

**Andrea Birdsall, University of Edinburgh**  
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**‘A Monstrous Failure of Justice’?<sup>1</sup> Guantanamo Bay and National Security  
Challenges to Fundamental Human Rights**

The events of 9/11 had a profound effect on human rights in US national policy. Established international human rights standards came increasingly second place behind national security considerations. Advances in international human rights that had been made over the past decades were suddenly called into question for the need to emphasise national security. America declared a ‘war on terror’ with far reaching consequences for civil liberties and some of the most basic human rights that were brushed aside in the name of ‘necessity’ to ensure the protection of the homeland against new and unprecedented threats. The US government found new ways of interpreting international law to make it ‘fit’ its policy and using it as a political tool to match the national security agenda. This article discusses some of these challenges posed to the international human rights regime with a particular focus on Guantanamo Bay. The detention and interrogation centre in Cuba is an important example of the way the US under the Bush administration used and interpreted international law to suit its own policy choices.

To understand US decisions and actions and also constraints placed on them, this article employs the IR theory approach of two logics of action: the logic of consequences that focuses on national security considerations and the logic of appropriateness that emphasises common norms and laws. These two logics are linked and rather than purely seeing the US as hegemon with unopposed powers to introduce more permissive human rights standards, looking at norms in this context opens up moral questions to assess US actions in its ‘war on terror’.

The Bush administration’s attempts to prioritise national security considerations over international human rights standards is challenged for two main reasons: firstly, from a legal point of view and secondly from a conceptual viewpoint. Legally, international standards and norms for the protection of some very fundamental human rights exist that the US cannot ignore and that require calculations of appropriateness. Conceptually, security interests and human rights are linked and cannot be pursued in isolation from each other. This is not only an integral part of the existing human rights regime but has also been recognised by the US government in various documents such as its 2002 and 2006 National Security Strategies.

This article starts by briefly outlining the two logics of action and issues arising from them. It then examines the establishment of Guantanamo Bay as a detention centre for suspected terrorists captured in the ‘war on terror’. The focus is on violations of international human rights and humanitarian law at Guantanamo, most importantly the Geneva Conventions and the Torture Convention. The main issues of controversy are the denial of prisoner of war status, denying detainees the right to challenge their

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<sup>1</sup>Steyn, J. (2004) Guantanamo Bay: The Legal Black Hole. *International and Comparative Law Quarterly* 53:1-15, p. 11.

detention and allegations of torture of prisoners. This article demonstrates that the wrangling over Guantanamo Bay is an important illustration of the complex interaction between interests and norms and also law and politics in US policy making. The starting point of the argument is that politics and law are linked and cannot be seen in isolation from each other but the question is what *kind* of politics law can maintain. (Shklar, 1964)

### **The two logics of action**

One way of understanding how policy decisions by states are made is to distinguish between interest-based calculations ('logic of consequences') and norms-based ones ('logic of appropriateness').<sup>2</sup> March and Olsen argue that the divide between these two logics is both normative and descriptive: it is normative in the sense that it questions whether one logic leads to a better international community and it is descriptive in the sense that it seeks to answer whether one logic is more common as basis for action than the other (March and Olsen, 1998:949).

The *logic of consequences* explains behaviour by looking at the anticipated costs and benefits of a particular action. Actors focus on the consequences of their conduct and are driven by calculations of how a particular strategy is likely to further their own preferences. Actors are seen as having given interests and that 'a rational act is one that will produce an outcome that maximizes the interests of the individual unit.' (Fierke, 2007:170) The logic of consequences assigns a very limited role to international law mainly because it is seen to be not really 'law' as it has no higher authority and no independent enforcement mechanism attached to it. Since states consent to international law voluntarily, they only comply with it if it is in their interest to do so. Posner asserts that 'because states have no intrinsic desire to comply with international law, all international law is limited by the rational choice of self-interested actors.' (Posner, 2003:1919)

In contrast, the *logic of appropriateness* is rooted in constructivism in IR which focuses on norms and laws and how they enable and constrain state action. This logic suggests that actors think about their actions in terms of whether or not they are in accordance with such rules. Actions are dependent on a sense of what is seen as appropriate and legitimate for the situation, based on intersubjective norms and shared practice. The logic of appropriateness assumes that 'what is rational is a function of legitimacy, defined by shared values and norms within institutions or other social structures rather than purely individual interests.' (Fierke, 2007:170) International law matters and states comply with it even if it is not in their short term self-interest to do so, because they are members of an international community with a separate set of rules that are prior to a state's sovereign will. Franck, for instance, argues that state sovereignty is subordinated to obligations that derive from the membership of that community and that states 'obey rules of the community of states because they thereby manifest their membership in the community, which, in turn, validates their statehood'. (Franck, 1990:8) By being part of the international community, states accept that they are not completely sovereign, but that some minimum rules of co-existence exist that states follow to avoid jeopardising their position in it.

