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# BEYOND OUR BORDERS: THE INTERNATIONAL LAW CONTROVERSY CONCERNING THE WRIT OF HABEAS CORPUS AND GUANTÁNAMO BAY

Michael Palitz<sup>1</sup>

## PART I: INTRODUCTION

The United States' arbitrary detainment of aliens held at Guantánamo Bay violates international law and United Nations conventions focused on protecting human rights. In *Boumediene v. Bush*, the Supreme Court determined that detainees possess habeas corpus rights, and the Court also considered the constitutionality of Congress' Military Commissions Act of 2006.<sup>2</sup> This article focuses on whether international law also trumps this act. Both the U.N. Charter and the Geneva conventions provide directives that denounce arbitrary and indefinite detention of foreign citizens. At Guantánamo Bay, the United States detains alien citizens without charging these individuals with a crime. The international legal community seeks to prevent such abuses of governmental power and ensure that the United States does not practice arbitrary methods of violating human rights. Human rights watch groups and the American Civil Liberties Union ("ACLU") also want to stop the United States from denying communication rights to aliens who wish to seek advice from legal counsel.<sup>3</sup>

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<sup>2</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2276-77 (2008); see also Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.) [hereinafter "MCA"].

<sup>3</sup> American Civil Liberties Union Close Guantánamo Campaign, <http://www.aclu.org/safefree/detention/closeGuantánamo.html> (last visited Feb. 24, 2009).

It is well-established American law that the writ of habeas corpus<sup>4</sup> shall not be suspended except in situations of rebellion or invasion.<sup>5</sup> In limited exceptions, Congress may also suspend the writ of habeas corpus as long as it provides an adequate, alternative means for the petitioner to demonstrate the alleged violations with his or her detention.<sup>6</sup> In cases involving foreign citizens detained at Guantánamo Bay, however, scholars debate whether the Constitution even applies to them. By labeling these individuals as “enemy combatants,” it appears that former President George W. Bush circumvented the Constitution by placing these detainees outside the scope of the protections afforded by the Constitution.<sup>7</sup> Unfortunately for the former President, the Supreme Court disagrees with his assertions.<sup>8</sup>

When the Supreme Court first addressed this issue in *Ex parte Quirin*, the Court “recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.”<sup>9</sup> After the September 11th attacks in 2001, the “Bush Administration made claims that the Executive has an unreviewable power to detain persons without trial in a so-called ‘war’ against ‘terrorism.’”<sup>10</sup> However, “numerous decisions of the Supreme Court and other federal courts demonstrate that this is not correct.”<sup>11</sup> The Supreme Court has held that the federal courts have jurisdiction to “hear applications for habeas corpus by any person” held “in violation of the Constitution or laws or treaties of the United States.”<sup>12</sup> Because of the inherent nature of America’s adversary system, the Supreme Court believes that the United States’ courts provide the best fora for detained foreign citizens to demonstrate their

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<sup>4</sup> 28 U.S.C. § 2241 (2006).

<sup>5</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>6</sup> *Boumediene v. Bush*, 476 F.3d 981, 995 (D.C. Cir. 2007) (Rogers, J., dissenting).

<sup>7</sup> *See id.* at 985.

<sup>8</sup> *See generally* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>9</sup> *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

<sup>10</sup> JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 165 (2d ed. 2005).

<sup>11</sup> *Id.* *See, e.g.,* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 518-25 (2003).

<sup>12</sup> *Rasul*, 542 U.S. at 473; 28 U.S.C. §§ 2241(a), (c)(3).

claims of arbitrary and illegitimate detention in violation of international law and the laws of the United States of America.<sup>13</sup> The adversary system will also provide the court with all of the relevant facts necessary to make an informed decision regarding each foreign citizen.<sup>14</sup> With a complete set of facts and information, the courts are better able to make the most informed determinations as to whether these foreign detainees are properly held as enemy combatants.

The second part of this comment addresses the historical background to this controversial international legal issue. The Supreme Court continues to debate with the other branches of the government over the protections and rights, if any, that alien detainees have at Guantánamo Bay. A discussion of the recent Supreme Court decisions and Congressional acts will help to provide background to this debate. Additionally, The American Declaration of the Rights and Duties of Man<sup>15</sup> provides further insight that seems to contradict Congressional legislation.

Part III of this comment discusses the relevant international law found in the U.N. Charter and the articles of the Geneva Convention Relative to the Treatment of Prisoners. Through this discussion, I will compare the international law in the U.N. Charter and the Geneva Convention to recent United States military interrogation tactics. This analysis will demonstrate the conflict between international law and the United States' actions to protect its nation in an age of terrorism. Some interrogation techniques conflict with the U.N. Charter and the Geneva Convention Relative to the Treatment of Prisoners. Although the United States has a duty to protect human rights, the United States' focus remains on the safety and security of its nation. The question remains: To what extent, if any, can the United States depart from established international law regarding detainment of potential terrorists? I will address the complicated issues surrounding this question.

Part IV of the comment analyzes the countervailing interests between the United States and the international legal com-

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<sup>13</sup> See, e.g., *Rasul*, 542 U.S. at 466.

<sup>14</sup> See PAUST ET AL., *supra* note 10, at 165.

<sup>15</sup> American Declaration of the Rights and Duties of Man, art. I, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.L/V/I.4 rev. (1965).

munity. I will analyze whether revoking the writ of habeas corpus violates international law that the United States is bound to follow under the U.N. Charter. I will discuss whether congressional actions violated international law. I will also introduce a minor analysis of the potential implications for United States citizens abroad if the United States denied detainees' habeas corpus petitions. After this analysis, I will offer a conclusion that will provide suggestions to the Supreme Court in future cases involving the rights of detainees.

## PART II: HISTORICAL BACKGROUND

After World War II, the international community realized the need to provide appropriate protections for prisoners of war.<sup>16</sup> Article 5 of the Geneva Convention Relative to the Treatment of Prisoners offers protection to individuals held as prisoners of war.<sup>17</sup> Article 5 states that:

[s]hould any doubt arise as to whether persons, having committed a belligerent act and fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [of the Geneva Convention Relative to the Treatment of Prisoners], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>18</sup>

Article 5 demonstrates the desire of the parties to the Geneva Convention Relative to the Treatment of Prisoners to provide prisoners of war with a status hearing by a competent tribunal.<sup>19</sup> The tribunal could evaluate the challenges and make a reasonable decision based on actual evidence.

When foreign citizens challenge their detention at Guantánamo Bay, the United States must ensure that these individuals receive the protections of the Geneva Convention.<sup>20</sup> Furthermore, as the Convention language demonstrates, the United States must provide a status determination hearing by a

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<sup>16</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* In Part III of this Comment, I will analyze the different categories of Article 4.

