp the significance of the Bush administration's actions. The meaning of "sovereignty" has varied throughout history. Historically, sovereignty is manifested in both practical institutions and political thought. At its core lies the notion of supreme authority within a territory, and with the state operating as the political institution in which that sovereignty is embodied. Sovereignty has two facets at its core: the "internal" and the "external."  

Those words do not describe exclusive sorts of sovereignty, but different aspects of the same sovereignty that are coexistent and omnipresent. Sovereign authority is exercised within borders, "internally" but also, by definition, with respect to outsiders who are "external" and may not interfere with the sovereign's governance.

Tying the two facets of law, Lynn S. Bickley observes: "Legal scholars of the Renaissance and Classical periods saw no distinction between municipal and international law, instead recognizing the law of nations as a universal law binding upon all mankind." Indeed, this view is evident in Blackstone's observation of the law of nations. He wrote international law is:

[A] system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world ... to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

From the foregoing there can be no doubt that the Rule of Law has both municipal and international dimensions. The so-called "War against Terrorism," however, has upset the neat two faceted paradigm sketched above. Waged inside, as well as outside of the United States by American officials, and at times against American citizens, the war has confounded the long established foreign-domestic dichotomy.

Legal challenges based on the rubric of applicable
international law to USA domestic laws have revealed gaps in the post-September 11 domestic legislation. Neither the Geneva Conventions nor any other international law applied to all issues raised by U.S. domestic laws, a number of whose provisions seem based on policy and expediency. As indicated by the British Court in the Abbasi case above, no extra-national tribunal appears competent to pass judgment. In any event, it would appear impossible to issue judgments that adhere to shaky domestic legislation while rejecting international norms either implicitly or explicitly. The task of doing justice thus fell to U.S. courts. Lower courts have tended to dodge careful review, chiefly by resorting to doctrines of deference and extraterritoriality. As the U.S. Supreme Court agreed to take up these questions in 2004, two appellate panels issued rulings somewhat less deferential to the U.S. executive. The ultimate outcome at the Supreme Court has been a disappointment for parties interested in civil liberties and the Rule of Law.

Nevertheless, the situation as it now stands leaves the detainees imprisoned without having gone through competent tribunals, and unlikely ever to have access to the courts, or fair trials. The President of the United States recognized in 2001 that Taliban detainees “are covered by” the Geneva Conventions, and then concluded that neither the Taliban soldiers nor Al-Qaeda detainees are entitled to Prisoner of War status. Now,


96 See Hamdi v. Rumsfeld, 540 U.S. 1099 (2004), cert. granted; Padilla v. Rumsfeld, 353 F.3d 695 (2d Cir. 2003), aff’d in part, rev’d.

97 Kenneth Roth, Bush Policy Endangers American and Allied Troops, INT’L HERALD TRIB., Mar. 5, 2002, available at http://www.commondreams.org/views02/0305-09.htm (last visited Oct. 12, 2006) (stating “Third Geneva convention does not cover members of Al Qaeda because they are terrorists, not government troops” and that “Taliban fighters, whom it does admit are covered by the convention do not qualify for POW [prisoner of war] status because they allegedly failed to wear distinctive insignia and abide by the laws of war.”); See Marco Sassòli, La “Guerre Contre le Terrorisme,” le Droit International Humanitaire et le Statut de Prisonnier de Guerre, 39 CAN. Y.B. INT’L L. 211, 214, n.11 (Donald M. McRae ed) (2001) (explaining even after Administration decided that Geneva
while it may be that once competent tribunals hold hearings, they will determine that some or many are not prisoners of war, such a conclusion does not leave them in a legal black hole as the administration leads the public to believe with respect to the international law regime. If the tribunals were to determine that these detainees are not Prisoners of War, the detainees will fit into another category or status, but—and this is important—they will have some status: they will be civilian detainees under the Fourth Geneva Convention. There simply is no gap between the conventions. In situations of international armed conflict, when an individual has committed a “belligerent act” and falls into the hands of an adversary and doubt arises as to status as a privileged or unprivileged combatant or civilian, the capturing power is required to convene a competent tribunal to determine the status of the detainee and ensure that such persons enjoy the protections of the Third Geneva Convention.\(^9\) Clearly, the U.S. has completely failed to fulfill its international legal obligations in the case of Guantanamo detainees and has chosen instead to run rough shod over the Rule of Law on the international plane.

