

Nationalism

\*1009 GLOBALIZED CITIZENSHIP: SOVEREIGNTY, SECURITY AND SOUL

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I. Introduction

HUMAN rights law has redefined the concepts of sovereignty and citizenship. Just as transnationalization has weakened the hegemony of the political elites (corporate economic elites and domestic ruling classes) by strengthening citizenship claims of all persons, so, too, a globalized citizenship grounded on a human rights model will strengthen personhood by denationalizing states' claims on individuals' rights. The human rights narrative has been imagined, crafted and delivered by Northern/Western powers--the hegemon--however, for the human rights model to be of utility to the globalized citizen project, it must be reconstituted with an antisubordination agenda. It must include the voices of the marginalized--both persons outside Western cultures and subordinated persons within Western cultures--all women; racial, ethnic, religious, cultural and sexual minorities; the poor; and the differently abled. In sum, such a new vision of human rights refocuses the discourse and creates a globalized citizenship movement from below that embraces and empowers those currently in the periphery.

This essay will use the reconstituted human rights paradigm to explore the relationship between sovereignty, security and personhood. Part II engages the human rights model by recognizing how it first effected a change in the concept of sovereignty and suggest a reconstitution to render the human rights system truly pluralistic. As reconceived, the human rights system provides a rich and complex foundation for a globalized citizenship model that promotes and respects personhood, well-being and human flourishing. Part III explores the tension between human rights and security, acknowledging three significant realities: (1) the normative reality that in times of danger the sovereign can suppress certain human rights to maximize security protections for its citizens and others within its territory; (2) the corollary legal and moral reality that even in times of danger the sovereign cannot derogate from certain fundamental human rights; and (3) the practical reality that the ability of the sovereign to act in breach of the nonderogable obligations may be unassailable if the actor is a powerful world actor. In this context, the essay addresses the uneasy legacy of Nuremberg and its more recent delineation of the \*1010 bounds of sovereignty--the addition of individual responsibility which means that states cannot escape accountability by doing indirectly (via individual actors) what they cannot do directly.

Part IV moves toward a new conceptualization of limits on sovereignty: a proposed globalized citizenship model that draws from traditional citizenship theory, uses the human rights structure as its foundation and places limits on the power of entities, including states and transnational and multinational organizations, associations or groups, to act if the consequence is a violation of human rights norms. This new conceptualization is different from the previous conceptualizations of the limits of sovereignty [\[FN1\]](#) because the affirmation emanates from the individual him/herself (and others similarly situated around the globe) who has suffered as a consequence of a

breach of norms regardless of whether the norm violator is a state actor. Finally, Part V applies the developed model to the post-9/11 condition of the captives held in Guantánamo Bay, Cuba.

## II. Human Rights--Creating Limits to Sovereignty

The contemporary human rights regime was developed after World War II. However, even prior to that war, and in the absence of any legal doctrine that challenged full and absolute state sovereignty, states recognized that protection of humanity was the paramount goal of international law. Thus, sovereignty, although state-centered, was not seen as absolute. Under international law, sovereignty was always recognized as an instrument that should not be used to shield abuses against human beings. Indeed, well before World War II, Oppenheim recognized the supra-sovereign nature of human rights:

[T]here is no doubt that, should the state venture to treat its own subjects or part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention with the purpose of compelling such state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideals of modern civilization. [\[FN2\]](#)

Oppenheim's statement about the limitations of state sovereignty was prescient. After World War II, in the Nuremberg Tribunal, [\[FN3\]](#) the world community punished German Nazis for committing atrocities against millions *\*1011* of innocent citizens, including those against German Jews on German soil. As a result, a state would no longer be insulated from sanction simply because the crimes committed were against its own nationals and within its geographic boundaries. The human rights idea challenged the notion of unfettered state sovereignty, much as in the 1980s globalization challenged the supremacy of the nation-state.

The human rights ideals can be traced to religion as well as natural law and contemporary moral values. The human rights movement recognizes those rights vital to an individual's existence--fundamental, inviolable, interdependent, indivisible and inalienable rights that are predicates to life as human beings and that concern the respect and dignity associated with personhood. Today, these include not only civil and political rights, but also social, economic and cultural rights, as well as solidarity rights--rights to peace and to a healthy environment.

The signing of the United Nations Charter [\[FN4\]](#) in 1945 marked the establishment of a system of comprehensive human rights protection for all individuals against various forms of injustice by a state--regardless of whether the abuse or injustice was committed by a foreign sovereign or the individual's own state of nationality, and, for the most part, irrespective of the existence of war. The Charter, the purpose of which is "to promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion," [\[FN5\]](#) expressly acknowledges "rights to which all human beings have been entitled since time immemorial and to which they will continue to be entitled as long as humanity survives" as rights of personhood. [\[FN6\]](#)

Numerous human rights instruments that followed the Charter further articulate and refine the nature and breadth of the human rights vision. These include, among others, [\[FN7\]](#) the Universal Declaration of Human Rights [\[FN8\]](#) (Declaration or Universal Declaration); International Covenant on Civil and Political Rights [\[FN9\]](#) (ICCPR); International Covenant on *\*1012* Economic, Social and Cultural Rights [\[FN10\]](#) (ICESCR);

Convention on the Elimination of All Forms of Discrimination Against Women; [\[FN11\]](#) International Convention on the Elimination of All Forms of Racial Discrimination; [\[FN12\]](#) Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; [\[FN13\]](#) and the Convention on the Prevention and Punishment of the Crime of Genocide. [\[FN14\]](#) These instruments collectively protect civil and political rights initially pursued by the French and American revolutions--rights largely expanded to include not only the rights to equality for white men and to "life, liberty and the pursuit of happiness," but also the rights to self-determination; nondiscrimination; sex equality; life; freedom from torture, cruel, inhumane treatment or punishment; freedom from slavery, servitude, forced or compulsory labor; freedom of opinion and expression; freedom of speech and assembly; and free association. [\[FN15\]](#) They also provide a plethora of due process rights; ensure freedom of movement; protect family and marriage; recognize personhood; recognize freedom of thought, conscience and religion; and recognize the right to participate in government and to protect culture. [\[FN16\]](#) Significantly, these instruments also embrace the social, economic and cultural rights sought by the Mexican and Russian revolutions, thereby making the following rights part of the human rights framework: the rights to good working conditions; to receive fair wages; to form trade unions; to receive social security; to attain an adequate standard of living including *\*1013* food, housing and clothing; to enjoy physical and mental health; to receive an education; and to participate in cultural life. [\[FN17\]](#) Most noteworthy, the documents, while acknowledging that the inherent dignity of people is the foundation for freedom, justice and peace in the world, also expressly recognize the interrelationship of civil and political rights with economic rights: "freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights." [\[FN18\]](#)

Notwithstanding the laudable and desirable ideal of universality of rights, the grounding of this articulation in Western philosophy has invited critique. The absence of linkages to the periphery [\[FN19\]](#) and claims that a system was being imposed on states that were not present or perhaps non-existent at the time of the system's formation challenged the authenticity of the system as lacking a broad-based cultural and ideological foundation. [\[FN20\]](#)

*\*1014* The reconfiguration and transformation of the human rights project into a truly inclusive and pluralistic paradigm of dignity and personhood is necessary ontologically prior to the development of a globalized citizenship model. A reconstitution of the human rights system must include perspectives and understandings from different cultures and economies in order to explore the boundaries of rights in a nonessentialist, antisubordination posture and to attain its liberatory potential so that all--from North and South, East and West alike--can share and enjoy full personhood.

Critical analysis exposes the structural flaws, biases and assumptions of applying a hegemonic version of human rights law. Existing international ideas and ideals were crafted within specific and narrow social, economic, historical and cultural spaces. The universalization of the system resulted in the effective imposition on many states of the perspectives, needs, desires, interests and experiences of a few powerful ones, and thus effectively silenced the subaltern, the poor and the subordinated; the core silenced the periphery. The coexistence of slavery and women's status as chattel, as well as the decimation and exploitation of indigenous populations, with the late eighteenth century political and social uprisings that sought to identify impermissible governmental intrusions into individual lives and to protect the rights to private property, life and liberty, represents intrinsic contradiction, the irreconcilative tension imbuing those revolutions.

Vestiges of foundational inequities are evident at the start of the twenty-first century. Women lack equal rights and benefits in every geography of the global community. Racial, sexual, and ethnic minorities in the first-world states, all people in third-world states and indigenous people in all states-- North and South, East and West alike-- experience a widespread pattern of inequality in participation in social, political and economic spheres.

One of the central aims of the human rights system is liberation and justice for the subordinated, the disempowered, the marginalized and subaltern persons and communities. These borderlands include not only all peoples (and particularly the non-elites) in the peripheral states--precisely the societies claiming exclusion from the standards-generating process--but also non-normative, outsider communities within core societies. The human rights paradigm, refocused and reconstituted, becomes a morally compelling tool that denounces all sovereign action derogating from or interfering with personhood.

### III. Security and the Limits of Sovereignty

One of the central functions of any state, especially those states founded on civic republicanism as quintessentially expressed by the American *\*1015* and French Declarations, is to provide security for its citizens--one of those state functions that would be wholly unworkable if maintained in individual hands. Thus, the security of persons was one of the obligations conceptually delegated to the states by the people in the "social contract." [\[FN21\]](#)

In this context, it is important to explore the relationship of human rights to the state's sovereign obligation to defend its citizens. The ICCPR expressly addresses this concern. Article 4(1) establishes six onerous conditions that predicate security concerns trumping rights of personhood: (1) a public emergency must exist; (2) it must threaten the life of the nation; (3) the public emergency must have been officially proclaimed; (4) the derogation of rights must be necessary vis-à-vis existing circumstances; (5) the measures taken that derogate from the protected rights cannot be inconsistent with other obligations of the state; and (6) under no circumstances can discrimination on the basis of race, color, sex, language, religion or social origin be the grounds for the derogation. [\[FN22\]](#) Beyond these listed requirements, article 4(2) of the ICCPR also expressly prohibits derogation from certain rights even during public emergencies that threaten the life of the nation. [\[FN23\]](#) Such nonderogable rights include: (1) the right to life; (2) the right to be free from torture or cruel, inhumane or degrading treatment or punishment, including the right not to be subjected to medical or scientific experimentation without consent; (3) the prohibition against slavery and servitude; (4) the prohibition against imprisonment merely on the ground of inability to fulfill a contractual obligation; (5) the prohibition against imposing criminal punishment based on ex post facto laws; (6) the right to personhood; and (7) the right to freedom of thought, conscience and religion. [\[FN24\]](#)

Thus, beyond the curtailment of the state's sovereign power effected by human rights norms generally, international norms also expressly constrain the state's sovereign power to derogate from individual rights--rights of personhood--for security reasons. To be sure, history is replete with examples of states that did not conform to the nonderogation principle. However, inconsistencies abound with respect to which states are condemned for such derogations. Criticism seems to be aimed more freely at weaker, rather than powerful, states. In all cases, honoring the norm in the breach does not negate the existence of the norm.

*\*1016* In scrutinizing the sovereign and security prerogatives of states, it is appropriate to examine the Nuremberg Tribunal, a watershed event for human rights. Nuremberg marks a historical moment in defining when a state's sovereignty veil may be pierced vis-à-vis its treatment of human beings (including its own citizens), outside and within its borders at a time of war when security interests are at a high water-mark. A critical analysis serves to problematize its procedural and substantive foundations.

The United Nations Charter, which first centered human rights in the international legal system, was a document setting out an ambitious but general plan. [\[FN25\]](#) The Charter of the International Military Tribunal [\[FN26\]](#) (Tribunal Charter), on the other hand, was concrete and specific to the circumstances providing for prosecutions, convictions and punishment of real people for real crimes. The Tribunal Charter resulted in trials of individuals for heinous crimes that were committed during the war years. The bases for these trials were, in part, grounded in existing international law such as the Hague Convention of 1907, [\[FN27\]](#) which prohibited certain methods of waging war, and the 1928 Kellogg-Briand Pact, [\[FN28\]](#) which renounced aggressive war and war as an instrument of national policy. Some concepts and norms designed for the prosecution, conviction and punishment of "war criminals," however, represented significant developments of the law and confirmed emerging fundamental international human rights norms.

A unique aspect of Nuremberg is that the trial and judgment process applied international law doctrines and concepts in order to impose criminal punishments on individuals for their commission of one of three types of crimes under international law: (1) crimes against peace; [\[FN29\]](#) (2) war *\*1017* crimes; [\[FN30\]](#) and (3) crimes against humanity. [\[FN31\]](#) In dispensing justice, violations of previously existing international laws were analyzed. In the prewar days, there existed two "universal" crimes. One, piracy on the high seas, was based on the interests of all states to protect navigation against interference on the high seas outside the territory of any state. Because there existed no international criminal tribunal with jurisdiction over these matters, however, prosecutions were carried out in state courts. Second, breach of the humanitarian laws of war, was found in customary norms, treaties and concepts such as "just war." It was grounded on states' interests that combatants follow restrictive rules of war.

Yet at the time of the trials at Nuremberg, the concept of individual criminal responsibility had not been systematically developed except in the context of piracy. Certainly, the individual responsibility concept gained a new prominence and a clearer definition after Nuremberg, primarily through the Geneva Conventions of 1949 and their 1977 Protocols. [\[FN32\]](#)

The Nuremberg Tribunal was possible because after World War II the prevailing Allied states were able to dictate policies aimed at Germans who *\*1018* were responsible for the war and for the barbarity of the acts perpetrated. The applicable policies were developed in various conferences and culminated in the London Agreement [\[FN33\]](#) in which the victorious parties accorded constitution of an International Military Tribunal for the trial of war criminals. [\[FN34\]](#) The Tribunal Charter provided for the composition and basic procedures for the tribunal. [\[FN35\]](#) The Tribunal's structure itself is telling: Article 2 allowed for four judges, one from each of the victorious Allied powers--Britain, United States, France and Russia. [\[FN36\]](#)

At the heart of the Tribunal Charter is the concept of the existence of international crimes for which there can be individual responsibility. [\[FN37\]](#) The adopted definition went beyond traditional war crimes in two ways. First, it included war-related crimes against peace. [\[FN38\]](#) Second, the notion *\*1019* that individuals could commit crimes

against humanity emerged. [\[FN39\]](#) Also, in the past, war crimes could be committed only by official combatants who represented the state. [\[FN40\]](#)

The substantive criminal provisions appeared in Articles 6 through 8 of the Tribunal Charter. Article 6 defined the actions for which there would be individual responsibility, including crimes against peace; war crimes, defined as "violations of the laws or customs of war;" and crimes against humanity, which included murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population or prosecutions on political, racial or religious grounds. [\[FN41\]](#) Article 7 provided that the official position of the defendants was irrelevant to ascertaining their responsibility or mitigation of punishment. [\[FN42\]](#) Article 8 provided that actions pursuant to the order of a government or a superior would not shield an individual actor from responsibility, but could be considered as mitigation in punishment. [\[FN43\]](#)

In this context, it is appropriate to analyze the challenges and objections-- both procedural and substantive--to the Nuremberg Tribunal. One challenge invoked the fundamental principle of law that there could be no punishment of a crime without a preexisting law, noting that ex post facto punishment is abhorrent to the law of all civilized nations. Article 15 of the ICCPR later confirmed this norm: "[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." [\[FN44\]](#) Germans claimed that the Tribunal Charter's provisions violated the prohibition against passing ex post facto laws because no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, no statute had defined aggressive war, no penalty had been fixed for the commission of aggressive war and no court had been created to try and punish offenders. [\[FN45\]](#) The German position arose from the Nazi conception of "total war" that renders everything subordinate to war. [\[FN46\]](#) The Nazis believed that prisoners of war could be ill-treated, tortured and murdered in disregard of international law and dictates of humanity because, under the concept of "total war," rules and *\*1020* regulations were trumped by the war. [\[FN47\]](#) Similarly, the fate suffered by civilian populations-- deportation for slave labor, murder, plundering and pillaging of public and private property, and the wanton destruction without military justification or necessity of cities, towns and villages--were subordinated to the "total war" concept. [\[FN48\]](#) But while "some observers will contend that in 'total war' there can be no laws regulating military conduct . . . ; international lawyers will point out that there is no such legal concept as 'total war' . . . [as] the laws of war apply without exception to all wars." [\[FN49\]](#)

Notwithstanding these objections, the Nuremberg Tribunal--perhaps not surprisingly as it was made up of only Tribunal Charter members--upheld the legality of both the creation of the Tribunal Charter and its application to the perpetrators. [\[FN50\]](#) First, the Nuremberg Tribunal noted that the creation of the Tribunal Charter constituted the proper "exercise of sovereign legislative power by countries to which the German Reich unconditionally surrendered." [\[FN51\]](#) The Nuremberg Tribunal did not interrogate or challenge the right of the victors to legislate for the occupied territories, but rather simply observed that such a right had been recognized by the civilized world and that "the maxim of nullum crimen sine lege is not a limitation of sovereignty, but . . . [rather] a principle of justice." [\[FN52\]](#)

