

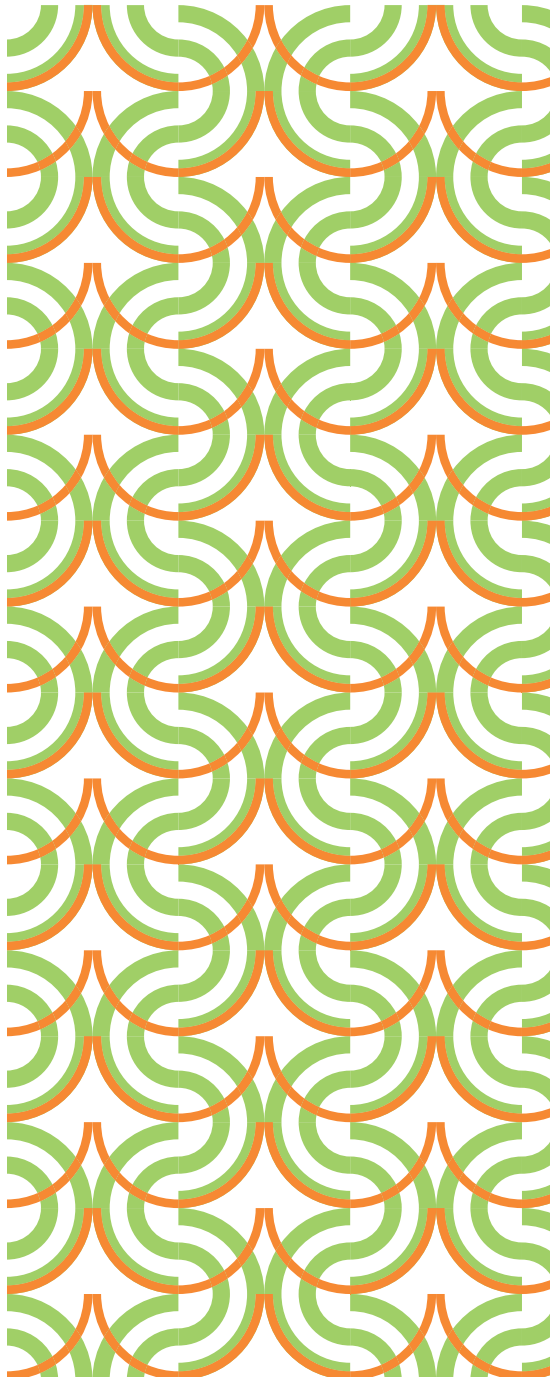


HEINRICH BÖLL STIFTUNG
DEMOCRACY

Beyond Guantánamo

Restoring U.S. Credibility on Human Rights

Thomas C. Hilde



**BEYOND GUANTÁNAMO:
RESTORING U.S. CREDIBILITY ON HUMAN RIGHTS**

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Commissioned by the Heinrich Böll Foundation

ABSTRACT

How to restore the credibility of a country whose foundations and self-understanding are based on the universality of freedom and human rights, but that has violated precisely those rights by practicing torture in Guantánamo and other prisons around the world? The image of the United States as a role model of liberal democracy has suffered tremendously over the last eight years. In the name of the global war on terror, former President Bush suspended the law for those detained as possible terrorists. Even though President Obama's promise to close Guantánamo is recognized by the international community as a first step towards restoring U.S. credibility, several problems require comprehensive policy solutions: How to proceed with detainees that are considered to be dangerous? What to do with detainees who are cleared of suspicion, but might face torture in their country of origin? How to cope with evidence that is derived from torture? Thomas C. Hilde outlines several post-Guantánamo detainee policy proposals – and their difficulties – that address these distinctive sets of issues, such as military commission trials, continued preventive detention, a national security court or U.S. criminal court trials. In the long run, however, restoring credibility through a reformed detainee policy is only one component of post-Guantánamo credibility; the second indispensable element is accountability. Prof. Hilde discusses the functions of different forms of accountability in the process of reestablishing U.S. credibility on human rights. Whereas legal accountability requires the formal investigations of human rights violations, public-moral and pragmatic accountability refer to the need to address the norms on which international society is based. Moreover, a public discourse is needed that confronts the stories of those who have suffered human rights violations and the empathetic aspect of human rights. A more comprehensive form of accountability can serve as both a means towards regaining U.S. credibility and a strengthening of human rights culture.

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PREFACE

Security and Human Rights in Asymmetric Conflicts

The hope after the fall of the Berlin Wall that the end of the confrontation between blocs would lead to an era of global peace and prosperity has not materialized. Using ethnicity and religion as a pretext, humans (mostly men) continue fighting for access to resources and to prevent cultural and economic marginalization in the course of globalization. These conflicts are becoming increasingly asymmetric. Conventional warfare between sovereign states is replaced by attempts of insurgents, terrorists, and pirates to challenge state power.

The difference in the nature of asymmetrical conflicts from traditional wars has severe implications: there is no state on which to declare war. Even worse, there is no state or government with which to make peace after the battle has ended, a peace that would normally result in the release of prisoners of war.

There is also a difference in the legal treatment of captured "enemy combatants" and ordinary prisoners of war. While trying to prevent future killings, security agencies worried that existing instruments were insufficient to fulfill this task. To solve the dilemma, the former US administration tried to formulate a third category of law, aside from existing civil law and martial law with its respective international conventions. The military commissions, external detention camps like Guantánamo or Abu Ghraib and the euphemistically described "enhanced interrogation methods" are the practical results of that political approach.

Former government officials argue that this policy prevented the country from another attack like the one the nation suffered on 9/11/2001. Even if this were true, however, this policy never solved the dilemma in asymmetrical wars of how to prosecute "enemy combatants" in accordance with humanitarian international law. Moreover, "enhanced interrogation methods" not only harmed human rights credibility and undermined the integrity of liberal democracies; the officially decreed use of torture in Abu Ghraib, Guantánamo and possibly other places in the early years of the Iraq war also led to counterproductive results. It played directly into the hands of extremist Islamic recruiters, making their job much easier. As President Barack Obama said, "the existence of Guantánamo likely created more terrorists around the world than it ever detained."

The new US administration inherited this dilemma. Closing down Guantánamo alone will not solve it. Even worse, conflicts in Afghanistan and Pakistan as well as with pirates off the East African coast continue to require the capture of combatants in asymmetric constellations. In the years ahead, an increase in new or outbreak of existing conflicts is to be expected. Climate change as a threat multiplier will contribute to the fight over resource access through food and water scarcities, natural disasters, and migration. Religion will continue to be misused as a pretext in conflicts about social injustice in the course of globalization. In other words, there is an urgent need for international legal arrangements to help provide security to citizens and prosecute those engaged in terrorism, while at the same time respecting the rule of law and thus the integrity of liberal democracies.

