

NO FIRM GROUND: CLAIMS OF TORTURE IN GUANTANAMO BAY

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The United States is currently holding several hundred aliens in detention at the United States Naval Base in Guantanamo Bay, Cuba. There have been claims of possible torture and/or cruel, inhuman treatment by American officials and military personnel against the detainees, and several detainees have appealed for judicial review of their situations. Lower courts have dismissed several complaints on procedural grounds, effectively holding that claims by detainees cannot be heard by any court in the land. The United States Supreme Court subsequently granted certiorari to hear arguments on only a habeas corpus claim by the detainees,¹ but oral arguments gave no indication as to the outcome of the detainees' application to access courts in the United States legal system.

The Supreme Court will make a decision on the status of the detainees within the next month. If the Court asserts jurisdiction in these cases, the detainees may then have their substantive claims judged on the merits in the lower courts or file separate claims of torture or cruel, inhuman treatment. If the Court does not assert jurisdiction, the detainees are left without recourse for judicial review or intervention through the United States legal system. Similarly, if the Court had denied certiorari, the detainees would have been left to the whims of diplomatic initiatives by their countries of citizenship, and the response by the United States to such initiatives.

¹ Three cases were combined into one for purposes of determining the habeas corpus claims. See *Rasul v. Bush*, No. 03-334; *Al Odah v. United States*, No. 03-343. In fact, Rasul filed a torture claim but the parties agreed to combine cases for the Court to consider jurisdiction. See also *California Clergy Association v. Bush*, (310 F.3d 1153) filed as friends on behalf of detainees. The claim was dismissed for failure to establish sufficiently close relations to the detainees.

This paper analyzes the basis for possible claims of torture or cruel, inhuman treatment based *solely on international law through the United States legal system*, with due regard given to the current political climate. Based on current international law theories and systems, there appear to be three basic legal routes for the detainees to pursue claims of torture or cruel and inhuman treatment: international humanitarian law, international human rights law, and international criminal law. Each of the three possible hooks of liability is problematic due to initial procedural obstacles, thus failing to provide the detainees with clear substantive claims of torture against United States officials or military personnel. These particular procedural obstacles were the focus of much of the debate during oral arguments.

This paper concludes that even if the Court asserts jurisdiction over the detainees in Guantanamo, a claim of torture or cruel, inhuman treatment predicated on international law would not provide a clear hook of liability in United States courts. However, in light of the Bush administration's announcement that it will release at least one hundred detainees and subsequent releases, it may not be long before additional suits are filed in United States courts based on domestic and international law, specifically alleging torture and/or cruel, inhuman treatment of certain detainees during detention at the naval base. This paper is an attempt to advise and assist those individuals who would seek to file such claims.

Claims of Torture and Cruel, Inhuman Treatment²

At the moment, the Department of Defense is holding several hundred foreign nationals without charge or trial at the United States (hereinafter US) Naval Base located in Guantanamo

² Much of the information comes from several reports by Amnesty International. See Amnesty International, BEYOND THE LAW: MEMORANDUM TO THE US GOVERNMENT ON THE RIGHTS OF THE DETAINEE HELD IN US CUSTODY IN GUANTANAMO BAY AND OTHER LOCATIONS (2002), at 32-37. See also Amnesty International, UNITED STATES OF

Bay, Cuba. There is little public information about the detainees, because the Bush administration has not made public the specific number of detainees, their names, their nationalities or citizenship. During transfer to Guantanamo, the detainees were tied and gagged, had their eyes covered with darkened goggles, and several were reportedly sedated. In fact, the detainees apparently were not told they were being taken to Guantanamo.

These detainees have been in custody for what appears to be indefinite, extended periods in isolation without specific information about their release or judicial/military review of their cases. Some of those detained have been in custody for several years without access to legal counsel, without knowing the charges against them, and without visits from or communication with relatives.³ None has been granted prisoner of war (hereinafter POW) status or had their status determined by impartial courts. They have collectively been categorized as (illegal) enemy combatants.

Certain reports allege cruel, inhuman treatment, or torture in the totality, by US officials and military personnel. The reports cite handcuffs that have been too tight, forced kneeling for prolonged periods, continual threats and interrogation. There are reports that detainees have been restrained in painful positions and threatened, had their heads covered in hoods, and have been deprived of sleep through 24-hour illumination. One report cites US officials as stating the techniques of interrogation are “not quite torture, but as close as you can get.”⁴ There is concern that the “stress and duress” tactics of disrupting sleep and forcing prisoners to stand for extended periods, employed by US officials in Afghanistan, are also employed at Guantanamo Bay.⁵ There are also reports the detainees receive little to no time for regular exercise. Finally, there

AMERICA, THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS ‘WAR ON TERROR’ CONTINUES (2003).

³ Amnesty International, THE THREAT OF A BAD EXAMPLE, *supra* note 2, at 1-2.

⁴ Don Van Natta Jr, *Interrogation or torture: Blurred line?*, N.Y. Times, March 8, 2003.

are reports of children under the age of eighteen who are interned at the naval base.⁶ It is not surprising, therefore, that there have also been reports of more than thirty suicide attempts,⁷ hunger strikes, and subsequent punishment for not eating.⁸

On November 13, 2001, President Bush issued an order providing for trial by military commission.⁹ At the moment, only six individuals have been declared eligible for trial by this commission but their cases have not been heard.¹⁰ The rules of the executive order do not forbid coercion or physical force to elicit information from detainees. The opposite is actually true. The executive order permits military personnel to apply, and submit such statements as admissible in military tribunals, mental and/or physical stress statements “if the evidence would have value to a reasonable person.”¹¹ A subsequent second order provides, among other things, a right to counsel and civilian counsel; a presumption of innocence; a provision against self-incrimination; standards of evidence and proof; public monitoring; civilian commission members; and, a process of review.¹² These are improvements, but there remain gaps between commission procedures and international law standards. The detainees, therefore, are held *incommunicado*, without regard for certain, basic due process rights, including the writ of habeas corpus or presumption of innocence, and are subject to possible mental and physical stress.¹³

The failures of the lower courts to judge the cases on their merits and continued detention have caused an international outcry from the corners of the globe. The United Nations

⁵ Amnesty International, THE THREAT OF A BAD EXAMPLE, *supra* note 2, at 23.