Moreover, the Nuremberg Tribunal rejected the characterization of the Tribunal Charter as an arbitrary exercise of power on the part of the victorious nations, and embraced it as the expression of international law on aggressive war that already existed at the time of its creation. [\[FN53\]](#) Specifically, the Tribunal Charter cited to the Kellogg-Briand Pact--a treaty binding on sixty-three states, including Germany and Japan, when World War II broke out in 1939--and it noted that a state that signs a pact renouncing aggressive

war as an instrument of national policy and then engages in such aggressive war is in breach of the agreement. [\[FN54\]](#) The renunciation of war as an instrument of national policy renders such a war illegal under international law. [\[FN55\]](#)

The Nuremberg Tribunal concluded it was not unjust to punish those who attacked neighboring states without warning in defiance of treaties, because the attacker should have known that the attacker's actions were *\*1021* wrong and unlawful given existing treaties and norms. [\[FN56\]](#) Consequently, it would be incorrect and improper to allow such conduct to go unpunished. The Nuremberg Tribunal supported its conclusion by considering the existing international law on aggressive war. [\[FN57\]](#)

Further, to show that Germany's conduct in prosecuting its "total war" violated existing norms, the Nuremberg Tribunal also cited to the Hague Convention. [\[FN58\]](#) The Hague Convention prohibited certain methodologies in the waging of war, including inhumane treatment of prisoners, employment of poison weapons and improper use of flags. [\[FN59\]](#) The Nuremberg Tribunal noted that since 1907, not only had such actions constituted crimes punishable as offenses against the laws of war, but also that military tribunals had in the past tried and punished individuals who had violated rules of land warfare set out by the Hague Convention. [\[FN60\]](#) The Nuremberg Tribunal stated that those who waged aggressive war were doing something as illegal as, but more egregious than, acts that would constitute a breach of the Hague Convention. [\[FN61\]](#)

The Nuremberg Tribunal did not address the issue that some of the belligerents were not state parties to the Hague Convention. In this regard, it is appropriate to examine the role of custom in developing international law. It is clear that practice of states that is perceived as obligatory (i.e. custom) is one of the primary sources of public international law. [\[FN62\]](#) Custom, however, should not be judicially established by interpreting treaties in a manner in which it seeks to bind an actor for actions directly contrary to the claimed obligatory norm. Yet, the Nuremberg Tribunal simply observed that the Hague Convention was a revision of the general laws and customs of war that were already in existence. [\[FN63\]](#) Therefore, as a codification of existing customary norms, the Hague Convention was binding on all states, signatories and nonsignatories alike. The Nuremberg Tribunal emphasized that by 1939 the rules were "recognized by all civilized nations, and were regarded as being declaratory of *\*1022* the laws and customs of war" to which the Tribunal Charter referred. [\[FN64\]](#) The Nuremberg Tribunal also concluded that the matters included in the Tribunal Charter had been recognized as war crimes under the Hague Convention, as well as under the Geneva Conventions. [\[FN65\]](#)

Significantly, the Nuremberg Tribunal's conclusion accepts that the law of war is to be found in treaties and in states' customs and practices that have been universally recognized. The law of war also can be found in general principles of justice that jurists and military courts have applied. This conclusion is of moment because it is an acknowledgment that law is not static.

Perhaps most significant is the Nuremberg Tribunal's ruling that international law imposes duties and liabilities not only upon states but also upon individuals. [\[FN66\]](#) In a now oft-quoted statement, the Tribunal specifically provided that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [\[FN67\]](#) With this pronouncement, the Tribunal ruled that authors and perpetrators of internationally prohibited acts cannot shelter themselves behind their official positions to avoid punishment in appropriate proceedings. Rather, individuals have international duties that transcend national obligations. [\[FN68\]](#)

This finding of individual and state responsibility constituted the first massive erosion of sovereignty principles affected by human rights norms. In ascertaining the legality of a sovereign act, the question no longer would be whether a foreign sovereign acted within its territorial boundaries. Nor in ascertaining responsibility would the inquiry be whether the individual was following orders. Instead, the question now would be whether the acts committed by the sovereign, even within its territorial boundaries, violate higher norms of humanity. If so, the state and the individuals (if moral choice is possible) engaging in such acts would be internationally responsible for wrongdoing. With the reconceived question, the acts carried out by the Nazis on non-German and German citizens alike were war crimes, crimes against peace and crimes against humanity for which the perpetrators could properly be punished.

**\*1023** Criticisms of the Tribunal Charter and the Nuremberg decision raise a patent tension permeating law, politics and power, which is important in the analysis of a globalized citizenship model. This tension has several implications. One, the tension renders clear that international legal principles allow states, within certain parameters, to derogate from individual rights at times of public emergencies. Two, international norms specifically impose limits on states' ability to derogate from particular rights. Finally, however, as the Nuremberg decision shows, sometimes the lines between law and politics are blurred. When the rule of power and the rule of law collide, the acts of the powerful may have an impact on the exercise of rights. For example, the Nazis ran roughshod over "undesirables" and the Allied powers erected the necessary legal structures to render the Nazis accountable for such transgressions.

#### IV. Globalized Citizenship

Human rights and economic polarization, particularly as manifested in and exacerbated by the economic globalization of the last two decades, have transformed the liberal conception of citizenship. [\[FN69\]](#) These changes inspire the model for globalized citizenship. This model both borrows from and redesigns traditional ideas of citizenship.

Two different concepts of citizenship exist. One, the "legal status" model, emphasizes "full membership in a particular political community." [\[FN70\]](#) The other, the "desirable activity" model, in which "the extent and quality of one's citizenship is a function of one's participation in that community." [\[FN71\]](#)

The citizenship construct includes three elements or components: civil (rights), political (participation) and social (welfare, security, culture). [\[FN72\]](#) Early citizenship literature tended to fuse these three components. Today, citizenship is an idea that resonates and has both local and global impacts. [\[FN73\]](#)

**\*1024** A classic conception of citizenship that shows the conflation of both models identifies citizenship as groups of persons with shared descent, language, culture and/or traditions. [\[FN74\]](#) Indeed, many believe that "democracy . . . requires a large measure of social and cultural homogeneity to function." [\[FN75\]](#) In this regard, "[c]itizenship . . . becomes less an entitlement than a definition . . . [for] [p]eople [who] want to know where they belong, and they want to belong to familiar and homogeneous groups." [\[FN76\]](#)

Essential in the formulation of a globalized citizenship model is the confrontation of the failure of the legal, social, political and economic versions of citizenship for subordinated and marginalized groups. As one commentator has suggested, for persons at the margins, citizenship "may not make much difference to one's life" as neither the "legal status" nor the "desirable activity" concepts of citizenship has enabled such persons to attain desired social justice and equality. [\[FN77\]](#) This failure of the current concepts of citizenship can be explained in a two-fold manner. First, because citizenship is narrowly

viewed as solely a political category, it fails to address its attendant, but separate, social and economic inequities. [\[FN78\]](#) Second, a model of citizenship that focuses on the complex of civil and political rights embraced in the French and American Declarations is more likely to be grounded on characteristics and interests of the dominant elites-- the political and economic ruling classes--around the world. [\[FN79\]](#) Thus, it reinforces class stratification, as well as ethnic, racial and gender differences. [\[FN80\]](#)

*\*1025* Thus, contrary to the homogeneous conception of citizenship is the view that "[t]he true test of the strength of citizenship is heterogeneity [because] common respect for basic entitlements among people who are different in origin, culture and creed proves that combination of identity and variety which lies at the heart of civil and civilized society." [\[FN81\]](#) Far from the early liberal understanding of citizenship as limited to political activity, which some critics presently view as translating simply into the right to pursue individual economic interests in the market, [\[FN82\]](#) contemporary citizenship theories have a broad, flexible sense of participation in public life--a relational dimension. Indeed, since Marshall's conception of "the ideal of citizenship as full participation in the community," the relational aspect of citizenship has shifted from an individual vis-à-vis state model to an individual vis-à-vis society model. [\[FN83\]](#) As theories of citizenship evolved, they underwent "a double process of fusion and separation. The fusion was geographical, the separation functional." [\[FN84\]](#) Ostensibly following this model, many contemporary theorists insist that the concept of citizenship must embrace differences among persons-- differences of race, sex, sexuality, ethnicity and religion, to name a few--and that a new conception of citizenship must be developed because as "originally defined by and for white men, [it] cannot accommodate the special needs of minority groups." [\[FN85\]](#) This latter idea is coherent both with the reconstitution of the *\*1026* human rights system proposed above and with the globalized citizenship idea proffered in this work.

To be sure, the notion of globalized citizenship that I will develop here is not without context, the idea has been discussed broadly in recent times and has given rise to complex and nuanced conversations. For example, Richard Falk, a prominent author in globalization and global governance discourses, has indicated the tension between the corporate-driven exercise of power by the financial elite: governments and markets/investors--globalization from above-- and the grassroots response of citizens who focus on individual needs and react to the corporate/elite grab of power, money, and resources--globalization from below. Falk has developed the idea of a "citizen pilgrim" who is part of the globalization from below movement who works to resist the structures and conditions imposed by the powerful. [\[FN86\]](#) This "citizen pilgrim" strikes a balance between the spiritual and the material worlds; s/he focuses on equality and is not a fan of global governance. [\[FN87\]](#) This "citizen pilgrim" yearns to protect the world for today's inhabitants as well as for later generations, but does not view the state as the entity that can affect this goal; instead, the aspirations can be achieved only by collective action "from below."

In a similar vein, David Held, a renowned theorist of globalization, explains humans' "interconnectedness and vulnerability" across the globe--and beyond national boundaries--as existing "overlapping communities of fate." [\[FN88\]](#) Like the "citizen pilgrim," this community cannot rely solely on the state, as it both surpasses and transgresses it, for justice. This community reflects a shift from the state to a complex of actors that includes national, subnational, supranational, international and regional locations of activity. [\[FN89\]](#) The community also reflects the political diversity of groups from both the developed and developing worlds, who nonetheless are concerned about particular issues such as the environment and the deleterious *\*1027* impact of economic globalization, capitalism, and neoliberalism. [\[FN90\]](#) This community insists that "unchecked economic power, exploding asymmetries of life chances, weak democratic governments, the self-interest of politicians and the threatened takeover of the public

domain by the priorities of big corporations--all violate our most elementary sense of social justice and democracy." [\[FN91\]](#) Networks of social, economic and political relations around the world, which seek to further justice and democracy--a globalization from below--comprise the communities that search for justice. In order to succeed in attaining justice "[a] bridge has to be built here between international economic law and human rights law, between commercial law and environmental law, between state sovereignty and transnational law." [\[FN92\]](#)

Globalization has affected the global expansion of "markets for goods, services and finance [and] altered the political terrain." [\[FN93\]](#) It is identified with the "expansion of markets, neoliberal deregulation and the abdication of politics." [\[FN94\]](#) As such, it has created this overlapping community of fate with "growing aspirations for international law and justice" of which the United Nations, the European Union and the human rights system are prime examples. [\[FN95\]](#) "The principles of freedom, democracy and justice are the basis for articulating and entrenching the equal liberty of all human beings, wherever they were born or brought up." [\[FN96\]](#)

Given that persons already are members of various communities--social, economic, political--to achieve global democracy, the notions of justice have to be extended beyond territorial borders.

Democracy for the new millennium must allow citizens to gain access to, and render accountable, the social, economic and political processes which cut across and transform their traditional community boundaries in the larger world. The core of this project involves re-conceiving legitimate political activity in a manner which disconnects it from its traditional anchor in fixed borders and territories and, instead, articulates it as an attribute of basic democratic arrangements in diverse associations--from cities and sub-national regions, to nation-states, regions and global networks. The cosmopolitan project, as [Held] call[s] it, *\*1028* is in favour of a radical extension of this process as part of a commitment to a far-reaching cluster of democratic rights and duties. [\[FN97\]](#)

In short, in order to protect the communities of fate, it is necessary to have an international democratic polity.

It is not surprising then that both Falk and Held support the creation of global structures for the pursuit of the well-being of the "citizen pilgrim," of the community. Falk has proposed the creation of a "Global Peoples Assembly" that permits an "ideological dynamic of empowerment" for popular sovereignty, but threatens the notion of state autonomy. [\[FN98\]](#) Held, on the other hand, more generally calls for the "build[ing of] new political capacities, regionally, like the [European Union], and also globally." [\[FN99\]](#) He signals the importance of creating or bettering:

new kinds of effective public assemblies at regional and global levels, to complement those at local and national levels. . . . The creation of new global governance structures with responsibility for addressing global poverty, welfare and related issues are vital, to offset the power and influence of the predominantly market-oriented agencies such as even a reformed [International Monetary Fund] and [World Trade Organization]. [\[FN100\]](#)

In short, he wants a cosmopolitan democracy that places the "public domain" in the hands of the public itself. [\[FN101\]](#) He maintains "that the narrative of expertise and top-down government has run its course." [\[FN102\]](#)

Kwami Anthony Appiah invokes the idea of "citizens of the world." [\[FN103\]](#) Unlike other citizenship ideas, this vision focuses on individual responsibility. Recognizing that world

citizens can find themselves anywhere on the globe, their obligation is to leave "that place better than we found it." [\[FN104\]](#) Such "cosmopolitan[ism]" also celebrates the fact that there are different local ways of being human, while humanism is consistent with the \*1029 desire for global homogeneity." [\[FN105\]](#) In sum, while we may all be different, we are all equally human and thus deserving of respect, dignity and well-being.

These ideas of citizen pilgrim, communities of fate and world citizens, which emphasize emancipation and growth for individuals, contrast with other conceptions of global citizenship that effectively signify and identify with the forces of capitalism, neoliberalism and the market. [\[FN106\]](#) One example is the burgeoning field of social corporate responsibility that is generated by the elite corporate power to soften and enliven their image. [\[FN107\]](#) Such global citizens are economic actors who have acquired rights solely because of their economic power, much like states have power because of their economic and military might. Under the guise of concern with economic rights, global corporate citizens instead use their economic power to exploit workers and even host states. [\[FN108\]](#) As economic globalization increases, the need to make these corporate "citizens" accountable to the people increases. [\[FN109\]](#) This conception of a global corporate citizen lies in stark contrast to the vision proffered in this piece.

The proposed globalized citizenship model also exists in contraindication to the liberal idea(l) of citizenship that embraces the notion that human beings are "atomistic, rational agents whose existence and interests are ontologically prior to society." [\[FN110\]](#) Rather, globalized citizenship is relational and promotes equality and pluralistic participation in all facets of civil existence. It deconstructs "the fiction of effective individual agency," which, in reinforcing the status quo, simply fortifies and bolsters the location of the powerful in social, political and economic circles and veils the disempowerment of the marginalized. [\[FN111\]](#)

The globalized citizenship construct addresses not only social, economic and political inequalities, but also accounts for varied cultural concerns\*1030 and circumstances within which real people live their real existence. In this regard, the emancipatory potential of globalized citizenship lies not just in its embrace of individual rights, but also of culture, community and society. Unlike the liberal view of citizenship, globalized citizenship is not about individuals as isolated from social or political conditions, but rather as part of them--about humans' relational spaces. As such, a globalization from below model of globalized citizenship requires new ways of thinking about civil society. The either local or global dichotomy needs instead to become a third way in which we think and act globally--both locally and globally--so that interests and rights movements can connect across and within local and global lines.

Just as the un-reconstituted human rights model reflects Western values, [\[FN112\]](#) the popular market notion of globalization, which is effecting gross economic disparities and thus affecting the enjoyment of full citizenship rights, is one that reinforces and confirms the Western liberal preference for markets over state lines. [\[FN113\]](#) Ironically, this preference for deterritorialization of activity and denationalization of identity supports the erasure of the national borders constitutive of traditional claims of citizenship--a foundational concept that supports the connections engendered by the globalized citizenship idea. An erasure of territorial borderlands by market globalization creates a tension with the liberal view of the citizen as atomistic, individualistic and wedded to those transcended territorial borders. [\[FN114\]](#) Indeed, the deterritorialization of states effected by the globalization of markets, along with the impairment of sovereignty effected by human rights norms, effectively has blurred the notion of citizenship as a condition of membership specific to the nation-state and enabled the \*1031 crafting of the globalized citizenship idea as a human counterbalance to economic market forces.

Powerful economic actors have a newfound claim in and control of the means of production and the flow of capital, formerly the province of state sovereigns. [\[FN115\]](#) First-world states have developed internal third-worlds consisting of inner cities, new under-classes, racial and ethnic minorities, politically disenfranchised and economically marginalized persons. Third-world states are increasingly dependent on the exportation of labor to the first-world or importation of industry into its territory--in both cases subjecting its peoples to substandard wages and exploitative working conditions. [\[FN116\]](#)

Significantly, the first-world's opening and broadening of financial markets and industry in the third-world effect a cultural and economic "exim" (export/import) process in which the values and desires of the powerful North and West (mostly the United States) are implanted on the South and East. Such market expansion has an impact on individual lives and on human capabilities. If the economic globalization discourse adopted a critical perspective, existing narratives would be broadened to include stories beyond those about mass capital transfers. A critical chronicle would also expose the effects of social globalization--such as the transmigrations of customs, languages and religious and cultural practices that follow the flow of persons who follow the flow of money; the widening gap between the rich and poor and the erosion of cultures and families. [\[FN117\]](#)

The more persons, culture and capital travel and become diffused and no longer bound to territorial borderlands, membership in more than one community--even more than one political community--becomes inevitable. The migrations and relocalizations of members of national, ethnic, religious, sexual, racial and gender groups outside of clearly defined national territorial borders will result in international and transnational communities that exist without respect to nation-state boundaries, resulting in changing concepts and boundaries of accountability. Thus, social globalization, particularly the aspect of movement of persons across myriad borders, facilitates the formation of multiple alliances and perhaps broad political interconnections. As citizenship becomes an increasingly deterritorialized concept, its nexus to and communion with a nation-state will continue to erode.