As Thomas Hilde rightly explains, Guantánamo is not an American problem alone. Europeans also failed to live up to their own human rights standards. Investigative committees of various institutions revealed that European governments did not oppose the US policy choices for treating "enemy combatants" in the "Global War On Terror." They either quietly allowed secret activities of the CIA on European soil or made use of information gained through "harsh interrogations,"

which were sometimes conducted by questionable allies. Nevertheless, the challenge of how to provide security and fundamental rights at the same time was crucial for domestic policy decisions in Europe. This was mirrored in a heated debate in Germany about its Aviation Security Act. In February 2006, Germany's Constitutional Court in Karlsruhe ruled that under the Basic Law, shooting down hijacked airplanes is incompatible with the right to life and the guarantee of human dignity. The ongoing debate about domestic deployment of armed forces in Germany shows that the court's ruling did not satisfy all political actors.

Thomas Hilde's call for public moral and legal accountability comes at a timely moment. President Barack Obama issued a Presidential decree to close Guantánamo within a year after his inauguration. This is an important step welcomed by the whole world. But the discussion about more important questions has just started: how can we deal with the remaining prisoners? How can we compensate the suffering of those who were unjustifiably detained? On what international legal basis can combatants be detained in asymmetric conflicts? There is an urgent need to debate these questions among liberal democratic states. With this publication, the Heinrich Böll Stiftung would like to foster the transatlantic debate on how liberal democracies effectively defend the security of their citizens by ensuring the application of the rule of law in asymmetric conflicts.

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Beyond Guantánamo: Restoring U.S. Credibility on Human Rights

We're an empire now, and when we act, we create our own reality. And while you're studying that reality — judiciously, as you will — we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors... and you, all of you, will be left to just study what we do. — *Unnamed aide to President George W. Bush, as cited by Ron Suskind, 2004.*¹

Few things predict future torture as much as past impunity. — *Darius Rejali*

Beginning at least in 2002, the United States created and developed a policy instituting torture — what it calls “enhanced interrogation” — of its detainees in the “global war on terror”² under the general framework of a *state of necessity*. Many of these torture techniques have already been used and refined by the Western powers during the 20th Century.³ They are also built partially into U.S. “Survival, Evasion, Resistance, Escape” (SERE) training program techniques, which reportedly also adapt techniques previously used by China.⁴ The logic of torture used as an information-seeking instrument in the current conflict, however, has entailed the creation of a large-scale institution of torture, spread among several countries, and implicating hundreds and perhaps thousands of people.⁵

This institution strikes at the heart of the very idea of human rights and core principles of liberal democratic society. It raises important and uncomfortable questions about the nature of human rights in the wake of the torture at Guantánamo and other sites, the policy and practice of extraordinary rendition, indefinite detentions and the suspension of due process and habeas corpus, the violation of domestic and international laws, and perhaps other features and goals of the program

1 Ron Suskind. “Faith, Certainty and the Presidency of George W. Bush.” *The New York Times Magazine*. October 17, 2004.

2 President Obama has publicly shelved this Bush administration expression.

3 See Darius Rejali. *Torture and Democracy*. Princeton: Princeton University Press, 2007.

4 SERE is a U.S. training program for teaching military personnel techniques for, among other things, resisting torture.

5 On the logic of torture as an information-gathering instrument, see Thomas C. Hilde, “Information and the Tortured Imagination.” *On Torture*. Thomas C. Hilde, ed. Baltimore: Johns Hopkins University Press, 2008.

yet to come into the public light. The claim is a claim to exception or necessity to the suspension of laws and civil liberties in a moment of national emergency. This is not unusual, unfortunately. Most states have similar national emergency procedures, even if only implicit. The law will always be suspended in the name of survival and the global war on terror was framed as a matter of the survival of civilization. With self-defense being the moral justification of violence par excellence, extraordinary acts may be viewed as entirely legitimate in the defense of civilization. What should also concern us, however, is the suspension of rights in the name of political expediency. In other words, this is not only a moment for lawyers to rise to the occasion. The problem is political and philosophical. There is more at stake than the legally appropriate punishment of terrorists and credibility of certain public officials and agencies.

The prohibition of torture has been formal international law since the UN Declaration on Human Rights (1948) and the Geneva Conventions (1949). It is also generally assumed to be an international peremptory norm (*jus cogens*), a norm accepted universally by the international community that cannot be derogated, such as the norm of state sovereignty. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984/1987) and the non-binding Istanbul Protocol (1999), among other international legal instruments, further codified the norm into international law. Torture violates international law, usually domestic law (as, for example, in the 8th Amendment to the United States Constitution banning “cruel and unusual punishment”), basic morality, and one of the fundamental shared norms of international society. Violation of the law entails criminality by definition. Violation of a basic shared norm entails a loss of moral and political standing, of credibility, trust, and legitimacy in international society.

One should be cautious of jumping too quickly to condemnation. No country has a perfect record on human rights. Indeed, as Darius Rejali and others have documented, modern torture techniques have been perfected not only by totalitarian states but also by the grand liberal democracies, particularly the UK, France, and the U.S.⁶ But the scope and magnitude of the post-9/11 institutionalization of torture and other abuses is unique in modern history among the liberal democratic states. The institution undermines the principles of equality before the law, universal human dignity and autonomy, and basic liberties are the moral-philosophical core of the liberal democratic state.

The system of torture and its legal arguments created in its defense have damaged international human rights standards and diminished credibility and legitimacy of the United States as a lead advocate for human rights. It is likely to have compromised national security as well. Is it possible to reverse this damage to credibility and security? A number of tenuous balancing acts are involved. Each of these elements stands on their own as a nest of complex issues in need of resolution and for which present options are suboptimal. Credibility, however, depends on each of them taken as an interrelated whole. These critical balancing acts include: 1) legally and humanely processing Guantánamo detainees and other detainees in light of the abuses, while also ensuring national and international security; 2) pursuing the moral and legal accountability required in a representational democracy, while mitigating other resulting political and social injuries; and 3) reinforcing international human rights standards and ensuring the rule of law in tandem with the pursuit of national interests. Furthermore, the events compel us to revisit a larger and older question addressed briefly in the final section: what must be said about the contemporary status and nature of human rights and their enforcement if powerful countries may ignore them or rewrite their content to accommodate the perceived interests of that country?

6 See Darius Rejali. *Torture and Democracy*. Princeton: Princeton University Press, 2007.

Background

Abuses by the U.S. military and the C.I.A. have been confirmed or reported in Guantánamo, Abu Ghraib, Baghram and “The Salt Pit” (Afghanistan), “The Dark Prison” near Kabul, “The Disco” in Mosul, Camp Bucca and Camp Cropper in Iraq, Kohat and Peshawar (Pakistan), Camp Lemonier (Djibouti), al-Tamara and Salé (Morocco), Diego Garcia, Mihail Kogălniceanu Airport (Romania), Stare Kiejkuty and Szymany Airport environs (Poland), Thailand, several countries of Eastern and Western Europe, and numerous other US-operated prisons and C.I.A.-run “black sites.” Although a 2006 Council of Europe investigation found no “irrefutable evidence” of black sites in Europe,⁷ other investigations suggest that numerous countries in Europe and elsewhere have clandestinely assisted the C.I.A.’s program of “extraordinary renditions.”⁸