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*; see also *Rasul v. Bush*, 542 U.S. 466, 473 (2004).

competent tribunal.<sup>21</sup> This article of the Geneva Convention is in accordance with the American Declaration of the Rights and Duties of Man, which the United States helped establish as the world's first international human rights instrument.<sup>22</sup> The Declaration states that “[e]very person may resort to the courts to ensure respect for his legal rights.”<sup>23</sup> If the United States believes that “[a]ll men are born free and equal, in dignity and in rights,”<sup>24</sup> how can the government refuse to offer habeas corpus hearings in order to ensure that these foreign citizens are not being improperly detained?

Since the first Supreme Court decision in 1942 on this issue in *Ex parte Quirin*,<sup>25</sup> the Supreme Court has considered the Writ of Habeas Corpus an essential right to provide individual protection against arbitrary government.<sup>26</sup> The September 11th attacks in 2001, however, forced the United States government to determine the habeas corpus rights of potential terrorists held as enemy combatants at Guantánamo Bay.<sup>27</sup> In response to the attacks, “Congress passed a joint resolution authorizing former President Bush to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”<sup>28</sup> “Acting pursuant to that authorization, former President Bush sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.”<sup>29</sup> During the subsequent military campaign against the Taliban, the United States Armed Forces proceeded to capture and detain any combatants believed to be

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<sup>21</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, art. 5.

<sup>22</sup> See *id.*; see generally American Declaration of the Rights and Duties of Man, *supra* note 15, art. I (Article I states, “Every human being has the right to life, liberty, and the security of his person.”).

<sup>23</sup> *Id.* at art. XVIII.

<sup>24</sup> *Id.* (as quoted in the Preamble).

<sup>25</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>26</sup> See generally *id.* The Writ of Habeas Corpus challenged whether the detention of the petitioners for trial by Military Commission on charges against them conformed to the laws of the United States and its Constitution.

<sup>27</sup> *E.g.*, *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>28</sup> *Rasul*, 542 U.S. at 470.

<sup>29</sup> *Id.*

al Qaeda members.<sup>30</sup> The military detained these foreign individuals at the United States Naval Base in Guantánamo Bay, Cuba.<sup>31</sup>

Beginning in 2002, these foreign detainees, through their relatives, “filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at the base.”<sup>32</sup> Specifically, the detainees claimed that they have not “ever been a combatant against the United States” or “ever engaged in any terrorist acts.”<sup>33</sup> “They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal.”<sup>34</sup> The foreign detainees “claimed that denial of these rights violates the Constitution, international law, and treaties of the United States.”<sup>35</sup>

The District Court in *Rasul* dismissed the habeas corpus petitions holding that it had no jurisdiction because the individuals were not held in the United States, but rather in Cuba.<sup>36</sup> The Court of Appeals affirmed, holding that “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’”<sup>37</sup> The Supreme Court granted certiorari and held, citing 28 U.S.C. §§ 2241(a), (c)(3), that the federal courts have jurisdiction “to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States.’”<sup>38</sup> In its opin-

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<sup>30</sup> *See id.*

<sup>31</sup> *Id.* Detainees alleged violations of the Geneva Convention Relative to the Treatment of Prisoners. Detainees claimed that the United States’ actions in Guantánamo Bay violated Article 13 of the Convention. Article 13 states, “Prisoners of war must at all times be humanely treated.” Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, at art. 13. However, the detainees complained that the United States violated Article 13 when the United States practiced torture methods such as waterboarding, force-feeding, and other cruel and degrading treatment. *See* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, available at [http://www.nytimes.com/2007/10/04/washington/04interrogate.html?\\_r=L&oref=slogin](http://www.nytimes.com/2007/10/04/washington/04interrogate.html?_r=L&oref=slogin).

<sup>32</sup> *Rasul*, 542 U.S. at 471.

<sup>33</sup> *Id.* at 471-72.

<sup>34</sup> *Id.* at 472.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 473 (internal citations omitted).

<sup>38</sup> *Rasul*, 542 U.S. at 473.

ion, the Supreme Court determined that the writ of habeas corpus “served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”<sup>39</sup> In further support of its position, the Court quoted a statement from the opinion in *Shaughnessy v. United States*, “no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”<sup>40</sup>

The Supreme Court reversed the lower court’s holding on jurisdictional grounds by stating that Guantánamo Bay’s Naval Base is “within the ‘territorial jurisdiction’ of the United States.”<sup>41</sup> “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”<sup>42</sup> Furthermore, the Court stated that aliens detained in United States military custody outside of the United States possess “the privilege of litigation” in United States’ courts.<sup>43</sup> “Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.”<sup>44</sup> “The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court’s jurisdiction” or right to hear the foreign detainees’ habeas corpus petitions.<sup>45</sup> Under this

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<sup>39</sup> *Id.* at 474 (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)); see also *Brown v. Allen*, 344 U.S. 443, 533 (1953) (noting that “[t]he historical purpose of the writ has been to relieve detention by executive authorities without judicial trial.”).

<sup>40</sup> *Shaughnessy v. United States*, 345 U.S. 206, 218 (1953) (Jackson, J. & Frankfurter, J., dissenting).

<sup>41</sup> *Rasul*, 542 U.S. at 480.

<sup>42</sup> *Id.*; but see *Lease Agreement*, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418.

This base, sprawling across 45 square miles on Cuba’s southeastern tip, has for years been a sore spot between the United States and the Castro regime, which declared null and void a series of earlier leases and agreements dating back to Teddy Roosevelt’s time. Castro has consistently called the U.S. presence here an illegal occupation, and refused to cash the checks the United States cut annually to make good on a lease agreement.

Carol Rosenberg, *A New Alcatraz Rises: Guantánamo Ready for Taliban*, MIAMI HERALD, Jan. 10, 2002, available at <http://www.miamiherald.com/Guantánamo/story/277564.html>.

<sup>43</sup> *Rasul*, 542 U.S. at 484.

<sup>44</sup> *Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908).

<sup>45</sup> *Rasul*, 542 U.S. at 485.



method, the Court must first inquire “into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented.”<sup>46</sup> If the detainees “are being held indefinitely, and without benefit of any legal proceeding to determine their status,” then the federal courts have a duty to hear these petitions to ensure that the military necessity outweighs the dangers of imprisoning an innocent individual.<sup>47</sup>

In response to the Supreme Court’s decision in *Rasul*, Congress passed the Detainee Treatment Act of 2005 (hereinafter “DTA”).<sup>48</sup> The DTA states that “no court, justice, or judge shall have jurisdiction to hear or consider ‘an application for the writ of habeas corpus filed by or on behalf of an alien detained’” by the Department of Defense at Guantánamo Bay, Cuba.<sup>49</sup> Congress also sought to prevent any detainee from filing an action “against the United States or its agents relating to any aspect of the detention.”<sup>50</sup> If the detainee was either currently in military custody or had been determined by the United States Court of Appeals for the District of Columbia to have been properly detained as an enemy combatant, then the Act prevented the United States’ courts from having jurisdiction to hear the foreign detainees’ claims.<sup>51</sup> Congress believed that the DTA had the “immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court

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<sup>46</sup> *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

<sup>47</sup> *Id.* at 487-88 (Kennedy, J., concurring).