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<sup>2</sup>A similar distinction is made in international legal debates that discuss the role of international law in political action.

These two logics of action are not mutually exclusive but are linked: states act in accordance with their national interests, but they are constrained by existing norms and expectations of the international community. As March and Olsen argue: 'Political actors are constituted both by their interests, by which they evaluate their expected consequences, and by the rules embedded in their identities and political institutions. They calculate consequences and follow rules, and the relationship between the two is often subtle.' (March and Olsen, 1998:952) The two logics of action constitute each other: norms enable and constrain state, but (in turn) actions by self-interested states also shape norms and ideas. A number of decisions taken with regard to Guantanamo demonstrate this link between the two logics. As Hurrell argues, 'the present crisis illustrates very powerfully that how we calculate consequences is often far from obvious, especially in conditions of great uncertainty; it is almost impossible to separate the calculations of consequences from our understanding of legal or moral norms and form the constitutive, mobilizing and legitimizing power of those norms.' (Hurrell, 2002:186)

As Shklar argues, law is a form of politics and cannot be seen in isolation from its normative and political contexts. This is a starting point for an analysis that examines 'what sort of politics can law maintain and reflect?' (Shklar, 1964:143-4) The question is how state interests (i.e. actions in line with the logic of consequences) and normative obligations (i.e. logic of appropriateness considerations) interact. The existing normative environment places both legal and conceptual constraints on purely interest-based calculations. A body of international human rights and humanitarian laws exists that has led to changes in the understanding of state sovereignty to include human rights. It is also generally acknowledged that the concepts of human rights and security are linked in a number of ways and cannot be pursued in isolation from each other.

### **The human rights regime – international human rights and humanitarian law**

Historically, international law was predominantly concerned with states and regulating the relations between them. Individuals only had rights by virtue of being citizens of a particular state. Over the years, however, international law has changed considerably to increasingly include human rights independently of states. General human rights laws (such as the International Bill of Rights) have been established as well as more specific Conventions that deal with particular human rights issues such as the torture and genocide. These rights are seen as belonging to a different category that are important to *all* states and therefore justify establishing special provisions in international law to protect them. Conventions establish offences with *jus cogens* character which means that such crimes 'may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'. (Chigara, 2000:118) *Jus cogens* norms are special because they are binding on all states and allow no contradiction or exception by other treaties or customary law.

In addition to human rights law, humanitarian law has developed as a separate area of international law to protect human rights in times of war and armed conflict.<sup>3</sup> Most

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<sup>3</sup>International human rights law and international humanitarian law are two distinct but complementary bodies of law. Human rights law is designed to protect individuals at all times – during peace as well as times of war. It is based on the idea that individuals have rights by virtue of being human. Humanitarian law, in contrast, only applies in situations of armed conflict.

importantly, it includes the four Geneva Conventions of 1949 that protect those that are not or no longer taking part in the fighting such as prisoners of war, sick and wounded soldiers and certain groups of civilians.<sup>4</sup> The Geneva Conventions are accepted by all 194 countries in the world, including the US and Afghanistan, and are generally considered to constitute customary international law relating to war.

### **Changing notions of sovereignty**

The increased recognition of human rights in international relations has led to changes in the notion of sovereignty by placing limits on states' treatment of their own citizens. The focus of sovereignty is no longer only on the inviolability of the state but it is increasingly dependent on the protection of human rights.<sup>5</sup> This idea of 'sovereignty as responsibility' is based on the belief that all human beings have rights by virtue of their humanity which transcend state borders. Human rights provide a standard of moral legitimacy based on the understanding that 'if sovereignty is a shared set of understandings and expectations about state authority that is reinforced by practices, then changes in these practices and understandings should in turn change sovereignty. The expansion of human rights law and policy in the postwar period is an example of a conscious collective attempt to modify this set of shared norms and practices'. (Keck and Sikkink, 1998:37) Sovereignty is important, because it means that states can act independently and in accordance with their national interests, but by including a responsibility to protect human rights this interest-based approach is tempered by expectations and norms established in the international community.