Reported abuses involve a wide range of practices, most of which individually constitute torture in international and U.S. domestic law, but combined — as has been common practice — undeniably pass the thresholds of causing “physical and mental suffering.” U.S. Department of Justice Office of Legal Counsel (OLC) memoranda released to the public on April 16th, 2009 and earlier (e.g., the Yoo and Bybee memos) clearly indicate that torture — or “enhanced interrogation” — was approved at the highest levels of the U.S. government,⁹ including executive orders and/or approval by President George W. Bush, Vice President Dick Cheney, National Security Advisor and later Secretary of State Condoleezza Rice, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, and others (Senate and House leaders on the respective intelligence committees were also briefed on the policy, although the breadth and depth of these briefings remain unknown at this point).¹⁰ This high-level approval apparently took place prior to the writing of the OLC legal memoranda.¹¹

These interrogations were carried out by CIA personnel, military staff, and private contractors. They involved specially-designed physical environments, special equipment (for example, a special table used in waterboarding), the participation of psychologists and medical doctors, and the participation of guards and transportation personnel, and officers along the chain of command, in addition to the lawyers and high-level policy makers.¹² Formally approved techniques, explicitly listed in these memos, include stress positions, slapping, cramped confinement, diet manipulation, sleep deprivation, and insects placed in a confinement box, among others.¹³ Other torture techniques either known or reported to have been used include sodomy, cigarette burns in ears, severe beatings, the use of dogs, various forms of cultural and religious denigration, and strangulation.¹⁴

7 Dick Marty. “Alleged secret detentions in Council of Europe member states.” Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Information Memorandum II. AS/Jur (2006) 03 rev. January 22, 2006.

8 Dick Marty. “Secret detentions and illegal transfers of detainees involving Council of Europe member states.” Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Doc. 11302 rev. 11. June 2007.

9 See, for example, Scott Shane and Mark Mazzetti. “In Adopting Harsh Tactics, No Look at Past Use.” *The New York Times*. April 21, 2009.

10 Selected Opinions of the Office of Legal Counsel, Department of Justice. <http://www.fas.org/irp/agency/doj/olc/index.html>. (Last accessed April 23, 2009).

11 See Carl Levin, et al. “Inquiry into the Treatment of Detainees in U.S. Custody.” Report of the Committee on Armed Services, United States Senate. November 20, 2008. See also, Jane Mayer. *The Dark Side*. New York: Doubleday, 2008.

12 ICRC Report.

13 Jay Bybee, Office of Legal Counsel. “Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency: Interrogation of al Qaeda Operative.” August 1, 2002. Pp. 1-3.

14 Heavily redacted June 25, 2004 “Urgent Report” from the Sacramento Division of the FBI to the Director of the FBI. http://www.aclu.org/torturefoia/released/FBI.121504.4910_4912.pdf. (Last accessed April 23, 2009).

According to the 2007 International Committee of the Red Cross Report on detainee treatment, they also include various forms of alternating sensory deprivation and sensory assault, kicking, prolonged nudity, prolonged use of handcuffs, exposure to extreme temperatures, and threats of, for instance the arrest and rape of a detainee's family members.¹⁵

These methods were used in combination with each other in a context of enforced disappearance, undisclosed detention ("especially vulnerable to being subjected to ill-treatment"), denial of family contact, denial of access to any legal recourse such as case review mechanisms, solitary confinement, and incommunicado detention.¹⁶ The OLC lawyers regularly declined to make any judgment regarding the combination of techniques, which, in the Senate Armed Services Committee report of 2008 explicitly links to the "homicides" of at least two detainees.¹⁷ According to a Human Rights First report, roughly 100 detainees have died in U.S. custody since August 2002, many of which are reported to be homicides and/or deaths due to torture.¹⁸

A prima facie legal characterization of U.S. actions suggests war crimes as described in the U.S. federal code and according to international law, but legality or illegality will ultimately be determined by courts of law in a democratic society.¹⁹ There is, however, no robust moral argument that justifies the actions of the U.S.²⁰ The U.S. government coordinated the institution through a series of legal memos, covert policies, and the Military Commissions Act of 2006, the latter which was struck down by the U.S. Supreme Court in 2008. These legal memos, acts of legislation, and policies collectively lay claim to extraordinary executive power unchecked by the law and basic morality and to lifting the *jus cogens* torture prohibition under "exceptional circumstances." As made explicit in a January 25, 2002 memorandum from Attorney General Alberto Gonzales to President George Bush, the judgment of the U.S. government was that the war against terror "places a high premium on... factors such as the ability to quickly obtain information from captured terrorists and their sponsors... and the need to try terrorists for war crimes... this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners...."²¹ This extraordinary claim seeks to override the Geneva Conventions regarding detainee treatment, but it also contravenes the UN Convention Against Torture, which states in Part 1, Article 2.2: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture." It remains unclear the extent to which the U.S. government's redefinition of domestic and international laws and norms prohibiting torture was designed specifically to fit prior, desired policy.

At present, the U.S. media and political discourse has moved to the question of whether or not torture "works," an assertion made by former Vice President Dick Cheney.²² The question

15 International Committee of the Red Cross. *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*. WAS07/76. February 14, 2007.

16 ICRC Report.

17 See Carl Levin, et al. "Inquiry into the Treatment of Detainees in U.S. Custody." Report of the Committee on Armed Services, United States Senate. November 20, 2008. Pp. 151-152.

18 Hina Shamsi, author, and Deborah Pearlstein, ed. *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*. Human Rights First Report. February 2006.

19 For example, an April 24, 2009 ruling by the D.C. District Court, *Rasul, et al., v. Myers, et al*, appears to throw out claims of torture and religious bias at Guantánamo on the part of former Defense Secretary Donald Rumsfeld and other military officers. <http://pacer.cadc.uscourts.gov/common/opinions/200904/06-5209-1177375.pdf>. (Last accessed April 25, 2009).

20 For refutation of the "ticking time bomb" argument, see David Luban. "Liberalism, Torture, and the Ticking Bomb." *Virginia Law Review*. (91) 2005: 1425-1461. See also Thomas C. Hilde. "Information and the Tortured Imagination." *On Torture*. Thomas C. Hilde, ed. Baltimore: Johns Hopkins University Press, 2008.

21 Alberto Gonzales. "Memorandum for the President: Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban." January 25, 2002. <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html>. (Last accessed April 23, 2009).

is perhaps intended to lead public discussion away from legal and moral questions and back to the ticking time bomb hypothetical and generalizations from particular anecdotes. It unhelpfully frames the issue as a zero-sum tradeoff between national security and war crimes.

Apart from recent revelations that CIA and FBI officials warned as early as 2004 that torture does not “work,”²³ traditional rapport interrogators have had the answer all along.²⁴ Yet again, in the April 22nd, 2009 issue of *The New York Times*, FBI interrogator Ali Soufan, who interrogated Abu Zubaydah prior to the infamous August 2002 OLC memos by Jay Bybee and John Yoo claiming justification for various torture techniques to be applied to Zubaydah, including waterboarding, points out the basic reality of torture: “traditional interrogation techniques are successful in identifying operatives, uncovering plots and saving lives... There was no actionable intelligence gained from using enhanced interrogation techniques on Abu Zubaydah that wasn’t, or couldn’t have been, gained from regular tactics... The short sightedness behind the use of these techniques ignored the unreliability of the methods, the nature of the threat, the mentality and modus operandi of the terrorists, and due process.”²⁵ Interrogator Matthew Alexander, writing in *The National Interest*, adds, “as a senior interrogator in Iraq, I conducted more than three hundred interrogations and monitored more than one thousand. I heard numerous foreign fighters state that the reason they came to Iraq to fight was because of the torture and abuse at Abu Ghraib and Guantánamo Bay. Our policy of torture and abuse is Al-Qaeda’s number one recruiting tool. These same insurgents have killed hundreds, if not thousands, of our troops in Iraq, not to mention Iraqi civilians. Torture and abuse are counterproductive in the long term and, ultimately, cost us more lives than they save.”²⁶

Given the abuses of detainees, the ongoing detention of people cleared of wrongdoing, ongoing security concerns, and the legal and policy urgency of dismantling the status quo, U.S. detention policy must be addressed first.