<sup>48</sup> See Detainee Treatment Act of 2005, 28 U.S.C.A § 2241 (2005) [hereinafter “DTA”]; see also Brief of Senators Graham and Kyl as Amicus Curiae Supporting Respondents, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 481426. The Detainee Treatment Act of 2005 provided military procedures for determining the status of detainees. See DTA at § 2241. The DTA limited the jurisdiction of federal courts by providing for limited review of Combatant Status Review Tribunals. *Id.* Congress limited appellate review to the United States Court of Appeals for the District of Columbia Circuit. With regard to evidentiary issues, Congress directed the D.C. Circuit to allow for a rebuttable presumption in favor of the government’s evidence. In the Combatant Status Review Tribunal, the burden of proof is a “preponderance of evidence” rather than the stricter standard of “beyond a reasonable doubt.” See *id.*

<sup>49</sup> DTA at § 2241(e)(1).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

. . . .”<sup>52</sup> Citing general statutory construction principles, Congress believed that the language in the DTA was clear and unambiguous.<sup>53</sup> Therefore, Congress stated that the Supreme Court lacked jurisdiction to hear the habeas petitions of Guantánamo Bay detainees.<sup>54</sup>

In 2006, Salim Ahmed Hamdan challenged the constitutionality of the Detainee Treatment Act of 2005 in *Hamdan v. Rumsfeld*.<sup>55</sup> “Hamdan, a Yemeni national, is in custody at an American prison in Guantánamo Bay, Cuba.”<sup>56</sup> “In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military.”<sup>57</sup> “Over a year later, former President Bush deemed him eligible for trial by military commission for then-unspecified crimes.”<sup>58</sup> “After another year had passed, Hamdan was charged with one count of conspiracy ‘to commit . . . offenses triable by military commission.’”<sup>59</sup> Hamdan objected to the military commission for two principle reasons.<sup>60</sup> “First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy . . . .”<sup>61</sup> “Second, Hamden contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that the defendant must be permitted to see and hear the evidence against him.”<sup>62</sup> The District Court granted Hamdan’s request for a writ of habeas corpus.<sup>63</sup> The Court of Appeals for the District of Columbia reversed.<sup>64</sup> The Court of Appeals “recogniz[ed] . . . that trial by military commission is an extraordinary measure raising important questions

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<sup>52</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 574 (2006).

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 558-60.

<sup>55</sup> *Id.* at 557.

<sup>56</sup> *Id.* at 566.

<sup>57</sup> *Id.*

<sup>58</sup> *Hamdan*, 548 U.S. at 566.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 567.

<sup>61</sup> *Id.* Hamdan argued that the crime of conspiracy is not a violation of international law or the law of war. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Hamdan*, 548 U.S. at 567.

about the balance of powers in our constitutional structure.”<sup>65</sup> The Supreme Court in *Hamdan* held that the military commission “lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.”<sup>66</sup>

Hamdan also objected to the DTA on constitutional grounds citing Congress’ lack of “authority to impinge upon [the Supreme Court’s] appellate jurisdiction, particularly in habeas cases.”<sup>67</sup> The Supreme Court determined that the DTA did not apply to pending writs of habeas corpus filed before the Act took effect.<sup>68</sup> By applying a “normal rules of construction” approach to interpreting the retroactive effect of the Act, the Supreme Court reasoned that Congress did not intend for the Act to apply to writs of habeas corpus that were previously filed.<sup>69</sup> The Court also determined that “the Government has identified no other ‘important countervailing interest’ that would permit the federal courts to depart from their general ‘duty to exercise the jurisdiction that is conferred upon them by Congress.’”<sup>70</sup>

The Supreme Court also expressed concern about the alternative method offered by Congress to address Hamdan’s petition.<sup>71</sup> A military commission may not provide an adequate place for redress because the commission is:

arguably . . . without any basis in law and operates free from many of the procedural rules prescribed by Congress . . . intended to safeguard the accused and ensure the reliability of any conviction.<sup>72</sup>

The Court also expressed its view that the role of military commissions is “primarily a factfinding one—to determine . . . whether the defendant has violated the law of war.”<sup>73</sup> In certain cases, the United States government does not actually charge some detainees with war crimes, but rather holds them pending an investigation into their alleged terrorist connec-

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<sup>65</sup> *Id.*; see also *Ex Parte Quirin*, 317 U.S. 1, 19 (1942).

<sup>66</sup> *Hamdan*, 548 U.S. at 567.

<sup>67</sup> *Id.* at 575.

<sup>68</sup> *Id.* at 575-76.

<sup>69</sup> *Id.* at 576-84.

<sup>70</sup> *Id.* at 589 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

<sup>71</sup> *Hamdan*, 548 U.S. at 587-90.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 596-97.

tions.<sup>74</sup> In the *Hamdan* case, the Court determined that a military commission is improper because the crimes alleged against Hamdan did not constitute a violation of the laws of war.<sup>75</sup> In such circumstances involving alien detainees, the Supreme Court stated that United States law requires a proper determination through the writ of habeas corpus in order to ensure that these foreign citizens receive due process in a fair manner.<sup>76</sup>

The Supreme Court also discussed the concept of the law of war and the role of international law in alien detention cases.<sup>77</sup> Through its discussion, the Court in *Hamdan* stated the limited circumstances in which a military commission should be used to try a defendant.<sup>78</sup> “At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.”<sup>79</sup> The Court stated:

[I]t is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.<sup>80</sup>

“The jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i.e.* in unlawful commissions or actual attempts to commit, and not in intentions merely.”<sup>81</sup> Since the government had failed to even charge many of the foreign detainees held at Guantánamo Bay with crimes, Hamdan argued that a military commission is not the appropriate forum to evaluate his detainment and determine his status.<sup>82</sup> It appeared to the Court that the conspiracy charge by itself did not constitute a violation of the law of war or

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<sup>74</sup> See generally *Rasul*, 542 U.S. 466; see also *Hamdan*, 548 U.S. 557 (in both of these cases, the government held these detainees indefinitely without access to counsel or the ability to contact family members).

<sup>75</sup> *Hamdan*, 548 U.S. at 600.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 602-03.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 603. The Fourth Hague Convention of 1907 required that the defendant charged with a law of war violation must possess some sort of control or authority over his troops. *Id.*

<sup>80</sup> *Hamdan*, 548 U.S. at 604.

<sup>81</sup> *Id.* (quoting 1 W. WINTHROP, MILITARY LAW AND PRECEDENTS 831, 841 (rev. 2d ed. 1920)).