⁶ Amnesty International, BEYOND THE LAW, *supra* note 2, at 21.

⁷ *Suicide Attempts at Guantanamo Reach 32*, Associated Press, August 26, 2003.

⁸ See *Fewer detainees joining hunger strike*, Miami Herald, March 7, 2002; *Some Al Qaeda, Taliban Detainees Refuse Food*, American Forces Information Service, February 28, 2002.

⁹ Exec. Order No. 57833, Fed. Reg. 66,222 (Nov. 13, 2001). The order is titled “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.”

¹⁰ Johan Steyn, Guantanamo Bay: The Legal Black Hole, Address at the Twenty-Seventh F.A. Mann Lecture (November 25, 2003). Also, Amnesty International, BEYOND THE LAW, *supra* note 2, at 2.

¹¹ Exec. Order No. 57833, *supra* note 9, §4(c)(3).

(hereinafter UN) Commission on Human Rights, the Inter-American Commission on Human Rights, the European Parliament and the Parliamentary Assembly of the Council of Europe have criticized the detentions.¹⁴ The International Committee of the Red Cross (hereinafter ICRC), which is considered the authoritative interpreting organ of Geneva Conventions and international humanitarian law, stated, “There are divergent views between the United States and the ICRC on the procedures which apply and how to determine that the persons detained are not entitled to prisoner of war status.”¹⁵ The UN Committee on Torture and the Special Rapporteur on Torture have previously stated that *incommunicado* “facilitates torture.”¹⁶

Several prominent jurists have even questioned the *incommunicado* detention, including Louise Arbour, a justice on the Supreme Court of Canada and former lead prosecutor at the International Criminal Tribunal for the former Yugoslavia, Johan Steyn, a Lord of Appeal in Ordinary, and Master of the Rolls, Lord Phillips of Worth Matravers. Steyn has called Guantanamo a “legal black hole”, stating, “The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors.”¹⁷ Phillips has called the conditions “objectionable” given that the US government has obvious control over the naval base in a long-term treaty.¹⁸

Given the information cited by Amnesty International, the work of other independent nongovernmental organizations, reports in numerous newspapers, it seems there is concern for the treatment of the detainees on two levels. Concern stems, first, from lack of basic due process rights or access to judicial review, and second, from possible exposure to torture and cruel,

¹² Department of Defense, Military Commission Order No. 1, March 21, 2002. Procedures for Trials by Military commissions of Certain Non-United States Citizens in the War Against Terror. Article 3(B).

¹³ Steyn, *supra* note 10.

¹⁴ Amnesty International, BEYOND THE LAW, *supra* note 2, at 1-5.

¹⁵ Press Release, International Committee of the Red Cross (February 9, 2002).

¹⁶ Amnesty International, THE THREAT OF A BAD EXAMPLE, *supra* note 2, at 11.

¹⁷ Steyn, *supra* note 10.

inhuman treatment. During recent history, the world community has become increasingly concerned with protecting individuals from ill treatment, including torture and other cruel forms of treatment. International human rights law, international humanitarian law, and international criminal law are the specific avenues through which the world community has attempted to create such protection. It is rather ironic that the United States, which played such a significant role in the development of such legal theories since World War II and the Nuremberg Trials through efforts to create the International Criminal Court, should not provide direct relief for the detainees through its domestic legal system.

International Human Rights Law

International human rights law has rapidly developed during the last six decades. Although numerous documents and philosophical treatises could be cited for the origins of contemporary international human rights,¹⁹ the obvious foundation is the UN Charter and the Universal Declaration of Human Rights (hereinafter UDHR). These documents represent agreement in the world community about the inherent dignity of the human person and the importance of the rule of law.

The UN Charter was a significant step in the development of international human rights law. The Charter establishes the promotion and encouragement of human rights as one of its purposes and principles.²⁰ It also provides all member states “shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all,”²¹ and that all member

¹⁸ Steyn, *supra* note 10, quoting, R (Abbasi) v The Secretary of State for Foreign Affairs, EWCA Civ 1598 (2002).

¹⁹ I will not list the litany of philosophical and political treatises that constitute the basis of ‘rights’ dating to the Greek and Roman periods, through the Enlightenment, the Declaration of Independence, the French Declaration on the Rights of Man, and the US Constitution, etc.

²⁰ U.N. CHARTER art. 1, para. 3.

²¹ *Id.* art. 55(c).

states must “take joint and separate action” in order to achieve such an objective.²² The US, led by Eleanor Roosevelt, then played an important role in the early stages of the development of international human rights law.²³ Ms. Roosevelt and a corps of US diplomats were instrumental in debating and drafting the UDHR through the nascent UN Commission on Human Rights that was established in 1946.²⁴ It might be surprising, therefore, to know that the detainees in Guantanamo do not have a clear legal claim against US officials for torture or cruel, inhuman treatment under international human rights law in the US legal system.

The UDHR was adopted in 1948 as a general statement of human rights and was followed by the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) in 1966. The UDHR, ICESCR and ICCPR form the so-called International Bill of Human Rights, which constitutes the basis for fundamental regard of human rights and development of additional rights. These multilateral treaties were subsequently followed by a number of more specific conventions on human rights: the Optional and Second Optional Protocols to the ICCPR in 1966, the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter CERD) in 1965, the International Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) in 1979, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) in 1984, and the Convention on the Rights of the Child (hereinafter CRC) in 1989. These documents represent the most fundamental international human rights statements by the world community.

Several regional human rights documents have also been written and adopted during the last five decades, which have created regional human rights regimes. The American Declaration

²² *Id.* art. 56.