Post-Guantánamo Detainee Policy

After the horrific September 11, 2001 terrorist attacks on the U.S., President Bush ordered the institution of military commissions to try detained, suspected terrorists beyond public view. The order was struck down in 2006 in the U.S. Supreme Court decision, *Hamdan v. Rumsfeld*. The Military Commissions Act, passed by Congress and signed by President Bush in 2006, dropped the jurisdiction of federal courts over detainees’ habeas corpus petitions, authorized indefinite detention, and re-authorized military commissions for the prosecution of detainees. The U.S. Supreme Court will soon review the case of *Al-Marri v. Pucciarelli*, which will determine whether the U.S. may detain a prisoner indefinitely without charge or trial. The denial of habeas corpus to Guantánamo prisoners was struck down as unconstitutional by the Supreme Court in 2008, after hearing the cases of *Ali Odah v. United States* and *Boumediene v. Bush* consolidated into *Boumediene*. Two days after his inauguration in January 2009, President Barack Obama gave an Executive

22 Dick Cheney interviewed on “Hannity,” Fox News. April 20, 2009.

23 Mark Seibel and Warren P. Strobel. “CIA official: no proof harsh techniques stopped terrorist attacks.” *McClatchy*. April 24, 2009. <http://www.mcclatchydc.com/227/story/66895.html>. (Last accessed April 25, 2009). And David Rose. “Tortured Reasoning.” *Vanity Fair*. December 16, 2008. <http://www.vanityfair.com/magazine/2008/12/torture200812?currentPage=4>. (Last accessed April 25, 2009).

24 See, for instance, interrogator Malcolm Nance’s testimony to the U.S. Helsinki Commission (of the CSCE) hearing, “Is It Torture Yet?” December 10, 2007. http://www.csce.gov/index.cfm?Fuseaction=ContentRecords.ViewDetail&ContentRecord_id=407&Region_id=0&Issue_id=0&ContentType=H,B&ContentRecordType=H&C FID=5252314&CFOKEN=91698051. (Last accessed April 23, 2009).

25 Ali Soufan. “My Tortured Decision.” *The New York Times*. April 22, 2009.

26 Matthew Alexander. “Torture’s Rendition.” *The National Interest*. April 23, 2009. <http://www.nationalinterest.org/Article.aspx?id=21354>. (last accessed April 24, 2009).

Order closing the Guantánamo prison and all black sites, demanding that interrogations must conform to “all applicable laws,” including Common Article 3 of the Geneva Conventions, and announcing that military commission proceedings were to be suspended.²⁷ A separate Executive Order directed a task force led by Attorney General Eric Holder to review detention policy options, “in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice....”²⁸

As of this writing, the Obama administration is challenging a ruling by the U.S. District Court of Washington, DC regarding the president’s detention authority and whether habeas corpus extends to Taliban and non-Afghan detainees held at Baghram airbase in Afghanistan. The unsettled legal question is whether, generally, the habeas privilege extends to territories where the U.S. exerts neither *de jure* nor *de facto* governmental control (apparently unlike Guantánamo, regarding which *Boumediene v. Bush* held that habeas corpus does indeed apply). Such questions must be resolved before the U.S. can develop a clear policy on detainees, especially those who will be transferred, extradited, or released from Guantánamo, which continues to hold about 240 prisoners.

What, precisely, is the problem to be resolved? It is a multifaceted nest of problems largely generated out of and complicated by Bush administration detention and interrogation policies. Without Guantánamo and other prisons and black sites, the problem would likely have been one simply of processing detainees through the judicial system. But, as David Cole writes, “the problem with Guantánamo Bay... is not the detention of enemy combatants. The problem is that the Bush administration has denied fair hearings, resulting in the detention of many who were not enemy fighters; it has defined the category of ‘combatants’ so as to sweep in grandmothers who donated unknowingly to an organization affiliated with al Qaeda; it has authorized cruelty and torture as interrogation methods; it has asserted the right to hold prisoners for the duration of the ‘global war on terror’ (that is, forever); and, most fundamentally, it has argued that Guantánamo is a law-free zone. Guantánamo is a black mark because of this resistance to law and refusal to recognize the basic human dignity of the detainees.”²⁹ Today, we are faced with disentangling this nest and possess few, if any, attractive options for doing so.

A concrete detainee policy will depend on several elements of legal adjudication that have yet to play out. We can, however, outline a number of different detention policy proposals and lines of concern. Proposals advanced by legal scholars and policy analysts include: military commission trials; continued preventive detention; a proposed “national security court”; U.S. criminal court trials; and regarding “innocent” detainees, either repatriation, release within the U.S., or expatriation to a third country. These sets of policy concerns respond to unique situations and problems:

1. Some of the detainees are deemed “dangerous” and remain a suspected risk. Although the term “dangerous” likely begs the question in advance of legal trials, these detainees will nevertheless need to be tried in the legal system or detained indefinitely. Repatriation, however, does not necessarily involve criminal prosecution. Furthermore, evidence gathered through torture or “enhanced interrogation” is inadmissible in U.S. civil court and elsewhere. In February 2009, a Paris appeals court ruled that previous evidence was inadmissible because illegally obtained, thus overturning on appeal the 2007 conviction of five former Guantánamo prisoners for criminal conspiracy.

27 Barack Obama. “Executive Order: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities.” January 22, 2009. http://www.whitehouse.gov/the_press_office/Closure-Of-Guantanamo-Detention-Facilities/. (Last accessed April 24, 2009).

28 Barack Obama. “Executive Order: Review of Detention Policy Options.” January 22, 2009. http://www.whitehouse.gov/the_press_office/ReviewofDetentionPolicyOptions/. (Last accessed April 24, 2009).

29 David Cole. “Closing Guantánamo: the problem of preventive detention.” *Boston Review*. December 2008. <http://bostonreview.net/BR34.1/cole.php>. (Last accessed April 24, 2009).

2. Some have been cleared of suspicion of terrorism and should be released. In an estimated 60 individual cases, however, the detainees risk oppression and harsh treatment, including torture, if repatriated. This is the case of the group of Chinese Muslim, Uighur detainees.³⁰ Two pending possibilities are asylum in Canada or release in the U.S. The latter promises to be an intense political battle within the U.S.

