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Human Rights of Guantánomo Detainees under International and US Law: Revisiting the US Supreme Court Cases

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This article reviews the US Supreme Court cases regarding detention of alleged terror suspects in Guantanamo Bay, Cuba, and examines the interplay between international human rights law and the American Constitution with respect to the executive policies of the Bush Administration to detain terror suspects. The article first references the international human rights legal framework regarding detainees, specifically the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, and then analyzes seminal cases brought before the Supreme Court by detainees, specifically how the Supreme Court interprets the US Constitution and international law in reaching its decisions regarding detainees at Guantanamo. While the Supreme Court provided detainees the right to challenge the legality of their detentions through habeas corpus petitions, limitations still exist as to the lack of extraterritorial application of rights protections as well as the domestic judicial failure to redress detainees' subjection to torture and other abusive treatment.

Keywords

Guantánomo, Detainees, Habeas Corpus, US Supreme Court, Common Article 3, Geneva Conventions, US Constitution

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I. Introduction

The phrase 'nine-eleven' captures for many the horrors visited upon the United States in September 2001 when four airplanes commandeered by al Qaeda terrorists crashed into New York's Twin Towers, part of the Pentagon, and into the fields of Pennsylvania in an aborted attempt towards the White House. The deaths of nearly 3,000 American lives and the violation of national peace and security led the administration under President George W. Bush, Jr. to begin the War on Terror. The Bush Administration responded rapidly with force, bombing Afghanistan in the hunt for Osama bin Laden and his al Qaeda operatives, and later invading Iraq in March 2003 under the justification that Saddam Hussein had stockpiled weapons of mass destruction to target the United States.[1]

President Bush explained his foreign policy approach toward terrorism in the National Security Strategy of 2002, stating that terrorists groups would be destroyed by "using all means"; "exercising the right of self-defense, whether alone or with international support, in preemptive action against terrorists"; and denying support to terrorists by "convincing or compelling states to accept their sovereign responsibilities."[2] Under this foreign policy initiative, also known as the Bush Doctrine, the US government set its sights abroad to capture and contain anti-American terrorist networks. By the end of 2005, the US forces had captured and held more than 83,000 prisoners.[3] Among those captured, a total number of 779 suspected terrorists ended up at a detention facility at Guantanamo Naval Bay Station in Cuba.[4] Approximately 600 have been released without charges, while 155 detainees remain at Guantanamo as of January 2014, of whom 76 have been approved for release but still remain at Guantanamo due to lack of a safe host country to take them.[5] A total number of seven were convicted by the military convictions, and only six still remain who face formal charges.[6]

1 *See generally* National Commission on Terrorist Attacks upon the United States: The 9/11 Commission Report (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (last visited on Apr. 11, 2014).

2 *See* The National Security Strategy of the United States of America, Sep. 2002, *available at* http://www.state.gov/documents/organization/63562.pdf (last visited on Apr. 11, 2014).

3 K. Shrader, *U.S. Has Detained 83,000 in War on Terror*, Wash. Post, Nov. 16, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111601475_pf.html (last visited on Apr. 11, 2014).

4 Human Rights Watch, Facts and Figures: Military Commissions v. Federal Courts (Jan. 10, 2014), *available at* http://www.hrw.org/features/guantanamo-facts-figures (last visited on Apr. 11, 2014).

5 *Id.*

6 *Id.*

Discussing Guantanamo is relevant today because detainees are still there. The issue is also timely because the US government was before the Human Rights Committee ("HRC") of the UN Office of the High Commissioner for Human Rights in March 2014 to respond to the fourth periodic review regarding US obligations as a party to the International Covenant on Civil and Political Rights ("ICCPR"). Among the list of issues, HRC raised its concerns about the lack of extraterritorial applicability of ICCPR to the US actions abroad, ongoing detentions at Guantanamo, the use of drones for targeted killing in Pakistan and Iraq, and the lack of remedies for torture victims in the War on Terror.[7] HRC also asked whether the US Senate Select Intelligence Committee would declassify its contentious 6,000-page report detailing the detention and interrogation program of the Central Intelligence Ageny ("CIA") during the Bush Administration.[8]

Guantanamo also represents the issue of whether the US Executive Branch can disregard domestic and international laws regarding individual rights without legal accountability in its fight against terrorism. The detention of terror suspects at Guantanamo led to four major Supreme Court decisions between 2001 and 2008 regarding the following key questions: (1) whether the federal courts have jurisdiction to review the legality of alleged suspects' detention; (2) whether constitutional rights extend to non-citizens abroad; and (3) whether executive power can remain legally unchecked.

This article will explore the interplay among international human rights and humanitarian law, the Executive policies, and the US Supreme Court [hereinafter the Court] decisions regarding detainees in Guantanamo. This paper is composed of six parts including the Introduction and Conclusion. Part two will discuss under what legal justification the Bush Administration detained terror suspects at Guantanamo; how these policies violated human rights norms from an international legal framework, focusing on the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and how the international legal community reacted. Part three will review four Supreme Court case decisions, *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008), and two intervening statutes, the Detainee Treatment Act (2005) and the Military Commissions Act (2006), all of which

7 *See* Human Rights Committee considers report of the United States (Mar. 14, 2014), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E (last visited on Mar. 20, 2014).

8 M. Mazetti & S. Shane, *Senate and C.I.A. Spar over Secret Report on Interrogation Program*, N.Y. Times, July 19, 2013, at A13, *available at* http://www.nytimes.com/2013/07/20/us/politics/senate-and-cia-spar-over-secret-report-on-interrogation-program.html?_r=0 (last visited on Apr. 11, 2014).

address the right of the Executive Branch to detain terror suspects at Guantanamo without judicial review. Part four will then evaluate the Supreme Court decisions on the treatment of past and current detainees at Guantanamo and abroad elsewhere. Part five will discuss to what extent the international human rights framework has had a role in the process of these decisions.