²³ Mary Ann Glendon, *A WORLD MADE NEW* xv – xxi (Random House 2001).

of Rights and Duties was approved in 1948 and adopted in 1949, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950, the American Convention on Human Rights was adopted in 1969, the African Charter on Human and Peoples' Rights was adopted in 1981, and most recently, the Bangkok Declaration was drafted in 1993. Indeed, there has been such a rapid growth in human rights treaties, conventions, statements and declarations that it is possible to term the last half of the twentieth century as 'The Rise of International Human Rights.'²⁵ Or, more appropriately, the rise of international human rights law and international criminal law represent 'The Rise of Individual Legal Personality under International Law'.

The relevant international human rights documents for claims by the Guantanamo detainees are the UDHR, the ICCPR, and CAT. The remaining conventions are not relevant for the current section either because the US has not ratified them or the documents do not contain provisions on torture or cruel, inhuman treatment.²⁶ The important point about international human rights standards and treaties is that they are *always* applicable. Once a country has signed and ratified an international human rights treaty, there is no period when that treaty is entirely inapplicable or void.²⁷ In this sense, the ICCPR and CAT are always applicable to individuals within the jurisdiction of states party to the conventions. And, although the UDHR is not a treaty, it is considered reflective of customary international law. To that end, the UDHR, ICCPR, and CAT are clear in their jurisdictional application:

²⁴ *Id.* at 27-32.

²⁵ I am not quoting a source. The same is true for the phrase in the following sentence.

²⁶ This is not to diminish the significance of the conventions themselves, rather merely their significance for this paper.

²⁷ I am addressing countries that have signed and ratified the human rights treaty. I assume a country that has signed but not ratified, or one that has renounced, a treaty is not obligated to the treaty terms. This assumption is debatable but such a discussion falls outside the purview of this paper.

Article 2 of the UDHR states, “Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

“Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

Article 2 of the ICCPR states, “Each State Party to this Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 2 of CAT states, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

Article 5 of CAT states, “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state;

(b) When the alleged offender is a national of that State”

The language in the UDHR, ICCPR, and CAT makes the provisions applicable to territory under the jurisdiction of the US. The UN Human Rights Committee subsequently clarified any uncertainty about the jurisdictional application of the ICCPR, implying the same for CAT. The Committee stated that a state’s jurisdiction extends beyond national borders to areas it controls and over which it provides jurisdiction.²⁸

Based on the terms of the treaty between Cuba and US, it would appear the US has jurisdiction over the territory on which the naval base is located. The treaty stipulates the US “recognizes the continuance of the ultimate sovereignty” by Cuba over the land and water in the lease, but the US shall “exercise complete jurisdiction and control over and within said areas” in the lease.²⁹ It is difficult to find, on a plain reading of the language in the treaties, that the jurisdictional provisions in the UDHR, ICCPR, and CAT would not trigger US jurisdiction over the Guantanamo naval base under international law. As such, the provisions of those documents

²⁸ U.N. Human Rights Committee, General Comment 3, para. 1 (1981). *See also*, Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add. (1998), para. 10.

²⁹ Treaty on Relations of 1934, Nov. 12, 1934, U.S.-Cuba. This treaty amended the Lease to the United States by the Government of Cuba of Certain Areas of Land and Waater for Naval or Coaling Stations in Guantanamo and Bahia Honda of 1903.

would also apply to individuals on the naval base. The ICCPR applies to “all individuals...subject” to US jurisdiction and CAT applies to the “alleged” nationals of a state party to CAT.³⁰ US officials and military personnel are subject to US law on Guantanamo, and the alleged offenders are US citizens working for the US military.³¹ This analysis finds the ICCPR and CAT applicable as treaties, and the UDHR as customary international law, to the US treatment of detainees on the naval base.

International human rights law, however, provides for temporary deviation of certain provisions in human rights treaties and documents. These deviations are temporary and apply to most, *but not all*, provisions during public emergencies or national dangers, including in time of war or armed conflict.³² Once the public emergency is over, the human rights treaties resume application in entirety. Although temporary deviation is permitted from certain rights, international human rights law forbids deviation from several basic, fundamental human rights under any circumstance. The UDHR, ICCPR and CAT are clear in stating which rights are non-derogable:

UDHR (Article 29(2)): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Article 30 provides that nothing in the UDHR may be interpreted as implying a right to “engage in any activity or to perform any act aimed at the destruction of the rights” set in it.

ICCPR (Articles 4 & 5): Sets several non-derogable rights even in times of public emergency. Article 6 (the right to life, right to appeal and seek pardon of death penalty; prohibition on the death penalty for children under 18 and pregnant women); Article 7 (torture or cruel, inhuman or degrading treatment or punishment); Article 16 (recognition before the law).

³⁰ International Convention on Civil and Political Rights, Mar. 23, 1976, art. 2, U.N.T.S. 999. *Also*, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, June 26, 1987, art. 2(2), U.N.T.S. 1465.

³¹ This is a fairly complicated issue. The US Supreme Court has not directly addressed substantive claims brought by aliens located on the Guantanamo Naval Base. *See Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), *cert. denied*, 515 U.S. 1142 (1995). *See also Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.* However, in *Duro v. Reina*, 495 US 676 (1990), the Court recognized jurisdiction over American Indian reservations. And, in *US v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979), the Court addressed the issue of jurisdiction over non-resident aliens.

³² These are the non-derogable rights cited below.

CAT (Article 2): Article 2(2) states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 2(3) states, “An order from a superior officer or a public authority may not be invoked as a justification of torture.”

For purposes of this paper, it is assumed that the US was and has been in a period of national emergency following September 11, 2001. It also assumed that the US was at war, although President Bush did not make an official declaration of war.³³ It was during this period in Afghanistan that most or all of the detainees were caught or captured by US forces. Further, the claims of torture or cruel, inhuman treatment are not for what occurred during or immediately following military operations. The claims are focused solely on conduct at the Guantanamo naval base.