<sup>82</sup> *Id.* at 606-07.

a violation of international law.<sup>83</sup> Historically, the Supreme Court has failed to recognize conspiracy as a violation of the law of war.<sup>84</sup>

In the 1942 case, *Ex parte Quirin*, the Supreme Court “placed special emphasis on the *completion* of an offense . . . .”<sup>85</sup> The Court held “that there can be no violation of a law of war – at least not one triable by military commission – without the actual commission of or attempt to commit a ‘hostile and war-like act.’”<sup>86</sup> By effectively excluding conspiracy as a triable offense in military commissions, the Court actually complied with Congress’ rationale behind establishing military commissions. Military commissions were formed “to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.”<sup>87</sup> “[O]vert acts constituting war crimes are the only proper subject” that military commissions should handle.<sup>88</sup> Therefore, where a detainee is not charged with an overt act in violation of a law of war, a military commission is not the proper forum to hear habeas corpus petitions.<sup>89</sup>

When considering these types of cases, it is important for federal courts to consider international law sources to understand the law of war as applied to the relevant facts of each case. In fact, “international sources confirm that the crime [of conspiracy] charged [in *Hamdan*] is not a recognized violation of the law of war.”<sup>90</sup> “[T]he only ‘conspiracy’ crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war . . . .”<sup>91</sup> Both of these crimes require “actual participation in a ‘concrete plan to wage war.’”<sup>92</sup> In the Nuremberg trials, Hitler’s most senior associates were convicted of “conspiracy to commit war crimes.”<sup>93</sup> The members of the Nuremberg

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<sup>83</sup> *Id.* at 607.

<sup>84</sup> See generally *Ex Parte Quirin*, 317 U.S. 1 (1942).

<sup>85</sup> *Hamdan*, 548 U.S. at 606.

<sup>86</sup> *Id.* at 606-07.

<sup>87</sup> *Id.* at 607.

<sup>88</sup> *Id.* at 608.

<sup>89</sup> See *id.* at 607-11.

<sup>90</sup> *Id.* at 610.

<sup>91</sup> *Hamdan*, 548 U.S. at 610.

<sup>92</sup> *Id.* at 610 (citing 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, Nov. 14, 1945 – Oct. 1, 1946, p. 225 (1947)).

<sup>93</sup> *Id.*

Tribunal “objected to recognition of conspiracy as a violation of the law of war on the ground that ‘[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.’”<sup>94</sup> By relying on international law, the Court in *Hamdan* provided further support for its holding that military commissions cannot try conspiracy cases of alien detainees held at Guantánamo Bay.<sup>95</sup> The Court held that the conspiracy charges’ “shortcomings are not merely formal, but are indicative of a broader inability on the Executive’s part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity.”<sup>96</sup>

The Court further stated that “[a]nother striking feature of the rules governing Hamdan’s commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, ‘would have probative value to a reasonable person.’”<sup>97</sup> “Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses’ written statements need be sworn.”<sup>98</sup> The evidentiary requirements state that “the accused and his civilian counsel may be denied access to evidence in the form of ‘protected information.’”<sup>99</sup> As “long as the presiding officer concludes that the evidence is ‘probative’ . . . and that its admission without the accused’s knowledge would not ‘result in the denial of a full and fair trial,’” a military commission can accept evidence that a United States federal court would never admit into a criminal trial.<sup>100</sup> Even if a presiding officer determines “that evidence ‘would not have probative value to a reasonable person,’” his decision “may be overridden by a majority of the other commission members.”<sup>101</sup>

In military commission trials, “a two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence

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<sup>94</sup> *Id.* at 611 (citing T. TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 36 (1992)).

<sup>95</sup> *Hamdan*, 548 U.S. at 611-12.

<sup>96</sup> *Id.* at 612.

<sup>97</sup> *Id.* at 614.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Hamdan*, 548 U.S. at 614-15.

not including death (the imposition of which requires a unanimous vote)."<sup>102</sup> If the case is appealed, the appellate "panel will make its recommendations to the Secretary of Defense" who "can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition."<sup>103</sup> "The President then, unless he has delegated the task to the Secretary, makes the 'final decision.'"<sup>104</sup> The President "may change the commission's findings or sentence only in a manner favorable to the accused."<sup>105</sup>

In the *Hamdan* case, Hamdan, on behalf of the alien detainees at Guantánamo Bay, objected to the procedures set forth for these commissions.<sup>106</sup> Hamdan challenged the lack of evidentiary and judicial protections for defendants tried under the rules of military commissions.<sup>107</sup> Hamdan claimed that these procedural rules prevent him from reviewing evidence against him and inhibit his opportunity for a fair hearing.<sup>108</sup> Hamdan believed that these commissions eliminate the adversary system, which arguably provides the best forum to unravel the truth in a complicated trial.<sup>109</sup>

In the final part of the Supreme Court's decision in *Hamdan*, the Court discussed the Geneva Conventions.<sup>110</sup> The D.C. Circuit Court of Appeals held "that Hamdan could not invoke the Geneva Conventions at all" because the Conventions did not "apply to the armed conflict during which Hamdan was captured."<sup>111</sup> The Circuit Court "accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan."<sup>112</sup> By so hold-

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<sup>102</sup> *Id.* at 615. Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. "The review panel is directed to 'disregard any variance from procedures . . . that would not materially have affected the outcome of the trial before the Commission.'" *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Hamdan*, 548 U.S. at 615.

<sup>107</sup> *Id.* at 616.

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See Hamdan*, 548 U.S. at 627-33.

<sup>111</sup> *Id.* at 628.

<sup>112</sup> *Id.*

ing, the Circuit Court “reasoned that the war with al Qaeda evades the reach of the Geneva Conventions.”<sup>113</sup> The Circuit Court agreed with the Government that “[t]he conflict with al Qaeda is not . . . a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions” should be afforded.<sup>114</sup> The Government argued that “Article 2 of these Conventions renders the full protections” only to cases “‘of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’” to the Geneva Conventions.<sup>115</sup> The Circuit Court held:

Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a ‘High Contracting Party’ –i.e., a signatory of the Conventions, the protections of those Conventions are not . . . applicable to Hamdan.<sup>116</sup>

However, Article 3 provides that:

in a conflict ‘not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to’ . . . certain provisions protecting [p]ersons taking no active part in the hostilities . . . .<sup>117</sup>

Another provision prohibits sentencings and executions “without previous judgment pronounced by a *regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized people.”<sup>118</sup> Based on the Geneva Conventions, it appears that the Circuit Court strayed from the binding international law.

The Circuit Court stated that the provisions in Article 3 “do[] not apply to Hamdan because the conflict with al Qaeda

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 628-29.

<sup>116</sup> *Hamdan*, 548 U.S. at 629. Former President Bush stated that the Geneva Conventions apply to the conflict with the Taliban. See White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees 2 (Feb. 7, 2002), [http://www.justicescholars.org/pegc/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf) (last visited Feb. 24, 2009).

<sup>117</sup> *Hamdan*, 548 U.S. at 629 (emphasis in original). Article 3 is known as Common Article 3 because it appears in every Geneva convention.