The link between interest-based and norms-based actions is also evident in the understanding that security and human rights are connected and cannot be seen in isolation from each other. The idea that upholding human rights contributes to peace and security is fundamental to the human rights regime. For instance, the preamble of the Torture Convention recognises that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. The US acknowledged this connection between security and human rights in the past: for instance its National Security Strategies of 2002 and 2006 set out that US security is linked to promoting free and open societies that guarantee political and economic liberty. Foot argues that 'the US approach to prosecuting the 'war on terror' has had to contend not only with its own rhetoric proclaiming that protection of the individual is vital in the search for global peace, but also with concrete institutional and normative developments in wider global society. Placing the individual at the centre of the concept of security implies there should be no trade-off between human rights and counter-terrorism strategies.' (Foot, 2006:119) The US had to justify its policy decisions in the context of existing obligations and considerations of appropriate behaviour in the international community as a whole.

### **US policy approach after 9/11**

The foreign policy agenda of the Bush administration that came into office in 2001 showed a marked shift towards a stronger focus on national interests and unilateral action from the start. Secretary of State Condoleezza Rice already set out in 2000 the

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<sup>4</sup>The Geneva Conventions and their provisions will be discussed in more detail below.

<sup>5</sup>During the UN World Summit in 2005, for instance, it was generally agreed that sovereignty includes a responsibility for a state's own citizens. For a discussion on 'sovereignty as responsibility' see for instance Evans, Gareth, and Mohamed Sahnoun. (2002) *The Responsibility to Protect. Foreign Affairs* 81:99-110. and Annan, K. (1999) Annual Report to the General Assembly, 20 September 1999.

importance of the US pursuing its national interests. She emphasised the importance of American, rather than international values for promoting peace and security in the world, arguing that ‘America’s pursuit of the national interest will create conditions that promote freedom, markets, and peace. (...) American values are universal’. (Rice, 2000) She further argued that the Bush administration’s foreign policy will ‘proceed from the firm ground of the national interest, not from the interests of an illusory international community’. (Rice, 2000)

This emphasis on national interests set the tone for the US foreign policy in the years to come; ‘the Bush approach to foreign policy in general, and certainly to human rights issues in foreign policy, was highly unilateralist, affected by a genuine belief in American exceptionalism, and consequently dubious at best about what international norms and actors could bring to the subject of protection of human rights – both at home and abroad’. (Forsythe, 2006:170) This position intensified even further after 9/11. The National Security Strategy of 2002 sets out an agenda for possible unilateral and pre-emptive action in the pursuit of national security which also involves new interpretations of international law to justify such conduct. In a joint investigation into September 11, Cofer Black, Director of the CIA’s Counterterrorism Center (1999-2002), argued that ‘there was a “before” 9/11 and “after” 9/11. After 9/11 the gloves came off’ and further: ‘I know that we are on the right track today and as a result we are safer as a nation. “No limits” aggressive, relentless, worldwide pursuit of any terrorist who threatens us is the only way to go and is the bottom line’. (Black, 2002:12)

The events of 9/11 inevitably led to security concerns being put at the centre of the political agenda and it can be argued that it was even a reasonable response to give less priority to human rights as a matter of national policy. The policy approach became controversial, however, when the emphasis on national security was used as an unlimited justification for government actions that led to abuses of some of the most fundamental human rights. As Falk argues, ‘the inevitable impact of September 11 was soon made unacceptable from a human rights perspective, however, by the gratuitously abusive treatment of individuals ... this governmental behavior seemed to flow from the highest levels of authority and could not be convincingly rationalized as necessary for “security”’. (Falk, 2005:230)

On 18 September 2001, the US government passed the Authorization for Use of Military Force (AUMF) which gave the president the power to ‘use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons’. The AUMF was used to justify a number of actions taken in the ‘war on terror’ that began with the invasion of Afghanistan and also to justify the detention of prisoners captured during the war that were suspected of being terrorists. In November 2001, President Bush issued a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism in which he determined ‘an extraordinary emergency ... for national defense purposes’. The Military Order also specifies that ‘any individual subject to this order shall, when tried, be tried by military commission’ rather than US courts.

The first step in this process was to build a detention facility where suspects could be held before being put on trial.

### **Guantanamo Bay – the legal black hole**

The US established such a detention centre for suspected terrorists at the US naval base at Guantanamo Bay in Cuba. The location was chosen very carefully: the naval base is on long-term, indefinite lease from Cuba to the US (i.e. the US can exercise de facto sovereignty) but is outside US soil (i.e. it is therefore outside US federal courts' jurisdiction). Due to the territory's unusual legal status, the rights of detainees are limited which was important to the government because as Justice Department officials Patrick Philbin and John Yoo wrote: 'judicial review could "interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens" if courts examined such issues as prisoner rights under the Geneva Conventions or "whether and what international law norms may or may not apply to the conduct of war in Afghanistan"'. (Bravin, 2007)

On 11 January 2002, the first 20 prisoners that were captured in Afghanistan were flown to Guantanamo Bay. On 7 February 2002, Bush wrote in a memo that the 'war on terrorism' led to a 'new paradigm' that required 'new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.' (Bush, 2002) Bush thereby acknowledged the existence of international humanitarian laws, but determined that the Geneva Conventions only applied to states and not to al Qaeda as a terrorist organisation. Determining the status of al Qaeda members is problematic: since they cannot be seen as acting on behalf of a state, they are not part of international law that is primarily based on a state-centric order.