Given jurisdictional applicability of the UDHR, ICCPR, and CAT, it would seem the non-derogable rights cited above prohibit torture and cruel, inhuman treatment by US officials against the detainees. Article 7 of the ICCPR and Article 2 of CAT prohibit torture at all times. The conduct of US officials towards the detainees would seem to merit judicial review, and international human rights law provides basic standards for review. If the conduct does not rise to the level of torture, at the very least, it might be considered cruel, inhuman treatment. Sleep deprivation, forced kneeling, prolonged periods of isolation, threats, continual interrogation and minimal exercise for extended periods of time are not considered humane treatment by the individuals and organizations mentioned above.

While the facts appear to comport with the relevant international human rights standards, there is no clear claim for the detainees under the UDHR, ICCPR, or CAT through the US legal system. The UDHR is a non-binding resolution adopted by the UN General Assembly, which

although it is thought to reflect customary international law, is not a primary source of international law on which a legal claim could be brought in US courts.³⁴ The ICCPR was made largely non-self-executing, which prohibits direct application of the treaty to US law.³⁵ CAT, likewise, was also made non-self-executing.³⁶ Non-self-executing treaties do not generally create a private right of action in the US legal system.³⁷ The fact that the ICCPR and CAT are non-self-executing means they are not directly applicable (theoretically) in US courts, and the detainees must find a hook of liability under US domestic law. Consequently, any claim predicated solely on one or all of these three international human rights documents is problematic. Although the DC Circuit's decision in *al Odah* and *Rasul* relied largely on *Johnson v. Eisentrager*, an underlying assumption in the Court's reasoning was that international human rights treaties and standards are not directly applicable to US courts.

International Humanitarian Law

International humanitarian law, the law of armed conflict or the law of war, is founded on both customary international law and multilateral treaties. It is intended to limit the suffering during armed conflict, in particular the suffering by sick and wounded combatants, as well as by noncombatant civilians. The law of war has historically been divided into two distinguishable

³³ A declaration of war would not necessarily be essential to showing the US was 'at war' under international law. Appropriations bills, subsequent spending, mobilization of the armed forces and coordination with foreign military forces, as well as the military order regarding captives would probably suffice as evidence that the US was at war.

³⁴ Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *INTERNATIONAL LAW CASES AND MATERIALS* 602-607 (4th ed., West Law Series 2001).

³⁵ See U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

³⁶ CAT was made largely non-self-executing but 28 U.S.C. 1350, which incorporates much of CAT into US domestic law, is discussed below. See U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

³⁷ The concept of self-executing treaties is a judge-made doctrine. The distinguishing criterion for whether a treaty is self-executing or non-self-executing seems to be the intention of the government when it signs/ratifies the treaty. See *Foster and Elam v. Neilson*, 27 U.S. 253 (1829).

categories: *jus in bello*, the ways in which war out to be waged, and *jus ad bellum*, the conditions in which a just or justified war can be waged and in which it is legal.³⁸ The origins of modern international humanitarian law (indeed, international law in general) are frequently attributed to the Dutch jurist Hugo Grotius. Grotius wrote *De jure belli ac pacis* in the 16th century, in which he listed existing principles of the law of war.³⁹

Although Grotius is generally given credit as the father of modern international humanitarian law, a number of individuals and events have contributed to the development of the body of international humanitarian law during the last century and a half. The ICRC lists the Lieber Code in 1863 as the most significant of these efforts, the same year that ICRC was founded.⁴⁰ The first attempt to codify existing laws and customs of war in a multilateral treaty occurred a year later with the drafting of the first Geneva Convention in 1864.⁴¹ The first convention focused specifically on the amelioration of the wounded in armies on the battlefield, and was followed by a number of conventions designed to limit conduct during war. The most notable was the 1907 Hague Convention on the Laws of War, which is considered customary international law.⁴² In contemporary international humanitarian law, there are six fundamental multilateral treaties (including the four 1949 Geneva Conventions), along with the UN Charter, and the UDHR, which were all crafted following World War II in the spirit of a period that lended itself to increased protection of individuals.⁴³ Contemporary international humanitarian

³⁸ Henry J. Steiner and Philip Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS, MORALS* 59 (2nd ed., Oxford Univ. Press 2000).

³⁹ International Committee of the Red Cross, *INTERNATIONAL HUMANITARIAN LAW*, at 4 (2002).

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 9.

⁴² See statements by US Ambassador at-large for War Crimes Pierre-Richard Prosper (not dated) (<http://usinfo.state.gov/dhr/Archive/2003/Oct/09-932878.html>).

⁴³ The six conventions are the four Geneva Conventions of 1949 and the two additional Protocols of 1977 to the four Geneva Conventions of 1949. The first Geneva Convention addresses wounded and sick in the field in armed services; the second Geneva Convention addresses wounded and sick in armed services at sea; the third Geneva Convention provides standards for protecting prisoners of war; the fourth Geneva Convention protects civilians in

law, therefore, is roughly a century and a half old and represents both customary international law and codified international law.

The US has ratified the four Conventions and acknowledged them as customary international law but has not ratified the two Protocols, although selected provisions of the protocols are also widely considered reflective of customary international law.⁴⁴ Article 75 of First Protocol Additional to the Geneva Conventions of 1949 (hereinafter Article 75) was drafted to mandate humane treatment of all prisoners, regardless of their determined status.⁴⁵ Article 75 is also widely considered customary international law,⁴⁶ and the US government was advised of this status as early as 1989.⁴⁷

Like most issues of international law, states are parties to the conventions and protocols, which means that individuals historically did not have primary legal personality. This is starting to change, of course, following the International Military Tribunals in Nuremberg and Tokyo, the International Criminal Tribunal of the former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR), and the subsequent development of international criminal law.⁴⁸

For purposes of this section, the third Geneva Convention (hereinafter 3rd Convention), as well as Article 75 are the relevant standards for considering torture claims by detainees in Guantanamo. The 3rd Convention is the appropriate place to begin because the torture claims are

time of war; the first Protocol protects victims of international armed conflicts (usually civilian/noncombatant casualties); and, the second Protocol protects victims of non-international armed conflicts (usually noncombatants in the civilian population)

⁴⁴ The Geneva Conventions are among the most widely ratified multilateral treaties in the world. Art. 75 of the First Protocol Additional to the Geneva Conventions is also widely considered customary international law. See the ICRC website, www.icrc.org. See also Pierre-Richard Prosper, U.S. ambassador-at-large for war crime issues, *supra* note 41.