<sup>118</sup> *Id.* at 630 (emphasis added). This provision also protects “members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention.” *Id.*



being 'international in scope' does not qualify as a 'conflict not of an international character.'"<sup>119</sup> The Supreme Court determined that the Circuit Court's reasoning was erroneous because "[t]he term 'conflict of an international character' is used here in contradistinction to a conflict between nations."<sup>120</sup> Common Article 3 affords:

some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory . . . involved in a conflict 'in the territory of a signatory.'<sup>121</sup>

Since the official commentaries encourage a broad reading of Common Article 3 in order to provide protections specifically to rebels in a "conflict not of an international character," the Court held that Common Article 3 is applicable to the conflict between the United States and al Qaeda.<sup>122</sup> Therefore, the Court determined that Common Article 3 "require[ed] that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"<sup>123</sup>

While the term 'regularly constituted court' is not specifically defined in either Common Article 3 or its accompanying commentary, the Fourth Geneva Convention "defined 'regularly constituted' tribunals to include 'ordinary military courts' and 'definitely exclud[e] all special tribunals.'"<sup>124</sup> Furthermore, the Fourth Geneva Convention requires that ordinary military courts must meet "the recognized principles governing the administration of justice."<sup>125</sup> To meet those principles, the court must afford all "of those trial protections that have been recognized by customary international law."<sup>126</sup> The proposed military commissions "deviate from those [principles] governing courts-martial in ways not justified by any evident practical

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<sup>119</sup> *Id.* (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005)).

<sup>120</sup> *Hamdan*, 548 U.S. at 630.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 631. *See also* Int'l Comm. Of Red Cross, Commentary III Geneva Convention Relative to the Treatment of Prisoners of War 35 (1987).

<sup>123</sup> *Hamdan*, 548 U.S. at 631-32.

<sup>124</sup> *Id.* at 632. Military commissions that are specifically constituted for a particular trial do not meet the requirements of a regularly constituted court.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 633.

need . . . and for that reason, at least, fail to afford the requisite guarantees.”<sup>127</sup>

The Court also stated that a military commission may eliminate the accused’s ability to be present at trial. Since this military commission rule stands inapposite to the Geneva Conventions and customary international law, the Court concluded that “an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”<sup>128</sup> Even though the Court acknowledged the Government’s national security interest in “denying Hamdan access to certain sensitive information,” the Court held that “information used to convict a person of a crime must be disclosed to him.”<sup>129</sup> In so holding, the Court determined that the military commissions do not meet the requirements that the United States is bound to adhere to under the Geneva Conventions.<sup>130</sup>

### PART III: THE CONFLICTS BETWEEN THE U.N. CHARTER AND U.S. INTERROGATION TACTICS

The United Nations Charter formed the United Nations. The Charter was created, *inter alia*, “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>131</sup> The Charter was also drafted “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”<sup>132</sup> The member states of the United Nations determined that there is a need “to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security.”<sup>133</sup> Some of the main purposes of the United Nations are to

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<sup>127</sup> *Id.* at 634.

<sup>128</sup> *Id.*

<sup>129</sup> *See Hamdan*, 548 U.S. at 635.

<sup>130</sup> *See id.*

<sup>131</sup> U.N. Charter Preamble.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* When the United Nations was originally established in 1945, there were only 51 member states to the United Nations. As of January 11, 2008, the United Nations has 192 member states with its most recent addition of Montenegro on June 28, 2006. United Nations, <http://www.un.org/members/list.shtml> (last visited Feb. 24, 2009).

promote fundamental human rights, foster international peace, and discourage warfare.<sup>134</sup> Absent circumstances requiring a state to act in self-defense, the U.N. Charter prohibits warfare unless the Security Council recommends the action.<sup>135</sup>

The United States must act in accordance with the U.N. Charter and cannot make any treaty or international agreement that conflicts with the U.N. Charter.<sup>136</sup>

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.<sup>137</sup>

Since the U.N. Charter is a treaty made under the authority of the United States, the U.N. Charter is the "supreme Law of the Land"<sup>138</sup> and the "Judges in every State shall be bound thereby . . . ."<sup>139</sup> Therefore, it appears that the United States must adhere to the Charter's goals of supporting fundamental human rights and fostering international peace.<sup>140</sup> The United States, however, appears to deviate from the Charter through their treatment of detainees at Guantánamo Bay.<sup>141</sup>

On October 4, 2007, the New York Times published an article regarding a secret United States Department of Justice report that sanctioned the use of severe torture methods during against alleged terrorists.<sup>142</sup> The Department of Justice issued this report in February 2005, shortly after the Supreme Court held that United States' courts have the authority to determine whether the alleged terrorists at Guantánamo Bay were, in

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<sup>134</sup> See *id.* See also U.N. Charter art. 1.

<sup>135</sup> U.N. Charter art. 51.

<sup>136</sup> U.N. Charter art. 103.

<sup>137</sup> *Id.*

<sup>138</sup> U.S. CONST. art. VI, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>139</sup> *Id.*

<sup>140</sup> See generally U.N. Charter; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16.

<sup>141</sup> See Shane, Johnston, & Risen, *supra* note 31.

<sup>142</sup> *Id.*

fact, rightfully imprisoned.<sup>143</sup> Officials stated that the document was “an expansive endorsement of the harshest interrogation techniques ever used by the Central Intelligence Agency.”<sup>144</sup> The document “provided explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures.”<sup>145</sup> Mr. Alberto Gonzales, former United States Attorney General, “approved the legal memorandum . . . over the objections of James B. Comey, the deputy attorney general . . . who told colleagues at the department that they would all be ‘ashamed’ when the world eventually learned of it.”<sup>146</sup>

Despite Mr. Comey’s warnings and Congress’ attempt toward outlawing cruel, inhuman, and degrading treatment,<sup>147</sup> the Justice Department issued another secret opinion, one most lawmakers did not know existed, which declared that none of the C.I.A. interrogation methods violated that standard.<sup>148</sup> Mr. Gonzales, along with the White House, believed that the interrogation practices at Guantánamo Bay “fall within U.S. law and international agreements.”<sup>149</sup> Contrary to this determination, lower level members of the Justice Department criticized Mr. Gonzales stating that he:

seldom resisted pressure from Vice President Dick Cheney . . . to endorse policies that they saw as effective in safeguarding Ameri-

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<sup>143</sup> *Id.* See also *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>144</sup> Shane, Johnston, & Risen, *supra* note 31.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> DTA at § 2241 (2005). See also Human Rights Watch, U.S.: Landmark Torture Ban Undercut (2005), <http://hrw.org/english/docs/2005/12/16/usdom12311.htm>.

[E]ven as the U.S. Congress has passed a prohibition against the use of torture and cruel, inhuman, and degrading treatment [in the DTA], it is set to adopt legislation that would strip the judiciary’s ability to enforce the ban . . . . [t]he Graham-Leven Amendment . . . would deny the . . . detainees in Guantánamo Bay the ability to bring legal action seeking relief from the use of torture or cruel and inhumane treatment. The amendment leaves Guantánamo detainees no legal recourse if they are, in fact, tortured or mistreated. The treatment of Guantánamo Bay detainees will be shrouded in secrecy, placing detainees at risk for future abuse.