II. Detention of 'Enemy Combatants' under the Bush Administration

President Bush declared a national emergency three days after September 11. Exactly one week from 9/11, Congress passed the Authorization for Use of Military Force ("AUMF"), which allowed the president to use "all necessary and appropriate force against those nations, organizations, or persons" related to the 9/11 attack.[9] Before passage of this statute, President Bush signed Presidential Findings authorizing the CIA to capture, detain, and take 'lethal action' against al Qaeda terrorists.[10] Within the same month, President Bush issued a military order to create military commissions to try non-citizens who are believed to be members of al Qaeda or otherwise involved in acts of terrorism.[11]

Meanwhile, the Bush administration needed legal justification in order to capture, detain, and interrogate terror suspects. The US Department of Justice's Office of Legal Counsel ("OLC") began drafting memos to justify the US government's treatment of detainees. The two laws most at issue concerned the Geneva Conventions on the treatment of prisoners and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

A. Circumventing the Geneva Conventions

Ratified by the United States in 1955, the Geneva Conventions embody international

9 *See* Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

10 J. Rizzo, Company Man 173-174 (2012). *See also* The Constitution Project, Report of the Constitution Project's Task Force on Detainee Treatment 130 (2013) [hereinafter Report of the Constitution Project], *available at* http://detaineetaskforce.org/read (last visited on Apr. 11, 2014).

11 Mil. Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. 57,833 (Nov. 16, 2001), *available at* http://www.gpo.gov/fdsys/pkg/FR-2001-11-16/pdf/01-28904.pdf (last visited Feb. 23, 2014).

humanitarian rules of war including the humane treatment of prisoners of war.[12] In particular, Common Article 3 of the Geneva Conventions provides for minimum standards of protection for detainees, including prohibition against torture, cruel, humiliating and degrading treatment, and "the passing of sentences…without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[13] The US military has integrated the Geneva Convention principles into its regulations.[14]

The Bush administration argued that al Qaeda and the Taliban were not protected by the Geneva Conventions. Over the objections of the Secretary of State Colin Powell and the State Department's legal adviser, William H. Taft IV, White House Counsel Alberto Gonzalez relied on the OLC memos by those attorneys as Jay Bybee and John Yoo that the Geneva Conventions did not apply to al Qaeda or the Taliban.[15] The underlying rationale was that only States or signatories are parties to the Geneva Conventions, so al Qaeda and Taliban members were exempt from this legal protection—al Qaeda on account of not being either a State or signatory, and the Taliban for failing to establish a government in the failed State of Afghanistan.[16] Secretary of Defense Donald Rumsfeld then conveyed to the US military that the Geneva Conventions were not to apply to detainees.[17] Thus, detainees did not have prisoner-of-war status ("POW") protections under either the Geneva Conventions or US military regulations. Instead, they were thus labeled as 'unlawful combatants.'[18] This had two implications: (1) leaving open the possibility of treating detainees without the protections of the Geneva Conventions and (2) creating military

12 *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6. U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

13 Geneva Conventions art 3.

14 *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (US Army Reg. 180-9; effective Nov. 1, 2007), *available at* http://info.publicintelligence.net/USArmy-Detainees.pdf (last visited Apr. 11, 2014).

15 Report of the Constitution Project, *supra* note 10, at 135-136. *See also* J. Yoo & J. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207-228 (2003), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2007&context=facpubs (last visited on Apr. 11, 2014).

16 Report of the Constitution Project, *supra* note 10, at 135.

17 *Id*. at 136.

18 D. Rumsfeld & R. Myers, Dep't of Defense News Briefing (Jan. 11, 2002), *available at* http:// http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031 (last visited on Mar. 23, 2014).

commissions to try detainees without the judicial protections of the US court system. The Supreme Court was to address this later in *Hamdan v. Rumsfeld* in 2006.[19]

The status of suspected terrorists as unlawful enemy combatants meant that the Geneva Convention protections did not apply, leaving detainees open to interrogation methods which bordered on torture.[20] As the US military and the CIA operatives swept up suspected terrorists, their detention and interrogation methods tested the threshold of what constituted 'torture.'

B. Inventing the Torture Threshold

OLC submitted a chain of memoranda to the Department of Defense, Executive Office, and the CIA to provide legal justification regarding the treatment of enemy combatants (also known as 'Torture Memos').[21] The memos explained whether or not some acts constituted torture according to international and federal laws.[22]

According to the OLC attorneys, the US obligations as a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") were limited to the US government's formal understanding of the treaty when signed. [23] This meant that the US government agreed to the definition of torture but not to the ambiguity of cruel, inhuman or degrading treatment or punishment ("CID").[24] CAT defines 'torture' in terms of domestic legislation under the Torture Statute, as:

> an act committed by a person acting under the color of the law to 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.[25]

Referencing other US statutes related to health on the matter of severe pain, the

19 Hamdan v. Rumsfeld, 548. U.S. 557 (2006). For details, *see* O. Hathaway, *Hamdan v. Rumsfeld: Domestic Enforcement of International Law, in* International Law Stories 232 (2007).

20 Hathaway, *id*. at 233-234.

21 *See* A Guide to Memos on Torture, *available at* https://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited on Apr. 11, 2014).

22 *Id*.

23 U.S. Department of Justice, Memorandum for William J. Haynes II, General Counsel of the Department of Defense (Mar. 14, 2003), at 50-51, *available at* http://www.justice.gov/olc/docs/memo-aba-taskforce.pdf (last visited on Apr. 11, 2014).

24 *Id*. For the Bush Administration's definition of torture, *see* Memorandum for Alberto R. Gonzales Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. [sections] 2340-2340A, *available at* http://www.justice.gov/olc/.../memo-gonzales-aug2002.pdf (last visited on Apr. 14, 2014).

25 18 U.S.C. §2340(1). For the general definition of torture, *see* Convention against Torture art. 1, §1.