Bush also argued that even though Afghanistan was party to the Geneva Conventions, the Taliban had failed to meet its treaty obligations for lawful fighting (such as wearing distinct signs or uniforms). He concluded that 'the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva'. This blanket presidential decree led to all detainees at Guantanamo being denied prisoner of war status with the accompanying rights such as the opportunity to challenge their detention. This move became subject of subsequent challenges before US courts and was also heavily criticised by a number of NGOs and others such as former UK Law Lord Steyn who argued that it constituted 'a monstrous failure of justice'. (Steyn, 2004:11)

In relation to treatment of detainees, Bush set out that 'as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva'. This carefully chosen wording left considerable room for interpretation, because 'military necessity' was used to justify a range of questionable actions taken by the US army and the government over the years to come. Even though the government pursued an interest-based approach in its policy decisions, its frequent references to international law demonstrate that it recognised that its actions needed to be justified in the existing normative context. The Administration reinterpreting existing human rights laws and agreed standards of appropriateness of the international community to fit its own policy agenda.

### **The Geneva Conventions and the question of prisoner of war status**

The four Geneva Conventions are part of international humanitarian law and are designed to cover *all* individuals that do not or no longer take part in an armed conflict. The first two Conventions cover wounded, sick or shipwrecked armed forces; the third covers prisoner of wars, while the fourth deals with civilians. This system aims to ensure that *all* individuals detained during an armed conflict have some legal status and certain rights in international humanitarian law. As the authoritative commentary on the fourth Convention sets out: ‘every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law’.<sup>6</sup>

This means that all individuals captured during armed conflict are entitled to *some* protection in international humanitarian law under the Geneva Conventions. The First Additional Protocol<sup>7</sup> establishes a presumption in favour of a person being a prisoner of war and sets out that ‘the onus is on a detaining power to demonstrate that detainees, purportedly captured for their role in the conduct of hostilities, do not deserve POW status’. This notion is put on its head at Guantanamo, however, because all detainees are presumed *not* to be prisoners of war and therefore do not have the right to challenge their status. The US government started from the premise that Guantanamo Bay detainees are unlawful enemy combatants without a need to prove this assertion. This status of the detainees and their guilt was already determined from the outset: Defense Secretary Donald Rumsfeld, for instance, labelled them ‘the worst of the worst’ (washingtonpost.com, 12 July 2008) and Bush called them ‘bad people’. (CNN.com, 18 July 2003) Guantanamo Bay therefore constitutes a legal limbo for prisoners that are at the mercy of the US government.

The Administration’s insistence that Guantanamo Bay detainees are unlawful combatants has been criticised by a number of legal writers and lawyers. Borelli, for instance, argues that ‘the US reading of the Geneva Convention is a severe misinterpretation of the text of Article 4, and is at odds with the generally accepted conception of the category of prisoner of war; although it maybe that “the war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949” [Statement of the US Press Secretary on the Geneva Conventions], this does not justify the US in unilaterally rewriting the rules’. (Borelli, 2004:44)

Even if it were the case that Guantanamo prisoners could not be classified as prisoners of war, a number of legal writers argue that the detainees are still entitled to some very basic rights such as the right to a fair trial, access to legal counsel and the right to know the reasons of their arrest.<sup>8</sup> The legal right to access to a court or tribunal is aimed at ensuring that a court of law and not politicians or the department of defence

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<sup>6</sup>Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Part I: General provisions’ paragraph 4.

<sup>7</sup>The First Additional Protocol is generally accepted to constitute customary international law.

<sup>8</sup>Duffy, for instance, argues that ‘basic rights relating to detention and fair trial apply to Guantanamo detainees whether they are considered POWs, civilians or unlawful combatants not entitled to greater protection under IHL [International Humanitarian Law]’. Duffy, H. (2005) *The "War on Terror" And the Framework of International Law* Cambridge; New York: Cambridge University Press.

determine a prisoner's status. This is important in order for law to not to be abused as a political tool, but to be utilised as instrument of the judiciary that is tasked with taking decisions based on *legal* provisions, independent from political contexts. It aims to ensure that law is applied consistently and not solely dependent on political considerations.