As Boaventura de Sousa Santos says in reply to the question "who needs Cosmopolitanism? . . . Whoever is a victim of intolerance and discrimination needs tolerance, whoever is denied basic human dignity needs a community of human beings; whoever is a not-citizen needs world citizenship \*1032 in any given community or nation." [\[FN118\]](#) A globalized citizenship model that emerges from a critical intervention into the human rights model shifts the concept of citizenship from a state-based model to a deterritorialized rights-, interests- and identity-based one. Such a construct provides a remedy to the moral flaw of sovereignty that allows a state to disregard its disempowered and marginalized citizens as well as to the myopic disingenuity of economic market globalization that is eroding equality and justice around the world and benefiting only corporate, official and even state elites. Thus, globalized citizenship can form part of a subaltern cosmopolitan legality that opens the door to emancipation by creating aspiration- and rights-based bonds, and thus collectives of interest, unbound by territorial lines or limitations.

Notions and forces of the new model of globalized citizenship are not synonymous with westernization, with the privileging of elites from the peripheral spaces, with the visible portions of global market economies or singularly with economic growth. Rather, the new globalized citizenship model embraces and incorporates the international human rights idea of personhood and dignity. Globalized citizenship is a paradigm based on attributes of human beings qua human beings, recognizing that the fulfillment of personhood is indivisibly connected to the enjoyment of civil, political, social, economic

and cultural rights of individuals; peace; and a healthy environment, as well as to individuals' participation in civil society. In short, globalized citizenship constitutes the proverbial bundle of sticks that belongs to persons because they are human beings.

This idea is both a construct and a methodology. It allows the evaluation of the tension between the weakening of the state and correlative erosion of sovereignty effected by the small-government-seeking, free-market-promoting, neoliberal policies effected by globalization on the one hand, and the need for a strong efficient state that can promote and protect human rights, including antipoverty measures, employment, education, justice and the rule of law as a primary responsibility of government on the other hand. Globalized citizenship provides the basis for a reconceptualization of policies, instruments and structures of international trade, investment and finance, as well as security, from the bottom up. The analytical framework centers the needs of the people.

To be sure, that the emergence of a global community has eroded sovereignty is beyond peradventure. One prime example is the development of international criminal responsibility. While the concept of individual accountability was first seen in the Nuremberg Tribunal, it recently reemerged with the International Criminal Tribunal for the Former Yugoslavia <sup>\*1033</sup> [FN119] (ICTY) and the International Criminal Tribunal for Rwanda [FN120] (ICTR) and culminated with the International Criminal Court [FN121] (ICC). It is also reflected in the unacceptability of unilateralism, plainly seen in the virtually universal condemnation of President Bush's Military Commission as a means to bring justice to the September 11 terrorists. [FN122]

Globalized citizenship is complementary to Westphalian citizenship. [FN123] It is part of a counter-hegemonic project that protects persons where the Westphalian state fails. [FN124] It is a citizenship pendent to our humanity that embraces an ethic of care [FN125] collectivity and commonality while recognizing and embracing our differences rather than an ethic of competition, adversity and conflict--concepts involved in both their actual and metaphoric significations.

In sum, globalized citizenship constitutes a politics of resistance to oppression and subordination. It uses the human rights structure to instrumentalize the state or civil society on behalf of social responsibility, eradication of poverty, education and sustainability. It organizes peripheral actors, regardless of geographic location, along coherent lines of rights, identities and interests across as well as within borders. The human rights structure enables and facilitates mobilization along these coherent lines.

<sup>\*1034</sup> As such, globalized citizenship makes possible human development and human flourishing, as well as participation and consent. It promotes real democracy by facilitating people's voices in cogent contexts. A globalized citizenship paradigm embraces human rights as indivisible and inalienable. It promotes justice by insisting on a pluralistic rule of law that is knowable and obeyable by all, that is transparent and in which there is true and ultimate accountability.

Globalized citizenship does for people what economic globalization did for corporate interests. It provides a deterritorialized location of empowerment and solidarity. Rather than free market and neoliberalism, human rights are its foundational policy. It provides a structure--a constitutive base--for the global civil society that seeks equality and justice. Globalized citizenship also demands that the state reenter the global conversations about resources, rights and people. These conversations have recently been monopolized by elite corporate actors and have excluded state actors. But like global governance, [FN126] globalized citizenship rejects a state-centric concept of world politics and of citizenship, focusing instead on the international human rights ideal.

These movements are by necessity "glocal"--both global and local--as they will often be based on local need shared throughout the globe. [\[FN127\]](#)

A globalized citizenship model centrally maps human rights, delimits sovereignty, redefines legitimacy of states under the rule of law and the concept of territoriality and revalorizes humanity irrespective of borders or boundaries. Such globalized citizenship marks the expansion of an international civil society. Although at present it may be a contested space, it represents a space where subaltern communities--within and without national borderlands--can gain visibility and protections as members of a newly constituted polity. The needs of individuals and groups who find themselves in the midst of a new world geography will not be defined exclusively within nation-state borders. As members of our own countries, of our varied communities and also of a transnational citizenry--workers, women, native/first peoples, ethnic, racial and sexual minorities, children, and subaltern groups-- we can draw on international alliances to better their conditions, to ensure participation and to assure that a democratic principle of citizenship takes into account the varied cultural environments and circumstances in which people exist.

This global citizenship model can come to life by analyzing concrete examples of marginalization, oppression, subordination and disempowerment. \*1035 As has been suggested, globalization can take the traditional route of the hegemonic first-world state exporting products and values, but it can also take form with the subaltern moving in and sharing the spaces formerly occupied by the hegemon.

#### V. The Guantánamo Case

The case of the prisoners in Guantánamo Bay's Camps X-Ray and Delta provides a vivid and disheartening example of how the rights of the powerless can be compromised by those in power. It also provides an opportunity to examine how the embrace of a globalized citizenship model that is deterritorialized, relational and identity-based can be of utility in engaging the problematic nature of unequal power relations. In Guantánamo Bay, the captives have entered into an asymmetric encounter with a dominant national culture--the United States, possessor of massive hegemonic power both domestically and internationally, locally and globally.

To be sure, the events of September 11, 2001 had a transformative effect on life and society in the United States and the world. [\[FN128\]](#) On that day, nineteen men, whose presence within U.S. territorial borders ranged from the illegal to the mysterious, armed themselves with box-cutters and hijacked four civilian aircraft. These men strategically turned the four planes into "human-controlled jet-fueled missiles of mass destruction" by flying two into the twin towers of the World Trade Center in New York City and one into the Pentagon, outside of Washington, D.C. [\[FN129\]](#) Although the hijacking of a fourth plane was successful, passengers thwarted the hijackers' efforts to use it as a weapon for mass destruction. These brave passengers made the plane crash in a field in Pennsylvania without taking casualties beyond the persons aboard.

The perpetrators were not state actors. Rather, they were members of Al Qaeda, a group that apparently worked with the Taliban, a rebel group that controlled about eighty percent of Afghanistan but was not recognized as its government by the global community except for Saudi Arabia, the United Arab Emirates, and Pakistan. These Al Qaeda criminals, some of whom trained as pilots in U.S. flight schools, were immediately and universally labeled as terrorists for their heinous acts.

An estimated 6,333 people were immediately missing and, eventually, almost 3,000 were declared dead, including foreign citizens from sixty-five countries. With these occurrences, the United States, the sole surviving superpower in the twenty-first

century, was transmogrified from a safe state to a besieged one--from a state where security and even invulnerability were presumed to one permeated by fright, incertitude and anxiety. The United States, promptly joined by the global community, labeled the events of September 11 as an act of war. This designation elides Al *\*1036* Qaeda's criminal acts with (possibly legally justifiable) acts of war--an elision that may carry legally problematic consequences as will be discussed below.

Global response to the attacks was fast and virtually uniformly expressed as solidarity with and support for the United States. For example, NATO invoked Article 5 of its founding treaty, a mutual defense clause stating that an armed attack against any of the allied nations in Europe or North America shall be considered an attack against all of them. [\[FN130\]](#) The day after the attack, many governments of the world expressed both shared aims with the United States and against terrorism. Thus, the Bush Administration began an effort to form a coalition against terrorism. This endeavor received overwhelming support, including the support from such surprising sources as Pakistan, Saudi Arabia, North Korea, Egypt and Kazakhstan. Moreover, states that had recognized the Taliban as Afghanistan's legitimate government quickly severed their ties, thus ending recognition. By the end of September, 2001, even the Chinese government, who was originally seriously concerned about sovereignty issues, expressed strong support for the U.S. war on terrorism, and even for limited military strikes. Such cooperation, however, did not come without a price. For example, in order to obtain Russia's support, the United States ceased its open condemnation of Russia's massive human rights violations in Chechnya, including its armed incursions into territory that sought to be independent, ostensibly subordinating human rights to security needs possibly in violation of the Article 4 of the ICCPR. [\[FN131\]](#)

On September 18, 2001, the Bush Administration advised a joint session of Congress that Al Qaeda was responsible for the attacks. On October 7, 2001 the war against terrorism took a significant turn when U.S. *\*1037* military forces launched Operation Enduring Freedom. This operation consisted of U.S.- led air strikes with British participation in Kabul, Afghanistan, which targeted forces associated with Al Qaeda or with the Taliban leadership under Mullah Muhammad Omar.

Yet, while the popular narrative is that September 11 transfigured life as we knew it in the United States, the reaction to those events reflects historical patterns of targeting "others." Both the domestic and international responses by the United States are of questionable legality, but nonetheless are being pursued and imposed because the United States has the power to do so. For example, the domestic legal response to these heinous acts has been, and continues to be, to unconstitutionally target immigrants based on their sex, national, racial, religious, ethnic and even political identities--specifically Muslim men of Middle Eastern descent, [\[FN132\]](#) designations that also are patently illegal under international law. Even if this war against terror could legitimately be considered a war, and it certainly can be considered a state of public emergency, such targeting is in breach of the standards of derogation. As the ICCPR makes clear, rights cannot be derogated from "solely on the grounds of race, colour, sex, language, religion or social origin." [\[FN133\]](#)

On January 11, 2002, the United States transferred the first group of captives from Afghanistan to the U.S. naval base in Guantánamo Bay, Cuba. The Pentagon described the complex evaluation process used to ascertain which captives are sent to Guantánamo Bay. First, U.S.-led coalition soldiers, based on available information of direct combat, detain those posing a threat to the United States and coalition forces. Next, captured *\*1038* individuals are sent to a central holding area, where a military screening team reviews available information, including interviews with detainees. The military screening team assesses whether the detainee should continue in detention, or

be transferred to Guantánamo Bay. A general officer then makes a third assessment of enemy combatants who are recommended for transfer, including assessing "the threat posed by the detainee, his seniority within hostile forces, and possible intelligence that may be gained from detainee through questioning . . . ." [\[FN134\]](#) Once that determination is made, U.S. Department of Defense (DOD) officials review the proposed transfer. An internal review panel passes the information and evaluates the propriety of the transfer. Upon the detainee's arrival at Guantánamo Bay, there is a "very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released or transferred to the custody of a foreign government consistent with [U.S.] security interests." [\[FN135\]](#) Each case is reviewed by a team and assessed according to the threat posed to U.S. national security interests. Information revealed during questioning is constantly reviewed and analyzed to assess reliability. The U.S. Southern Commander, or his/her designee, makes a recommendation on each case based on the threat posed. The recommendations are sent to the Pentagon, where a panel of experts collects information and makes recommendations on release, transfer to foreign government or continued detention. These recommendations are sent to an interagency expert group composed of members of the DOD, Department of Justice, including the Federal Bureau of Investigations, the Central Intelligence Agency, the Department of State, the Department of Homeland Security and the National Security Staff. Once there, each expert votes on the recommendation and the entire package is sent to the Secretary of Defense or his/her designee for review. The decision then finally is made as to release, transfer or continued detention. [\[FN136\]](#)

Despite this process, the images are troubling. Pictures of the transferred Taliban-Al Qaeda captives in shackles, either hooded or wearing black-out goggles, in prison jumpsuits and sometimes brought to their knees, generated protests from around the world and from within the United States. Over two years later, the prisoners, at least three of whom were minors, remain in chain-link cages and are allowed only twenty minutes of activity three times a week. They are limited in their communication with each other and the outside world. Such treatment, either viewed separately or collectively, conceivably constitutes violations of international law.

*\*1039* Notwithstanding these conditions, the United States insists that the captives are well cared for and have their physical and spiritual needs met. Despite these official assertions and even allowing for the necessary accommodation of religious practice, some reports suggest that prisoners are forced to stand, hooded, with arms raised and chained to the ceiling, their feet shackled, unable to move for long periods and sometimes naked. [\[FN137\]](#) Over six hundred persons from forty-two states currently held in Guantánamo Bay are approaching their second anniversary in captivity, without any trial. [\[FN138\]](#) Many have been found to have no ties to terrorism, Al Qaeda or the Taliban.

A global source of contention was President Bush's unilateral announcement on the status of the prisoners. Ignoring established procedure, President Bush declared that the third Geneva Convention [\[FN139\]](#) would apply to the Taliban, but not to the Al Qaeda detainees. [\[FN140\]](#) The President declared that neither group would be granted prisoner of war status. [\[FN141\]](#) Instead, he unilaterally has labeled the captured as unlawful combatants--a term unknown in international law--lacking protected status in international law. He has kept the prisoners incarcerated in Guantánamo Bay, all the while denying them the procedural and substantive rights to which they are ostensibly entitled under international law pursuant to the Geneva Conventions and other human rights instruments. Having made these unilateral designations, the United States has failed to hold hearings to determine the legal status of the detainees as required by the third Geneva Convention. [\[FN142\]](#) It is precisely because of possible ambiguities

concerning \*1040 the status of a person captured during armed conflict that Article 5 of the third Geneva Convention specifically provides that:

[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. [\[FN143\]](#)

Holding persons in Guantánamo Bay without clarification of their status as required by the Geneva Conventions, and without any reasoned explanation, weakens international humanitarian law. [\[FN144\]](#)

The United States, no longer very credibly after the Abu Ghraib photos, [\[FN145\]](#) promises to treat captives humanely as it flouts accepted international norms and ignores the global demands for the captives to be treated according to the Geneva Conventions, which are binding not only under conventional law but also as customary norms. While disregarding the law, the United States also unilaterally claims the power of the law--seemingly becoming the sole arbiter of which accepted norms it will follow and which it will discount. The United States has asserted that it is entitled to hold the detainees without trial, even after acquittal, until the end \*1041 of the war against terrorism--the international standard applicable to enemy combatants captured during the course of a war.