OLC attorneys construed severe pain to mean damage rising to "the level of death, organ failure, or the permanent impairment of a significant body function."[26] By implication, physical or mental pain and suffering not rising to this level of torture essentially allowed a host of acts which may be cruel, inhuman or degrading but not enough to "produce pain and suffering of the requisite intensity within the Torture Statute's proscription against torture."[27] This legal leeway permitted interrogative methods by the CIA, euphemistically called "Enhanced Interrogation Tactics" ("EIT"), which included: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."[28] While these EITs were not considered tantamount to torture in the eyes of the Bush administration, the CIA sought assurances from OLC that its agents would not be criminally liable for using EITs, which it did not obtain.[29] Michael Chertoff, assistant attorney general at the criminal division and later Secretary of Homeland Security, had warned the CIA that it had "better be careful" because "it was dealing in an area where there was potential criminality."[30] The CIA was right to be nervous. News about its interrogative methods would break within a couple of years.

C. Backlash from the International Human Rights Community

As reports of detainee abuse began to leak and gain coverage, especially with the Abu Ghraib scandal in Iraq which publicly aired in April 2004, international and domestic outcry ensued.[31] Within the month, the CIA inspector general issued a report with critical findings about unauthorized and inhumane treatment of detainees subjected to the CIA-led interrogations.[32] In October 2005, Congress passed amendments led by Senator John McCain [hereinafter McCain Amendment] to require the US military personnel to follow the US Army Field Manual for detention treatment and to prohibit cruel, inhuman and degrading treatment or punishment

26 Report of the Constitution Project, *supra* note 10, at 143.

27 *Id.*

28 *Id.* at 145. *See also* The Rendition Project, *available at* http://www.therenditionproject.org.uk/the-issues/torture/eits.html (last visited on Apr. 14, 2014).

29 Rizzo, *supra* note 10, at 192.

30 Report of the Constitution Project, *supra* note 10, at 142.

31 S. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact (last visited on Apr. 11, 2014).

32 Report of the Constitution Project, *supra* note 10, at 149. *See also* Central Intelligence Agency-Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities (May 7, 2004), *available at* http://media.luxmedia.com/aclu/IG_Report.pdf (last visited on Apr. 11, 2014).

of anyone under the US custody.[33] The Bush administration wanted to exempt the CIA from this amendment because the Agency had been shuttling terror suspects to secret detention sites in third countries (called 'black sites') and subjecting them to EIT practices.[34]

After news of the 'black sites' surfaced in November 2005, attention further galvanized over detainee treatment. By this time, awareness had already shifted upon the detainees imprisoned in Guantanamo, many of whom had been detained for a number of years without formal charge and had been subjected to ill treatment. In February 2006, the UN Commission on Human Rights released a report by UN-mandated special rapporteurs alleging human rights violations of detainees at Guantanamo.[35] It catalogued and criticized the US detention policies with respect to arbitrary detention; the independence of judges and lawyers;[36] torture and other cruel, inhuman or degrading treatment or punishment;[37] religious intolerance; and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The US government objected to this report, however, claiming that it did not have sufficient notice to respond; the US Ambassador to the UN, Kevin Moley replied that the report was inadequate in its legal analysis in determining whether certain international human rights instruments applied extraterritorially, whether the United States is a State Party, whether and what reservations and understandings were filed, and whether they are legally binding.[38]

Meanwhile, the International Committee of the Red Cross ("ICRC") had since 2002 repeatedly requested the US government for information about those captured and detained in the War on Terror.[39] The US government granted ICRC to access to prisons in Iraq in 2003 and also finally in 2006 to 14 "high value detainees" who were

33 M. Garcia, Interrogation of Detainees: Overview of the McCain Amendment, CRS Report for Congress (Jan. 24, 2006), *available at* http://www.fas.org/sgp/crs/intel/RS22312.pdf (last visited on Apr. 11, 2014).

34 Hathaway, *supra* note 19, at 242.

35 *See* Situation of Detainees at Guantanamo Bay, Commission on Human Rights, 62d sess., E/CN.4/2006/120 (Feb. 15, 2006), *available at* http://daccess-ods.un.org/TMP/2508924.60346222.html (last visited on Apr. 14, 2014).

36 This specifically addressed the right to challenge the legality of detention before a judicial body, the right to be tried by a competent and independent tribunal, and the right to a fair trial. *Id.*

37 This section addressed lack of clear rules, interrogation techniques, detention conditions, excessive violence, transfer, extraordinary rendition, non-refoulement, and lack of impartial investigation/impunity. *Id.*

38 *Supra* note 35, annex II.

39 *See* ICRC Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment, and Interrogation (Feb. 2004), *available at* http://www.informationclearinghouse.info/pdf/icrc_iraq.pdf; ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody (Feb. 2007), at 3, *available at* http://www.progressiveaustin.org/icrc-rpt.pdf (all last visited on Apr. 11, 2014).

transferred to Guantanamo after being held in the CIA-run detention programs.[40] ICRC submitted a classified report in February 2007 to the CIA general counsel outlining the detention process and method of maltreatment suffered by detainees, detention conditions, healthcare, legal aspects of undisclosed detention, and discussion of other detainees who had been subjected to the CIA detention.[41] Later publicly disclosed, the ICRC report claimed that combined instances of enforced disappearance, the arbitrary deprivation of liberty, and practices of torture and other cruel, inhuman or degrading treatment violated international humanitarian and human rights laws, particularly referencing the Geneva Conventions and CAT.[42]

American rights advocates began to focus on the right of detainees to challenge the legality of their detention as early as 2002. Activists and lawyers found that: (1) leaflets offering USD3000 as bounty were dropped in Afghanistan, leading to the possibility of innocents being falsely accused for the sake of informants' enriching themselves; (2) others were picked up for being in the general vicinity of a conflict area; and (3) most detainees were being held in confinement without any formal charge.[43]

NGOs such as Amnesty International, Human Rights Watch, and Human Rights First, as well as lawyers groups such as the American Civil Liberties Union ("ACLU"), the Center for Constitutional Rights ("CCR"), law school clinics, and individual pro bono lawyers began mobilizing to protect detainee rights.[44] Actions included filing lawsuits in federal courts, meeting with detainees at Guantanamo, and petitioning the Inter-American Court on Human Rights ("IACHR"). *Amicus* briefs for plaintiffs were submitted by lawyers, legal scholars, the American Bar Association, diplomats, retired judges and military officers, overseas legislators, the UN High Commissioner for Human Rights, and international and local NGOs.[45] This legal mobilization was not an easy feat. The Guantanamo lawyers explained:

> The first step in challenging the detentions at Guantanamo was gaining access to the

40 *Id*.