The reasons why the US government denies detainees prisoner of war status are manifold, but most importantly by declaring them unlawful combatants, the government has greater scope to interrogate prisoners. According to the Geneva Conventions, prisoners of war only have to state their name, rank and serial number and otherwise have the right to remain silent. Interrogations in Guantanamo go far beyond this as they are aimed at purportedly gathering intelligence to prevent possible future terrorist attacks. Furthermore, prisoners of war have the right to be freed once the war ends without having to face trial in the country they are being held in (i.e. the US). The administration argued that denying the status was therefore necessary in order to be able to apply more stringent security measures and confine prisoners for interrogation.

### **The Torture Convention - interrogation techniques and definitions of torture**

The second area of international law that the Bush administration violated in Guantanamo is the Torture Convention. Guantanamo Bay was officially established as a detention centre for suspects before facing a military trial but it quickly became clear that the main objective of keeping the detainees was to extract information on possible future terrorist threats. By 2005, of 520 detainees only nine had been referred to a military commission. Increasingly, complaints about the way prisoners were treated and interrogated at Guantanamo surfaced. This was met with the government's response that the 'war on terror' constituted a new kind of war that required novel mechanisms including new interrogation techniques. White House Counsel Alberto Gonzales in a draft memo to Bush set out in January 2002 that 'in my judgment, this new paradigm, renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions'. (Gonzales, 2002) The administration thereby tried to distance itself from the existing framework and legal obligations.

The administration started exploring new approaches of questioning detainees and finding justifications for interrogation methods. In the infamous 'Torture Memo'<sup>9</sup> by Judge Jay S. Bybee in August 2002<sup>10</sup>, the Justice Department narrowed its definition of torture and argued that the techniques used at Guantanamo Bay were in accordance with international law. The memo concluded that before an act is classified as torture, interrogators must cause severe pain or suffering (mental or physical) of an extreme nature: 'Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily

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<sup>9</sup>The memo was written at the request of the CIA that wanted authority to conduct more aggressive interrogations than were permitted prior to 9/11. The CIA asked the White House for legal guidance which in turn asked the Justice Department's Office of Legal Counsel for its legal opinion on the standards of conduct under the Torture Convention.

<sup>10</sup>The memo was leaked to the Washington Post in June 2004 after alleged prisoner abuse by US forces at the Abu Ghraib prison in Iraq. It clearly shows that rather than torture being committed by just a few 'bad apples' in the army, torture was carried out with full knowledge and approval of the US government and senior officials in the Bush administration.

function, or even death. For purely mental pain or suffering to amount to torture ... it must result in significant psychological harm of significant duration, e.g. lasting for months or even years'. (Bybee, 2002:1) This definition includes only the most severe acts and leaves a large number of interrogation techniques that are generally recognised to amount to torture permissible. For instance, the US government does not include so-called 'water boarding', the mock drowning of prisoners, in its definition of torture even though it fulfils criteria of torture set out in the Torture Convention.

In the memo, the Department of Justice asserted that US legislation banning torture in accordance with obligations under the Torture Convention may be unconstitutional because it infringes the President's powers (as Commander-in-Chief) in times of war. This was justified by arguing that 'under the current circumstances, necessity or self-defense may justify interrogation methods that violate Section 2340A<sup>11</sup>'. (Bybee, 2002:2) This gives the President almost unlimited powers without any checks and balances, devoid of legislative and judicial oversight of the executive branch. Even though the detainees are classified as unlawful combatants and therefore do not have the same rights as prisoners of war in relation to interrogation, the prohibition of torture is an absolute right with *jus cogens* status. The US ratified the Torture Convention into its national laws and thereby accepted not only the established definition of what constitutes torture, but also Article 2 that makes clear that torture can *never* be justified, regardless of perceived extraordinary emergency situations.<sup>12</sup>

### **Executive power and legal challenges**

The way the government tried to circumvent established obligations under international law and use it for its own purposes became more prevalent over the years as a number of cases were brought before the US Supreme Court to challenge the arrest and denial of due process proceedings to prisoners at Guantanamo. Court decisions that gave more rights to detainees were met with political manoeuvres from the Bush administration to avoid interference in its handling of the detainees in the camp. In all cases, the Supreme Court upheld the importance of international law and standards of appropriateness that place constraints on the predominantly interest-based political decisions. The Bush administration justified its actions with reference to existing international legal provisions but interpreted them differently to fit its policy. It acknowledged that law placed a constraint on its actions, but had a different understanding of the nature of these obligations. The back and forth between the executive and the judiciary demonstrate the different visions of what kind of politics law can maintain: Bush emphasised the predominance of US national security considerations over fundamental human rights whereas the Supreme Court upheld established interpretations of international law and considerations of appropriate behaviour in the international community.