Some already have questioned the legality--both procedural and substantive--of the Guantánamo Bay detentions. For example, the United Nations Working Group on Arbitrary Detentions concluded that the U.S. failure to have an international body ascertain the captives' status and grant them a fair trial, as provided for under the third Geneva Convention, signified that the captive's detention was arbitrary. [\[FN146\]](#) The Working Group also noted that even if a competent tribunal invalidated prisoner-of-war status for the detainees, the guarantees of the ICCPR, which would automatically become effective, would be violated. [\[FN147\]](#)

It is noteworthy that the Inter-American Commission on Human Rights (IACHR), an organ of the Organization of American States of which the United States is a member, requested by letter dated March 12, 2002 that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent Tribunal." [\[FN148\]](#) The United States responded by claiming that "the legal status of the detainees is clear, that the IACHR does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the Commission lacks authority to request precautionary measures of the United States." [\[FN149\]](#) In reply, the IACHR reasserted its authority to request precautionary measures citing Article 5 of the third Geneva Convention [\[FN150\]](#) and Article XVIII of the American Declaration of the Rights and Duties of Man. [\[FN151\]](#) The IACHR claimed the right of:

\*1042 human rights supervisory bodies such as this Commission [to] raise doubts concerning the status of persons detained in the course of an armed conflict, as it has in the present matter, and require that such a status be clarified to the extent that such clarification is essential to determine whether their human rights are being respected. In light of the principle of efficacy, it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status. [\[FN152\]](#)

Until recently, legal challenges to the U.S. Guantánamo Bay detentions have been unsuccessful. In *Rasul v. Bush*, [\[FN153\]](#) two British, one Australian and twelve Kuwaiti nationals who were captured in Afghanistan challenged their Guantánamo Bay detentions in United States federal district court. [\[FN154\]](#) The District Court dismissed the detainees' petition for habeas corpus, ruling that foreigners held by the United States outside of its sovereign territory could not seek habeas relief in U.S. courts because U.S. courts lack jurisdiction in foreign territories. Commentators have already shown the incoherence of denying jurisdiction in territory that is clearly under U.S. control. [\[FN155\]](#) Moreover, using the Nuremberg Tribunal's recognition of jurisdiction to prescribe, adjudicate, and enforce based on legal occupation, the U.S. ostensibly legal (although contested) occupation of Guantánamo Bay should suffice for the federal courts to exercise their jurisdiction to adjudicate with respect to persons detained there. [\[FN156\]](#)

Some answers as to the legitimacy of the U.S. Guantánamo Bay detentions are now available, although short on detail. The United States Supreme Court heard the cases of *Rasul v. Bush* [\[FN157\]](#) and *Al Odah v. United States*, [\[FN158\]](#) specifically asking "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" [\[FN159\]](#) Distinguishing precedent, the Court decided that U.S. courts have jurisdiction to adjudicate the constitutional and statutory legality of the continued U.S. detention of persons in Guantánamo Bay. [\[FN160\]](#)

Significantly, because the legacy of Nuremberg confirms that what a state does on its own soil to its own citizens matters, it is only apt that the U.S. Supreme Court also decided the cases of *Hamdi v. Rumsfeld*, [\[FN161\]](#) and *Rumsfeld v. Padilla*. [\[FN162\]](#) *Hamdi* concerned a U.S. citizen captured on the battlefield in Afghanistan, labeled an enemy combatant and detained in Navy brigs first in Norfolk, Virginia and later in Charleston, South Carolina. [\[FN163\]](#) *Padilla* concerned the so-called "dirty bomber," a U.S. citizen arrested in Chicago after returning from a trip to Pakistan, on the allegation that he planned to detonate a dirty bomb in the United States. [\[FN164\]](#) *Padilla* was designated an enemy combatant and held at a Navy brig in Charleston, South Carolina. [\[FN165\]](#)

In *Hamdi*, the Court asked "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" [\[FN166\]](#) In its holding, the Court concluded "that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." [\[FN167\]](#) The Court rejected the government's contention that the enemy combatant status "justifie[d] holding \*1044 him in the United States indefinitely--without formal charges or proceedings." [\[FN168\]](#) The Court formally noted that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." [\[FN169\]](#) Thus, a citizen being held as an "enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." [\[FN170\]](#)

In *Padilla*, the Court only reached the question of whether petitioner had filed for habeas in the appropriate district. [\[FN171\]](#) Because it concluded that he had not, the Court did not reach the issue of whether the President had authority to detain him indefinitely. [\[FN172\]](#) In his dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, would have found jurisdiction. The dissent noted that "this case is singular not only

because \*1045 it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen." [FN173] Considering the Secretary a proper custodian for habeas purposes, the dissent found that the petitioner properly filed for relief in the Southern District of New York. [FN174] The dissenting justices acknowledged that reasonable jurists might differ on whether Padilla is entitled to immediate release; however, they recognized that there is "only one possible answer to the question whether he is entitled to a hearing on the justification for his detention." [FN175] The dissent compellingly observed:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. [FN176]

In response to the Rasul decision, on July 7, 2004, the DOD issued an order establishing a Combatant Status Review Tribunal (CSRT) to provide the Guantánamo Bay detainees with notice of the grounds for their detention and an opportunity to contest their status as enemy combatants. [FN177] \*1046 To be sure, the Court ruled that federal courts had jurisdiction to hear challenges of the Guantánamo Bay detentions; however, the DOD, relying on Justice O'Connor's statements in Hamdi that the fairly informal military tribunal processes established under Army Regulation 190-8 may suffice to satisfy due process requirements, [FN178] established the CSRT with similarly lax standards.

All of these decisions can be viewed as confirming the rule of law's separation of powers, and thus a curb on unfettered Executive power unilaterally to deprive persons--citizens and noncitizens alike--of any semblance of due process. Thus, it is encouraging that the Supreme Court exercised oversight of the Executive in hearing these detention cases because it is plain that foreign courts feel they lack power to rule on these matters even where their own citizens are concerned. For example, in Britain, the family of a British national, Feroz Ali Abbasi, who was captured by U.S. forces in Afghanistan and was transported to Guantánamo Bay, initiated proceedings based on the claim that one of his fundamental human rights, the right not to be arbitrarily detained, was being violated. [FN179] At the time of his hearing, Abbasi had been a captive in Guantánamo Bay for eight months without access to an attorney, court hearing or any other form of tribunal. [FN180] Although the British court refused to decide whether the United States, a foreign sovereign, was in breach of treaty obligations or in breach of public international law, it concluded that "in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Abbasi is at present arbitrarily detained in a 'legal black-hole.'" [FN181] Interestingly, since that decision, President Bush, in behind-the-scenes conversations with his British and Australian partners in Operation Iraqi Freedom, has apparently agreed that neither British nor Australian citizens incarcerated in Guantánamo Bay will be subject to imposition of the death penalty. [FN182]

Similarly dissatisfied with U.S. processes are Swedish authorities who have expressed to the United States their belief that Mehdi Ghezali, the only Swedish prisoner held in Guantánamo Bay, had no involvement with \*1047 illegal behavior before his arrest. Notwithstanding the U.S. agreement with Sweden regarding Ghezali's activity, it refuses to release him for failure to cooperate with authorities. [FN183]

In a March 15, 2004 press release, the U.S. Department of Defense (DOD) announced it had transferred twenty-three Afghani and three Pakistani detainees from Guantánamo Bay for release. [\[FN184\]](#) A week earlier, on March 9, 2004, the DOD had announced that it transferred five British detainees from Guantánamo Bay to the British government. [\[FN185\]](#) The British government had agreed to accept the transfer of the detainees and take responsibility that they do not pose a threat to the security of the United States or its allies. Currently, 119 detainees have been released and 12 others transferred for continued detention (four to the Saudi Arabian government, one to the Spanish government, seven to the Russian government). As of March 15, 2004, there remain approximately 610 detainees in Guantánamo Bay. [\[FN186\]](#)

The freed British detainees have charged that they suffered inhumane treatment at the hands of their captors, including beatings and interrogations at gunpoint and other degrading treatments. The detainees claimed that after their capture they were taken to a detention center in Kandahar where "they were forced to kneel bent forwards for hours with their foreheads touching the ground." [\[FN187\]](#) Moreover, they leveled claims of guards kicking and punching detainees, and further alleged many captives were suffocated as a result of having been forced into lorry containers. Further, former detainees described instances of botched medical treatment, psychological torture and unreasonable confinement, such as being shackled for up to fifteen hours with the restraints cutting into their skin.

**\*1048** In addition, released detainees complained of the condition of detention--wire cages open to the elements in which the captives claimed that they were exposed to "rats, snakes and scorpions." [\[FN188\]](#) They further alleged that the diet provided consisted of "porridge and fruit," some of which was out of date for up to ten years, which resulted in malnourishment. [\[FN189\]](#) Finally, they raised claims of "U.S. soldiers bringing in prostitutes and parading them naked in front of Muslim prisoners." [\[FN190\]](#) The Pentagon dismisses the charges as "lies" and insists that all detainees are being, and will continue to be, treated humanely. [\[FN191\]](#) These dismissals post-Abu Ghraib and in light of the Gonzales memo on torture [\[FN192\]](#) are not, on their face, fully credible.

On November 13, 2001, President Bush, as Commander-in-Chief, issued a Military Order (Order) that created Military Commissions to try foreign nationals "for violations of the laws of war and other applicable laws" related to acts of international terrorism. [\[FN193\]](#) The Order applies to acts that have "adverse effects on the United States, its citizens, national security, foreign policy, or economy." [\[FN194\]](#) The Order imposes no time limit, and it originally contemplated that "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" would not apply. [\[FN195\]](#)

**\*1049** One prominent commentator has noted that "[i]n its present form and without appropriate congressional intervention, the Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges." [\[FN196\]](#) The President's power as Commander-in-Chief to set up such commissions is only applicable during "war within a war zone or relevant occupied territory [here, Afghanistan] and apparently ends when peace is finalized." [\[FN197\]](#) "However, outside of the occupied territory [of Afghanistan], . . . military commissions can only be constituted in an actual war zone and can only prosecute war crimes." [\[FN198\]](#) The Guantánamo Bay Naval Base in Cuba is neither a war zone nor occupied territory.

The Order, which provides only for review by a military panel and thereafter only by the President or Secretary of State, does not comport with the right of review as articulated

in the ICCPR that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." [\[FN199\]](#) Rejecting criticism from around the globe for noncompliance with international substantive and procedural requirements, it is the position of the United States, that "[t]he law of armed conflict makes no provision for judicial review of the detention of enemy combatants who are detained during hostilities solely to take them out of the fight." [\[FN200\]](#)

On a positive note, the criticisms have resulted in some changes to the procedures as originally contemplated. In July 2003, an international law scholar commented that the military tribunal process "take full account of modern standards of international humanitarian and human rights law." [\[FN201\]](#) This view, however, is not universally embraced; rather, it is highly contested.

To be sure, the rules now require a unanimous verdict by a seven-member panel for the death penalty, provide that a suspect is presumed innocent, require guilt to be established by proof beyond a reasonable doubt, allow the accused to have military lawyers at government expense or to hire their own civilian lawyers at their own expense and allow the *\*1050* press to cover most proceedings. [\[FN202\]](#) Nonetheless, questions still exist as to the Military Commissions' conformance with international and domestic substantive and procedural justice requirements. [\[FN203\]](#) For example, the applicable rules of evidence for military tribunals are less onerous than for either civilian trials or military courts-martial, where strict rules apply. Specifically, the Military Commissions allow evidence that "would have probative value to a reasonable person," thereby applying a much weaker standard. [\[FN204\]](#)

Except for death penalty cases, a finding of guilt can be established by the concurrence of two-thirds of the Military Commission panel, which is comprised of "at least three but no more than seven members." [\[FN205\]](#) This procedural standard follows the two-thirds vote requirement in noncapital cases and unanimous vote requirement in courts-martial, but the composition of courts-martial for "serious offenses"--arguably a description of all the offenses triable by the Military Commissions--require at least five military members. On the other hand, the Military Commissions' requirements are weaker than those in civilian federal courts, in which the jury is composed of twelve members of the community drawn at random and in which a unanimous decision is required to convict in all cases, including capital cases.

Other troubling aspects of the Military Commission trial structure persist. For instance, Military Commission Order No. 3 allows the monitoring *\*1051* of communications between detainees and their counsel "for security or intelligence purposes," [\[FN206\]](#) although supposedly the information could "not be used in proceedings against the individual who made or received the relevant communication." [\[FN207\]](#) In some cases, captives and their civilian lawyers may be denied access to evidence used in trial. Further, counsel may also be required to reveal information learned from clients concerning further criminal activity.

In addition, the reconfigured rules still do not provide any process for independent appeals, continue to deny habeas review and keep the entire process within the military. [\[FN208\]](#) Following the panel's delivery of a verdict and imposition of a sentence, the Appointing Authority conducts an administrative review of the record and may return the case to the Military Commission. [\[FN209\]](#) Thereafter, a three-member review panel of military officers, which may include civilians commissioned for such purposes, reviews the record for "material error of law." If such error exists, the case is sent to the Appointing Authority for further proceeding; if no material error of law exists, the review panel forwards the case to the Secretary of Defense with a recommendation as to disposition. In turn, the Secretary of Defense reviews the trial record and the panel's

recommendation and either returns the case for further proceedings or, absent a presidential designation granting the Secretary of Defense final decision-making powers, forwards the case to the President for his review and final decision. The final decision-maker--either the President or the Secretary of Defense as his designee--"may approve or disapprove findings, or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof." [\[FN210\]](#) It is significant to highlight that these Military Commission procedures fail to provide the safeguards of appeals that are available in courts-martial, which provide for an appeal to the Military Court of Criminal *\*1052* Appeals or the Court of Appeals for Armed Forces and then possibly the U.S. Supreme Court. [\[FN211\]](#)

With these rules in place, it appears that some captives will finally be brought to trial by the Military Commissions. On July 7, 2004, the DOD announced that the President determined that nine more enemy combatants would be subject to his November 13, 2001 military order, bringing the total to fifteen detainees eligible for trial by military tribunal. [\[FN212\]](#) On July 3, 2003, six detainees were determined to be subject to the military order. [\[FN213\]](#) Of the original six, charges were brought against only two of them. [\[FN214\]](#)

Unlike the limited definition of war crimes that existed at Nuremberg, the concept of crimes of war has expanded. The U.S. DOD Military Commission Instruction No. 2, a document created in April, 2003 to provide guidance with regard to the offenses (and the elements thereof) for which the detainees may be charged, lists eighteen offenses under a category titled "Substantive Offenses," which includes many of the crimes included in the Tribunal Charter [\[FN215\]](#) as well as in the ICTY, [\[FN216\]](#) ICTR [\[FN217\]](#) and *\*1053* ICC [\[FN218\]](#) statutes. Specifically, Instruction No. 2 lists the following as war crimes: willful killing of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons as shields, using protected property as shields, torture, causing serious injury, mutilation or maiming, use of treachery or perfidy, improper use of flag of truce, improper use of protective emblems, degrading treatment of a dead body and rape. [\[FN219\]](#) Moreover, Instruction No. 2 lists eight additional substantive offenses which are triable by the military commissions: highjacking or hazarding a vessel or aircraft, terrorism, murder by an unprivileged belligerent, destruction of property by an unprivileged, aiding the enemy, spying, perjury or false statement, and obstruction of justice related to military commissions. [\[FN220\]](#) Further, Instruction No. 2 lists seven offenses for which an individual may be held criminally liable, which include aiding and abetting, solicitation, command/superior responsibility--perpetrating, command/superior responsibility--misprison, accessory after the fact, conspiracy and attempt. [\[FN221\]](#)

Neither of the first--the only two--charged Guantánamo Bay detainees is charged with genocide or crimes against humanity. Rather, their charges are that they conspired and agreed to commit the following offenses: attacking civilians and attacking civilian objects--actions not identified as war crimes, perhaps to avoid the necessity of having the Military Commission decide on the applicability of the Geneva Conventions; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism. [\[FN222\]](#)

Moreover, the detainees may claim prisoner-of-war (POW) status that would entitle them to the protections of the Geneva Conventions. This is important in light of trial by Military Commission because Article 102 of the third Geneva Convention provides that POWs can only be sentenced *\*1054* by the same courts and using the same procedures as would be the case for members of the armed forces of the detaining authority, which in this case is the United States. [\[FN223\]](#) Significantly, as explained above, the Military

Commissions for foreigners do not provide the same safeguards that courts-martial would provide U.S. soldiers. POW designation is limited, however, to members of militias and other corps in the service of a state party to the conflict. Someone not in the service of a state party to the conflict must be commanded by someone responsible for subordinates, have distinctive signage, carry arms, and behave according to laws and customs of war. Al Qaeda members may not be able to qualify for such status absent some connection to a state, which, in this instance, is likely to be Afghanistan.

It is also noteworthy that on March 2, 2004, the Secretary of Defense published a draft of "Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba." [\[FN224\]](#) These rules, it appears, are aimed at diffusing the strong criticism against the United States for holding detainees indefinitely without process. Establishing such rules reiterates the U.S. position that "[t]he law of war permits the detention of enemy combatants until the end of an armed conflict" [\[FN225\]](#)--a period that could be an indeterminate, if not interminable period, particularly in this context in which the enemy is elusive and the "war on terror" defies state boundaries and state actions. Lastly, the draft dictates that the process is wholly discretionary. Accordingly, a review board is established:

[To] reassess the need to continue to detain an enemy combatant at least annually during the course of hostilities. This process will operate in a manner that permits each enemy combatant in the custody of the Department of Defense at the Guantánamo Bay Naval Base to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or to explain why it is otherwise in the interest of the United States and its allies that he be released. [\[FN226\]](#)

#### \*1055 VI. Conclusion: Power, the Rule of Law and Globalized Citizenship

In reviewing the September 11 attacks, and the ensuing war on terror, in the context of human rights, some staggering similarities between the (dismissed) objections to the Nuremberg International Military Tribunal and its Charter by Germany, on the one hand, and to the U.S. post-9/11 processes by the global community, on the other, emerge. The discussion of these similarities is intended not to undermine Nuremberg's legacy, but to acknowledge the elision of politics and law that took place and to suggest that centering globalized citizenship in the analysis would be of great utility to both individuals and the world community interested in its emancipatory potential. At the outset, one important distinction is warranted: sovereign power, whether exercised singularly or collectively, is justified to deliver security, safety, and a good life to people. Notwithstanding the reality that Nuremberg represented the exercise of power by the victors, that exercise was consistent with the underlying purposes of sovereignty. Its aim was to unite persons against the horrible acts that were committed and it served to strengthen international institutions. The U.S. Guantánamo Bay strategy, on the other hand, is polarizing and divisive of international affairs and the proposed Guantánamo Bay structure weakens international institutions of peace and justice. The U.S.-led coalition, in pursuing a military response to 9/11, where the enemy is a "globalized [terror] network rather than a territorial state, or even a political movement associated with a struggle for control or secession affecting a single state," [\[FN227\]](#) has elected not to prioritize the development of international law and United Nations institutional arrangements and not to emphasize the importance, desirability and necessity of building bridges between its global economic and political interests and goals of justice. [\[FN228\]](#)

In both the post-Second World War and the post-9/11 series of events, a victor's justice was imposed on the captives. For Germany, there was no precedent to piercing its sovereignty. With Al Qaeda and the Taliban, there was no sovereignty to pierce. But the

labeling of the post-9/11 events as a war on terror has created a patina of official action and has given nonstate actors a quasi-sovereign status--potentially with legal consequences and legitimizing effects. [\[FN229\]](#)

*\*1056* In Nuremberg, the Tribunal Charter created and defined the crimes after the fact. [\[FN230\]](#) The Court rationalized its judgment on these "new" crimes as legitimate because it concluded that the crimes had previously existed in some form. Similarly, the post-9/11 process has created a new crime by redefining the concept of war. Just as in Nuremberg, there were new crimes for which not only states, but also individuals would be held accountable--now we have a concept of war in which private persons, not state actors, can be responsible. As unlawful combatants, the captured are indeed in a legal black hole with the rule of power creating a new status in law.