⁴⁵ Amnesty International, *BEYOND THE LAW*, *supra* note 2, at 1-5.

⁴⁶ Prof.C. Greenwood, *International Law And The "War Against Terrorism"*, 78 *International Affairs* 2, 307, 315 (2002).

not made in the context of fighting, on the battlefield, or in any circumstances of conflict that might trigger the other Geneva Conventions governing warfare. Rather, the detainees are currently removed from the battlefield, are in US custody by US officials at a US military base. Article 75 is appropriate given its status as customary international law.

The applicability of the Geneva Conventions is triggered because the fighting constituted an international armed conflict between two sovereign states. The Taliban arguably (albeit loosely) met the basic standards for recognition as a state are: (a) territory, (b) a population that is (c) under control of the government, and (d) capacity to engage in relations with other states.⁴⁹ Although the Northern Alliance maintained control of roughly 10% of the territory of Afghanistan (and the UN seat), the Taliban controlled the remaining 90% of Afghanistan. It clearly had a population that lived under its brutal regime, and it did engage in foreign relations with other states, including the US.⁵⁰

On the other hand, al-Qaeda does not meet traditional minimum standards as a sovereign state. It is a stateless organization without territory and citizens but with members who are citizens of various countries.⁵¹ Consequently, fighting al-Qaeda is non-traditional in that al-

⁴⁷ Theodor Meron, *HUMAN RIGHTS AND HUMANITARIAN NORMS OF CUSTOMARY LAW* (Clarendon Press 1989), at 62-69.

⁴⁸ I address the possibility of a claim based on international criminal law below.

⁴⁹ Damrosch, Henkin, Pugh, Schachter, Smit, *supra* note 34, at 250-260.

⁵⁰ As one example, representatives of the Taliban met with Dick Cheney and other US oil executive to discuss plans for a proposed pipeline that would run through Afghanistan. The negotiations for the pipeline required state-to-state discussions. See *Taliban in Texas for talks on gas pipeline*, British Broadcasting Company, Dec. 4, 1997, http://news.bbc.co.uk/1/hi/world/west_asia/37021.stm. Also, *Oil barons court Taliban in Texas*, The Telegraph, Dec. 14, 1997, http://www.telegraph.co.uk/htmlContent.jhtml?html=%2Farchive%2F1997%2F12%2F14%2Fwtal14.html&secureR efresh=true&_requestid=229077.

⁵¹ The fact that the detainees are citizens of sovereign states has caused significant diplomatic problems for the current administration. Diplomatic standards codified in treaties ensure citizens the right to speak with representatives of their countries. See Vienna Convention on Diplomatic Relations, as well as Vienna Convention on Consular Relations. The US has selectively deported foreign nationals, sometimes to countries that are known to torture individuals, but I will not address this issue. The US also recently announced it will release between 100-140 detainees. See articles by CBSNews.com, <http://www.cbsnews.com/stories/2003/06/10/terror/main557846.shtml>, or the Boston Globe, http://www.boston.com/news/nation/articles/2003/12/01/us_to_transfer_100_detainees_from_guantanamo/.

Qaeda has neither signed nor ratified the Geneva Conventions, nor would it be possible for al-Qaeda to do so because only states are parties to the Geneva Conventions. The argument is, therefore, that since al-Qaeda is a non-state entity and is not party to the Geneva Conventions (and may not be adhering to the Geneva Conventions), then the US is not obligated to adhere to the Geneva Conventions. Thus, it is an initial distinction between state and non-state entities that theoretically permitted the Bush administration to recognize the 3rd Convention for Taliban fighters but not for members of al-Qaeda. This position has been repeatedly stated by previous White House Spokesman Ari Fleischer, National Security Advisor Condelezza Rice, Secretary of Defense Donald Rumsfeld, and Deputy Secretary of Defense Paul Wolfowitz.⁵² It is also the state/non-state distinction that permits the Bush administration to argue the laws of war are different in seeking and fighting al-Qaeda than the Taliban, or say Iraq.

Article 2 of the 3rd Convention, however, is clear that states party to the Conventions are bound regardless of whether the enemy is a party to the Conventions or not. Moreover, the fact that Article 2 is common to all four Geneva Conventions lends weight to this statement. Certain commentators argue that even non-state entities or fighting units (e.g. al-Qaeda) not party to the Geneva Conventions are none-the-less bound to them.⁵³

The 3rd Convention provides specific criteria for determining when combatants should be granted POW status: operating in a structured hierarchy with a superior officer; wearing uniforms or distinguishing marks; openly carrying weapons; and, conducting operations in

⁵² Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002, www.whitehouse.gov/news/releases/2002/02/20020207-13.html; Rumsfeld's statements on the war and on the detainees, Feb. 8, 2002, http://www.dod.mil/news/Feb2002/t02082002_t0208sd.html and, July 31, 2002, <http://www.defenselink.mil/speeches/2002/s20020731-secdef3.html>; Wolfowitz on Iraqi prisoners and 3rd Geneva Convention: Dept of Defense News Transcript, Deputy Secretary Wolfowitz Interview with New England Cable News, Mar. 23, 2003, www.defenselink.mil/transcripts/2003/t03242003_t0323net.html; Rice reiterated this position on Nov. 10, 2003: <http://www.whitehouse.gov/news/releases/2003/11/20031114-13.html>.