Consider further that there is no indication that any of the detainees has been informed of his or her rights under the Vienna Convention on Consular Relations, which permits a foreign national to promptly contact and meet with a consular representative of his home government.\(^9\) Nor does it appear that any of the other international instruments that apply to protect the fundamental human rights of the detainees have been complied with by the USA.

Components of the executive’s policy neither comply with many aspects of international law, nor meet that law’s stringent test of derogation. To hold a person duly judged a Prisoner of War after hostilities end violates clear mandates of international humanitarian law.\(^10\) To detain anyone, even a presumed leader

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\(^9\) Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) (stating consular officers shall have right to visit sending State’s imprisoned or detained national to converse and correspond with him, and to arrange for his legal representation).

\(^10\) Third Geneva Convention, supra note 20, art. 118 (providing “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).
of terrorists, without affording him opportunities to consult with counsel and seek prompt judicial review of custody, is condemned. To deny detainees humane treatment, and ignore an injunction that comprehends an absolute prohibition on techniques of interrogation that profoundly disrupt a person’s psyche, is unconscionable. The U.S. proposal for trials before special military commissions likewise foretells infringement of fundamental rights.

To the extent that Rule of Law applies in the international sphere it is evident that it demands nations to fulfill obligations under international agreements for purposes of “justice and good faith” in Blackstone’s words, for as he notes pragmatically, nations often have interactions with each other. The impact of human rights violations (whether on a small or large scale) impinges directly on important world order values which no State has dared suggest are not common and shared. If human rights are considered serious values and matters of international concern, then “effective policing is required from local to global levels in the name of the world community as a whole.”

Denying the principles of human rights arguably points to “an alternative normative order that disparages the precept of human dignity.”

VI. END OF THE RULE OF LAW: THE USA ABANDONS THE LAW OF TORTURE

Perhaps nothing makes the U.S.’s decision to abandon the Rule of Law clearer than its handling of the law of torture. Torture is among the most widely condemned acts of all humanity. It has been described as “a cruel assault upon the defenseless” and as “inherently abhorrent.” Consider even the right wing, conservative, Judge Richard Posner’s pronouncement on the

101 See supra note 93, and accompanying text.
103 Id. at 146.
matter: "[E]ven a murderer, has a right to be free from torture."\textsuperscript{106} Its proscription is a peremptory norm of general international law, a \textit{jus cogens}. Almost all of the major international instruments for the promotion and protection of human rights and those that codify international humanitarian law condemn torture.\textsuperscript{107}

\textbf{A. The Torture Convention}

Evidencing this universal consensus on the repugnance of torture, in 1984 the United Nations specifically adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter Torture Convention].\textsuperscript{108} The Torture Convention defines the term "Torture" as follows:

\begin{quote}
[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{109}
\end{quote}

The Torture Convention goes on to place an obligation on States’ Parties to take “effective legislative, administrative, judicial, or other measures to prevent acts of torture” within their respective territories, and to incorporate the crime of torture as defined in the Convention into their national criminal

\textsuperscript{106} Wilson v. City of Chicago, 6 F.3d 1233, 1236 (7th Cir. 1993).
\textsuperscript{107} See, e.g., Third Geneva Convention, \textit{supra} note 20, art. 87 (asserting “[c]ollective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty are forbidden.”).
\textsuperscript{108} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), \textit{modified}, 24 I.L.M. 535 (1985) [hereinafter Torture Convention].
\textsuperscript{109} \textit{Id.} at art. 1.
The Torture Convention has certain outstanding features which are encapsulated eloquently by Professor Johan D. van der Vyver thus:

Torture is condemned regardless of the circumstances;

The Convention follows the principle of compulsory universal application: that is to say, it is made applicable to all countries of the world (and not only to States Parties) so that even acts of torture committed in a non-Party country are punishable in a State Party to the Convention;

States Parties are under an obligation not to extradite any person if there are substantial grounds to believe that the person would be in danger of being subjected to torture in the state requesting the extradition;

An order of a superior officer or public authority cannot be raised as a defense by a person charged with torture

The Convention itself serves as an extradition treaty among States Parties for purposes of bringing a perpetrator of torture to justice;

Evidence obtained through torture must be rendered inadmissible in the criminal justice systems of States Parties;

The Convention places upon States Parties the obligation to create a public awareness through education and information concerning the prohibition of torture.\footnote{111}

Although each signatory nation may phrase its definition of torture differently, the Torture Convention’s definition is generally regarded as “reflecting a consensus ‘representative of customary international law.’”\footnote{112} One must bear in mind, however, that the Torture Convention, being an international treaty, only addresses the obligations of states, and therefore has a limited application. The customary-law meaning of torture

\footnote{110 Id. at art. 2, 4 (guiding “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law”).