The Military Order unilaterally decreed by President Bush is much like the Tribunal Charter, unilaterally drafted by the Allied powers. The Germans decried the Tribunal Charter--its law and process--claiming it violated the rule of law; [\[FN231\]](#) but as the defeated entity, it was without power to ignore or fend off the imposed system of justice. In a perverse twist, the global community, including the IACHR, a body charged with promoting and monitoring human rights, today decries the U.S. failure to follow the rule of law, but the United States possesses the power to ignore the norms to which it has consented. In this context, it is encouraging that the separation of powers and rule of law doctrines were resoundingly embraced by the Supreme Court in its recent Rasul decision. With this Supreme Court precedent as reinforcement, the globalized citizenship ideal, using both procedural challenges and substantive identity corrections, provides international objectors a location in which to unite their voices and create a network that seeks justice for the captives.

There is an ongoing concern that the trials will not be fair and that the U.S. Military Commission alternative will fail to satisfy international standards. The procedures crafted lack transparency and the exclusive military-dominated nature of the process undermines the U.S. commitment to civil liberties and the rule of law. In this regard, it is noteworthy that Pentagon officials have announced that representatives of human rights advocacy groups will not be able to witness the Military Commission trials at Guantánamo Bay, while more than eighty members of the U.S. and foreign press, as well as representatives of the ICRC, will have seats. [\[FN232\]](#) Consideration whether to grant seats to human rights organizations went beyond seating availability, including problems of security and limited housing and food. Nonetheless, "there would probably be arrangements for some members of Congress to attend the trials and perhaps for officials of organizations that represent victims of the Sept. 11 terrorist attacks." *\*1057* [\[FN233\]](#) This move works against those who would be inclined to use the globalized citizenship model to insist on justice.

As a highly regarded human rights scholar has urged

We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law. If we are at war, that war will affect our children's future, and that future--I submit-- is far too important for us, as lawyers, to leave to the politicians and the generals. [\[FN234\]](#)

The question ultimately becomes: how can the captives in Guantánamo Bay benefit from a globalized citizenship model, grounded on human rights principles that refocus the human rights discourse to include the marginalized, the disempowered and the subaltern? A globalized citizenship model would focus on the marginalized and the disempowered, and would lead to more coherent and just results.

In the post-9/11 world, centering the marginalized would take two approaches. One, it would emphasize the ways in which the physical conditions and unilaterally established legal processes are depriving the captives of their ability to claim or enjoy their human rights. In the case of Afghan captives, it is especially critical as they effectively lack a government that can present their claims. Two, it would coordinate the efforts of others also marginalized, such as the global communities--states, nongovernmental organizations (NGOs), intergovernmental organizations (IGOs)--that condemn the United States' disregard of the rule of law.

Even if this were truly war, the United States cannot derogate from certain rights. For example, the imposition of the death penalty would deprive some of the Guantánamo Bay captives of their right to life, some conditions of their captivity could be deemed torturous and the monitoring of their communications with the family and counsel could be a violation of freedom of thought. A globalized citizenship model would draw together persons inside and outside Guantánamo Bay to clamor for the observance of the rights we all share, but which those in Guantánamo Bay are powerless to express.

The global citizenship idea can help with Guantánamo Bay because its foundational principle is one of a deterritorialized, relational, identity-based citizenship for individuals. That perspective allows for the formation of a global network of states, nongovernmental organizations (NGOs) and intergovernmental organizations (IGOs) that could unite to assist the \*1058 captives in asserting their rights. The value of such a coalition is clear in events that have already transpired with respect to some Guantánamo Bay captives. For example, both Britain and Australia have apparently secured President Bush's agreement not to impose the death penalty in the military tribunals of their nationals, thereby assuring their right to life.

Also, the Center for Constitutional Rights (CCR) has brought the Rasul case before the U.S. Supreme Court. [\[FN235\]](#) Although this type of case is not one that the CCR would typically litigate, the CCR clearly articulated its reasoning for filing the suit. First, "[t]he center's role is to take risks, legal and political risks, that other institutions are unwilling to take. . . . The Guantánamo Bay case was a high risk." [\[FN236\]](#) Second, and perhaps of more importance, "the detention case involved a policy that, if left unchecked, . . . could undermine the core mission and traditional work of the CCR itself." [\[FN237\]](#)

Human Rights Watch (HRW) has similarly served as a protector of rights. Responding to the U.S. intent to engage in extreme measures when interrogating some of the detainees, HRW called upon the Bush Administration to "immediately explain who reviewed and approved a high-level classified Pentagon memorandum that sought to justify the use of torture." [\[FN238\]](#) The HRW also has repeatedly called upon the United States to make public the results of their investigations into allegations of abuse in Afghanistan and into the deaths of three detainees--two Afghan detainees who died while in U.S. custody in 2002 and another who died in 2003. [\[FN239\]](#)

\*1059 Also noteworthy in the globalized citizenship paradigm are the efforts of the International Committee of the Red Cross (ICRC). [\[FN240\]](#) Among its many functions, the ICRC "regularly assess[es] the conditions of detention, the treatment of detainees and respect of their fundamental judicial guarantees." [\[FN241\]](#) Thereafter, reports of their assessments are provided to the state involved. As was learned from the Abu Ghraib situation, the ICRC's knowledge is often greater than that of the general public, [\[FN242\]](#) although obviously the responsibility to treat the detainees in accordance with "international humanitarian law" standards remains solely the responsibility of the United States. [\[FN243\]](#) In its Operational Update, dated May 14, 2004, the ICRC noted that it has visited detainees in Guantánamo Bay for over two years and helped detainees relay messages to and from family members--a service that is of significant importance to the

mental well-being of many of the detainees. [\[FN244\]](#) The ICRC's knowledge base can provide incentives for a state to observe accepted norms and bring much needed public attention to alleged violations.

To be sure, the response of organizations concerned with the treatment of Guantánamo Bay detainees, particularly significant in light of the recent allegations of abuse and torture of the prisoners held in Abu Ghraib which has lent new credence to the claims of similar types of treatment in Guantánamo Bay, has been swift. For example, in January of 2004, a new organization was created, Guantánamo Human Rights Commission (GHRC), the stated purpose of which is to "achieve an end to all *\*1060* forms of the internment without trial." [\[FN245\]](#) In an effort to achieve its goal, the organization, with the assistance of the American Civil Liberties Union, the CCR and the National Council of Churches, has taken steps to enable the families of European detainees to go to Washington. [\[FN246\]](#) In addition, GHRC has worked with the relatives of some detainees to petition for the investigation of reports of torture and "demand the immediate repatriation of the remaining four British citizens." [\[FN247\]](#)

Thus, as global networks coalesce around issues of justice to demand that internationally accepted processes be followed and that human rights be recognized, individuals deprived of these rights will derive the benefits of their global citizenship. For example, the IACHR demanded that their process be followed, the CCR brought about the Rasul decision and the ICRC used its access to the conditions in prison to create records. These actions constitute the first steps in an application of the globalized citizenship model that can result in the emancipation of Guantánamo Bay captives who find themselves in an asymmetric encounter with a dominant national culture.

A response to human rights violations, specifically the U.S. response to the heinous acts of September 11, is not only irresponsible but simply wrong if it serves to dehumanize others and to enable the commission of other crimes. The investigation and punishment of human rights violations, such as those of Al Qaeda, should be in the hands of an international coalition that will serve to bring the perpetrators to justice and avoid later crimes. It is true that during war, the courts that serve as the checks on abuses of power of the political branches tend to defer to the political branches on national security matters. It is this very reality, which militates against allowing a process that is unfair or unjust, that suggests it is of paramount importance to invoke an international, coalitional process.

To engage in warfare against sovereign states without a widely accepted basis in law and necessity would be profoundly destructive of prospects for a peaceful and stable world. It would also confirm the fears of many governments, including traditional friends and allies, and of a large segment of world public opinion, that our government acts on its own, that it has a militarist approach to global security, and that its wider project is to achieve global dominance. [\[FN248\]](#)

*\*1061* As James Madison stated in The Federalist No. 51, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." [\[FN249\]](#) This Madisonian paradox of power holds that "organized power is necessary to protect the liberty of citizens from the predations of their fellow citizens or others; but organized power itself poses dangers to liberty." [\[FN250\]](#)

In their recent elections, Spanish citizens demonstrated that democracy indeed works. The Spanish people opposed their leader's involvement in what they viewed as an illegal and illegitimate war, tenuously and disingenuously linked to 9/11, which exposed them to their own 3/11 Al Qaeda terrorist attack. They used their collective individual power to change the direction of their country's policies. They showed how globalized citizenship

can work in a local setting. This example, if followed across the globe, would have the salutary effect of the practice of globalized citizenship. The Spanish people's assertion of democracy as a tool of liberation provides a moving example of how global discontent with the war can unite citizens across the globe, opposed to the nebulous war on terror while still condemning terrorism, to ensure that terrorism is fought by means that respect and promote human rights.

Terrorist acts violate human rights, but the fight against terrorism should not engender human rights violations or violations of the international rule of law. Thus, the globalized citizenship idea could be of great utility in Guantánamo Bay in both a programmatic and an instrumental way. Programmatically, it would permit powerful countries to negotiate on behalf of the persons being held based on shared concerns for the rights violations that they are experiencing, whether based on religion, race or political belief. The current situation limits those powerful countries to negotiate only for their citizens. For example, we have seen Britain's and Australia's successes in negotiating on behalf of their citizens--both in regard to punishment to which their citizens may be subject and concerning their release. Relations based on traits other than territorial bonds could enable other captives to obtain guarantees of their right to life and perhaps even liberty.

Instrumentally, it can be used to form coalitions against injustice. If we are all global citizens, anyone seeking real justice for 9/11 (and 3/11), including those within U.S. borders, can join together to advocate on behalf of the persons being held in Guantánamo Bay. One of the ongoing *\*1062* themes that continues to resonate throughout this war is that if someone questions anything that the administration says or does, then that person is unpatriotic or, even worse, a traitor and a supporter of terrorists and terrorism. That is simply not true; it is only inflammatory rhetoric by the hegemon to instill fear and quash dissent. Rather than resort to such rhetorical tropes, a globalized citizenry can insist on free and open discourse, conversations and actions that are central to a claim of justice.

The treatment of the Guantánamo Bay prisoners is a matter of international, local and human concern. All who strive for justice and equality should demand adherence to the rule of law. Citizens around the world, regardless of territorial allegiances, share their humanity. They can use their voices locally, as the citizens of Spain did, in an impressive show of democratic spirit to demand adherence to the rule of law. Global citizens also can use their collective voices globally to demand similar accountability.

Globalized citizenship also could be instrumental in counterbalancing the U.S. hegemonic control of right and wrong, good and evil. Globalized citizenship as an analytical model deconstructs the U.S. view of the world as "you are either with us or you are against us"--a view that "exaggerates our goodness and our enemies' evil." [\[FN251\]](#) It challenges the U.S. attempt "to recast the world in our image, 'propagating democracy' and imposing our values and institutions on the third world" because the "we" becomes a different "we"--it becomes the globalized citizen, the citizens of the world. [\[FN252\]](#)

#### **Footnotes:**

[\[FN1\]](#). Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. I wish to thank Claire Moore Dickerson, Jane Larson, Pedro Malavet, Bill Page and Sharon Rush for their comments on earlier drafts. I also need to recognize invaluable editorial assistance from Elizabeth M. Crowder (UF Law 2004) and Shelbi Day (UF Law 2002). Finally, mil gracias to Cindy Zimmerman for her editorial and word processing genius.

[\[FN1\]](#). Specifically, the conceptualizations of the limits of sovereignty are that no state (first conceptualization) or individual (second conceptualization) can affirmatively harm a

citizen.

[FN2]. L. Oppenheim, 1 International Law: Treatise § 292, at 368-69 (2d. ed. 1912) (reprinted in International Protection of Human Rights (Louis B. Sohn & Thomas Buergenthal eds., 1973)).

[FN3]. International Military Tribunal (Nuremberg), Judgment and Sentences: Judgment, October 1, 1946, 41 Am. J. Int'l L. 172 (1947) [hereinafter International Military Tribunal (Nuremberg)].

[FN4]. U.N. Charter art. 1 (establishing universal system of human rights protection).

[FN5]. Id. art. 1, para. 3 (explaining purpose and function of Charter).

[FN6]. Louis B. Sohn, The [New International Law: Protection of the Rights of Individuals Rather than States](#), 32 Am. U. L. Rev. 1, 17 (1982) (discussing existence of human rights).

[FN7]. See, e.g., U.N. Office of High Commissioner for Human Rights, International Human Rights Instruments, at [http:// www.unhcr.ch/html/intlinst.htm](http://www.unhcr.ch/html/intlinst.htm) (last visited July 12, 2004) (providing comprehensive list and text of other treaties that serve to define human rights concepts).

[FN8]. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GOAR, 3d sess., Supp. No. 13, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration] (recognizing that human beings are born with equal dignity and rights).

[FN9]. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR] (establishing framework for universal system of human rights).

[FN10]. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR] (promoting and observing human rights that are inherent to all human beings).

[FN11]. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, [19 I.L.M. 33 \(entered into force Sept. 3, 1981\)](#) (establishing that human rights extend equally to men and women).

[FN12]. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 5 I.L.M. 352 (entered into force Jan. 4, 1969) (establishing that human rights extend equally to human beings of all races).

[FN13]. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, [23 I.L.M. 1027](#), modified, [24 I.L.M. 535 \(entered into force June 20, 1987\)](#) (recognizing that certain types of torture and other cruel, inhumane or degrading treatment or punishment are considered human rights violations).

[FN14]. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (acknowledging genocide, regardless of whether committed at times of war, violates human rights).

[FN15]. See, e.g., ICCPR, *supra* note 9, art. 1 (self-determination); id. art. 2 (nondiscrimination); id. art. 3 (sex equality); id. art. 6(1) (life); id. art. 7 (freedom from torture, cruel, inhumane treatment or punishment); id. art. 8 (freedom from slavery,

servitude, forced or compulsory labor); id. art. 19 (freedom of opinion and expression); id. art. 21 (freedom of assembly); id. art. 22 (free association).

[FN16]. See, e.g., id. art. 9 (due process rights); id. art. 12 (freedom of movement); id. art. 23 (family and marriage); id. art. 10 (personhood); id. art. 18 (freedom of thought, conscience and religion); id. art. 25 (participation in government); id. art. 27 (protection of culture).

[FN17]. See, e.g., ICESCR, *supra* note 10, art. 7(a) (fair wages); id. art. 7(b) (safe and healthy working conditions); id. art. 8 (form trade unions); id. art. 9 (receive social security); id. art. 11 (adequate standard of living); id. art. 12 (enjoy physical and mental health); id. art. 13 (receive education); id. art. 15(1) (participation in cultural life).

[FN18]. ICCPR, *supra* note 9, Pmb1.

[FN19]. See, e.g., Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 84-86 (1998) (noting extensive participation of Latin Americans in producing Universal Declaration, foundational document of all later human rights treaties); Linda Bosniak, [Citizenship Denationalized](#), 7 *Ind. J. Global Legal Stud.* 447 (2000) (discussing concept of citizenship identity and solidarity within nation-state); Kathryn Sikkink, [Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practices](#), 19 *Hous. J. Int'l L.* 705 (1997) (discussing transformation and reconceptualization of sovereignty); Kathryn Sikkink, *Transnational Politics, International Relations Theory, and Human Rights: A New Model of International Politics Is Needed to Explain the Politics of Human Rights*, 31 *Pol. Sci. & Pol.* 516, 517 (1998) (arguing for model, called "'neo-medievalism, where non-state actors begin to undermine state sovereignty and a new system with 'overlapping authority and multiple loyalty'"); Ruth Phillips, *Stakeholders on the Periphery of Citizenship in NGO/Corporate Engagement*, July 9, 2003, at <http://www.sprc.unsw.edu.au/ASPC2003/papers/Paper113.pdf> (addressing how northern non-government organization advocacy processes risk leaving some citizens on periphery).