3. Some detainees may not have been dangerous prior to captivity but radicalized by their experience in Guantánamo and other prisons. This is the case regarding the Kuwaiti Abdallah Saleh al-Ajmi. Ajmi was imprisoned at Guantánamo for four years and released to Kuwait in 2005. Ajmi had no previous connections to al Qaeda or radical tendencies, family members say. But, apparently tormented and radicalized by his experience at Guantánamo, Ajmi drove a truck laden with explosives into an Iraq army base in 2008, killing 13 people and himself.³¹

The second set of cases can be resolved with assistance from U.S. allies. France, Spain, Germany, Finland, and other European countries are considering accepting detainees who are stateless or who might otherwise suffer abuse after repatriation. Several European countries have refused to accept former detainees, including Austria and the Czech Republic. The third kind of case is an inevitable byproduct of failed policies in the “war on terror.” This has been a known risk since the first bits of information about a possible torture institution began to trickle out in 2003. Although referring to non-detainees, as interrogator Matthew Alexander noted above, “Our policy of torture and abuse is Al-Qaeda’s number one recruiting tool.”

The most difficult case from a legal and policy perspective is the first. The legal cases of these allegedly dangerous detainees are corrupted by the methods of evidence-collecting. Evidence gathered on the “battlefield” may be admissible in regular wars, but the traditional concept of “battlefield” means something quite different in the context of asymmetrical war with terrorist groups. There simply does not yet exist a clear understanding of how the line between admissible and inadmissible evidence may be drawn. Nonetheless, no court in the U.S. will accept evidence evinced from torture. Even evidence not gained through torture is corrupted by the larger institution in which the interrogations have taken place.

The Bush administration’s approach to detention, the Combatant Status Review Tribunal, swept far more than al Qaeda or Taliban fighters into its net. On one hand, a detention policy must target hostile actors and prevent them from returning to the “battlefield.” On the other hand, two central concerns regarding trials of high-risk Guantánamo detainees are, first, the risk of exposing state and military secrets and, second, the increased threat associated with smaller and more easily concealed mass-destruction weapons. Most proposals in the U.S. speak specifically to these combined concerns.

Military Tribunals. One option is to try the suspected terrorists in new military tribunals specially-designed to circumvent court rulings against the Military Commissions Act of 2006 in *Boumediene v. Bush*. This approach, even if found legal, would likely risk denying detainees their habeas rights in practice, if not formally. Few legal scholars wish to extend status quo detentions. Furthermore, closed military tribunals do not inspire confidence. Closed trials can provide a forum for shaping the guilt of the accused for extra-legal reasons. State secrets privilege is invoked as justification for not pleading the cases in public civilian courts. Yet, closed tribunals may also serve as a means of deflecting scrutiny for otherwise criminal abuses committed in the course of evidence-gathering. From a political perspective, especially once connected to demands for accountability for government abuse of detainees, this option appears entirely untenable. Unfortunately, the Obama administration may be leaning in this direction.

Preventive Detention (or Administrative Detention) and a National Security Court. Jack Goldsmith and Neal Katyal (the latter who has been appointed Principal Deputy Solicitor General by

30 See U.S. Court of Appeals for the D.C. Circuit. *Kiyemba v. Obama* (05-5487). April 7, 2009. Among other things, the ruling suggests that detainees may not be transferred to any country where torture is a possibility.

31 See Rajiv Chandrasekaran. “A ‘Ticking Time Bomb’ Goes Off.” *The Washington Post*. February 23, 2009.

Pres. Obama) have proposed indefinite “preventive detention” for anyone who can be shown to be a “suspected terrorist.” This system of detention would be, “overseen by a national security court composed of federal judges with life tenure... Such a court would have a number of practical advantages over the current system. It would operate with a Congressionally approved definition of the enemy. It would reduce the burden on ordinary civilian courts. It would handle classified evidence in a sensible way. It would permit the judges to specialize and to assess over time the trustworthiness of the government and defense lawyers who appear regularly before them. Such a court, explicitly sanctioned by Congress, would have greater legitimacy than our current patchwork system, both in the United States and abroad....” They add that, “criminal prosecutions should still take place where they can. But they are not always feasible. Some alleged terrorists have not committed overt crimes and can be tried only on a conspiracy theory that comes close to criminalizing group membership. In addition, the evidence against a particular detainee may be too difficult to present in open civilian court without compromising intelligence sources and methods....”³² Goldsmith and Katyal contend that such a special court would be comparable to bankruptcy or tax courts.

One significant difference from regular federal courts, however, is that a National Security Court would permit evidence obtained without Miranda warnings (similar to the European Union idea of a “letter of rights”), by hearsay, and other means normally inadmissible in federal courts. Goldsmith and Katyal offer that “the standards of proof for evidence collected in Afghanistan might not meet every jot and tittle of American criminal law.” It is unclear why the objectivity of criteria for judging veracity ought to be relaxed when the evidence is collected in Afghanistan.

This approach suggests that a National Security Court would have adequate means by which to judge not the actions of detainees, as with regular courts, but the *risk* of detainees engaging in harmful actions, even absent evidence. Such an approach appears to deny the notion of due process. It is also difficult to see how this approach would not generate the problem it ostensibly seeks to prevent; that is, the creation of enemies *through* detention policy. A 2008 document signed by 27 legal scholars opposes “any effort to extend the status quo by establishing either (1) a comprehensive system of long-term “preventive” detention without trial for suspected terrorists, or (2) a specialized national security court to make “preventive” detention determinations and ultimately to try terrorism suspects....” For the basic reason that, despite “dressed up procedures, these proposals would make some of the most notorious aspects of the current failed system permanent.” The authors add that perhaps “most fundamental is the fact that the supporters of these proposals typically fail to make clear who should be detained, much less how such individuals, once designated, can prove they are no longer a threat. Without a reasonably precise definition, not only is arbitrary and indefinite detention possible, it is nearly inevitable.”³³ Some of the authors, however, conclude that evidence on the part of the government that a detainee has “engaged in belligerent acts or has directly participated in hostilities against the United States” may be the exceptional case justifying “continued detention.”³⁴ Again, however, this distinction remains fluid enough as to be an arbitrary judgment by government officials.

Limited Preventive Detention for Identifiable Combatants. Arguing against preventive detention and a “try-or-release approach,” David Cole proposes, “If we are to fix the problem, we need not abandon military detention, but we must subject it to the rule of law... Congress should follow the example of traditional wars and give the administration the option to detain—without criminal

32 Jack L. Goldsmith and Neal Katyal. “The Terrorists’ Court.” *The New York Times*. July 11, 2007.

33 Catherine Powell, et al. “Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change.” White paper. Fordham University Law School, Leitner Center for International Law and Justice, International Law and the Constitution Initiative. Prepared under the auspices of the Center for American Progress. September 2008. <http://law.fordham.edu/ihhtml/center3.ihhtml?imac=1214>. (Last accessed April 24, 2009).

34 Powell, et al.

trial—those engaged in hostilities with us for the duration of the military conflict with al Qaeda and the Taliban. Detainees should be afforded punctilious procedure to ensure that we are detaining only those who fought for al Qaeda or the Taliban and pose an ongoing threat.”³⁵ Even if a prisoner cannot be criminally convicted, Cole asserts, it is reasonable in wartime to detain potential enemies. Based on the opinion of Judge J. Harvey Wilkerson, Cole suggests that potential enemies off the “battlefield” could be distinguished by the government establishing “that an individual is (1) a member of (2) an organization against which Congress has authorized the use of military force (3) who knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of an enemy nation or organization.”³⁶ This scheme requires Congress to recognize enemy status of a given individual or group. Yet, Eric Posner responds, such a scheme ignores the reality of new weapons technologies that pose greater threats to far more people. Posner suggests that these pressures lead away from burdensome congressional processes towards preventive detentions. Civil rights, he suggests, necessarily lose in the name of security.