\footnote{112 Id. at 432 (2003) (quoting Prosecutor v. Delalic, No. IT-96-21-T, P. 459 (1998)).}
exceeds the confines of the Convention: insofar as international
criminal law applies to the criminal conduct of individuals as
well as state officials, the prohibition of torture is not be limited
to acts of torture committed only by state actors.

Importantly, however, the Torture Convention’s drafters
accorded the states freedom to punish criminals. Specifically, the
Torture Convention acknowledges that states may impose pain
and suffering; provided it “aris[es] only from or inherent in, or
incidental to, lawful sanctions.”113 As such, the pain or suffering
in question may be permissible even if it is severe, as long as it
attends legitimate punishment, for instance, pain and suffering
arising from legitimate imprisonment, corporal punishment, or
capital punishment. As Professor Vyver notes, “[t]he phrase was
not intended to exclude or to excuse legally sanctioned
punishments that have all the makings of torture per se. Use of
the word ‘only’ was designed to make that distinction.”114

B. The Torture Convention and the United States

In 1990 the U.S. ratified the Torture Convention, and
implemented it through the enactment of the Torture Convention
Implementation Act [hereinafter the Act]. The purpose of the Act
was to conform the U.S.’s criminal codes with the Convention’s
directives.115 Torture is defined in the Act as: “an act committed
by a person acting under the color of law specifically intended to
inflict severe physical or mental pain or suffering (other than
pain or suffering incidental to lawful sanctions) upon another
person within his custody or physical control.”116 Similar to other
American jurisprudence traditionally claiming extraterritoriality,
the Act provides for the exercise of extraterritorial jurisdiction by
American courts to bring those who committed torture outside
the U.S. to justice within the U.S. notwithstanding victim’s or
perpetrator’s nationalities.117 The Act was subsequently
amended to cause a person who conspires to commit torture to be
subject to the same penalties as one who actually committed

113 Torture Convention, supra note 108, at art. 1(1) (emphasis added).
114 Johan D. van der Vyver, supra note 111, at 433 (2003).
115 Id. at 434.
116 Id. (citing 18 U.S.C. 2340).
117 Id. at 434.
torture.118

The Torture Victim Protection Act of 1991 establishes a cause of action and remedy to torture victims at the hands of anyone acting under actual or apparent authority or color of law of any foreign nation.119 Both U.S. nationals and aliens have the right to claim damages.120 It is important to note, however, that the American legislation only recognizes state actors as perpetrators of torture.121

C. Definitions: Torture as a War Crime versus Torture Under the Convention

Torture in the context of war is considered a war crime, regardless of whether the perpetrator was an enlisted member of the national forces, a recognized resistance group or an independent civilian. The ICTY emphasized this view in Prosecutor v. Blaskic.122 It opined that individuals, in order to determine crimes against humanity, will be treated as civilians regardless of whether they previously participated in hostilities.123 Therefore, the ICTY determined that acts causing serious bodily injury to civilians are war crimes. Professor Vyver eloquently synthesizes the judgment’s import:

Their non-combatant status might derive from the fact that they were no longer in the army or were no longer bearing arms, were placed hors de combat by being wounded, or were being detained by the enemy. In this regard, the victim’s situation at the time the crime was committed - rather than his or her general status - will determine his or her standing as a “civilian” for purposes of crimes against humanity.124

Notably, even if soldiers are present among the targeted civilians, the wrongful act is not disqualified from being classified

118 See id. (excepting death penalty).
119 Johan D. van der Vyver, supra note 1111, at 434.
120 Id.
121 Id. at 135.
124 Johan D. van der Vyver, supra note 111, at 440.
as a crime against humanity. In this context, contrary to the aforementioned Torture Convention definition, torture as a war crime is not limited to state actors’ or their agents’ conduct. The inevitable conclusion seems to be that torture as a crime under customary international law is free of the Torture Convention’s constraints, which by definition creates a necessary connection between an act inflicting pain and suffering and “public officials or persons acting in an official capacity.” Consequently, torture as a crime under customary international law is wider in scope than its counterpart under the Torture Convention.