⁵³ Convention III, art. 2, para. 1, 2, 3. *See also* ICRC website, www.icrc.org.

accordance with the laws of war.⁵⁴ Combatants, who fight in a war between sovereign states and adhere to these provisions, would be granted POW status under the 3rd Convention. On the other hand, combatants not adhering to provisions stated in the Geneva Conventions are not entitled to the benefits of POW status in the 3rd Convention. According to the US Supreme Court in *Ex parte Quirin*, the appropriate status would be illegal or unlawful combatants.⁵⁵ Most Taliban and al-Qaeda, if not all, were *not* in uniforms or wearing distinguishing marks, and there were also reports of Taliban and al-Qaeda dressing as civilians to lure US soldiers close. It is also not clear in what fighting units the Taliban and al-Qaeda fought. Thus, the Bush administration ultimately rejected the 3rd Geneva Convention protection for even Taliban fighters because they did not adhere to Article 4 of the 3rd Convention.⁵⁶

While it is true that POWs may be held until the cessation of hostilities,⁵⁷ it is also true that under Articles 4 & 5 of the 3rd Convention, if there is some doubt about the status of a detainee, an impartial tribunal must consider the issue. The US has neither established such a tribunal nor indicated it is going to establish one, which runs counter to both the Geneva Conventions and US Army regulations that have incorporated portions of the Geneva Conventions. For example, US Army regulations require status determinations by a competent tribunal to prove the right of appeal for interned civilians⁵⁸ or status determinations by competent tribunals for persons “not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as” POW or concerning such doubt.⁵⁹ Any possible claims by

⁵⁴ Convention III relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2).

⁵⁵ *Ex parte Quirin* 317 U.S. 1.

⁵⁶ Damrosch, Henkin, Pugh, Schachter, Smit, *supra* note 34, at 250-260.

⁵⁷ Convention III (to Geneva Conventions), art. 118.

⁵⁸ U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees Sections 1-6 (1997), also Sections 5-1b & 5-1g(1).

⁵⁹ U.S. Department of the Army, Field Manual on the Law of Land Warfare, FM 27-10 Section 71(a) (1956).

members of al-Qaeda are further complicated by a military order issued by the Executive Branch.⁶⁰ Thus, the Executive Branch has distinguished al-Qaeda from other detainees through executive discretion.⁶¹

Consequently, although diplomatic pressure seems to have resulted in the (announced) release of 100-140 detainees, there has been no discussion by the current administration of status determination other detainees. Several hundred will remain in detention. Other statements by Rumsfeld and Wolfowitz demonstrate the Bush administration has taken a pick and choose approach to applying the Geneva Conventions, that is the application of the 3rd Convention to Iraqi soldiers but not Taliban or al-Qaeda.⁶²

According to the Bush administration, only after the status of the detainees is determined could there be discussion of whether US officials treated the detainees in a manner inconsistent with the 3rd Convention. The obvious conclusion is that if the detainees receive POW status, they would receive the benefits of the 3rd Convention. If they do not receive POW status, they are not entitled to the benefits of the 3rd Convention. But the Bush administration, without the assistance of a competent, independent tribunal, has already determined the status of the detainees and determined they do not meet requirements necessary to receive POW status, yet has also stated the detainees will be treated in a manner generally consistent with the 3rd Convention.⁶³ These basic conditions are stated in Articles 12-16, as well as in Article 17 for questioning and interrogations. POWs must be treated humanely and with respect “at all times” including periods of transfer. They may not be physically mutilated or subject to scientific experiments. Moreover, POWs must not be subjected to “physical or mental torture, nor any

⁶⁰ Exec. Order No. 57833, *supra* note 9.

⁶¹ The issue of executive discretion is one that seems to cut against the Article 5 tribunals for status determination.

⁶² A selection of statements by Defense Department officials, including on the 3rd Geneva Convention, <http://www.defendamerica.mil/iraq/defenseviews.html>.

other form of coercion.”⁶⁴ The aforementioned reports indicate that these standards are being violated by US officials at Guantanamo.

The problem with this line of reasoning is that it does not address the substantive rights listed in Article 75, which are considered customary international law. Indeed, the Bush administration dedicates little public attention to comparing the actual conditions of the detainees with any of the substantive rights of the detainees listed in Article 75. It appears, therefore, that the Bush administration is circumventing the 3rd Convention and Article 75 both in word and in deed.

There is one final difficulty the detainees have in finding a valid legal claim under international humanitarian law in US courts. This is the issue of non-self-executing treaties. At least one US court has determined the 3rd Convention to be non-self-executing.⁶⁵ Thus, in order for the detainees to receive judicial review of their situations, they must find a clear domestic hook, which provides them access to the courts and then consideration of substantive rights. During oral arguments, both counsel for the plaintiffs and government, as well as the Justices were concerned with the short-term and long-term implications of this issue.⁶⁶

International Criminal Law

Recent developments in international law include the area of international criminal law. The rights and responsibilities of individuals under international law theoretically date to the Roman period when aliens were subject to a different set of laws from citizens of the Roman

⁶³ Damrosch, Henkin, Pugh, Schachter, Smit, *supra* note 34, at 250-260.

⁶⁴ Convention III, art. 17.

⁶⁵ See *Tel-Oren*, 726 F.2d 74, 808-809 (D.C.Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003.

⁶⁶ See U.S. Sup. Ct. Oral Arguments, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf (June 25, 2004).

Empire.⁶⁷ At the founding of the US Republic, the US acknowledged several limited crimes against ‘the law of nations’ including piracy and offenses against diplomats.⁶⁸ The list has grown to include, among other crimes, slavery, genocide, crimes against humanity, war crimes, and (arguably) torture.

Individual legal personality and legal responsibility under international law increased considerably in the twentieth century and are poised to continue in the coming years. The International Military Tribunals at Nuremberg and Tokyo were the first instances that individuals stood trial for crimes against humanity, war crimes, and genocide.⁶⁹ Established by the Allied powers, this model for individual accountability during times of war vanished for nearly fifty years, in part, because of the Cold War and other political reasons. However, the ICTY and ICTR revived individual accountability for actions and atrocities committed during times of war. The charters for these tribunals were founded on the UN Charter, the Nuremberg and Tokyo models, as well as international humanitarian and human rights norms and principles.