*Id.*

<sup>148</sup> Shane, Johnston, & Risen, *supra* note 31.

<sup>149</sup> *Id.*

cans, even though the practices brought the condemnation of other governments, human rights groups and Democrats in Congress.<sup>150</sup>

Furthermore, the Bush administration adopted interrogation policies and practices (including secret detention and coercive interrogation) that “the United States had previously denounced when used by other countries.”<sup>151</sup> This arbitrary and random approach to developing rules regarding the detainment and treatment of prisoners contradicts the principles of the United Nations Charter and the principles of the United States Constitution.<sup>152</sup>

“While [former] President Bush and C.I.A. officials would later insist that the harsh measures produced crucial intelligence, many veteran interrogators, psychologists and other experts say that less coercive methods are equally or more effective.”<sup>153</sup> In fact, “[i]nterrogators were worried that even approved techniques had such a painful, multiplying effect when combined that they might cross the legal line . . . .”<sup>154</sup> However, as evidenced in the infamous “torture memo” written by John Yoo<sup>155</sup> of the Office of Legal Counsel of the Department of Justice, the White House encouraged painful interrogation methods and “provided a sweeping legal justification for even the harshest tactics.”<sup>156</sup> “Mr. Yoo’s memorandum said no interrogation practices were illegal unless they produced pain

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<sup>150</sup> *Id.* “Critics say Mr. Gonzales turned his agency into an arm of the Bush White House, undermining the department’s independence.” *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See generally U.N. Charter; see generally U.S. CONST.

<sup>153</sup> Shane, Johnston & Risen, *supra* note 31.

<sup>154</sup> *Id.* (quoting Paul C. Kelbaugh, deputy legal counsel at the C.I.A. Counterterrorist Center from September to December 2003. Interrogators were often unsure about what were proper interrogation methods. Mr. Kelbaugh received numerous questions that “were sometimes close calls that required consultation with the Justice Department).

<sup>155</sup> *Id.* See also John Yoo – Biography, <http://www.law.berkeley.edu/faculty/yooj/> (last visited Feb. 24, 2009). John Yoo is a law professor at the University of California at Berkeley School of Law. “From 2001-03, he served as a deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice, where he worked on issues involving foreign affairs, national security, and the separation of powers.” *Id.* “He served as general counsel of the U.S. Senate Judiciary Committee from 1995-96, where he advised on constitutional issues and judicial nominations.” *Id.*

<sup>156</sup> Shane, Johnston & Risen, *supra* note 31.

equivalent to organ failure or ‘even death.’”<sup>157</sup> Many officials believed that Mr. Yoo’s conclusion evinced a lack of understanding of the relevant international law relating to the treatment of prisoners in United States custody.<sup>158</sup> As John D. Hutson<sup>159</sup> said, “[I]f you tell someone they can do a little of this for the country’s good, some people will do a lot of it for the country’s better.”<sup>160</sup> If the United States fails to develop proper procedures to address prisoners’ torture then “official American acceptance of such treatment could endanger Americans in the future.”<sup>161</sup>

On September 4, 2007, Hutson, along with seven other retired military Generals and Admirals, wrote an open letter to President Bush.<sup>162</sup> In the letter, these former military members state that the information gained through torture is often “unreliable” and the torture methods “jeopardize[] the United States’ moral and practical authority to promote democracy and human rights abroad.”<sup>163</sup> The former military members state that torture “seriously undermines the United States’ ability to ‘win the hearts and minds’ of the global community—a goal essential to defeating terrorism over the long term.”<sup>164</sup> The letter also promotes an open investigation into the detention policy that includes representatives from different branches of the government in order to develop a policy in accordance with United States and international law including the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>165</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> See generally *id.* See also Human Rights Watch, *U.S.: Landmark Torture Ban Undercut*, *supra* note 147.

<sup>159</sup> See John D. Hutson – Biography, <http://www.piercelaw.edu/johnhutson/> (last visited Feb. 24, 2009). John Hutson served as Judge Advocate General of the United States Navy. *Id.*

<sup>160</sup> Shane, Johnston & Risen, *supra* note 31.

<sup>161</sup> *Id.*

<sup>162</sup> John D. Hutson, et al., An Open Letter to the President (Sept. 4, 2007), [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Military\\_Leaders\\_Letter\\_President\\_Bush\\_FINAL.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_FINAL.pdf).

<sup>163</sup> *Id.* at 2.

<sup>164</sup> *Id.* The letter states that the national and international laws regarding the detainment and treatment of prisoners were designed “for critical policy reasons in the United States’ self-interest.” *Id.*

<sup>165</sup> See *id.* at 3. The letter recommends certain criteria that the commission must consider when evaluating the allegations of torture and arbitrary detention. The first criteria that the former military members recommend is a bipartisan commission that contains “recognized experts of unimpeachable credibility in mili-

After the United Nations Charter was formed in 1945, the parties of the first Geneva Convention Relative to the Treatment of Prisoners in 1929 sought to revise their principles in accordance with the United Nations Charter.<sup>166</sup> The parties reconvened at the Geneva Convention Relative to the Treatment of Prisoners of War in 1949 in an attempt to promote the ideals found in the United Nations Charter by applying those principles to prisoners of war.<sup>167</sup> Article 4<sup>168</sup> of the Convention defines prisoners of war in six different categories.<sup>169</sup> If a prisoner of war falls under one of the following categories, the prisoner shall be entitled to the protections under the Convention including, *inter alia*, access to medical treatment, appropriate rations of food, clothing, humane treatment, and the ability to practice their religious beliefs.<sup>170</sup>

The first category includes “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”<sup>171</sup> The second category includes:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that

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tary and intelligence operations, human rights and international law.” *Id.* These former military members want to ensure that the international community understands that the United States has undergone a full and complete inquiry into the torture allegations. If the United States military promotes torture of their prisoners of war, then there is the possibility that captured United States military members may be subject to torture in other countries. *See generally id.*

<sup>166</sup> *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at art. 4. Article 4 demonstrates the circumstances in which a prisoner is entitled to prisoner of war status. Such determinations will provide the prisoner with certain protections and rights under the Geneva Convention Relative to the Treatment of Prisoners of War. *Id.*

<sup>169</sup> *Id.* at art. 4.

<sup>170</sup> *See generally id.*

<sup>171</sup> *Id.*

of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war.<sup>172</sup>

The third category includes “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>173</sup> The fourth, fifth, and sixth categories do not apply to the detainees at Guantánamo Bay.<sup>174</sup>

Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War states that:

[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.<sup>175</sup>

The United States’ position is that the detainees at Guantánamo Bay do not fall into the categories defined in Article 4 because the detainees failed to meet the requirements of Article 4.<sup>176</sup> Since both al Qaeda and the Taliban armed forces did not sign the Geneva Convention Relative to the Treatment of Prisoners of War, the United States does not consider them a proper Party to the conflict.<sup>177</sup> Therefore, the United States argues that prisoners of war from al Qaeda and the Taliban cannot seek the protections of the Convention under category one.<sup>178</sup> Further, the United States also believes that since Afghanistan does not have an official armed forces, the Taliban cannot seek protections under category one.<sup>179</sup>

In their attempt to deny prisoner of war protections under category 2, the United States argues that category 2 also does not apply to either al Qaeda or the Taliban because these groups are not (a) commanded by a person responsible for his subordinates; (b) do not have a fixed distinctive sign recogniza-

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<sup>172</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, at art. 4.