The first two cases brought before the Supreme Court of *Hamdi v Rumsfeld* and *Rasul v Bush*, dealt with the question of whether detainees had the right to writ of habeas corpus, i.e. the right to challenge the legality of their detention. The Court ruled in

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<sup>11</sup> Legislation adopted by the US government in 1994 in accordance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. (US Code, Crimes and Criminal Procedure Title 18, Section 2340A: Torture.)

<sup>12</sup> 'No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

both cases that prisoners had the right to bring legal action to challenge their detention to US Federal Courts. The Supreme Court argued that ‘we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.’ (Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi, Petitioners V. Donald H. Rumsfeld, Secretary of Defense, Et Al. - Opinion of Justice O’connor, 2004:29) The Court held that the right to writ of habeas corpus was an important judicial check on the executive’s decision on detention and needed to be upheld. It therefore established that even in cases of ‘extraordinary emergency’ (such as the ‘war on terror’), fundamental human rights need to be observed and place a limit on government decision making powers. However, the Court gave the government the opportunity for a way out by saying that ‘there remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.’ (Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi, Petitioners V. Donald H. Rumsfeld, Secretary of Defense, Et Al. - Opinion of Justice O’connor, 2004:31)

In response, the administration established Combatant Review Tribunals (CRTs) to determine whether detainees are enemy combatants and continue to pose a threat to the US. Even though the government did what the Supreme Court offered it to do, the tribunals it created are very controversial have been criticised for a number of reasons especially because of significant flaws in their set-up. Most importantly, prisoners are presumed to be enemy combatants unless they prove otherwise which means that the burden of proof is on the detainees to establish their innocence and not on the government to determine their guilt. Arguably, the CSRTs were in effect designed to justify the continuing indefinite detention of most detainees.<sup>13</sup> The legality of the CSRTs was challenged in subsequent cases before the Supreme Court.

On 29 June 2006, in the case of *Hamdan v Rumsfeld*, the Supreme Court ruled with a majority of 5 to 3 that the Administration’s system of tribunals was unconstitutional and that they were neither authorised by federal law nor required by military necessity. Even though the Court ruled that the government had the authority to convene military commissions to try prisoners at Guantanamo Bay, the ones established by the administration were deemed to be improper. The Court ruled that the CSRTs did not provide minimum protection to individuals who were involved in armed conflict and all procedural rights required under the Uniform Code of Military Justice (UCMJ) and the laws of war. The Court upheld the validity of the Geneva Conventions and particularly Common Article 3 that sets out minimum protection for all individuals under international humanitarian law. It ruled that ‘even assuming that Hamden [*sic*] is a dangerous individual who could cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with

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<sup>13</sup>This seems to be confirmed by a testimony given before the European Parliament (Joint Hearing of the Committee on Civil Liberties and the Sub-committee on Human Rights on Guantanamo Bay, European Parliament, 28 February 2008) by a former intelligence officer who reported on his own experiences of presiding over a CSRT. He argued that ‘based on my observation and my experience, I conclude that the Tribunal process was little more than an effort to ratify the prior exercise of power to detain individuals in their war against terror while appearing to satisfy the Supreme Court’s mandate in *Rasul* and *Hamdi*. The Tribunal process was designed to validate detentions and that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.’ Abraham, S.E. (2008) *Speech before the Joint Hearing of the Committee on Civil Liberties and the Sub-Committee on Human Rights on Guantanamo Bay*. European Parliament.

the prevailing rule of law in undertaking to try him and subject him to criminal punishment.’ (Hamdan V Rumsfeld, Secretary of Defense Et Al., 2006:7) The Supreme Court again upheld existing interpretations of international law and rejected the wide powers given to the President and argued instead that both, the UCMJ and the Geneva Conventions were applicable to prisoners held at Guantanamo.

Following this ruling, in October 2006, the Republican-led Congress intervened and passed the *Military Commissions Act* (MCA) which authorises the President to set up military commissions to try enemy combatants and outlines limits on interrogation and prosecution based on Article 3 of the Geneva Conventions. The administration argued that such military commissions were required due to the security threat prisoners posed and because of the sensitivity of the evidence presented that could endanger intelligence gathering. The Act also contains the very controversial narrow definition of torture that was advanced in the ‘Torture Memo’ and that allows for a number of interrogation methods that fall afoul of the definition of torture in the Torture Convention.