Of course, the definition of torture was not born in a vacuum. Rather, it also reflects the customary-law’s concept, and further, that the Convention’s definition should be applied for purposes of proscribing torture under humanitarian law. We next turn briefly to consider torture in the context of the Geneva Conventions, and then consider the impact of the Geneva Conventions on those to whom may apply. Afterwards, we provide instances of the U.S.’s steamrolling over the Rule of Law without as much as a nod to its existence.

i. The Geneva Conventions

Torturing persons protected by any of the Geneva Conventions is strictly prohibited. The First, Second, and Fourth Geneva Conventions apply their prohibitions on the use of torture generally. There are, for example, general proscriptions such as the prohibitions of the “physical mutilation” of a Prisoner of War:


127 Johan D. van der Vyver, supra note 111, at 432-33 (commenting prohibition of torture should not be limited to state actors).

128 Id. at 438 (explaining “torture,” for purposes of international law, is not confined to acts by those who are public officials or act in an official capacity).

129 See Fourth Geneva Convention, supra note 20, art. 3 (criminalizing “violence to life and person, in particular of all kinds, mutilation, cruel treatment and torture.”); Second Geneva Convention, supra note 21, art. (prohibiting “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”); First Geneva Convention, supra note 20, art 3 (providing, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” is “prohibited at any time and in any place whatsoever”).
War and “acts of violence or intimidation . . . against prisoners of war,”\(^{130}\) that prohibit torture for purposes unrelated to gathering information. Moreover, in dealing with Prisoners of War, the Third Geneva Convention specifically forbids utilizing torture and any other kinds of coercion as information gathering tools.\(^{131}\)

Additionally, the Third Geneva Convention provides that when questioned, a Prisoner of War is required to disclose his name, rank, date of birth, and army, regimental, personal, or serial number, or any equivalent biographical information.\(^{132}\) However, the Convention specifies: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of War who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind.”\(^{133}\)

Furthermore, where an individual has partaken in hostilities and becomes his adversary’s captive, he is presumed a Prisoner of War.\(^{134}\) By contrast, where one’s status is doubtful, that individual is entitled Prisoner of War privileges until a competent court concludes upon his or her status.\(^{135}\) As previously noted, prisoner-of-war status is an extremely important right afforded to combatants who have fallen into the power of the enemy. The U.S.’s failure to afford Prisoner of War status to Taliban captives detained in Guantanamo Bay following the war in Afghanistan clearly constitutes a flagrant violation of the Geneva Conventions. Arguably, this criticism also applies to the U.S.’s treatment of members of Al-Qaeda held captive there.

To take a second example, in terms of the Third Geneva

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\(^{130}\) Third Geneva Convention, supra note 20, art. 13.

\(^{131}\) Third Geneva Convention, supra note 20, art. 17 (declaring “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”).

\(^{132}\) Id. (providing “[e]very prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and arm, regimental, personal or serial number, or failing this, equivalent information.”).

\(^{133}\) Third Geneva Convention, supra note 20, art. 17.

\(^{134}\) See id. art. 4 (listing different types of people parking in hostilities who “have fallen into the power of the enemy” as prisoners of war).

\(^{135}\) See id. art. 5 (asserting “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).
Convention, combatants include, without further qualification, members of the armed forces of a party to the conflict, including members of militias or volunteer corps that form part of those forces. Non-recognition of a government by its belligerent adversary is of no consequence as far as the combatant status of members of the armed forces of that government is concerned. Al-Qaeda captives, while not having been part of the armed forces of Afghanistan, might still be entitled to protection. They can most likely be classified as (guerilla) combatants who, owing to the nature of the hostilities, were not required to distinguish themselves from the civilian population. A member of a militia falling within this category will qualify as a combatant, and therefore will be entitled to prisoner-of-war status, provided that “he carries his arms openly: (a) during each military engagement and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

\textit{ii. Torture and Inhuman Treatment}

Torture as a war crime must be distinguished from the lesser harm of inhuman treatment. The distinction is one of degree, depending on the intensity of the suffering inflicted. The General Assembly of the United Nations, on one occasion, described torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment,” and the European Court of Human Rights has on several occasions emphasized that the special stigma of torture attaches only to “deliberate inhuman treatment causing very serious and cruel suffering.”