<sup>173</sup> *Id.*

<sup>174</sup> See *id.*

<sup>175</sup> *Id.* at art. 5.

<sup>176</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 577, 629 (2006).

<sup>177</sup> *Id.* at 628-29.

<sup>178</sup> See *id.* at 629.

<sup>179</sup> George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 892 (2002).



ble at a distance; (c) do not carry arms openly; and (d) do not conduct their operations in accordance with the laws and customs of war.<sup>180</sup> The United States claims that the militia members of the Taliban and al Qaeda fail to follow the laws of war and do not meet the standards set forth in category 2 of Article 4.<sup>181</sup>

The United States uses the same rationale to deny protections under category 3 of Article 4.<sup>182</sup> Category 3, however, appears to provide a possible argument for both al Qaeda and Taliban detainees held at Guantánamo Bay to obtain protections under the Convention. Under category 3, the detainees must establish sufficient evidence to show that they are “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>183</sup> The United States considers this category inapplicable because al Qaeda and the Taliban armed forces are not considered “regular armed forces” as required under Article 4(A)(3).<sup>184</sup> Even though the Taliban had effective control over Afghanistan, the Taliban do not receive prisoner of war protections in American prisons.<sup>185</sup> If we assume that the United States is correct in its argument that al Qaeda and the Taliban do not fall under the categories of the Geneva Convention, the question remains: why does the United States deny prisoner of war status and protections to people captured in the course of an international conflict that which they are entitled to under international humanitarian law?<sup>186</sup>

In support of the United States’ decision to deny protections, the United States Department of State cites, on its website, the report of Pierre-Richard Prosper who is the Ambassador at Large for War Crimes Issues.<sup>187</sup> Prosper states that:

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<sup>180</sup> *Id.* at 898 n.14. *See also* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, art. 4 § A(2).

<sup>181</sup> *See Hamdan*, 548 U.S. at 628.

<sup>182</sup> *See generally id.*

<sup>183</sup> *Id.*

<sup>184</sup> Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, art. 4, § A (3).

<sup>185</sup> Aldrich, *supra* note 179, at 892.

<sup>186</sup> *Id.* at 894.

<sup>187</sup> *See* Remarks at Chatham House from Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues (Feb. 20, 2002), *available at* <http://www>.

. . . [a] careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.<sup>188</sup>

Prosper's argument specifically addresses category 2 of Article 4.<sup>189</sup> Prosper and the Bush Administration, however, ignore the main purpose of the Geneva Convention Relative to the Treatment of Prisoners. Using either a plain meaning or a teleological (general) purpose approach to interpreting the terms in the Convention, the detainees argue that the categories in Article 4 are not all-inclusive.<sup>190</sup> Using this interpretation, the detainees believe that the rights of prisoners of war should extend beyond those provided for in Article 4.<sup>191</sup>

#### PART IV: COUNTERVAILING INTERESTS OF THE INTERNATIONAL COMMUNITY AND THE UNITED STATES

"It is beyond question that substantial interests lie on both sides of the scale in this case."<sup>192</sup> The Supreme Court of the

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state.gov/s/wci/us\_releases/rm/2002/8491.htm. Former President Bush nominated Pierre-Richard Prosper on May 16, 2001 to be the U.S. Ambassador-at-Large for War Crimes Issues. Biography of Pierre-Richard Prosper, *available at* <http://www.state.gov/outofdate/bios/p/4417.htm> (last visited Feb. 24, 2009). As Ambassador-at-Large, "he advises the Secretary of State directly and formulates U.S. policy responses to atrocities committed in areas of conflict and elsewhere throughout the world." *Id.* "As the President's envoy, he travels worldwide engaging heads of state and international organizations to build bilateral and international support for U.S. policies." *Id.* "Since September 11, 2001, Ambassador Prosper has played a key role in the war on terror and has been the chief negotiator and lead diplomat for the United States in engaging nations regarding their nationals captured in combat." *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, art. 4 § A (2).

<sup>190</sup> Aldrich, *supra* note 179.

<sup>191</sup> *Id.*

<sup>192</sup> *See Hamdi*, 542 U.S. at 529.

United States must strike the proper constitutional balance necessary to protect the rights of alien detainees and the rights of the other branches of government.<sup>193</sup> “[O]ur Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”<sup>194</sup> Therefore, courts are mostly reluctant “to intrude upon the authority of the Executive in military and national security affairs.”<sup>195</sup> However, the Court states:

during our most challenging and uncertain moments . . . our Nation’s commitment to due process is most severely tested . . . and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.<sup>196</sup>

This line of reasoning demonstrates one of the reasons why the Supreme Court has addressed the issue of whether Guantánamo Bay detainees have a right to habeas corpus petitions.

In support of the United States’ position to deny habeas corpus rights to detainees, the government cites “weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.”<sup>197</sup> The government fears that, due to the evidentiary requirements, habeas corpus hearings for detainees may leak military secrets and other confidential information to our enemies in combat.<sup>198</sup> The Government also argues “that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process.”<sup>199</sup> The government believes that any process other than the Combatant Status Review Tribunal (hereinafter “CSRT”) would distract military officers from their important duties overseas.<sup>200</sup> In *Hamdi*, the government argued that:

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<sup>193</sup> *See id.* at 532.

<sup>194</sup> *Id.* at 531.

<sup>195</sup> *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988).

<sup>196</sup> *Hamdi*, 542 U.S. at 532.

<sup>197</sup> *Id.* at 531.

<sup>198</sup> *See Rasul*, 542 U.S. at 499.

<sup>199</sup> *Hamdi*, 542 U.S. at 531.

<sup>200</sup> *See id.*

[M]ilitary officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.<sup>201</sup>

The government also asserts that the detainees receive adequate protections in the CSRT hearings to ensure that the detainees are properly held at Guantánamo Bay and, therefore, habeas corpus hearings will not produce different outcomes than the CSRT hearings.<sup>202</sup>

In the United States' brief to the U.S. Supreme Court in *Boumediene v. Bush*, the United States cited the Detainee Treatment Act and the Military Commissions Act as precedent that Congress explicitly created statutory procedures for alien detainees that substitute as an adequate alternative to the writ of habeas corpus.<sup>203</sup> The United States argued that Congress' alternative procedure, the CSRT, will adequately determine whether a detainee is, in fact, an enemy combatant.<sup>204</sup> Since Congress provided for appellate review of the status determination through the D.C. Circuit Court of Appeals, the Government believes that the detainees receive appropriate protection from an erroneous determination by the Combatant Status Review Tribunal.<sup>205</sup> Also, former President George W. Bush, along with other members of his administration, believed that allowing detainees habeas corpus rights will place great burdens on the federal court system.<sup>206</sup>

As evidenced by the numerous *Amicus Curiae* briefs<sup>207</sup> filed in support of the detainees, both the international and domestic communities evinced their concern over the United States' detainment practices at Guantánamo Bay. The Brief of Interna-

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<sup>201</sup> *Id.* at 531-32.