The MCA has widely been criticised because it ‘contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law’. (Nations, 27 October 2006) The MCA, for instance, contradicts principles of fair trial procedures that are part of the Geneva Convention such as the right of the defendant to be informed about the nature and cause of the charges brought against him, the right to a speedy trial, and the right to have access to all evidence against him. Another major concern is the fact that the President has got very wide and unchecked powers to declare anyone without charge ‘unlawful enemy combatant’ and also to interpret ‘meaning and application’ of the Geneva Conventions. This is obviously problematic for the consistent application of international law because reinterpreting the legal framework to justify policy choices opens up the possibility of arbitrary and selective application of agreed international standards. The exclusive focus on national interests is shaping the Bush administration’s view of international law and constitutes an attempt to make interest-driven actions ‘fit’ with established rules and norms.

### **Bush’s Final Challenge**

The last step in the struggle between the judiciary and the executive came on 12 June 2008 when the Supreme Court ruled with a majority of 5 to 4 in the case of *Boumediene v Bush* that the right to writ of *habeas corpus* is a constitutional right regardless of their status or designation. The Court ruled that parts of the MCA’s attempt to prevent federal courts from hearing cases of Guantanamo detainees was unconstitutional and that detainees have the right to challenge the legality of their detention.

The Ruling means that the burden of proof now lies with the government to establish that there is a legal and factual basis for the suspects’ detention. The Court agreed with the government that security depended on sophisticated intelligence, but argued that further considerations needed to be borne in mind: ‘security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers’. (Lakhdar Boumediene, Et Al., Petitioners V. George W. Bush, President of the United States, Et Al. , 2008:68-69)

The latest ruling means that around 270 prisoners that are still held at Guantanamo have the right to bring a writ of habeas corpus to challenge their detention. On 24 June 2008, the US Court of Appeals for the District of Columbia Circuit overturned the designation of an inmate as 'enemy combatant', which means that he either has to be freed or to be transferred or to be given a fresh hearing. This was just the first in what was undoubtedly going to lead to a number of similar cases that were challenging the way the government used and interpreted international law in this context.

### **The Obama administration**

The situation at Guantanamo Bay changed considerably with Barack Obama taking office in January 2009. One of the first actions taken by the Obama administration was to issue an executive order to close Guantanamo Bay. The aim is to close the detention facility as soon as 'practicable' but no later than one year from the date of the order. Obama also ordered that the status of each individual detained in Guantanamo be reviewed immediately. (Obama, 2009) In a speech on National Security, Obama acknowledged the conceptual link between human rights and security and argued that compliance with international law was in US interest because it enhances security. He maintained that even though al Qaeda presented a new threat to the US and that ways of dealing with this threat needed to be found, but he also argued that this needed to be done 'with an abiding confidence in the rule of law and due process; in checks and balances and accountability.' The Obama administration has an overall stronger focus on international obligations arising from the existing legal framework and normative environment. Actions and decisions are more strongly based on expectations arising from the logic of appropriateness rather than purely interest-based considerations. Obama rejected the interrogation techniques that had been employed during the Bush administration, arguing that they undermined the rule of law as well as counterterrorism efforts. He furthermore criticised the Bush administration for attempting to place the detention facility beyond law, arguing that 'rather than keeping us safer, the prison at Guantanamo has weakened American national security'.

The realities of closing Guantanamo are proving very difficult, however, not only because a spending request of \$80million that was sought by the White House to help closing the facility were rejected by the House of Representatives.<sup>14</sup> In May 2009, the administration was further criticised by human rights advocates for proposing to use Bush's military commissions to try some of the detainees after their legitimacy had already been questioned and they were denounced as failures. One major problem in trying to close Guantanamo is the question as to what to do with the 240 remaining detainees that are still held at the camp. But as Obama state, 'the problem of what to do with Guantanamo detainees was not caused by my decision to close the facility; the problem exists because of the decision to open Guantanamo in the first place.' (Obama, 2009)<sup>15</sup>

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<sup>14</sup>The House argued that it did not approve the money because Obama had not outlined a plan of what to do with the remaining inmates.

<sup>15</sup>On 21 October 2009 Congress voted 79-19 in favour of allowing prisoners to be tried in the US. This was part of a vote on the budget for the Homeland Security department and requires 15 days notice as well as a certification that the prisoner does not represent a security risk. It is still unclear what happens to those inmates after they have gone through the legal process and the realities of closing the camp are

## Conclusions

The wrangling over Guantanamo Bay is an important illustration of the US government's politicised use of law and also the interaction between interest-based and norms-based approaches in IR. Actions based on national interest considerations (security) were constrained by the existing framework of human rights norms and laws. The Bush administration tried to subvert the separation of power inherent in the US system to act as legislative, judiciary and executive at once. This was also made possible through a Republican-controlled Congress that supported decisions made in the name of national security. Government actions were justified with reference to extraordinary circumstances and necessity in the 'war on terror'. The judiciary held against this politicised use of international law and maintained that certain rights are fundamental regardless of the circumstances. The last Supreme Court ruling of 2008 and the Obama administration's approach demonstrate a different kind of politics maintained by law: one that is more strongly based on a respect for international human rights and humanitarian law and a recognition of obligations towards the international community as a whole.