As a member of the UN Security Council, the US was involved in drafting and approving the resolutions for the ICTY and ICTR. The International Criminal Court (hereinafter ICC) is seen as a continuation of the development of international criminal law. Although the US engaged in negotiations for the Rome Statute and signed the Rome Statute, it has not ratified it. At the moment, ninety-two countries have ratified the multilateral treaty,⁷⁰ the ICC is now in effect, and it has its first prosecutor.⁷¹ Consequently, it is apparent both that international

⁶⁷ Hans Julius Wolff, *Roman Law: An Historical Introduction* 71 (Red River 1951).

⁶⁸ See U.S. Const. art. 1, sec. 8(10), permitting Congress to define and punish “Piracies and Felonies committed on the High Sea, and Offenses against the Law of Nations.” See also *Respublica v. De Longchamps*, 1 U.S. 111 (1784), in which the Court determined that certain offenses against foreign officials constitute a violation of the Law of Nations.

⁶⁹ Damrosch, Henkin, Pugh, Schachter, Smit, *supra* note 34, at 405-409, 932-933.

⁷⁰ See International Criminal Court website, “States Parties”, <http://www.icc-cpi.int/php/statesparties/allregions.php>.

⁷¹ See International Criminal Court website, “The Office of the Prosecutor at a glance”, <http://www.icc-cpi.int/otp/ataglance.php>.

criminal law has experienced a sharp growth in recent years and that the US has been involved with and influenced (somewhat) that growth.

At present, a claim of torture or cruel, inhuman treatment against US officials based on international criminal law would not succeed in US courts. In fact, such a claim would have to be either carefully filed in the Second Circuit or in some adjudicatory body with jurisdiction over the US legal system, which does not currently exist. This is because torture or cruel, inhuman treatment claims based on contemporary international criminal law have developed so recently that they fall only within the purview of either ad hoc military tribunals (Nuremberg, Tokyo, ICTY, ICTR) or the newly created ICC. Only traditional criminal offenses that violate the law of nations (piracy, offenses against diplomats) provide a sound basis for a claim in all US courts through the Alien Tort Claims Act. At the moment, there is considerable debate within the US legal system about the Alien Tort Claims Act and whether it is merely a jurisdictional provision or if it implies a private right of action for aliens in US courts. The issue is further complicated because of debate as to what constitutes torture, as opposed to cruel, inhuman treatment.⁷²

However, there are several additional reasons why the Guantanamo detainees would not have a clear claim against US officials predicated on international criminal law. The first reason is that the military tribunals established during the last century were created, in part through the will and influence of the US and the international community. The US was one of the Allied

⁷² This issue is quite complex. In the US legal system, the Alien Tort Claims Act (28 U.S.C. 1350 provides “jurisdiction for civil action of any tort in violation of the law of nations or a treaty) is one possible route for a claim based on the law of nations. There is currently a circuit split on this issue, however, which complicates the matter for US courts. The DC Circuit has read the ATCA narrowly, while the 2nd Circuit has read it broadly. There is debate as to whether the ATCA merely provides jurisdiction or if it also implies a private cause of action. There is also debate about whether torture is a violation of customary international law. Torture is further distinguished from cruel, inhuman treatment, which is not a violation of customary international law. *See* Tel-Oren; *Filartiga v. Pena-Irala*, 630 Fed 876 (2d. Cir. 1980). These and related issues may ultimately be resolved through the *Doe v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976, at 16 (9th Cir. Sept. 18, 2002) and *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003)(en banc) that are working their way through the US legal system. For now, the issues remain uncertain.

powers that created the Nuremberg and Tokyo Tribunals, and the UN Security Council was the organ that ultimately created the ICTY and ICTR. It seems unlikely, therefore, that the US would consent to the establishment of an independent, international military tribunal to review and adjudicate US conduct. It is also unclear that such a tribunal would be desired or necessary by the international community, because the US fought the Taliban and al-Qaeda in Afghanistan with a limited military coalition (by choice) but substantial international support (as opposed to the invasion of Iraq).

The second reason is that the US has not ratified the ICC, and as such, it is not subject to the ICC's jurisdiction. Moreover, the ICC does not open cases retroactively, which would prohibit valid claims from most of the current detainees. The detainees could arguably raise a claim with the ICC based on the territory where they were captured, if they were seized after the ICC came into effect in 2002.⁷³ Afghanistan, for example, ratified the Rome Statute on February 10, 2003 and there are no limitations that would prevent a claim based on act that occurred after Afghanistan's ratification. However, there should be no illusions about the US position on the ICC: President Clinton signed the Rome Statute without intent to ratify it in its current form, and there is no indication President Bush will push for ratification. It seems unlikely, therefore, the US would bend or bow to a request by the ICC to release the detainees.

The third reason also addresses the jurisdiction of the ICC, *assuming arguendo* that the US had ratified the Rome Statute: the detainees have not exhausted all possible domestic remedies through the US legal system. The fact that the US Supreme Court agreed to hear a habeas claim for several detainees means that the highest court in the land is reviewing the nature and conditions of the detention in Guantanamo. Consequently, even if the US had ratified the ICC and the detainees had filed a claim with the ICC, the ICC would likely refrain from

investigating and reviewing the case until after the US Supreme Court had completed its review and issued its opinion.⁷⁴

Finally and equally as important, *assuming arguendo* that the US had ratified the Rome Statute, it is not clear that US officials are in violation of international criminal law as stated in the treaty. The ICC was created to end impunity for violations of the most serious international crimes. These crimes are stated in Article 5: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 defines genocide, Article 7 defines crimes against humanity against a civilian population, and Article 8 defines war crimes.⁷⁵ There is no evidence of genocide that would trigger Article 6, nor is there evidence of systematic attacks on civilians that could trigger Article 7. Article 8 addresses grave breaches to the Geneva Conventions of 1949, including international and non-international armed conflict. A reading of Articles 6-8, with due regard to the facts gathered by NGOs and other individuals regarding the detainees in Guantanamo, reveals that conduct by US forces in Guantanamo could, but may not, fall within the purview of Article 8 war crimes.