41 *Id*. at 2. Methods detailed include suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation and use of loud music, exposure to cold temperature/cold water, prolonged use of handcuffs and shackles, threats, forced shaving, and deprivation/restricted provision of solid food.

42 *Id*. at 24.

43 *See* The Guantanamo Lawyers: Inside a Prison Outside the Law 307 (M. Denbeaux & J. Hafetz eds., 2009) [hereinafter The Guantanamo Lawyers].

44 *Id*.

45 Center for Constitutional Rights, *Boumediene v. Bush / Al Odah v. United States*, *available at* http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states (last visited Apr. 11, 2014).

> prisoners who were being held in secret and without legal process. It took more than two years and a decision by the US Supreme Court to achieve this first, but critical, step in the habeas corpus litigation.[46]

Lawyers representing detainees found the experience frustrating on numerous fronts, *e.g.*, in terms of access and travel to Guantanamo, and in establishing client trust amid government stonewalling and cross-cultural suspicions.[47] Attorney-client privilege was also strongly tested due to suspected government surveillance such as the National Security Agency wiretapping and in-room audio surveillance.[48] As late as 2011, this concern continued as the US government intercepted attorney-client correspondence, prompting the President of the American Bar Association to petition the Secretary of Defense.[49]

Lawyers continued to file lawsuits in the US federal courts, filing for habeas corpus relief and alternatively under the Alien Tort Statute ("ATS," also known as the Alien Tort Claims Act: "ATCA") which allows aliens to sue for violations of basic rights protected by international law or a treaty of the US.[50] Appeal after appeal, habeas petitions began to rise through the federal courts to reach the Supreme Court by 2004. However, ATS suits against the Secretary of Defense and military officers for arbitrary detention and torture failed when, in *Rasul v. Myers*, the District Court decided that the plaintiffs had not exhausted their administrative remedies as required under the Federal Tort Claims Act ("FTCA") when the US can be brought in as the defendant.[51] In a later case, the D.C. District Court dismissed torture claims by a Guantanamo detainee who had been granted habeas corpus, explaining that the Military Commissions Act of 2006 did not permit judicial review for any aspect of detention and would not have been permitted otherwise under the ATS or FTCA since sovereign immunity of the United States would not have been waived.[52]

46 The Guantanamo Lawyers, *supra* note 43, at 29.

47 *Id*. at 65-67, 246-247 & 386.

48 *Id*. at 32, 381 & 385.

49 W. Robinson III, Preservation of Attorney-Client Privilege for Guantanamo Bay Detainees and Their Lawyers, Letter to Secretary of Defense Leon Panetta (Dec. 21, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec21_guantanamoattcltpriv.authcheckdam.pdf (last visited on Apr. 11, 2014).

50 28 U.S.C. §1350. *See also* The Guantanamo Lawyers, *supra* note 43, at 32.

51 Rasul v. Myers, 512 F.3d 644, 654 (D.C. Cir. 2008), vacated on other grounds, Rasul v. Myers, 129 S.Ct. 763 (2008).

52 Al Janko v. Gates, USCA #12-5017 (D.C. Cir., 2014), *available at* http://caselaw.findlaw.com/us-dc-circuit/1655096.html (last visited on Apr. 11, 2014). For the lower level case, *see* Al Janko v. Gates, 831 F.Supp.2d 272 (DDC 2011).

III. The US Supreme Court Responds

In 2004, the US Supreme Court granted certiorari to hear cases related to Guantanamo detainees. Four cases concerning Guantanamo detainees were decided by the Supreme Court: *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008). The key issues of each case will be analyzed such as the Court's consideration of domestic and international laws; its holdings and decisions; and consequent statutory implications regarding judicial review.

A. Rasul v. Bush

The Supreme Court consolidated two cases, *Rasul v. Bush* and *Al Odah v. United States*,[53] to consider whether federal courts have the jurisdiction to hear challenges to the legality of detaining aliens captured abroad and held outside the US at Guantanamo Bay, Cuba. The Court had to decide "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty."[54]

Lawyers representing the detainees believed that they were detained at Guantanamo because it was not US territory and therefore not subject to US laws, in other words, a "legal black hole."[55] They maintained:

> We suspected at the time that Guantanamo was chosen by the Bush administration precisely because of the argument that the Constitution and habeas corpus did not apply there. Subsequently, we learned we were right: a memo was written on December 28, 2001, from Deputy Attorney General Patrick F. Philbin to Deputy Assistant Attorney General Yoo entitled "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba." It concluded 'that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Naval Base, Cuba." But the memo also cautioned that the question has not been definitively decided and that "there is some

53 Rasul v. Bush / Al Odah v. United States, 542 U.S. 466 (2004).

54 *Id*. at 475.