Even in times of extraordinary emergencies, security concerns cannot be used as blanket excuse to abandon all checks and balances in a democratic system and it is necessary to ensure the consistent application of law. Guantanamo Bay illustrates the continuous interaction between the two logics of action: interest-based decisions were made with reference to existing norms and laws - even though they were interpreted in different ways by the Bush administration and the Supreme Court. In such situations, a responsibility is placed on courts to act as safeguards against an overly politicised use of international law. As Lord Steyn argues, 'judges do have the duty, even in times of crisis to guard against an unprincipled and exorbitant executive response'. (Steyn, 2004:12)

Some argue that the Bush administration's interpretation of international law is in line with its historic, very pragmatic approach to international law: 'an approach that adjusts legal rules to the reality of U.S. power and one that allows the law to be read "purposively" in order to make it fit the present day.' (Farrell, 2005:9) Some might also argue that 'from the US point of view, it is consciously acting as a norm entrepreneur in seeking to revise human rights and humanitarian law to permit extraordinary measures against what it portrays as an extraordinary dangerous and unusually barbaric enemy.' (Armstrong et al., 2007:174) This assertion is supported by Bush's memo from 7 February 2002 in which he claimed that law needs to fit the 'new paradigm', ushered in by the terrorist threat. His policy choices with regards to Guantanamo were framed as necessary responses to 9/11 in the 'war on terror'. As Alberto Gonzales claimed, 'just as military theorists thought about new strategies and tactics to fight terrorists, so, too did lawyers in looking at how this war fits into the current legal landscape.' (Gonzales, 2004) Undoubtedly, law shapes politics, but the question is what kind of politics? The US is not acting in a vacuum and cannot reinterpret established laws to suit its policy decisions. Interest-based decisions cannot be taken in isolation from what is seen as appropriate behaviour with accompanying obligations and expectations towards the international community.

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proving to be more difficult than the rhetoric suggested. In November 2009, Obama admitted that he would not be able to meet the deadline of closing the camp by January 2010.

The Bush administration tried to use international law to support its interest-driven politics but was challenged by the Supreme Court and its interpretation of international legal obligations in its rulings. Bush mainly used a logic of consequences approach by predominantly focussing on national interests whereas the Court focused more on the logic of appropriateness and existing international obligations. The Bush administration attempted to advance its politics based on national security within international law, but this is a very short-sighted approach because security is linked to human rights and cannot be considered in isolation from it. Undermining human rights in US foreign policy decisions leads to jeopardising the security of US armed forces that might be captured abroad and might equally not be granted prisoner of war status with the accompanying privileges. Some argue that Guantanamo and 'the abuse of prisoners has cast a pall of illegitimacy over American justice that will take decades to repair, and this ultimately undermines American security by undermining legitimacy and cooperation abroad'. (Wilson, 2005:22-23)

Guantanamo Bay has shown that even though the US emphasised national security (and challenged existing interpretations of human rights laws), eventually it had to admit that this cannot be done in complete isolation and disregard for norms that have evolved over a number of years. The existing normative context proved to be strong and established enough to make a difference. The Supreme Court upheld the rule of law against a number of challenges posed by the government and thereby demonstrated that international law does matter and that states follow it even if it is not in their short-term national interest. The Bush administration tried to justify its conduct in terms of international law by interpreting their actions in line with existing provisions to fit its policy decisions. The Supreme Court rulings in response, however, maintained that the government is constrained by existing international law and that it has obligations towards the international community as a whole that it cannot ignore.

The Bush administration admitted that it would like Guantanamo Bay closed, but that it had difficulties in finding ways how this could be done. A major ongoing problem is the question of where to send the remaining prisoners. The Bush administration could not simply release detainees it had labelled as terrorists for fear of losing face and it also needed to be consistent in its assertion that Guantanamo detainees are dangerous terrorists that need to be kept in indefinite detention. A number of detainees face persecution in their home countries when they are being sent back which goes against the Torture Convention that sets out that no one can be sent to a country where it is known that they will be tortured. This provides a difficult challenge, but the latest Supreme Court decision and the Obama administration's approach at least offer some hope to the remaining detainees that they will finally be given the rights that are due to them and that they will be judged primarily by law and not entirely by politics.

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