Article 8 addresses “[g]rave breaches of the Geneva Conventions” and “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.”⁷⁶ Within Article 8, several provisions could apply to the conduct of US officials towards the detainees: 8(2)(b)(xiv) forbids suspending “the rights and actions of the nationals of a hostile party”; and, 8(2)(b)(xxi) prohibits “outrages upon personal dignity.” Both of these provisions could apply to the detainees at Guantanamo, but application of these provisions to US officials would be a purely hypothetical exercise.

⁷³ Rome Statute, art. 12(a).

⁷⁴ *Id.* art. (17).

⁷⁵ *Id.* arts. 6-8.

⁷⁶ *Id.* arts. 8(2)(a), 8(2)(b).

Thus, while it is fairly clear that the Guantanamo detainees currently have virtually no claim based on international criminal law through the US legal system or the ICC (at the moment), this area of the law has grown so rapidly during the last decade that it merits further discussion. The Bush administration could theoretically employ international criminal law as a way of prosecuting the detainees in Guantanamo. It could have requested the UN Security Council create an ad hoc military tribunal to try al-Qaeda and members of the Taliban, or it could have transferred the detainees to the ICC or a state party to the ICC. In so doing, the administration could avoid scrutiny and criticism that it now faces for holding the detainees *incommunicado* for extended periods, a situation that flies in the face of common international norms and standards. Such common international norms and standards are nowhere more evident than in the intersection of international human rights law, international humanitarian law, and international criminal law.

Intersection at International Law

Aside from historical origins, international human rights law, international humanitarian law, and international criminal law have several similarities and differences. The similarities stem from the fact that the three areas of law clearly intersect. First, each attempts to provide norms, rights and legal protection to individuals, thus granting international legal personality to individuals. Second, the rights granted by each field overlap during periods of international and

non-international armed conflict. Third, the specific rights overlap with regard to basic due process rights, as well as several substantive rights.⁷⁷

The basic difference between the three areas of international law is that international humanitarian law applies temporarily *only* during armed conflict, while international human rights law and international criminal law are always applicable. Second, international humanitarian law applies to certain categories of individuals (civilians, prisoners of war, combatants), while international human rights law and international criminal law apply to all individuals within a state's jurisdiction.⁷⁸ Finally, whereas international humanitarian law and international criminal law are decisively criminal,⁷⁹ international human rights law may be civil or criminal, depending on the application of international standards into domestic law.⁸⁰

Consequently, one of these three forms of international law is *always* applicable. Indeed, there is no point in which all three areas of international law are inapplicable. International human rights law and international criminal law are always applicable, with the aforementioned exceptions to human rights standards during public emergencies. If the public emergency does not rise to the level of an international or non-international armed conflict, certain non-derogable

⁷⁷ Due process rights are guaranteed by all the aforementioned documents. For international criminal law, *see* ICTY art. 21 titled "Rights of the Accused"; ICTR art. 20 titled "Rights of the Accused"; and, Rome Statute of the ICC, arts. 59, 63, 65, 66 and 67 ("Rights of the Accused"). For human rights standards, *see* UDHR arts. 6, 7, 8, 9, 10, 11(1); ICCPR arts. 6, 9, 14, 16; CAT arts. 12, 13, 15. For humanitarian law, *see* Convention III, arts. 3, 99-107; Protocol I, art. 75(3) & 75(4).

Substantive rights are also guaranteed by the same documents. These rights include the right to life and security of person, freedom from torture, and freedom from outrages against personal dignity. *See* UDHR arts. 3, 5, 12; ICCPR arts. 7, 10(1) & 17; CAT art. 2. *Also*, Convention III, arts. 3, 12-16; Protocol I, art. 75. *Also*, ICC arts. 5-8.

⁷⁸ *See* ICCPR art. 2(1) and CAT art. 2(1). *Also*, the Rome Statute states crimes against a 'civilian population'. The four Geneva Conventions of 1949 apply to sick and wounded in the field, sick and wounded at sea, prisoners of war, and civilians, respectively.

⁷⁹ ICTY art. 7, titled "Individual Criminal responsibility". ICTY Statute, as amended by UNSC Resolution 1329 on November 30, 2000. ICTR art. 6, titled "Individual criminal responsibility." ICTR Statute, as amended by UNSC Resolution. While international criminal law is not exclusively international humanitarian law, the two intersect. *See* Rome Statute of the ICC preamble noting, "every State to exercise its criminal jurisdiction over those for international crimes" and the ICC "shall be complementary to national criminal jurisdictions." Further, *see* Article 1, which states the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern."

human rights, as well as international criminal law are still applicable. If the public emergency does rise to the level of armed conflict, then international humanitarian law fills the gap for derogable human rights, yet international criminal law is also applicable. Thus, there is no point when (theoretically) US conduct towards the detainees should evade international law, yet the conduct of US military officials and personnel have not been reviewed by a judicial body.

Conclusion

The US has signed and/or ratified a number of international documents that provide for minimum rights of individuals under international human rights law, international humanitarian law, and international criminal law. The US also recognizes the persuasive authority of customary international law. These areas of international law provide common, albeit minimum, standards for basic due process and substantive rights to all individuals that are applicable to all individuals at all times. In spite of this, the detainees who are held at the US naval base in Guantanamo face significant procedural and substantive legal barriers to basing claims on international human rights law, international humanitarian law, or international criminal law in the US legal system. If the Supreme Court asserts jurisdiction in *al Odah* and *Rasul*, claims of torture or cruel, inhuman treatment will begin to fill US court dockets. In order to be successful, however, those claims should be predicated primarily on US domestic law rather than solely on international law. In this manner, international law will provide a secondary claim or persuasive authority that is more likely to be considered by the Court, as in its decision in *Lawrence v. Texas*.

⁸⁰ ICCPR art. 2, CERD arts. 2-6, CEDAW art. 2-3, CRC art. 2-4. However, CAT Article 4 requires torture be classified under “criminal law”.