55 This label was used in a British case, R. on the application of Abbasi & Anor. V. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA Civ. 1598, ¶ 64 (U.K. Sup. Ct Judicature, (C.A.), Nov. 6, 2002), *available at* http://www.bailii.og/ew/cases/EWCA/Civ/2002/1598.html (last visited on Apr. 11, 2014).

possibility that a district court would entertain such an application.[56]

In this case, 12 Kuwaiti citizens and two Australian citizens challenged the legality of their detention at Guantanamo. Each claims that he has never been a combatant against the US or engaged in terrorist acts, neither been charged with wrongdoing, nor permitted to access a lawyer, courts, or other tribunals.[57] The case was filed in the District Court for the District of Columbia in 2002 but was dismissed for lack of jurisdiction since the District Court relied on a Supreme Court decision, *Johnson v. Eisentrager*, which held that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus."[58] 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."[59]

In a 6-3 decision, Justice Stevens distinguished the current case from *Eisentrager* by noting that this time, unlike the prior case, the enemy combatants: were not nationals of States at war with the United States; denied engaging in terrorist acts; never had access to or were charged by a tribunal; and were imprisoned in territory over which the United States had exclusive and complete control.[60] Furthermore, the Court interpreted habeas corpus primarily from a statutory rather than a constitutional perspective. The statute in question was 28 USC §2241, which authorizes district courts "within their respective jurisdiction" to consider habeas applications by anyone who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States."[61] The Court interpreted Section 2241 as a means to review the legality of an executive detention without judicial review, finding that the statute "draws no distinction between Americans and aliens held in federal custody."[62] Thus, the effect was to extend statutory habeas corpus jurisdiction to Guantanamo regardless of the status of citizenship. This decision was vital on two counts: Guantanamo Bay could not be used as a site immune to the reach of the US laws, thus checking the power of the Executive; and the right

56 The Guantanamo Lawyers, *supra* note 43, at 17.

57 542 U.S. at 471-472.

58 339 US 763 (1950), ¶ 2, *available at* http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=339&invol=763 (last visited on Apr. 14, 2014). For the decision of the District Court, *see id*. at 472-473 (215 F. Supp. 2d 55, 68 (D.D.C.2002).

59 *Id.* at 473 (321 F. 3d 1134, 1144 (C.A.D.C. 2003)).

60 *Id*. at 476.

61 28 U.S.C. §§2241(a) & (c)(3).

62 542 U.S. at 481.

to habeas corpus does not depend on being a US citizen.[63] The Court reversed the Court of Appeals judgment and remanded the case back to the District Court.

In response to the Supreme Court decision, the Department of Defense and Congress respectively countered with (1) the establishment of Combatant Status Review Tribunals ("CSRT") in 2004 to provide administrative review in lieu of judicial review for aliens at Guantanamo,[64] and (2) the Detainee Treatment Act of 2005, which delineated that no federal court had the jurisdiction to hear or consider a writ of habeas corpus by an alien deemed to be an enemy combatant or detained and awaiting such determination.[65]

Rights lawyers criticized the procedural flaws inherent in CSRTs, such as the lack of lawyers for detainees, the admission of coerced testimonies and hearsay evidence, detainee's lack of access to classified information submitted as evidence (which usually made up the bulk of evidence presented to the tribunal), and the admission of evidence having "probative value to a reasonable person."[66] The establishment of CSRTs was consistent with President Bush's Military Order of 2001, which states that "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"[67] and that detainees "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (1) any court of the United States, or any State thereof, (2) any court of any foreign nation, or (3) any international tribunal."[68] In effect, CSRTs were designed to substitute for normal judicial review.

The Detainee Treatment Act ("DTA") further served to keep cases related to alien detainees at Guantanamo out of federal courts. While DTA evolved from the McCain Amendment to prevent acts of torture and cruel, inhuman or degrading

63 Hathaway, *supra* note 19, at 240.

64 *See* Deputy Secretary of Defense Paul Wolfowitz, Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf; Secretary of the Navy Gordon England, Memorandum on the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), *available at* http://www. defense.gov/news/Jul2004/d20040730comb.pdf (all last visited on Apr. 11, 2014).

65 Detainee Treatment Act of 2005, Pub. L. No. 109-148, §1004(a), 119 Stat. 2739, 2740 (42 U.S.C. §2000dd-1).

66 Center for Constitutional Rights, *Boumediene v. Bush / Al Odah v. United States*, *available at* http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states (last visited on Apr. 11, 2014).

67 66 Fed. 57,835 (2001), Sec. 1(f).

68 *Id*. Sec. 7(b)(2).

treatment or punishment, it also amended 28 USC §2241[69] to provide that: "No court, justice, or judge shall have jurisdiction to hear or consider…an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[70] Furthermore, DTA stipulated that the US Court of Appeals for the District of Columbia Circuit had "exclusive jurisdiction to determine the validity of any final decision of a [CSTR] that an alien is properly detained as an enemy combatant."[71] DTA was enacted to stem the pending appeals related to Guantanamo detainees in federal courts. This statute was later addressed by the Supreme Court in Hamdan v. Rumsfeld (2006) discussed below.

B. Hamdi v. Rumsfeld

Decided on the same day as the *Rasul* and *Al Odah* cases, *Hamdi v. Rumsfeld* concerns an American citizen, Yasser Esam Hamdi, who contested his detention as an enemy combatant, first held at Guantanamo and later transferred to a naval brig once his US citizenship came to light. Like other alien enemy combatants, he had been held without charge, without access to counsel, and without a trial. Despite his American citizenship, he was not protected by the US criminal law or the Geneva Conventions. The Supreme Court recognized that Congress authorized Hamdi's detention through AUMF,[72] but found issue with the indefinite nature of his detention.[73]

The Court had to address the threshold issue of whether "the Executive has the authority to detain citizens who qualify as 'enemy combatants,'"[74] and the remaining question of "what process is constitutionally due to a citizen who disputes his enemy-combatant status."[75] The Due Process clause found in both the Fifth and Fourteenth Amendments of the US Constitution states that no one shall be deprived of "life, liberty, or property, without due process of law," meaning without proper and fair procedures, such as notice and an opportunity to be heard before a neutral judge.[76] The Court determined that Hamdi was not afforded due process as provided

69 *Supra* note 53.