Civil Criminal Trials — Try or Release. Underlying the above preventive detention approaches is an assumption that regular civil criminal procedures are inadequate to the task of convicting dangerous enemies and of maintaining confidentiality of intelligence-gathering practices where necessary. Joanne Mariner maintains, however, that U.S. federal courts are well-equipped to handle evidence from intelligence sources following the procedures of the Classified Information Procedures Act (CIPA).³⁷ She rejects preventive detention and says that over-emphasis on preserving what Cole calls “confidential information” in preventive detention approaches is a recipe for repeating the mistakes of Guantánamo. Furthermore, why define the actions of al Qaeda as combatant rather than criminal in the first place? As Mariner puts it, “the real question is whether it should be deemed an armed conflict at all. The fact that NATO and the United Nations authorized a military response in Afghanistan should not be conflated with international recognition of a global war against al Qaeda: a conflict that is untethered both temporally and geographically, and that has few of the customary attributes of war.”³⁸

This is the position of the UN Commission on Human Rights. In a 2006 report, UN Special Rapporteur Martin Scheinen recommended that the U.S. either put on trial or release detainees categorized as “unlawful enemy combatants,” a category Scheinen recommends be abandoned as a “term of convenience without legal effect.”³⁹ Scheinen notes grave concern “about the increasing risks of an unfair trial as time continues to pass....”

The central problem is clear. On one hand, according to basic law and democratic principle, the detainees must be tried in a fair court. Human rights advocates suggest sooner rather than later. On the other hand, protection from high-risk detainees must be ensured. Indefinite detention, however, is at least in most forms illegal. Perhaps in all forms indefinite detention is politically untenable. The situation cannot be left to fester. Try or release advocates urge civil court trials. If the detainee cannot be found guilty of engaging in or lending material support to terrorism, he must be released by law. Opponents of strict try or release maintain that there are cases in which

35 David Cole. “Closing Guantánamo: the problem of preventive detention.” *Boston Review*. December 2008. <http://bostonreview.net/BR34.1/cole.php>. (Last accessed April 24, 2009).

36 Eric Posner. Destructive technologies require us to re-assess civil liberties.” From “Closing Guantánamo: A forum on what to do with detainees.” *Boston Review* (online). December 10, 2008. <http://bostonreview.net/BR34.1/posner.php>. (Last accessed April 24, 2009).

37 Joanne Mariner. “Criminal justice techniques are adequate to the problem of terrorism.” From “Closing Guantánamo: A forum on what to do with detainees.” *Boston Review* (online). December 10, 2008. <http://bostonreview.net/BR34.1/mariner.php>. (Last accessed April 24, 2009).

38 Mariner.

39 Martin Scheinen. “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America.” UN General Assembly, A/HRC/6/17/Add.3. October 25, 2007.

gathered evidence may be inadmissible in court and other evidence may be inadequate for a robust legal case but in which the government may nonetheless deem that it has compelling evidence of detainee hostility. In such instances, try or release is considered dangerous and the prisoner should be kept in detention. Thus, as advocates of at least limited detention propose, there must be some form of special detention for those deemed dangerous. Abuse of many of the detainees, however, has elevated the risk of acquittal of these presumably dangerous detainees. Much of the current debate about detention policy, therefore, responds to legal and moral problems generated by the preceding detainee policy.

The case of al-Ajmi summarized above, the man radicalized by his experience at Guantánamo, throws another wrench into these gears. The case raises questions about how to properly determine who is a high-risk detainee, especially based on conjecture about future actions rather than observation of past actions. What if risk is born of detention? Al-Ajmi's case indirectly raises the double-barreled question of how to define legally inadmissible but ostensibly accurate evidence, and what to do in cases for which there exists some extra-legal evidence of wrong-doing and high risk but the detainee is acquitted in a fair court of law. Each of the proposals above, apart from try or release, attempts to articulate a moment in which the law may be suspended or distorted in the service of national security goals. Once policy is articulated beyond the bounds of the law and moral norms, it's difficult to discern what grounds render it an improvement on Bush administration policy. Even as U.S. Attorney General Eric Holder unfolds his decisions on detainee policy over 2009 and perhaps beyond, these questions will remain attached to ambiguous outcomes, underdetermined policy, and unresolved inconsistencies in the treatment of human prisoners. In other words, a reformed detainee policy goes only a short distance towards the larger and important goal of restoring credibility through accountability.

Accountability and Politics

A second critical element for restoring credibility is accountability for the torture regime undertaken through concrete measures. President Obama's executive order closing Guantánamo and the black sites is a good first step. Despite the complexities discussed above regarding the detainees, the prison closings demonstrate a presumptive respect for the rule of law and for the public moral element of accountability. Yet these two strains of accountability — legal and public-moral accountability — do not necessarily overlap. Accountability, moreover, must take into account political context. This is not to say that politics should take priority over law and morality. It is to raise the finer point that the purpose of genuine accountability is defeated if undertaken (or not undertaken) for political reasons or if seriously undermined by political upheaval or other comparable damages to a society. A democratic society is defined in part by its accountability mechanisms and the fairness of their application. But we should be very careful. Resistance to investigation and accountability in the name of social unity has deep and manipulative political roots in nearly every country whose leaders have faced war crimes accusations. It would be very tempting simply to "look ahead."

The reason for pursuing accountability is not solely retribution for previous wrongs or, although vital, restoration of the rule of law. Accountability has a pragmatic function. It helps to ensure that acts destructive of any human rights framework we wish to perpetuate, acts such as torture, do not occur again. Indeed, as discussed in the concluding remarks, society reconstructs not only the rule of law but also a more robust human rights regime through demands for and concrete steps towards genuine accountability.

Legal accountability. Manfred Nowak, U.N. Special Rapporteur on Torture, has announced that the U.S. is obligated under the U.N. Convention Against Torture to investigate and prosecute officials involved in legally justifying torture as a first step. Otherwise, the other 145 countries of the Convention are obligated by law to claim universal jurisdiction and carry out investigations and prosecutions if necessary. Indeed, in the current absence of a U.S. investigation, Spain's

investigating magistrate of the National Court, Judge Baltasar Garzón (who brought the war crimes case against Augusto Pinochet of Chile), has opened a criminal investigation into Guantánamo detainee torture, possibly extending to other prisons such as the Baghram military base. A second case brought by the National Court against six high-level Bush administration officials is currently under consideration.

The law is clear. U.S. civil code Title 18, Part I, Chapter 113C, § 2340 defines and outlaws torture. Explicitly in accordance with Common Article 3 of the Geneva Conventions, Chapter 118, § 2441 outlines prosecutable war crimes, including torture, cruel or inhuman treatment, murder, and sexual assault or abuse. If death results from the abuses, the United States may seek the death penalty. Recall that roughly 100 detainees have died in U.S. custody, 34 of these cases attributed by Human Rights First to death from torture.⁴⁰ The Supremacy Clause of the U.S. Constitution (Article VI, Paragraph 2) states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding," integrating ratified international treaty law into the heart of U.S. federal law.