[FN20]. See generally William T. de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (1998) (discussing development and impact of universal human rights from Asian perspective); Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001) (discussing different culture can have different perspectives on purpose and content of human rights); Balakrishnan Rajagopal, *International Law From Below: Developments, Social Movements, and Third World Resistance* (2003) (discussing human rights from Third World perspective); David Kennedy, *Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?*, 15 *Harv. Hum. Rts. J.* 99 (2002) (questioning international human rights origins and inclusiveness); Makau Mutua, [Terrorism and Human Rights: Power, Culture, and Subordination](#), 8 *Buff. Hum. Rts. L. Rev.* 1 (2002) (discussing human rights from post 9-11 context as well as renewed American and European domination); Shashi Tharoor, *Are Human Rights Universal?*, *New Internationalist* No. 332, 2001, at <http://www.newint.org> (questioning whether in our multicultural world, human rights can ever be universal and affective).

[FN21]. *Human Rights in Western Civilization 1600-Present* (John A. Maxwell & James J. Friedberg eds., 1994) [hereinafter *Human Rights*] (citing Jean-Jacques Rousseau, *Social Contract* (G.D.H. Cole ed., 1950)) (reprinting excerpts from many of most significant pieces forming foundation of Western human rights idea, including Magna Carta, Locke's *Second Treatise of Civil Government*, American Declaration of Independence, French Declaration of the Rights of Man and Citizen, Burke's *Reflections on the Revolution in France* and Paines' *The Rights of Man*).

[FN22]. See ICCPR, *supra* note 9, art. 4(1).

[FN23]. Id. art. 4(2).

[FN24]. Id. (referring to articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18).

[FN25]. U.N. Charter, supra note 4.

[FN26]. Charter of the International Military Tribunal, Aug. 8, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> [hereinafter Tribunal Charter] (establishing International Military Tribunal to hear trials and punish war criminals of European axis and articulating crimes and appropriate punishments).

[FN27]. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) [hereinafter Hague Convention] (prohibiting certain methods of waging war).

[FN28]. Kellogg-Briand Pact, Aug. 27, 1928, available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> (providing for renunciation of war as instrument of national policy).

[FN29]. See Tribunal Charter, supra note 26, art. 6(a) ("namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing").

[FN30]. See id. art. 6(b). This article states:  
namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]  
Id.

[FN31]. See id. art. 6(c). Article 6(c) states:  
namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated[.]  
Id.

[FN32]. There are four conventions known collectively as the Geneva Conventions of 1949. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12, 1949, [6 U.S.T. 3114](#), 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, Aug. 12, 1949, [6 U.S.T. 3217](#), 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 6 U.S.T. 3616, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287 (entered into force Oct. 21, 1950). Additionally, there are two protocols known as the 1977 Protocols to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609

(entered into force Dec. 7, 1978) [hereinafter Protocol II].

[FN33]. London Agreement, Aug. 8, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (agreement by United States, Provisional Government of French Republic, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics for prosecution and punishment of major war criminals of European Axis).

[FN34]. Id. art. 1 (" There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities."); id. art. 2 ("The constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement."); see also Tribunal Charter, *supra* note 26, art. 6 ("The Tribunal established by the Agreement ... for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations ....").

[FN35]. See Tribunal Charter, *supra* note 26, *passim*.

[FN36]. See id. art. 2 ("The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories.").

[FN37]. See id. art. 6. Article 6 states:  
The Tribunal ... shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility .... Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Id.; see also id. art. 7 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); id. art. 8 ("The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

[FN38]. See id. art. 6(a). For a list of those crimes, see *supra* note 30 and accompanying text.

[FN39]. See Tribunal Charter, *supra* note 26, art. 6(c). For a discussion of the Geneva Conventions, see *supra* note 32 and accompanying text.

[FN40]. For the language of that requirement, see *supra* note 31 and accompanying text.

[FN41]. See Tribunal Charter, *supra* note 26, art. 6. For further discussion, see *supra* notes 30-32, 38 and accompanying text.

[FN42]. See Tribunal Charter, *supra* note 26, art. 7. For a discussion of the individual responsibility aspects, see *supra* note 37 and accompanying text.

[FN43]. See Tribunal Charter, *supra* note 26, art. 8. For further discussion, see *supra* note 38 and accompanying text.

[FN44]. ICCPR, *supra* note 9, art. 15(1).

[FN45]. See International Military Tribunal (Nuremberg), *supra* note 3, at 217 (citing Tribunal Charter, *supra* note 26).

[FN46]. See *id.* at 224.

[FN47]. See *id.*

[FN48]. See *id.*

[FN49]. Anthony D'Amato, Law and War: A Doctrine of Deterrence, 35 U.N. Chron. 52, 52-53 (1998) (discussing legal fallacy of "total war").

[FN50]. See International Military Tribunal (Nuremberg), *supra* note 3, at 216 (citing Tribunal Charter, *supra* note 26).

[FN51]. *Id.*

[FN52]. *Id.* at 216-17.

[FN53]. See *id.* at 216 (noting view of Tribunal Charter in Nuremberg Tribunal).

[FN54]. See *id.* at 217 (discussing Pact which "condemned recourse to war for the future as an instrument of policy" and noting implications of signing Kellogg-Briand Pact).

[FN55]. See *id.* at 218 (describing war as illegal in international law with criminal consequences).

[FN56]. See *id.* (asserting war "has become throughout the entire world ... an illegal thing" because of Kellogg-Briand Pact; quoting Mr. Henry L. Stimson, Secretary of State of United States).

[FN57]. See *id.* (noting Nuremberg Tribunal's reliance on Hague Convention of 1907).

[FN58]. See *id.* (citing Hague Convention, *supra* note 27).

[FN59]. See *id.* (explaining that certain methods of warfare had been outlawed as early as 1907).

[FN60]. See *id.* (citing Hague Convention, *supra* note 27).

[FN61]. See *id.* at 218-19 (stating Tribunal's conclusion).

[FN62]. See *id.* at 219 ("The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition ...."); see also Statute of the International Court of Justice, June 26, 1945, art. 38 § 1(b), 59 Stat. 1055, 1060, 3 Bevens 1179, 1187 (listing "international custom" as source of law Court "shall apply").

[FN63]. See International Military Tribunal (Nuremberg), *supra* note 3, at 248 (noting purpose for Hague Convention).

[FN64]. *Id.* at 248-49.

[FN65]. See *id.* at 218-19 (noting war crimes established by Hague Convention); *id.* at 219 (citing League of Nations 1924 Protocol for the Pacific Settlement of International Dispute, opened for signature Oct. 1, 1924, available at <http://www.canadahistory.com/sections/documents/docPacific%20settlement%20disputes.htm> (stating Geneva Protocol declared war of aggression as "an international crime").

[FN66]. See *id.* at 220 ("That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.").

[FN67]. *Id.* at 221.

[FN68]. See *id.* (stating international duties of individuals and loss of protection behind official position).

[FN69]. See M. Patricia Fernández-Kelly, Immigration, Poverty, and Transnationalism: The Changing Terms of Citizenship in a Global Economy, in *Moral Imperialism: A Critical Anthology* 337, 349 (Berta E. Hernández-Truyol ed., 2002) [hereinafter *Moral Imperialism*] (commenting that globalization is "reconfiguring notions of citizenship"); Saskia Sassen, Economic Globalization and the Redrawing of Citizenship, in *Moral Imperialism*, *supra*, at 135 (stating conditions of global economy have "blurr[ed] the edges of the institution of citizenship").

[FN70]. See Will Kymlicka & Wayne Norman, Return of the Citizen: A Survey of Recent Work on Citizenship Theory, 104 *Ethics* 352, 353 (1994).

[FN71]. *Id.* The authors note the danger of a "'theory of citizenship' that focuses on the identity and conduct of individual citizens, including their responsibilities, loyalties, and roles .... [The danger] arises because there are two different concepts which are sometimes conflated in these discussions ...." *Id.*

[FN72]. See T.H. Marshall, *Class, Citizenship, and Social Development: Essays by T.H. Marshall* 78 (Univ. of Chi. Press, 1977) (1964) (dividing citizenship into three parts).

[FN73]. See Kim Rubenstein, Citizenship in a Borderless World, in *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* 183 (Anthony Anghie & Garry Sturgess eds., 1998) ("Citizenship is a legal, political, and social construct which has domestic and international consequences."); see also Kim Rubenstein, Citizenship in Australia: Unscrambling Its Meaning, 20 *Melb. U. L. Rev.* 503, 527 (1995) (analyzing meaning of citizenship in Australia and noting it is "not a singular concept").

[FN74]. See Jürgen Habermas, Citizenship and National Identity, in *The Condition of Citizenship* 20, 22 (Bart van Steenberg ed., 1994) (discussing Roman usage of term "nation" for "communities of people of the same descent").

[FN75]. Paul Hirst & David Held, Globalisation: The Argument of Our Time, *Open Democracy*, Jan. 22, 2002, § 8, at <http://www.globalenvision.org/library/8/528/6> (observing "[m]odern democracy developed in sovereign territorial states that had made a huge effort to homogenise their populations, to create national languages, common traditions and shared institutions").

[FN76]. Ralf Dahrendorf, The Changing Quality of Citizenship, in *The Condition of Citizenship*, *supra* note 74, at 10, 16.

[FN77]. See Ann Phillips, *Democracy and Difference* 77 (1993) (commenting on possible indifference to citizenship). "One disadvantaged group after another fought lengthy battles to be included on the list [of citizens], only to find that social justice and equality still eluded them." *Id.*

[FN78]. See *id.* at 77-78 (discussing citizenship as "fundamentally a political category").

[FN79]. See Human Rights, *supra* note 21, at 24-26 (providing United States Bill of Rights in full); *id.* at 25-27 (providing France's Declaration of the Rights of Man and the Citizen in full).

[FN80]. See Phillips, *supra* note 77, at 78 (noting implications of class inequalities).

[FN81]. Dahrendorf, *supra* note 76, at 17.

[FN82]. See Mary G. Dietz, *Context Is All: Feminism and Theories of Citizenship*, *Daedalus*, Fall, 1, 5 (1987). Dietz explains:  
What citizenship comes to mean in this liberal guise is something like equal membership in an economic and social sphere, more or less regulated by government and more or less dedicated to the assumption that the 'market maketh man'.... [U]nder liberalism, citizenship becomes less a collective, political activity than an individual, economic activity--the right to pursue one's interests, without hindrance, in the market-place. *Id.* at 5; *The Condition of Citizenship: An Introduction*, in *The Condition of Citizenship*, *supra* note 74, at 1-2 [hereinafter *Introduction to Condition*] ("[T]he concept of citizenship seems to integrate the demands of justice and community membership.... Citizenship is intimately linked with ideas of individual entitlement on the one hand and of attachment to a particular community on the other.").

[FN83]. See *Introduction to Condition*, *supra* note 82, at 1-2 (noting Marshall's definition of ideal of citizenship and discussing shift in focus of citizenship from state to individual).

[FN84]. Marshall, *supra* note 72, at 79.

[FN85]. Kymlicka & Norman, *supra* note 70, at 370 (citing Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250, 258 (1989)) (developing notion of "differentiated citizenship" pursuant to which group members would belong to and participate in communities based not only on their individual status but also as group members). See generally Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in *Theorizing Citizenship* 175 (Ronald Beiner ed., 1995) (analyzing ideal of universal citizenship). Ironically, the following notion has been presented:

[C]itizenship often propels us towards an ideal of transcendence, a greater collectivity in which we get beyond our local identities and concerns. When we are called upon to act as citizens, we are by implication not acting simply as women or men, black or white, manual worker or professional, home-owner or council tenant ....  
Phillips, *supra* note 77, at 81.

[FN86]. See Richard Falk, *An Emergent Matrix of Citizenship: Complex, Uneven, and Fluid*, in *Global Citizenship: A Critical Introduction* 15, 27 (Nigel Dower & John Williams eds., 2002) [hereinafter *Global Citizenship*] (presenting metaphor of "citizen pilgrim").

[FN87]. See *id.* (describing how "citizen pilgrim rejects premises of materialism and believes that a sustainable community can only result from a combination of secular and spiritual energies").

[FN88]. See David Held, *Violence and Justice in a Global Age*, *Open Democracy*, Sept. 14,

2001, at <http://www.opendemocracy.net/articles/ViewPopUpArticle.jsp?id=2&articleId=144> [hereinafter Held, Violence and Justice] (arguing that because "the fate and fortunes of each of us are thoroughly intertwined," terrorism must be criminalized). See generally David Held, What Hope for the Future?: Learning the Lessons of the Past, 9 Ind. J. Global Leg. Stud. 381 (2002) (describing impact of globalization on international law and justice).

[FN89]. See Hirst & Held, supra note 75, § 2 (contending "[a] reconfiguration of political power is taking place as significant as the changes in the underlying world economy").

[FN90]. See id. § 3 (noting reasons for unease of world-wide globalization protest movement).

[FN91]. Id.

[FN92]. Id. § 5 (setting out program for international collaboration).

[FN93]. Held, Violence and Justice, supra note 88, at 1.

[FN94]. Id.

[FN95]. See id. (naming other examples of growing aspirations for international law and justice to include: changes to law of war, entrenchment of human rights, emergence of international environmental regimes and International Criminal Court); Hirst & Held, supra note 75, § 8 (positing that international law should be balanced to economic globalization).

[FN96]. Held, Violence and Justice, supra note 88, at 2.

[FN97]. Hirst & Held, supra note 75, § 7 (offering "cosmopolitan democracy" as solution to democratic legitimacy in globalized world).

[FN98]. See Richard Falk & Andrew Strauss, On the [Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty](#), 36 Stan. J. Int'l L. 191, 216 (2000) (commenting that assembly representing "people of the world" can create binding transnational law).

[FN99]. Hirst & Held, supra note 75, § 8 (noting that "the project of managing globalisation by strengthening the democratic basis of states, while important, is insufficient").

[FN100]. Id.

[FN101]. See id. (noting modern states' propensity to homogenize through culture, language and traditions).

[FN102]. Id.

[FN103]. Kwame Anthony Appiah, *Cosmopolitan Patriots*, in *For the Love of Country: Debating the Limits of Patriotism* 21 (Joshua Cohen ed., 1996).

[FN104]. Id.

[FN105]. Id. at 25.

[FN106]. See Claire M. Dickerson, *The Recognition of the Individual: A Human Rights*

Perspective for International Commerce, in *Moral Imperialism*, supra note 69, at 151 (discussing how norm of indifference facilitates human rights abuses).

[FN107]. See *id.* (discussing impact of supranational organizations and multinational enterprises on commercial and labor activity of repressed states); Sassen, supra note 69, at 135 (arguing economic globalization directly affects formation of rights associated with citizenship).

[FN108]. See Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Globalization and Emancipation* 62-63 (2d ed. 2003) (discussing affect of social and political conditions on pragmatic transition); see also Fernández-Kelly, supra note 69, at 338 (noting lack of opportunity among minority groups despite increased strength of globalized economy); Sassen, supra note 69, at 139-40 (discussing effect of global market on states' social and economic policies).

[FN109]. See Caspar Henderson & George Monbiot, *Governing Globalisation*, *Open Democracy*, Nov. 29, 2001, at <http://www.opendemocracy.net/articles/ViewPopUpArticle.jsp?id=6&articleId=269>.

[FN110]. Dietz, supra note 82, at 2 (citations omitted).

[FN111]. See Maria Lugones, *Pilgrimages/Peregrinajes* 210 (2003) (discussing fiction of individual agency).

[FN112]. See Berta E. Hernández-Truyol, *Human Rights, Globalization, and Culture: Centering Personhood in International Narrative*, in *Moral Imperialism*, supra note 69, at 359 (noting realm of human rights is only place where marginalized citizens can gain both "visibility and protections"); Berta E. Hernández-Truyol & Sharon Rush, [Culture, Nationhood, and the Human Rights Ideal](#), 5 *Mich. J. Race & L.* 817, 821 (2000) (arguing "complicity in silence promotes hegemony").

[FN113]. See Richard Falk, *Predatory Globalization: A Critique* 50-51 (1999) (arguing dynamics of globalization subordinating states role to global markets); Introduction: *Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century*, in *Theorizing Citizenship*, supra note 85, at 1, 20 n.2 [hereinafter Introduction to *Why Citizenship*] ("[T]he Western liberal commitment to the primacy of universal markets over national borders necessarily undermines the claims of citizenship in the formation of economic policy."); Rajagopal, supra note 20 (noting relationship between resistance in international law and state); Sassen, supra note 69, at 141 (questioning whether power of global capital markets is threat to democratic electoral system and political accountability); Held, *Violence and Justice*, supra note 88, at 1.

[FN114]. See Introduction to *Why Citizenship*, supra note 113, at 20 n.2 (discussing modern developments relating to break down between national identity and citizenship); see also Dietz, supra note 82, at 2 ("[T]here is the notion that human beings are atomistic, rational agents whose existence and interests are ontologically prior to society.").