<sup>202</sup> See generally Brief for United States as Respondent, *Boumediene v. Bush*, Reporter No. 06-1195 (U.S. Sup. Ct. Dec. 5, 2007), 2007 WL 2972541.

<sup>203</sup> *Id.* at 43.

<sup>204</sup> See generally *id.*

<sup>205</sup> See *id.* at 43.

<sup>206</sup> National Public Radio, *Bid to Give Detainees Right to Appeal Falls Short*, Sept. 19, 2007, <http://www.npr.org/templates/story/story.php?storyId=14531579>.

<sup>207</sup> Mayer Brown, *Boumediene/Al-Odah Supreme Court Case: Brief Resource Center*, <http://www.mayerbrown.com/probono/commitment/article.asp?id=3706&nid=3193> (last visited Feb. 24, 2009).

tional Law Experts cited the Geneva Conventions and their Protocols as “rules govern[ing] the legality of an individual combatant’s confinement, his right to challenge such confinement, the circumstances and conditions under which he may be interrogated, and his general treatment.”<sup>208</sup> Although the United States has not ratified either Protocol, “it has, nonetheless, recognized that certain key provisions dealing with the humane treatment of detainees constitute binding customary international law.”<sup>209</sup> One of those key provisions is that individuals captured during hostilities are “entitled to a presumption that he or she is a POW until the state holding the detainee (the “Detaining Power”) has proved otherwise.”<sup>210</sup> Regardless of prisoner of war status, the Detaining Power must treat the prisoner humanely and “safeguard the lives and dignity of combatants.”<sup>211</sup>

The Geneva Conventions demonstrate a collective goal to respect the human rights of all people regardless of their race, gender, or status as a member of enemy armed forces.<sup>212</sup> “States Party to the Geneva Conventions face great challenges in ensuring compliance and implementation of these rules in the fog of war.”<sup>213</sup> “Nonetheless, the obligations contained in the Geneva Conventions reflect not only a universal moral standard, but also binding law, solemnly reflected in the civil, penal, and military codes of the global community of signatories.”<sup>214</sup> In situations where government action deprives an individual of their liberty, United States’ courts must determine the legitimacy of the detainment in order to prevent erroneous deprivation of an individual’s liberty without sufficient process of law.<sup>215</sup> This is a customary rule of international law that “is evidenced by widespread state practice, and is reflected in nu-

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<sup>208</sup> Brief for International Humanitarian Law Experts as Amici Curiae Supporting Petitioners at 9, *Boumediene v. Bush*, 533 U.S. \_\_ (2008) (No. 06-1195), 2007 WL 2441573.

<sup>209</sup> *Id.* at 6.

<sup>210</sup> *Id.* at 9 (citing Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16, at art. 5).

<sup>211</sup> *Id.* at 15.

<sup>212</sup> See generally *id.*; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16.

<sup>213</sup> Brief for International Humanitarian Law Experts, *supra* note 208, at 19.

<sup>214</sup> *Id.* at 19-20.

<sup>215</sup> *Hamdi*, 542 U.S. at 530.

merous treaties, other international instruments, and international and domestic jurisprudence.”<sup>216</sup>

“International human rights law also defines the nature of a competent, independent, and impartial tribunal, which is the *sine qua non* of any meaningful review procedure.”<sup>217</sup> The CSRTs “were set up by the United States more than two years after detentions began in Guantánamo” and fell “far short of the international legal requirements for a competent, independent, and impartial tribunal administered under procedures which safeguard due process . . . .”<sup>218</sup> “[D]etainees are precluded by the CSRTs’ composition . . . from presenting a meaningful and effective challenge to the factual and legal basis for their detention.”<sup>219</sup> This system “cannot be reconciled with the United States’ obligations under international law.”<sup>220</sup>

“The right to be free from arbitrary detention is a universally recognized legal norm, essential for upholding the inherent dignity of all human beings and reaffirmed in every major human rights treaty.”<sup>221</sup> “As of August 22, 2007, there were approximately 355 detainees remaining in indefinite detention without charge at Guantánamo.”<sup>222</sup> “It is the government’s position that in the event a conclusion by the tribunal that a detainee is an ‘enemy combatant’ is affirmed,” the United States could hold the detainee “in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security.”<sup>223</sup> “At a minimum, the government has conceded that the war could last several generations.”<sup>224</sup> Under these circumstances where the

<sup>216</sup> Brief for Amnesty International, et al. as Amici Curiae Supporting Petitioners at 2, *Boumediene v. Bush*, 533 U.S. \_\_ (2008) (No. 06-1195), 2007 WL 2441589.

<sup>217</sup> *Id.* See generally Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16.

<sup>218</sup> Brief for Amnesty International, et al., *supra* note 216, at 2-3.

<sup>219</sup> *Id.* at 3.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 6-7.

<sup>222</sup> *Id.* at 4 (citing U.S. Department of Defense, Detainee Transfer Announced, No. 987-07 (Aug. 9, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11219>). In fact, “[n]one of the individuals detained in Guantánamo is a citizen of a nation presently at war with the United States.” *Id.*

<sup>223</sup> *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005); see also Brief for Amnesty International, et al., *supra* note 216, at 4.

<sup>224</sup> *Id.* at 465.

United States may potentially detain an individual without charge for their entire life at Guantánamo Bay, the international community wants to ensure that the individual's actions merit the detention imposed upon them.<sup>225</sup> Therefore, the international community demands that the United States provide safeguards such as "judicial review, in the form of habeas corpus" or "similar procedures [used] in other legal systems" to protect "the fundamental right of every person not to be illegally or arbitrarily detained."<sup>226</sup>

#### PART V: CONCLUSION

On July 4, 1776, the United States declared that all men possess the unalienable rights of life, liberty, and the pursuit of happiness.<sup>227</sup> By detaining individuals at Guantánamo Bay without charge, the United States violates their own founding principles. Although the international community must respect the United States' reasonable attempts to protect the safety of its people, the United States has an equally important duty to ensure that every detained individual receives the protections of both the Geneva Conventions and international human rights laws. By providing detainees with proper habeas corpus hearings, the United States will make a statement to the world that the United States respects human rights and the dignity of all people. Therefore, the United States should formulate new policies and eliminate its military commissions to protect detainees' rights in compliance with the Geneva Conventions and international law.

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<sup>225</sup> See generally Brief for Amnesty International, et al., *supra* note 216, at 4-9.

<sup>226</sup> *Id.* at 9. See generally Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 16.

<sup>227</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).