\footnote{136 See id. at art. 4 (stating “members of the armed forces of a party to the conflict as well as members of militias of volunteer corps forming part of such armed forces” are also considered prisoners of war).}

\footnote{137 See id. (defining “persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews...” as prisoners of war, and that “members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.”).}

\footnote{138 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), ¶ 91, U.N. Doc. A/10034 (Dec. 9, 1975).}

As we shall see the proscription of inhuman behavior is particularly pertinent with respect to the USA interrogations.

In the case of *Ireland v. United Kingdom*, the European Court of Human Rights evaluated certain “sensory deprivation” techniques applied by security forces in Northern Ireland as a means of obtaining information from detainees of suspected terrorist activities. Those techniques consisted of wall-standing (forcing detainees to remain standing for long periods of time in a stressful position), hooding (covering the detainees’ heads with a black or navy colored bag and removing it only during actual interrogations), subjection to noise (“holding the detainees in a room where there was a continuous loud and hissing noise”), deprivation of sleep, and deprivation of food and drink pending interrogations. Although the court decided that these techniques did not amount to torture by a thirteen to four vote, in a sixteen to one vote the court decided that the methods used to extract information from the detainees, when considered together, did constitute inhuman and degrading treatment.

Similarly, the Israeli Supreme Court also has had occasion to consider the legality of methods of interrogation applied to Palestinian captives in that country—such as shaking a captive forward and backward, holding someone in the “shabach” position, forcing persons being interrogated in a “frog crouch,” depriving prisoners of sleep, and subjecting detainees to loud music. The court, citing *Ireland v. United Kingdom*, decided that these means of interrogation constituted a violation of the detainees’ human rights, and were therefore illegal under the

(Describing the difference between inhuman and degrading treatment and torture as requiring torture to be “deliberate inhuman treatment causing very serious and cruel suffering.”); Aksoy v. Turkey, 26 Eur. Comm’n H.R. Dec. & Rep 2261, 2279 (1996) (noting torture can “attach only to deliberate inhuman treatment causing very serious and cruel suffering).

141 See id. at 35.
142 Id. (listing five distinct alleged torture techniques).
143 See id. at 86 (concluding “five techniques... constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3 [of the Geneva Convention]”).
144 See Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, Sept. 6, 1999, 38 I.L.M. 1471, 1474-76 (describing shaking as the harshest technique, whereby suspect’s upper torso is forcefully shaken back and forth, causing the neck and head to dangle and vacillate rapidly).
prevailing Israeli law.\textsuperscript{145}

There is compelling evidence that the United States employs methods of interrogation which although falling short of the torture threshold, have nevertheless been clearly condemned in international law as cruel and inhuman treatment. For example, an article in \textit{The Washington Post}, for example, referred to "intelligence specialists familiar with CIA interrogation methods" as authority for allegations that Afghan detainees who refuse to cooperate inside secret CIA interrogation centers are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles... [and] are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as 'stress and duress' techniques.\textsuperscript{146}

Such interrogation techniques are flagrant violations of international law norms with respect to the inhuman treatment, and as such serve as an indication of the U.S.'s abandonment of the Rule of Law at the international level.

The administration's attempts to obfuscate the situation and outright prevarications are particularly disturbing. For instance, let us consider Secretary of Defense, Donald Rumsfeld's, statements. In January 2002 he stated: "Let there be no doubt, the treatment of the detainees in Guantanamo Bay is proper, it's humane, it's appropriate, and it is fully consistent with international conventions."\textsuperscript{147} He continued, "[n]o detainee has been harmed. No detainee has been mistreated in any way. And the numerous articles, statements, questions, allegations, and breathless reports on television are undoubtedly by people who are either uninformed, misinformed or poorly informed."\textsuperscript{148}

Further, explaining his view of the prisoner's treatment vis-à-vis the Geneva Convention, Rumsfeld asserted, "[t]hey are being treated in a manner that's consistent with the Geneva Convention, whether or not they merit that kind of a treatment.