[FN115]. See Sassen, supra note 69, at 137-38 (discussing power and influence of private investors on social norms and citizenship).

[FN116]. See Fernández-Kelly, supra note 69.

[FN117]. See Santos, supra note 108, at 11 (discussing ambiguities in times of paradigmatic transition).

[\[FN118\]](#). See *id.* at 19.

[\[FN119\]](#). See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> [hereinafter ICTY] (establishing "International Criminal Tribunal for the Former Yugoslavia" due to "widespread and flagrant violations of international humanitarian law occurring within territory of former Yugoslavia").

[\[FN120\]](#). See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> [hereinafter ICTR] (establishing tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in territory of Rwanda and Rwandan citizens responsible for such violations committed in territory of neighboring states).

[\[FN121\]](#). See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002), available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter ICC] (establishing court as permanent institution with power to exercise jurisdiction over persons for most serious crimes of international concern in complement to national criminal jurisdictions).

[\[FN122\]](#). See generally Jordan Paust, [Antiterrorism Military Commissions: Courting Illegality](#), 23 *Mich. J. Int'l L.* 1 (2001) (arguing President Bush's actions after September 11 attacks raise serious human rights questions).

[\[FN123\]](#). See Falk, *supra* note 86, at 23 ("Regional citizenship is both competitive with and complementary to Westphalian citizenship. It is competitive in the fundamental sense of challenging the unitary and primary ideal of citizenship associated with the juridical/political construct of the nation-state, the backbone of the modern system of world order.").

[\[FN124\]](#). See *id.* (stating regional citizenship allows for greater individual participation without "subordination to a dominant territorial nationalism").

[\[FN125\]](#). See Carol Gilligan, *In a Different Voice* (1982); Kimberly Hutchings, *Feminism and Global Citizenship*, in *Global Citizenship*, *supra* note 86, at 53, 58.

[\[FN126\]](#). See generally Introduction, in *Governing Globalization: Power, Authority and Global Governance* 1, 9 (David Held & Anthony McGrew eds., 2002) [hereinafter *Governing Globalization*] (discussing basic tenets of "global governance" theory).

[\[FN127\]](#). See David Held, *Cosmopolitanism: Ideas, Realities and Deficits*, in *Governing Globalization*, *supra* note 126, at 305 (listing factors such as extensity, intensity and speed of trade as primary forces behind globalization of market economy affecting local communities).

[\[FN128\]](#). Berta E. Hernández-Truyol & Christy Gleason, Introduction, in *Moral Imperialism*, *supra* note 69, at 1.

[\[FN129\]](#). *Id.*

[\[FN130\]](#). North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; see also Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Oct. 22, 1951, available at <http://www.hri.org/docs/NATO/grturk.html>

(discussing territorial changes under NATO). While the political consensus is important, the NATO alliance has little to offer the United States militarily. Specifically, Article 5 provides as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Id.

[FN131]. See ICCPR, *supra* note 9, art. 4. For further discussion, see *supra* notes 24-25 and accompanying text.

[FN132]. See, e.g., [Custody Procedures](#), 66 Fed. Reg. 48,334 (Sept. 20, 2001) (amending 8 C.F.R. 287-3(d)) (interim rule providing that noncitizens can be detained for 48 hours without charge and, in "emergenc[ies] or other extraordinary circumstance ... [for] an additional reasonable period of time"); see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Justice* (USA Patriot Act), [Pub. L. No. 107-56, 115 Stat. 272 \(2001\)](#) (granting Attorney General unprecedented powers, including ability to detain noncitizens upon "reasonable grounds" to believe "that they are involved in activity that endangers national security" and to deport or refuse entry to persons who "endorse or espouse terrorist activity," who persuade others to support terrorist activity or terrorist organization, or raise money for terrorist group); *Monitoring of Communications with Attorneys to Deter Acts of Terrorism*, 28 C.F.R. §§ 500, 501 (2001) (interim rule allowing prison authorities to monitor communications between inmates and their counsel in instances in which Attorney General certifies there is "reasonable suspicion" inmate is using such communications to facilitate acts of violence or terrorism); [Registration and Monitoring of Certain Nonimmigrants](#), 67 Fed. Reg. 52,584 (Aug. 12, 2002); [Registration of Certain Nonimmigrant Aliens from Designated Countries](#), 67 Fed. Reg. 67,766 (Nov. 6, 2002) (regulations requiring noncitizen young men from Arab and Muslim nations to register with government, and requiring men from twenty-two nations--Afghanistan, Algeria, Armenia, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen--over age of sixteen to be interviewed, photographed and fingerprinted).

[FN133]. ICCPR, *supra* note 9, art. 4(1).

[FN134]. See United States Dep't of Def., *Briefing on Detainee Operations at Guantánamo Bay* (Feb. 13, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html> (discussing procedures for detaining enemy combatants at Guantánamo Bay prison).

[FN135]. Id.

[FN136]. See *id.* (discussing U.S. protocol for detaining enemy combatants).

[FN137]. See Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. Times, Mar. 4, 2003, at A14 (giving former prisoners' accounts of treatment at Guantánamo Bay prison).

[FN138]. See Jamie Fellner, Double Standards: Prisoners of War in Iraq and at Guantánamo, Mar. 31, 2003, Int'l Herald Trib., available at [http://www.ihrt.com/articles/2003/03/31/edfellner\\_ed3\\_.php](http://www.ihrt.com/articles/2003/03/31/edfellner_ed3_.php) (stating statistics for Guantánamo Bay prisoners).

[FN139]. See Convention III, *supra* note 32.

[FN140]. See Memorandum from William H. Taft, IV, the Legal Adviser, United States Dep't of State, to Counsel to the President (Feb. 2, 2002) [hereinafter Taft Memo] (noting that "[t]he President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years" and providing that "[f]rom a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them").

[FN141]. The prisoner of war status would require certain treatment under the Geneva Conventions of 1949, and also would impede trial in the military tribunals set up by President Bush. One obstacle to designating these captives "prisoners of war" is that this status requires the captive to have been acting on behalf of a state, while the captives, as well as the actors in the September 11 attacks, were acting on behalf of Al Qaeda, which is not a state or a state representative. See Taft Memo, *supra* note 140.

[FN142]. Convention III, *supra* note 32 (requiring that countries hold hearings to determine status of detainees during war).

[FN143]. *Id.* art. V.

[FN144]. See Heinz Klug, [The Rule of Law, War, or Terror, 2003 Wisc. L. Rev. 365, 373-74 \(2003\)](#) (criticizing U.S. detention of enemy combatants after September 11 attacks as "recasting of humanitarian and civil rights law").

[FN145]. See Curt Anderson, Abuse Claims Spur Justice to Rewrite Legal Advice in the Shadow of Abu Ghraib: The Department Reconsiders Its Counsel on the Interrogation of Prisoners, Orlando Sentinel, June 24, 2004, at A3 (reporting U.S. Dep't of Justice will review and revise several key 2002 documents, especially Bybee Memo, *infra* note 192); Nancy Benac, The Pictures Are Worth 1,000 Wincses--Images of Abuse in Abu Ghraib Revolt Americans the Way No Words Can, Star-Ledger (Newark N.J.), May 7, 2004, at 19 (detailing prisoner abuse at Abu Ghraib prison); Christopher Cooper, Cases of 33 Are Indication That Abu Ghraib Abuse Wasn't Isolated Situation, Wall St. J., May 24, 2004, at A3 (referring to deaths of 33 detainees captured in Iraq and Afghanistan, including nine homicides); Excerpts from Prison Inquiry: 'Sadistic, Blatant and Wanton Criminal Abuses' Reported at Abu Ghraib, L.A. Times, May 3, 2004, at A8 (describing excerpts from "U.S. Army investigative report on alleged abuses at U.S. military prisons in Abu Ghraib and Camp Bucca, Iraq"); Michael A. Fuoco & Cindi Lash, Prisoner Abuse No Secret to Many at Abu Ghraib: Documents Show Soldiers, Civilians Had Knowledge of Mistreatment, Post-Gazette (Pittsburgh, Pa.), May 27, 2004, at A1 (noting Army Criminal Investigation Division documents that "appear to support [charges] that military intelligence officers directed the [MPs at Abu Ghraib] to 'soften up' detainees prior to interrogations"); Craig Gordon, The Probes at Abu Ghraib Prison, Newsday, May 5, 2004, at A3 (noting "U.S. abuses wider than thought; Pentagon admits 25 Iraqis have died in custody"); Douglas Jehl, July Inspection: Red Cross Noted Abuses at 2nd Site, Chic. Trib., May 15, 2004, at 8 (noting "U.S.-run detention center outside Baghdad known as Camp Cropper was reportedly the site of numerous abuses of Iraqi prisoners several months before the mistreatment unfolded ... at Abu Ghraib prison"); The File: Prison Abuse, S.F. Chron.,

June 20, 2004, at A17 (noting various investigations and reporting deaths of thirty-two Iraqi and five Afghani prisoners).

[FN146]. See United Nations Working Group on Arbitrary Detentions, Civil and Political Rights, Including the Question of Torture and Detention (Dec. 16, 2002), U.N. Doc. E/CN.4/2003/8 (citing Convention III, *supra* note 32, art. 5(2)) (concluding Guantánamo Bay detainees' captivity "arbitrary" based on U.S. refusal to follow provisions of Geneva Convention).

[FN147]. See *id.* (contending even if prisoner-of-war status were dropped, United States would still be in violation of international law).

[FN148]. Letter from Juan Mendez, President, Inter-American Commission on Human Rights (IACHR), to Center for Constitutional Rights (CRC) (Mar. 13, 2002), available at <http://www.derechos.org/nizkor/excep/unnamed4.html>.

[FN149]. Letter from United States to IACHR, Response of U.S. to Request for Precautionary Measures-Detainees in Guantánamo Bay, Cuba (Apr. 11, 2002), available at <http://www.asil.org/ilib/ilib0508.htm#r2>.

[FN150]. Convention III, *supra* note 32, art. V. Article V stated in pertinent part: The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*Id.*

[FN151]. See American Declaration of the Rights and Duties of Man, at Art. XVIII, available at <http://www.cidh.oas.org/Basicos/basic2.htm> (last visited June 28, 2005) ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.").

[FN152]. Letter from Ariel Dulitzky, In Charge of the Executive Secretariat, IACHR, to CRC (July 23, 2002), available at <http://www.derechos.org/nizkor/excep/unnamed2.html>.

[FN153]. [215 F. Supp. 2d 55 \(D.D.C. 2002\)](#) (deciding petition for writ of habeas corpus by aliens detained at U.S. Naval Base in Guantánamo Bay), *rev'd* [124 S.Ct. 2686 \(2004\)](#).

[FN154]. See *id.* at 57-58 (deciding *Rasul* together with *Al Odah v. United States*, No. 02-828 (D.D.C. filed May 1, 2002), *rev'd sub nom.* [Rasul v. United States, 124 S.Ct. 2686 \(2004\)](#), action brought separately by twelve Kuwaiti detainees and their family members).

[FN155]. See Paust, *supra* note 122, at 27-28 (criticizing inconsistencies limiting prosecution within jurisdiction of federal courts).

[FN156]. See Diane M. Amann, *Guantánamo*, 42 *Col. Transnat'l L.* 263, 263 (2004) (concluding that "U.S. courts have jurisdiction to scrutinize extraterritorial detention, and that the doctrine of deference ought to yield to judicial duty to protect individual rights").

[FN157]. [124 S.Ct. 2686 \(2004\)](#).

[FN158]. [541 U.S. 933 \(2004\)](#) (granting certiorari; case decided with [Rasul, 124 S.Ct. 2686](#)).

[FN159]. [Rasul, 124 S.Ct. at 2693](#) (citations omitted); see also Amann, *supra* note 156, at 347-48 (discussing issue in case).

[FN160]. See [Rasul, 124 S. Ct. at 2693-95](#) (distinguishing case and noting "[p]etitioners in these cases differ from Eisentrager detainees in important respects"); [id. at 2698-99](#) (holding "[section]2241 confers on the District Court jurisdiction" to hear habeas challenges to Guantánamo detentions and that there is no bar under [28 U.S.C. § 1331 \(2002\)](#) (Federal Question Statute) or [28 U.S.C. § 1350 \(2002\)](#) (Alien Tort Statute) because they "implicate the 'same category of laws listed in the habeas corpus statute'" (citation omitted)).

[FN161]. [124 S.Ct. 2633 \(2004\)](#).

[FN162]. [124 S. Ct. 2711, 2716 \(2004\)](#) (deciding both procedural and substantive issues surrounding petitioner's challenge of detention as enemy combatant).

[FN163]. See [Hamdi, 124 S. Ct. at 2635-36](#) (reviewing factual findings of detainee's status).

[FN164]. See Face-Off: The Supreme Court and White House Are Facing a Showdown Over Enemy Combatants, *Newsday*, Jan. 13, 2004, at A26 (discussing upcoming enemy combatant case of "dirty bomber").

[FN165]. See [Padilla, 124 S. Ct. at 2715-16](#) (recounting relevant facts leading to petitioner's detention).

[FN166]. [Hamdi, 124 S. Ct. at 2639](#) (addressing threshold question in case).

[FN167]. [Id. at 2635](#) (reviewing holding of court).

[FN168]. [Id. at 2636](#). The case came about when Hamdi's father filed a habeas petition on Hamdi's behalf, challenging the government's detention "without access to legal counsel or notice of any charges pending against him." *Id.* (citation omitted). The District Court concluded that if Hamdi was an enemy combatant, the government's detention was lawful. See *id.* (discussing lower court's rationale for detention). The sole support for his detention was a declaration by someone described as a Special Advisor to the Under Secretary of Defense for Policy. See *id.* at 2636-37 (discussing facts leading to lower court's conclusion). While the District Court found this to be insufficient and ordered production of documents, the Fourth Circuit reversed this decision on appeal, thereby upholding the legal grounds for detention. See *id.* at 2637-38 (discussing facts leading up to Supreme Court grant of certiorari). The Court recognized, however, that detention may last no longer than active hostilities are ongoing. See *id.* at 2641 (stating rationale for upholding detention). Yet, it acknowledged that even when detention is legally authorized "there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status." *Id.* at 2643; see also *id.* at 2638 (noting existing debate regarding meaning of term "enemy combatant").

[FN169]. *Id.* at 2648 (highlighting historical context of case).

[FN170]. *Id.* The Court went on to add that while notice and right to be heard constitute rights, "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon

potential to burden the Executive at a time of ongoing military conflict." *Id.* at 2649. The Court emphasized the importance of the separation of powers, but declined to accept the government's rationale that such powers permit "a heavily circumscribed role for the courts in such circumstances." *Id.* at 2650-51. Nevertheless, the Court noted that the standards for due process may be satisfied by a military tribunal. See *id.* at 2651-52 (noting adequate standards of criminal process afforded enemy combatants).

[FN171]. See [Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 \(2004\)](#) (reviewing whether Padilla properly filed habeas petition in Southern District of New York).

[FN172]. See *id.* (failing to reach substantive issue in case on procedural grounds). The Court of Appeals for the Second Circuit affirmed the District Court for the Southern District of New York's holding that it had jurisdiction over Secretary Rumsfeld and that the President lacked authority to detain Padilla militarily. See *id.* at 2717 (discussing facts of case). The Court recognized that because Commander Marr had custody of Padilla and the District Court did not have jurisdiction over her, the District Court lacked jurisdiction. See *id.* at 2719-20 (noting key facts leading to Court's decision).

[FN173]. *Id.* at 2732-33 (Stevens, J., dissenting) (recognizing uniqueness of attack on federal criminal convictions).

[FN174]. See *id.* at 2733-34 (Stevens, J., dissenting) (noting proper forum is not matter of federal subject-matter jurisdiction).

[FN175]. *Id.* at 2735 (Stevens, J., dissenting) (analyzing whether respondent is entitled to immediate release).

[FN176]. *Id.* (Stevens, J., dissenting) (footnote omitted).

[FN177]. See United States Dep't of Defense, Defense Department Background Briefing on the Combatant Status Review Tribunal (July 7, 2004), available at <http://www.dod.mil/transcripts/2004/tr20040707-0981.html>. The Combatant Status Review Tribunal (CSRT) is a "streamlined" and "expedited" process where detainees are notified of the opportunity to challenge their enemy combatant designation, consult with a non-lawyer military official who will serve as a personal representative in the proceedings, and be advised of the Supreme Court's decision that they are entitled to review of their detention in U.S. courts within ten days of the issuance of the order creating the tribunal. See *id.* (discussing procedures for enemy combatants). The tribunal itself is comprised of three neutral military officers who have not had prior involvement with the detainee. See *id.* (discussing procedures under CSRT). The government affords the detainee an interpreter to help with communications with the personal representative and an opportunity to present both documentary and testimonial evidence, depending on reasonable availability of witnesses. See *id.* (same). The detainee, however, cannot be compelled to testify against himself, but the government's evidence is given a rebuttable presumption of validity. See *id.* (same). The tribunal decides "whether a preponderance of the evidence supports the detention of the individual as an enemy combatant." *Id.* If the tribunal decides that the enemy combatant status is not warranted, "[t]he secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship as appropriate." *Id.*

[FN178]. See [Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635, 2651-52 \(2004\)](#) (recognizing required standards may be met by "appropriately authorized and properly constituted military tribunal."). For a discussion of the Court's factual analysis, see *supra* notes 168-70 and accompanying text.