The U.S. is party to the Geneva Conventions, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the American Convention on Human Rights (signatory only), and other relevant international law. The U.S. has thus far refused to sign the International Convention for the Protection of All Persons from Enforced Disappearance, a 2006 treaty with over 70 signatories that is not yet in force. The U.S. is not a member of the International Criminal Court, although as U.S. Senator from Illinois Barack Obama previously expressed support for U.S. ratification of the Rome Statute of the ICC, the Court's founding treaty (signed but not ratified by the U.S.).

Legal accountability requires investigation into the system of extraordinary rendition, disappearances, indefinite detention, deaths in custody, and torture in the conflict with al Qaeda, the war in Afghanistan, and the Iraq War. It demands investigation of the OLC lawyers' legal analyses, the "extreme pressure" some lawyers and interrogators have mentioned, and the relations between the policy, political considerations, and legal justifications. The many "landmines" or loopholes in the law created by the OLC memo lawyers will be tested through investigation and civil lawsuits.⁴¹ And this process of recalibrating federal law with international human rights will take years.

The first step required by law is a formal investigation of abuse. The investigations by the U.S. Department of Justice must be legitimate and comprehensive or the U.S. will be faced with investigations by the governments of other countries, including the NATO allies, who are obligated to do so by international law. However, as Mark Drumbl writes of international accountability for atrocities, "the accountability process remains narrowly oriented to incarceration following liberal criminal trials. It is not a broader process that is yet comfortable with meaningful restorative initiatives, indigenous values, qualified amnesties, reintegrative shaming, the needs of victims, reparations, collective or foreign responsibilities, distributive justice, or pointed questions regarding the structural nature of violence in the international system... With pronouncement of sentence comes a rush to closure, absolution for the acquiescent, and the evaporation of collective responsibility."⁴² A clearer legal understanding of the contours and details of the torture regime is necessary before making concrete policy decisions holding into the indefinite future. The point that Drumbl underscores, however, is that to render account involves much more than litigation.

40 Hina Shamsi, author, and Deborah Pearlstein, ed. *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*. Human Rights First Report. February 2006.

41 "Legal landmines" is David Luban's term coined during his participation in the symposium "On Torture." George Washington University. November 18, 2008.

42 Mark A. Drumbl. *Atrocity, Punishment and International Law*. Cambridge: Cambridge University Press, 2007. P. 147.

Public moral accountability. Genuine or good faith accountability — and thus genuine credibility — must not only address technical legal issues but also public morality and the norms of international society. It is not sufficient either to acquit or convict those involved, even through a legitimate system of legal accountability. The public moral question would remain regardless of the outcome of litigation.

Beyond a legal approach, therefore, another concrete effort in achieving accountability would be the creation of a bipartisan investigative commission in the U.S. Congress. Such a commission would have broader scope than investigations by the Justice Department as it would be empowered to investigate both the institutional details and the larger narrative connecting the politics, policy-making and chain of command, moral norms, and the law. Significantly, its findings would be public. The public check on arbitrary power in a democratic society can only occur with the information a public moral accounting elucidates. This elucidation is the role of the legislature.

Both DOJ investigations and a congressional commission are therefore necessary pieces of progress towards accountability. Even in the case that investigations and cases pending in federal courts are found, technically, to absolve government authorities of legal wrongdoing, the spirit of the law remains violated.

Apart from these practical issues, however, the very existence of the U.S. torture institution points to a deeper crisis at the core of the liberal democratic conception of human rights. Historically, the foundational principles of liberal democracy include human dignity, individual autonomy, and the primacy of liberty. The doctrine suggests, in Locke's and Mill's formulations, that normative or regulatory limitations on individual autonomy and liberty are justifiable only when individuals cause harm to others or when they engage in acts of cruelty that deny others' dignity, autonomy, and liberty. These *de jure* principles of liberalism have often hung in a precarious balance with *de facto* violations of those principles: the universalizing impulse of principles of individual dignity and freedom in tension with violent means for protecting or preserving a society from enemies both real and imagined. Such contradictions have always been at the heart of the struggle to articulate a robust and legitimate conception of human rights embedded in liberal democratic institutions as the principle of equal respect for all persons.

Consider the liberal notion of toleration, for instance — how far does one tolerate the intolerant? How far does one extend human rights to enemies who wish to destroy you? At what point does the state's defense of a society or constitution become an assault on human dignity and liberty? Liberalism, despite *de facto* violations of its principles, attempts to give reason to the management of this balance between substance (its core values — say, autonomy) and procedure (its means of defending those values — say, habeas corpus or universal suffrage). Institutions may fail in practice to live up to these principles — such as in the case of racial bias in criminal sentencing — but the ideals are perhaps most important in giving guidance to and procedures for the ongoing reconstruction of society's institutions. One important strength of liberal democracy is precisely in its ongoing deliberation through democratic means over the meaning of its basic principles. Such deliberation at its best both defines those principles and is simultaneously an instance of them in action. This perpetual balancing act between substance and procedure defines many of the institutions of modern liberal democracy and, indeed, much of international law. For such a state, however, institutionalization of torture represents liberalism's preservationist procedures tipping the balance towards an increasingly authoritarian defense of its substance. A torturing society, especially a society with an *open* policy of torture (which is where the "torture works" argument leads), is no longer a liberal democratic society respectful of human dignity and freedom. Indeed, here the basic principles of liberal democratic society are inconvenient obstacles in the pursuit of other goals. The complexity of the current issues requires more than legal and moral accountability.

Politics and pragmatic accountability. Admittedly, public discourse hardly lives up to fully democratic ideals. There is currently an increasingly tense and at moments uncivil political climate regarding the detainee policy and potential investigations into the Bush administration's actions. Even a bipartisan congressional commission will be aggressively challenged by some segments of the population. Nevertheless, this is a formal version of a discussion that should take place.

As mentioned above, accountability has a pragmatic function. For one thing, it helps to deter, in this case, future human rights violations. It may do so by reinforcing the prohibition of such acts through prosecution. Additionally, it helps us understand the legal and political conditions that facilitate these violations (as well as, possibly, those of our enemies). As such, public accountability serves as a means for society to articulate or reconstruct norms it wishes to observe. This includes providing content to the very meaning of human rights. Like the precarious balance between substance and procedure essential to liberal democracy, a full understanding of human rights is only partially determined by its technical procedural aspects. It would be a grave mistake to reduce accountability to these aspects for fear of generating political waves domestically or internationally. The reason is not because of an insistence on absolute retribution, but because this would entail a partial effort that would defeat the pragmatic purposes of accountability. The political and emotional dimension must be allowed its outlet or it will continue to simmer and the public meaning of accountability will remain legalistic.