70 Detainee Treatment Act of 2005, Sec. 1005(e)(1).

71 *Id*. Sec. 1005(e)(2)(A).

72 Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

73 *Id*. at 519-521.

74 *Id*. at 516. 'Enemy combatant' is defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *See* P. Wolfowitz (Deputy Secretary of Defense), Order Establishing Combatant Status Review Tribunal, Memorandum for the Secretary of the Navy (July 7, 2004).

75 542 U.S. 507, at 524.

76 *Id*. at 533.

in the Constitution, holding that a citizen-detainee must be given "a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."[77] In effect, the Supreme Court limited the Executive Branch's power and actions in the War on Terror.

After the decision, Hamdi was released to Saudi Arabia after giving up his US citizenship. Afterwards, about 500 lawyers volunteered to later file more than 300 habeas petitions in federal court on behalf of Guantanamo detainees.[78] DTA was in response to these Supreme Court cases in 2004 to prevent further judicial review of pending and new habeas petitions, a matter which the Court had to address in the next case concerning another Guantanamo detainee.

C. Hamdan v. Rumsfeld

Salim Ahmed Hamdan, a Yemeni citizen and the alleged bodyguard and driver of Usama Bin Laden was captured, detained, and charged with conspiracy before a military commission.[79] The District Court granted Hamdan's request for a writ of habeas corpus, which the Court of Appeals for the D.C. Circuit reversed.[80] The Supreme Court then granted certiorari on November 7, 2005.[81] The *Hamdan* case is significant because it holds, first, that the DTA is inapplicable to cases already under review by the courts, and second, that the military commission set up to try Hamdan violated both the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions. [82]

The first issue was whether the Supreme Court could even hear the case given that no judge or court could hear the habeas petitions of alien detainees at Guantanamo under DTA. The Supreme Court rejected the applicability of DTA to the case at hand, stating that DTA was silent as to pending writs of habeas corpus.[83] The next issue was whether the military commission (CSRT) had the authority to try Hamdan, and whether Hamdan could rely on the Geneva Conventions in these proceedings. The Supreme Court found that the military commission violated both

77 *Id*. at 509.

78 Hathaway, *supra* note 19, at 241.

79 For a fuller account of Hamdan's trials, *see* W. Glaberson, *Bin Laden's Former Driver Is Convicted in Split Verdict*, N.Y. Times, Aug. 6, 2008, *available at* http://www.nytimes.com/2008/08/06/washington/07gitmo.html?pagewanted=1&ref=salimahmedhamdan (last visited on Apr. 11, 2014).

80 Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir., 2005).

81 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

82 *Id.*

83 *Id.* at 574.

UCMJ and Common Article 3 of the Geneva Conventions.[84] It found that the military commission violated UCMJ because Hamdan was being charged with conspiracy, yet conspiracy had not been identified as a war crime by Congress, had rarely been tried as a war crime before by any law-of-war military commission, and is not listed as a war crime under either the Geneva Conventions or the Hague Convention of 1899 and 1907.[85]

The Supreme Court also adjudicated that the military commission contravened Common Article 3 of the Geneva Conventions, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[86] Here, CSRT was not the same thing as a regularly constituted court because of its procedural deviations from standard US courts-martial procedures.[87] In particular, the Court found fault with the failure to provide the right to present, which is included in both the Manual for Courts-Martial and also UCMJ.[88]

The Supreme Court held that the military commission lacked authority because "its structure and procedures violate both the UCMJ and the Geneva Conventions."[89] While the Court conceded that although Hamdan had been determined to be an enemy combatant and thus posed a risk to national security, "the Executive is bound to comply with the rule of law that prevails in this jurisdiction."[90] The Court reversed in a 5-3 plurality decision; Hamdan served his time and eventually was released in Yemen.[91]

In immediate response to the *Hamdan* decision, the Military Commissions Act of 2006 ("MCA") was enacted later the same year. MCA reiterated DTA, but this time explicitly stated that no court or judge shall review any habeas corpus case pending, without exception, related to any aspect of the detention of an alien enemy combatant or one "awaiting such determination."[92] MCA also stipulated that a

84 *Id.* at 567.

85 *Id.* at 599-604.

86 *Id.* at 629-630. *See also* Geneva Conventions art. 3.

87 *Supra* note 81, at 613-615. *See also* 66 Fed. 57835, Sec. 4 (2001).

88 *Supra* note 81, at 624.

89 *Id.* at 567.

90 *Id*. at 635.

91 *See Yemen releases former bin laden driver from jail*, N.Y. Times, Jan. 11, 2009, at A9, *available at* http:// http://www.nytimes.com/2009/01/12/world/middleeast/12yemen.html?partner=rss&emc=rss&pagewanted=all&_r= (last visited on Apr. 11, 2014).

92 Military Commissions Act, 10 U.S.C. §948 Sec. 7 (2006).

military commission established under this statute would qualify as a regularly constituted court, satisfying Common Article 3 of the Geneva Conventions.[93] Essentially, the CSRT process would substitute for habeas corpus. Like DTA, MCA represented another Executive and Legislative challenge to the Supreme Court's decision.

D. Boumediene v. Bush

The issue of habeas corpus came up once again before the Supreme Court in 2008 in *Boumediene v. Bush*.[94] It was unanswered in the three prior cases on whether alien detainees at Guantanamo have the constitutional privilege of habeas corpus. The Court had to address, once again, whether MCA restricted its review of habeas corpus actions in this case. It verbalized the essential tug-of-war between the branches, stating that: "We cannot ignore that the MCA was a direct response to Hamdan's holding that the DTA's jurisdiction-stripping provision had no application to pending cases."[95] MCA was understood as to prevent federal courts from reviewing habeas corpus actions.[96]

Noticeable is the Suspension Clause laid down in Article I, Section 9, clause 2 of the US Constitution, which provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Supreme Court had to determine whether this constitutional provision extended to the petitioners. The Government argued that alien detainees had no such rights based on their designation as enemy combatants and their location outside the US territory. The precedential evidence was not dispositive for either side regarding the status of enemy combatant.[97] The Court then turned to the issue of territory. Here, as in *Rasul*, the Court found constitutional jurisdiction over Guantanamo Bay, Cuba, asserting that the US had *de facto* control over the base territory.[98] This time, the Court had stronger words to censure the Executive:

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide

93 *Id*. §948b(f).