\textsuperscript{145} \textit{See} 38 I.L.M. at 1484 (finding these interrogation exceeded State's authority to conduct interrogations).
\textsuperscript{148} \textit{Id.}
That is what the United States does."\textsuperscript{149} Again, we note that the evidence is clear that the U.S., contrary to its public statements, international obligations, and with complete disregard of the Rule of Law, has employed inhumane techniques in Guantanamo, Abu Ghraib, and presumably elsewhere. The evidence from the Red Cross, former detainees and current detainees makes it clear that the United States is torturing detainees in clear breach of its international obligations under the Geneva Convention, and making it evident that Secretary Rumsfeld has lied to the public.\textsuperscript{150}

\textbf{D. Legitimating of Torture?}

As previously noted, the prohibition of torture in international law knows no exceptions. Thus, although it is common for human rights instruments to make allowance for deviations from the norms in times of a national emergency, such allowances are not available when it comes to torture. A directive of the Committee of Ministers of the Council of Europe proclaims in this regard:

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law....

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from... prohibition against torture or inhuman or degrading treatment or punishment...\textsuperscript{151}

\textsuperscript{149} Id.

\textsuperscript{150} \"[T]he United States decreed that no member of the Taliban's armed forces was entitled to POW status... the United States insisted that no members of Al Qaeda deserved Geneva Conventions protection — not even those captured while fighting for Taliban armed forces.\" Jamie Fellner, \textit{Double Standards: Prisoners of war in Iraq and at Guantanamo}, \textsc{Int'l Herald Trib.}, Mar. 31, 2003, available at http://www.iht.com/articles/2003/03/31/edfellner_ed3_.php (last visited Oct. 10, 2006).

\textsuperscript{151} Guidelines of the Committee of Ministers of the Council of Europe on human
Following September 11th, the Committee of Ministers of the Council of Europe explicitly considered the application of torture to the fight against terrorism. It concluded as follows:

The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.\(^1\)

The Committee also stated that persons “arrested or detained for terrorist activities must be able to challenge the lawfulness of [their] arrest” or detention in a court of law.\(^2\) These directives accurately encapsulate the current state of international law, which under the norms enunciated in the Torture Convention, and indeed as a matter of customary international law, is binding on the United States.\(^3\)

In the Judgment Concerning the Legality of the General Security Services Interrogation Methods, the Israeli Supreme Court considered whether necessity can be relied upon to legalize the use of unbecoming methods of interrogation on suspected terrorists.\(^4\) The court decided that necessity is only a ground of justification that can be raised by an accused torturer at his or her trial, and that the use of physical force can consequently not be permitted in advance.\(^5\) Necessity, thus, cannot create an a priori source of administrative power to infringe upon human rights, though it might, in the appropriate circumstances, serve as a defense against liability.

\(^1\) Available at http://www.coe.int/t/E/Human_Rights/Lignes_dir_compendium_en.asp#TopOfPage (last visited Oct. 10, 2006).
\(^2\) Id.
\(^3\) Fellner, supra note 150.
\(^4\) Johan D. van der Vyver, supra note 111, at 460-61.
\(^5\) Article 34(1) of the Penal Law of Israel provides:
A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.
\(^156\) 38 I.L.M. at 1485.
\(^156\) See 38 I.L.M. at 1486 (declaring “the very nature of the defence does not allow it to serve as the source of a general administrative power.”).
The United States has yet to acknowledge its decision to create and implement a policy of inhumane treatment of detainees. Why it has done so is a matter of speculation. However, certainly there are two possible consequences. First, the United States' policies undermine its myths of moral superiority, following of Rule of Law and its purported concern for human rights. Secondly, the policies could undermine popular support for the current administration.

CONCLUSION

As we have seen, the post-September 11, 2001, Bush administration has changed the rules of the game. While still holding the United States out as the white knight, victim of terror and beacon of democracy, it has become despotic in its own territory, denying the application of the principles of the Rule of Law to individuals in its own territory. Furthermore, it has in practice become a rogue state in international law, defying international bodies, breaching international law conventions and their consequent duties, and even abandoning the Rule of Law. These developments, to say the least, are troubling. In some ways, it may be fair to characterize these changes as the end of the Rule of Law. Perhaps the old maxim “the first victim of war is truth” should be amended by adding, “and with it, the Rule of Law.”