In his 1755 *Encyclopédie* entry on “Droit Naturel,” Denis Diderot wrote of an “interior feeling... common both to the philosopher and to the man who has not reflected at all.”⁴³ Lynn Hunt contends that this “interior feeling” is a central insight into the nature of human rights. She builds upon the insight, drawing a contrast between two elements of human rights, individual autonomy and empathetic selfhood. Human rights, she maintains, depend on autonomy as bodily self-possession and on empathy as “the recognition that all others are equally self-possessed.” Hunt thinks that the “incomplete development” of this empathetic recognition “gives rise to all the inequalities of rights that have preoccupied us throughout history.”⁴⁴ Dehumanization follows lack of empathy, thus preparing the way for cruelty and abuse of other human beings.

The late philosopher Richard Rorty argued that the emergence of a moral and political culture of human rights is not due to decisive moral arguments or possibly even the existence of international human rights laws. It is due, rather, to what Rorty calls “sentimental education” which, through stories of human rights abuses, encourages people to try to understand what it might mean to undergo such abuses and to empathize with the pains of others.⁴⁵ A lack of empathy is at the heart of all human rights abuses, whether by the abuser or the bystander. But empathy isn’t increased through legislation or moral abstractions alone. It does, however, have political and moral force. Therein lies a central part of the post-Guantánamo duty — to continue to publicly tell the stories of those who have suffered, understanding that what Rorty calls (following Eduardo Rabossi)⁴⁶ a “human rights culture” can only be continuously reconstructed through an honest and open public accounting of human abuse. Yet, as the American philosopher John Dewey wrote, “the separation of warm emotion and cool intelligence is the great moral tragedy.”⁴⁷ We should also understand the protections afforded by human rights as being in the interests of not only those who are dehumanized but also in the rational interests of ourselves as autonomous beings.

To summarize, genuine accountability is the route to lasting credibility in the wake of Guantánamo. Accountability comes in several parts, all necessary: legal, public-moral, and pragmatic. Legal accountability is important as both retribution for crimes committed, for reasserting the rule of law by which a decent and secure society lives, and for its power of deterrence from future human rights abuses. Public-moral accountability involves the public expression of a liberal democracy recalibrating the balance between its substance and its procedures. Restoring credibility does not

43 Cited in Lynn Hunt. *Inventing Human Rights*. New York: W.W. Norton. 2007. Pp. 26-27.

44 Hunt. P. 29.

45 Richard Rorty. “Human Rights, Rationality, and Sentimentality,” in *Philosophical Papers, Vol. 3: Truth and Progress*. 1998.

46 Eduardo Rabossi. “La teoría de los derechos humanos naturalizada.” *Revista del Centro de Estudios Constitucionales* (Madrid). No. 5, January-March 1990.

47 John Dewey. *Human Nature and Conduct. The Middle Works: 1899-1924, Vol. 14.* Jo Ann Boydston, ed. Carbondale: Southern Illinois University Press. 1988 (1922). P. 177.

take place in private. A public accounting is particularly important in response to a corrosion of the norms and principles on which such a society stands. What I refer to as pragmatic accountability is the understanding that a full and effective accounting requires a renewed focus on the empathetic element common to human rights. It requires making known the stories of those who are abused, even when they have also committed atrocities, so that we at a minimum ensure a defense against dehumanization. Ultimately, a reflective people must understand that the conditions preparing the way for human rights abuses derive from insecurity writ large. These economic, political, personal, and cultural insecurities are structural conditions that give rise to such acts as terrorism, torture, and other crimes. In terms of short-term policy, then, a legal investigation through the Justice Department and a broader public investigation through its elected representatives are both critical elements to accountability and ultimately credibility.

Concluding Remarks on Post-Guantánamo Human Rights

Human rights are meaningful if they entail a genuine commitment by each state to refrain from or extensively modify some actions even when those actions may be otherwise perceived to be in a state's own interests. As Kant said, "all politics must bend its knee before human rights."⁴⁸ A human rights culture declares that there are some things that states cannot do to individual human beings, no matter whom the individual, especially within their own boundaries.

Unless we wish to shelve the idea of a "right" altogether, metaphysical or ethical justifications for civil rights apply also to human rights. The main difference is a practical one: the existence or absence of an effective enforcement mechanism. Within states, penal and regulatory systems function as means of coercive enforcement and the protection of certain sets of rights. In the international sphere, of course, there is no analogous enforcement mechanism for human rights, as is also ultimately the case with international treaties and other agreements among states. In this situation, it will remain a temptation for powerful states to violate international human rights standards when those states have compelling reasons to believe that doing so is, on the whole, in their interests. One might object by raising the example of the International Criminal Court. But some notable powerful countries and rogues have not yet signed onto the Rome Statute. Moreover, the underlying incentive structure of the ICC may lead it to investigate and prosecute weaker, less politically risky cases.⁴⁹ The ICC system may be important, but it needs to mature before it can lay claim to being a fair and effective enforcement mechanism for human rights.

The German philosopher Jürgen Habermas writes that, "human rights are not pre-given moral truths to be discovered but rather are constructions..."⁵⁰ In the absence of an effective enforcement mechanism, the normative force of human rights is vital in this construction project. In the international sphere, genuine agreements are built upon shared norms, mutual interests, and good faith efforts to cooperate. Peremptory norms and customary law can be powerful influences, but because their normative bases are widely accepted by definition (similar to Jefferson's claim in the *Declaration* that "all men are created equal" and "endowed with certain unalienable rights" are "self-evident" truths). If we understand human rights to involve an ongoing struggle to articulate their normative and practical meaning, constantly fitting and refitting local concerns and issues with the universal claims of human rights, then Guantánamo leaves us with very difficult work to do in securing their future in international society. Enforcement, in the end, comes through

48 Immanuel Kant. "A Perpetual Peace. Appendix I." In *Kant: Political Writings*. H.S. Reiss, ed. Cambridge: Cambridge University Press, 1991.

49 See David Chuter. *War Crimes: Confronting Atrocity in the Modern World*. Boulder, Colorado: Lynne Rienner Publishers. 2003.

50 Jürgen Habermas. "Remarks on Legitimation through Human Rights," in *The Postnational Constellation: Political Essays*. Cambridge: MIT Press, 2001. P. 122.

international participation in the ongoing formulation and construction of human rights values, and requires ever-growing empathy with those who suffer.

It is a reasonable expectation in the international sphere that a liberal democracy, by definition, does not torture. Guantánamo has lifted the veil on that illusion. Restoring credibility, post-Guantánamo, requires resolving the issue of detention policy and effecting accountability. It is no longer enough simply to resort to the faulty assumption that liberal democracies do not intentionally violate human rights. Outlined above are some of the proposed detention policies as well as a discussion of their inherent difficulties. The above discussion of accountability comprises several different aspects, legal, moral, public, and pragmatic. It is vital to restore the rule of law through clear legal policies. Justice Department investigations are thus critical. But it is also vital to cultivate empathy in the public and international sphere. There should thus be a more expansive congressional investigation providing the public with the information necessary to understand what is at stake and to make intelligent democratic decisions. Grave errors have occurred. The ability to understand and express one's own fallibility, however, is one of the great secrets of democratic leadership, whether by individuals or by nations. Public deliberation, in all its imperfections and in its full diversity of views, is essential to restoring credibility on human rights. It is also the democratic means by which to articulate a further empathetic understanding of human rights. Accountability can thus simultaneously serve both the goal of reconstructing credibility and the goal of extending a human rights culture.



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