94 Boumediene v. Bush, 553 U.S. 723 (2008).

95 *Id*. at 738.

96 *Id*.

97 *Id*. at 746-747.

98 *Id*. at 756 (Rasul v. Bush, 542 U.S., at 480).

> when and where its terms apply… Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold that the political branches have the power to switch the Constitution on or off at will is quite another… [It] would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v Madison*, 1 Cranch 137, 177 (1803).[99]

The Court continued that "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers" and that it "must not be subject to manipulation by those whose power it is designed to restrain."[100]

The Court found that MCA violated the Suspension Clause of the writ because it was neither a formal suspension of the writ, nor argued as such by the Government.[101] Therefore, the Court held that: the constitutional provision governing the writ of habeas corpus reached Guantanamo Bay; and the petitioners could submit habeas claims to challenge the legality of their detention.[102] Congress must otherwise make a formal suspension of the writ regarding the detainees. The judgment of the Court of Appeals was reversed, and the cases were remanded to the District Court. In November 2008, the District Court released five out of the six Bosnian-Algerians who had spent nearly seven years detained at Guantanamo.[103]

IV. Evaluation of the US Supreme Court Cases

In their totality, the four cases before the Supreme Court illustrate the dynamics among the branches in maintaining a reasonable balance between national security and fundamental rights, in respecting the applicability of the US Constitution and international law under the principles of separation-of-powers and checks-and-balances. All four cases concerned whether the Court could entertain habeas corpus petitions. The decision in *Rasul* concluded that Guantanamo was under the US sovereignty, thus allowing the privilege of the writ of habeas corpus to alien detainees.[104] *Rasul* triggered a statutory response, i.e., DTA to circumvent the

99 *Id*. at 766.

100 *Id.* at 765-766.

101 *Id*. at 771.

102 *Id.* at 771 & 798.

103 *Supra* note 45.

104 *Supra* note 53.

Supreme Court decision. In the case of *Hamdan*, the Court found that DTA did not apply to the habeas petitions already pending before the Court, ruling again in favor of the alien detainee.[105] The Executive and Congressional response was to enact MCA to try to limit judicial review of habeas corpus petitions yet again. The Court granted certiorari to hear *Boumediene*, this time explicitly admonishing the government for its unconstitutional statutory attempt to constrain judicial review.[106] These cases repeatedly determined that habeas corpus jurisdiction extended to Guantanamo.

The Supreme Court mainly relies on constitutional analysis distinguishing federal precedents in its decisions. The history of the writ of habeas corpus is emphasized to underscore the importance of this privilege in checking the excesses of the government, especially when it comes to holding an individual without lawful charge and the opportunity to challenge one's detention. In the *Hamdi* case, the Court considers his American citizenship to find that the due process rights under the Fifth and Fourteenth Amendments were violated when Hamdi was not given access to counsel or an impartial trial.[107] Due process was not an explicit consideration in the other cases due to the petitioners' alien status. Instead, the Boumediene decision relies solely on the Suspension Clause of the habeas corpus provision as standing on its own merit, without resorting to the principle of due process, to examine the legality of petitioners' detention.[108]

Hamdan distinguishes itself from the other cases due to the significant analysis and application of the Geneva Conventions. This case illustrates that the domestic enforcement of international law can provide protection for non-citizens even when powerful US government actors try to skirt international legal norms.[109] *Boumediene* returns the discourse to the Constitution, however, in protecting non-citizen detainees through habeas corpus.[110]

While these four cases appear to be a victory in protecting the writ of habeas corpus even for alien citizens outside the US borders, it must not be read too expansively given the subsequent decision in *Al Maqaleh v. Gates* (2010) of the US Court of Appeals in the D.C. Circuit which held that the district court lacked jurisdiction to hear the habeas corpus petitions of alien detainees at Bagram Airfield

105 *Supra* note 81.

106 *Supra* note 94.

107 *Supra* note 72.

108 B. Garrett, *Habeas Corpus and Due Process*, 98 Cornell L. R. 47 (2012).

109 Hathaway, *supra* note 19, at 231 & 236-237.

110 *Supra* note 94.

in Afghanistan.[111] While the detainee's citizenship and status did not prevent invoking the writ of habeas corpus, the appellate court did not find the Suspension Clause to reach beyond Guantanamo where detention was in an active war zone and in another nation's sovereign territory.

V. The US Supreme Court Cases and International Humanitarian and Human Rights Law

International humanitarian and human rights principles governing the treatment of prisoners and detainees have been in place long before the 9/11 attack. Besides the Geneva Conventions of 1949 and CAT which entered into force in 1987, the prohibition against torture is viewed as a *jus cogens* norm and a non-derogable right under human rights treaties, specifically listed as the latter in the International Covenant on Civil and Political Rights.[112] In 1988, the UN General Assembly adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in 1988.[113] In the next decade, it adopted a series of resolutions titled "Human Rights and Terrorism" stating that counter-terrorism strategies must strictly comply with international human rights standards.[114] This language continued after 9/11 and in subsequent UN Security Council resolutions, as well. It would be often repeated that States must comply with their obligations under "international law, in particular international human rights, refugee law, and humanitarian law" in any measures to combat terrorism.[115] Following 9/11, the Security Council Resolution 1373 established the Counter-Terrorism Committee, stating that "domestic legal frameworks on counter-terrorism should ensure due process of law in the prosecution of terrorists, and protect human rights while countering terrorism as effectively as possible."[116] This language was repeated in

111 Al Maqaleh v. Gates, 605 F.3d 84 (2010).

112 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, art. 7.