[FN179]. See *Abbasi v. Sec'y of State for Foreign & Commonwealth Affairs*, 2002 EWCA

1598 (discussing facts of case).

[FN180]. See id. (same).

[FN181]. See id. P 64 (noting court's predicament in deciding Abassi's fate).

[FN182]. See, e.g., Neil A. Lewis, *Bowing to Ally, Bush to Rethink Tribunals for British Subjects*, N.Y. Times, July 19, 2003, at A3; Associated Press, *Bush Says Six Prisoners May Face Tribunal*, CBSNEWS.com (July 3, 2003), at <http://www.cbsnews.com/stories/2003/07/18/attack/main563920.shtml>.

[FN183]. See Munir Ahmad & Tommy Grandell, *Eleven Pakistanis Freed from Guantánamo Bay After Two Years of Imprisonment*, The Guardian, July 18, 2003 (discussing U.S. refusal to release Swedish enemy combatant). For an account of how one Iraqi national resident in Britain and one Jordanian national refugee found themselves in captivity in Guantánamo Bay, see Amnesty International UK, *UK Government Must Act Now on Behalf of Guantánamo Detainees* (July 11, 2003), at <http://www.amnesty.org.uk/deliver?document=14723> (detailing account of four British residents arrested, questioned and threatened by United States and Gambia). While two of the British nationals were released, the remaining two were taken to Guantánamo Bay by way of Afghanistan and Britain refuses to take responsibility for them. See id. (discussing facts of British nationals detained in Guantánamo Bay).

[FN184]. See United States Dep't of Defense, *Transfer of Afghani and Pakistani Detainees Complete* (Mar. 15, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040315-0462.html> [hereinafter DOD 2004 No. 180-04] (announcing transfer and release).

[FN185]. See United States Dep't of Defense, *Transfer of British Detainees Complete* (Mar. 9, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040309-0443.html> (announcing transfer).

[FN186]. See DOD 2004 No. 180-04, *supra* note 184 (estimating number of detainees remaining in Guantánamo Bay).

[FN187]. See Aljazeera.net, *U.S. Military "Tortured" Guantánamo Brits* (Mar. 14, 2004), at <http://english.aljazeera.net/NR/exeres/28B34402-F7E9-4F97-BABB-07A7535CBDB4.htm> (recounting experience of detainees in Guantánamo Bay).

[FN188]. Id.

[FN189]. See id. (accusing U.S. military of psychologically and physically mistreating detainees).

[FN190]. See id. (detailing abusive activity of detainees).

[FN191]. See Aljazeera.Net, *More Guantánamo Detainees Freed* (Mar. 16, 2004), at <http://english.aljazeera.net/NR/exeres/58D16EDA-EFB2-4118-AEDB-7869CDDFA148.htm> (defending against allegations of abuse by former detainees at Guantánamo Bay).

[FN192]. See Memorandum from Jay S. Bybee, Asst. Attorney General, U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 44 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Bybee Memo] (regarding "Standards of Conduct for Interrogation under [18 U.S.C. §§ 2340-2340A](#);"

specifically outlines self-defense justification for interrogating detained enemy combatants, noting while "an enemy combatant in detention does not himself present a threat of harm ... [he] may be hurt in an interrogation because [he is] part of the mechanism").

[FN193]. See [66 Fed. Reg. 57,833](#) § 1(e) (2001) [hereinafter Military Commissions Order] (establishing military tribunals for prosecution of foreign nationals). The recent Hamdi decision may provide a glimpse into the analysis concerning the validity of the military commissions. Although the commissions are only for trying foreign nationals, Justice O'Connor in Hamdi specifically observed that "[t]here remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." [Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 \(2004\)](#). It seems fair to project that if such military tribunal ensures due process to a citizen captured in Afghanistan, it similarly will be deemed to ensure due process to foreign nationals.

[FN194]. Military Commissions Order, *supra* note 193, § 2(a)(1)(ii).

[FN195]. *Id.* § 1(f).

[FN196]. See Paust, *supra* note 122, at 2.

[FN197]. *Id.* at 5 (defining scope of President's military judgment).

[FN198]. *Id.* at 9 (stating military commissions' jurisdiction limited to war crimes unless convened in occupied territory permitting other criminal prosecutions because of "a special competence conferred by the law of war").

[FN199]. See ICCPR, *supra* note 9, art. 14(5); see also Military Commissions Order, *supra* note 193 (outlining procedures for military tribunals).

[FN200]. See Anthony Dworkin, Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense, Crimes of War Project: On the News (Dec. 16, 2002), available at <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (defending military's actions at Guantánamo Bay).

[FN201]. Ruth Wedgwood, Justice Will Be Done at Guantánamo, *Fin. Times Limited*, July 10, 2003, at 19.

[FN202]. See Katharine Q. Seelye & Sherri Day, Rumsfeld Gives Details of Rules for Military War Tribunals, *N.Y. Times*, Mar. 21, 2002, available at <http://www.deathpenaltyinfo.org/article.php?scid=33&did=223> (stating "the rules on introducing evidence [at the military tribunals are] looser than those in civilian courts, with hearsay allowed, as well as any evidence that would be convincing to a 'reasonable person'"); United States Dep't of Defense, Department of Defense Fact Sheet: Military Commission Procedures (2003), available at <http://www.defenselink.mil/news/Aug2003/d20030812factsheet.pdf> (providing details of detainees rights).

[FN203]. See, e.g., ICCPR, *supra* note 9, art. 2. Article 2 requires: [e]ach State party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. *Id.*; see also *id.* art. 26 (providing "[a]ll persons are equal before the law and are entitled

without any discrimination to the equal protection of the law"). "In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." *Id.*

[FN204]. United States Dep't of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, § 6D(1) (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter DOD 2002 MCO No. 1]; see also Seelye & Day, *supra* note 202 (noting that rules on introducing evidence were looser than those in civilian courts). For example, hearsay is allowed, as well as evidence that would be convincing to a "reasonable person." *Id.*

[FN205]. DOD 2002 MCO No. 1, *supra* note 204, § 4A(2).

[FN206]. United States Dep't of Defense, Military Commission Order No. 3: Special Administrative Measures for Certain Commission Subject to Monitoring, § 4A (Feb. 5, 2004), available at <http://www.defenselink.mil/news/Feb2004/d20040206ord3.pdf> (last visited Oct. 25, 2004) (promulgating policy where certain communications may be subject to monitoring by special administrative measures).

[FN207]. *Id.* § 4F. (designating policy regarding use and disclosure of monitored communications).

[FN208]. The recent *Rasul* decision, however, provided that U.S. courts have jurisdiction to hear habeas petitions, which effectively recognizes the right of persons in custody in Guantánamo to have their conditions of detention reviewed. See [Rasul v. Bush, 124 S. Ct. 2686, 2692-99 \(2004\)](#). In fact, the Court specifically noted that the habeas "statute draws no distinction between Americans and aliens held in federal custody." *Id.* at 2696.

[FN209]. See United States Dep't of Defense, Military Commission Instruction No. 9: Review of Military Commission Proceedings (Dec. 26, 2003), available at <http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf> (stating procedure for reviewing Military Commission proceedings).

[FN210]. DOD 2002 MCO No. 1, *supra* note 204, § 6H(6).

[FN211]. See Seelye & Day, *supra* note 202 (recognizing rules do not provide process for independent appeals to keep control of tribunals in military chain of command).

[FN212]. See United States Dep't of Defense, Presidential Military Order Applied to Nine More Combatants, News Release (July 7, 2004), available at <http://www.dod.mil/releases/2004/nr20040707-0987.html> (citing Military Commissions Order, *supra* note 193).

[FN213]. *Id.*

[FN214]. See, e.g., Neil A. Lewis, Rights Groups Won't Get Seats at Guantánamo Base Tribunals, *N.Y. Times*, Feb. 24, 2004, at A14 (observing President had designated six of 650 prisoners at Guantánamo Bay as eligible for trial); More Guantánamo Detainees Freed, *supra* note 191. For a complete discussion of the charges, see *United States v. Ali Hamza Ahmad Sulayman Al Bahlul*, available at <http://www.defenselink.mil/news/Feb2004/d20040224AlBahlul.pdf> (last visited June 28, 2005) (outlining charge of conspiracy against detainee), and *United States v. Ibrahim Ahmed Mahmoud Al Qosi*, available at <http://>

[www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf](http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf) (last visited June 28, 2005) (outlining charge of conspiracy against detainee).

[FN215]. Tribunal Charter, *supra* note 26, art. 6.

[FN216]. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, at 36, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/248/35/IMG/N9324835.pdf?OpenElement> (detailing offenses and procedures of ICTY); *id.* art. 2 (listing "[g]rave breaches of the Geneva Conventions of 1949," including "(b) torture or inhuman treatment ...; (c) wilfully causing great suffering or serious injury to body or health; ... (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian"); *id.* art. 3 (referring to violations of laws or customs of war); *id.* art. 4 (referring to genocide); *id.* art. 5 (referring to crimes against humanity, including "(e) imprisonment; (f) torture; ... (i) other inhumane acts").

[FN217]. ICTR, *supra* note 120, art. 2 (referring to genocide); *id.* art. 3 (referring to crimes against humanity); *id.* art. 4 (referring to violations of the Geneva Conventions of 1949 and of Protocol II, *supra* note 32, including:  
a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) Collective punishments; ... e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; ... h) Threats to commit any of the foregoing acts[]).

[FN218]. ICC, *supra* note 121, art. 5(1) (limiting jurisdiction "to the most serious crimes of concern to the international community as a whole ...: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression").

[FN219]. See United States Dep't of Defense, Military Commission Instruction No. 2: Crimes and Elements for Trials by Military Commission, § 6(B) (Apr. 30, 2003), available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf> (enumerating offenses and elements thereof).

[FN220]. *Id.* § 12 (listing specific offenses and elements thereof).

[FN221]. *Id.* § 16 (providing examples of offenses and elements thereof).

[FN222]. See Frederic L. Kirgis, United States Charges and Proceedings Against Two Guantánamo Detainees for Conspiracy to Commit Crimes Associated with Armed Conflict, *Am. Soc'y of Int'l L.*, March 2004, available at <http://www.asil.org/insights/insigh126.htm> (arguing that charges against detainees do not allege violation of any specific statutory or treaty provisions and referring to Al Qosi and Al Bahlul, where both defendants were charged with conspiracy).

[FN223]. Convention III, *supra* note 32, art. 102. This article provides:  
A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.  
*Id.*

[FN224]. United States Dep't of Defense, Draft Memorandum: Administration Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba, § 1 (2004), available at <http://www.defenselink.mil/news/Mar2004/d20040303ar.pdf> (citing draft of administrative

review procedures for enemy combatants in custody of DOD at Guantánamo Bay).

[\[FN225\]](#). *Id.*

[\[FN226\]](#). *Id.* (outlining role of review board).

[\[FN227\]](#). Richard Falk, Appraising the War Against Afghanistan, Social Science Research Council/After September 11, available at [http://www.ssrc.org/sept11/essays/falk\\_text\\_only.htm](http://www.ssrc.org/sept11/essays/falk_text_only.htm) (last visited Oct. 25, 2004) (describing new "enemy" in war on terror).

[\[FN228\]](#). See David Held, *Return to the State of Nature*, *Open Democracy*, Mar. 20, 2003, available at <http://www.opendemocracy.net/articles/ViewPopUpArticle.jsp?id=2&articleId=1065> (claiming U.S.-led war on Iraq was failure of American strategy, diplomacy and thinking).

[\[FN229\]](#). Significantly, recent decisions seem to apply the rules of conventional war to the war on terror. See, e.g., [Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 \(2004\)](#) (discussing "established principle of the law of war that detention may last no longer than active hostilities").

[\[FN230\]](#). Tribunal Charter, *supra* note 26.

[\[FN231\]](#). See International Military Tribunal (Nuremberg), *supra* note 3, at 216-22.

[\[FN232\]](#). See Lewis, *supra* note 214 (discussing deliberations by military officials regarding availability of seats in courtroom for possible military tribunals at Guantánamo Bay).

[\[FN233\]](#). *Id.* (acknowledging military officials' trial conclusions for seating arrangements).

[\[FN234\]](#). Harold H. Koh, *The Spirit of the Laws*, 43 *Harv. Int'l L.J.* 23, 39 (2002) (concluding human rights violations, whether committed by terrorists or allies, or even government officials, must be addressed).

[\[FN235\]](#). See Center for Constitutional Rights, at <http://www.ccr-ny.org/v2/home.asp> (last visited Oct. 25, 2004) (providing history and details of non-profit legal and educational organization dedicated to protecting and advancing rights guaranteed by U.S. Constitution and Universal Declaration).

[\[FN236\]](#). Marcia Coyle, *Taking the Risks*, *Nat'l L.J. Online*, Feb. 16, 2004, at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1076428323925>.

[\[FN237\]](#). *Id.*; see also Nancy Chang & Alan Kabat, *New Summary of Recent Court Rulings on Terrorism-Related Matters Having Civil Liberties Implications*, Feb. 4, 2004, at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=N7yKoAObvc&Content=324> (reasoning why, despite fact that representing detainees marks clear break with center's traditional representation, center chose to provide direct representation in detainee cases).

[\[FN238\]](#). Human Rights Watch, *Bush Administration Lawyers Greenlight Torture: Memo Suggests Intent to Commit War Crimes* (June 7, 2004), available at <http://hrw.org/english/docs/2004/06/07/usdom8778.htm> (criticizing President Bush's potential order, which would provide for torture of detainees with legal impunity).

[\[FN239\]](#). See Human Rights Watch, *U.S.: Systemic Abuse of Afghan Prisoners-- Open*

Files on Detainee Deaths (May 13, 2004), available at [http://hrw.org/english/docs/2004/05/13/afghan8577\\_txt.htm](http://hrw.org/english/docs/2004/05/13/afghan8577_txt.htm) (demanding information regarding mistreatment of prisoners by U.S. military and intelligence personnel which resulted in the deaths of 3 detainees); see also Amnesty International, USA: Covering Events From January 2002-December 2002 (2003), at <http://web.amnesty.org/report2003/Usa-summary-eng> (expressing concern over U.S. treatment of detainees).

[FN240]. See International Committee of the Red Cross (ICRC), at <http://www.icrc.org> (last visited July 13, 2003). The Committee provides: [The ICRC] works around the world on a strictly neutral and impartial basis to protect and assist people affected by armed conflicts and internal disturbances. It is a humanitarian organization ... mandated by the international community to be the guardian of international humanitarian law .... While the ICRC maintains a constant dialogue with States, it insists at all times on its independence. Only if it is free to act independently of any government or other authority can the ICRC serve the interests of victims of conflict, which lie at the heart of its humanitarian mission. Id.

[FN241]. Id. (outlining functions of ICRC).

[FN242]. See ICRC, Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners (May 8, 2004), at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7EE8626890D74F76C1256E8D005D3861> (regarding publication by Wall Street Journal of excerpts from confidential ICRC report on detention in Iraq dated January, 2004 and submitted by ICRC to Coalition Forces in February, 2004); see also Jehl, *supra* note 145 (noting ICRC report of abuses at U.S.-run detention Camp Cropper months before those reported at Abu Ghraib).

[FN243]. The responsibility is outlined in the Geneva Conventions of 1949.

[FN244]. See ICRC, Iraq: ICRC Continues to Provide Assistance to Victims of Violence, (May 31, 2004), at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/626HBN?OpenDocument> (describing main activities carried out by ICRC staff in places of detention by Coalition forces).

[FN245]. See Guantánamo Human Rights Commission, at <http://www.guantanamohrc.org> (last visited Oct. 25, 2004) (establishing organization to protect human rights of detainees in Guantánamo Bay).

[FN246]. See *id.* (describing measures taken by Guantánamo Bay Rights Commission in conjunction with other organizations in implementing its plans to achieve goals).

[FN247]. GHRC, Guantánamo Families Deliver Petition Signed by over 3,000 to Baroness Symons at Foreign Office, (June 16, 2004), at [http://www.guantanamohrc.org/petition\\_pressrelease.html](http://www.guantanamohrc.org/petition_pressrelease.html) (petitioning release of British detainees).

[FN248]. Falk, *supra* note 227.

[FN249]. The Federalist No. 51 (James Madison) (referring to text entitled "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments").

[FN250]. Donald A. Downs & Erik Kinnunen, [A Response to Anthony Lewis: Civil Liberties in a New Kind of War](#), 2003 Wisc. L. Rev. 385, 385-86 (2003) (citation omitted)

(criticizing Bush administration for disregard of international law, specifically U.S. detention of "enemy combatants" indefinitely without charge, counsel or meaningful review).

[\[FN251\]](#). Maureen Dowd, *Who's Your Daddy Party?*, N.Y. Times, Mar. 28, 2004, at 4-13 (criticizing President Bush for citing his father as rationale for war in Iraq).

[\[FN252\]](#). *Id.*