113 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. GAOR 43d Sess., 76th plen. mtg., U.N. Doc A/RES/43/173 (Dec. 9, 1988).

114 A. Conte, *Counter-terrorism and Human Rights*, *in* Research Handbook on International Human Rights Law 515 (S. Joseph & A. McBeth eds., 2010).

115 *Id.* at 518-519 (SC Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg., U.N. Doc S/Res/1456 (Jan. 20, 2003) & SC Res. 1624, U.N. SCOR, 60th Sess., 5261st mtg., U.N. Doc S/Res/1624 (Sept. 14, 2005).

116 U.N. Doc S/2008/379 (June 10, 2008), ¶¶ 141 & 143(a), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%20RES%20379.pdf (last visited on

September 2006 when the General Assembly adopted the United Nations Global Counter-Terrorism Strategy, emphasizing that "effective counter-terrorism measures and the protection of human rights are not conflicting goals but complementary and mutually reinforcing ones."[117]

Under this international human rights framework, the UN agencies and international NGOs called the US government actions into account for detainee abuses. Human rights actors mobilized international law in terms of reporting mechanisms, *amicus curiae* briefs referencing human rights, petitions to the Inter-American Commission of Human Rights, and transnational networking among various advocacy groups.

The question is then how helpful has the international human rights framework been in protecting detainee rights? As seen above, human rights actors were influential in using international human rights law to help frame the grievances of detainees. These were powerful tactics in giving lawyers access to detainees, fact-finding, and eventually litigating detention cases all the way to the US Supreme Court. While this resulted in relative success in targeting unlawful detention, the question of redressing the torture of detainees is yet unresolved. HRC challenged the US government on this account in the ICCPR periodic review, pushing for extraterritorial observance of human rights obligation abroad, Guantanamo's closure, and judicial redress for torture victims.[118] The US government responded that: it would not change its stance on extraterritorial application of ICCPR; closure was in its finalizing stages; and torture was never sanctioned, with anyone guilty of this being formally charged.[119] The US legal officers and scholars have argued for extraterritorial application of ICCPR. *E.g.*, Harold Hongju Koh, former Legal Advisor to the US Department of State, issued sensitive but unclassified memoranda as to the geographic scope of ICCPR and CAT, finding that the observance of extraterritorial application is the proper legal interpretation.[120]

Apr. 11, 2014).

117 *See* The United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. GAOR, 60th Sess., 99th plen. mtg., U.N. Doc A/Res/60/288 (Sept. 8, 2006); Report of the Secretary-General, Uniting against Terrorism: Recommendations for Global Counter-terrorism Strategy, U.N. Doc A/60/825 (Apr. 27, 2006).

118 *See* Human Rights Committee considers report of the United States (Mar. 14, 2014), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383&LangID=E (last visited on Apr. 11, 2014).

119 *Id.*

120 H. Koh, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010); Memorandum Opinion on the Geographic Scope of the Convention against Torture and Its Application in Situations of Armed Conflict (Jan. 21, 2013). *See also* B. Van Schaak, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 Int'l L. Stud. 20 (2014); O. Hathaway *et al*., *When Do Human Rights Treaty Obligations Apply Extraterritorially?* 43 Ariz. St.

As for the Supreme Court's engagement with international human rights law, this was weak with respect to the four Guantanamo detainee cases. *Hamdan* was the exception, but it was the substantive application of international humanitarian law as the Court considered the Geneva Conventions, especially in regard to its incorporation within domestic military regulations. The discussion of international human rights norms was not otherwise explicit in *Hamdan* or the other cases. Instead, the issue of rights derives primarily from the US Constitution, especially the concept of due process for US citizens and the habeas corpus privilege for alien detainees. These constitutional principles can be interpreted to reflect international norms of fair procedures for detainees, although the Court could have deepened the analysis by incorporating discussion of international norms especially in the *Boumediene* case.[121] Thus, while the Supreme Court relied on international law in one case to effect administrative observance of detainee rights, the activism of international and domestic rights advocacy actors helped to buoy the cases into the federal court system for judicial review.

VI. Conclusion

The Obama administration was able to close one chapter of the War on Terror by killing Osama bin Laden in Pakistan in May 2011. However, the legacy of the Bush Doctrine leaves lingering detention issues such as: the challenge in closing Guantanamo; the post-*Boumediene* result of not extending habeas corpus review to alien detainees outside the US jurisdiction; and military tribunal cases continuing with procedural difficulties such as protracted review and the inadmissibility of classified information. While many responsible terrorists were caught for the tragedy of 9/11, glaring gaps of injustice remain for hundreds of detainees who were tortured, mistreated, disappeared or renditioned, and never formally charged. The Supreme Court addressed the issue of habeas corpus to ensure detainees' rights to challenge the lawfulness of their detention. In doing so, the Court conveyed the importance of upholding rights and protections for citizens and non-citizens using constitutional and international legal principles, along with the judicial checking of unrestrained Executive power. However, there is judicial failure in not protecting

L. J. 389 (2011).

121 J. Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 Yale J. Int'l L. 307 (2011).

non-citizen detainees from the US government violations of non-derogable norms of international human rights law, namely torture, prolonged arbitrary detention, and enforced disappearances, especially outside the US jurisdiction. Rights advocates continue to rally for observance of international human rights rules, but the comprehensive lack of solid legal recourse and accountability under both the international and domestic judicial frameworks endangers the very principle of respect for individual rights which the US claims to uphold. The Executive Branch's lack of political will and the federal judiciary's restraint in not upholding international treaty obligations represent not only a lost opportunity for the reputation of the United States but also for innocent detainees whose grievances will never be redressed. The Ameircan observance of the extraterritorial application of the human rights treaties it has ratified, ICCPR and CAT in particular, could redeem the United States' standing in the international community.