

“UNLAWFUL” ENEMY COMBATANTS: AN EXCEPTIONAL CATEGORY WITH UNIQUE TENSIONS*

“Kanunsuz” Düşman Muharipler: Emsalsiz Gerilimler İçeren İstisnai Bir Kategori

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ABSTRACT

This paper is designed to investigate how and why the “unlawful enemy combatants” (UEC) notion came into existence during the American war against terrorism, what kinds of roles it played and to what extent the outcomes of the UEC discourse were in compliance with both the modern Law of the Armed Conflict (LOAC) and International Human Rights Law (IHRL). In this regard, after analysing extraterritorial operations of the United States of America (USA) (specifically the conditions of the capture, detentions, treatment and prosecutions in Guantanamo Bay), this paper states that the US government used this category to plunge transnational terrorist suspects into a complete legal obscurity. In this process, the ambit of applicable IHRL provisions were dubiously restricted due to high security concerns. For instance, since the UEC claimed to be security risk, coercive interrogation techniques and many other forms of mistreatments were legitimised. Furthermore, the humanitarian obligations, incumbent on the US, were eschewed when the US administration rejected to apply Geneva Conventions for war against terrorism operations. However, since the legality of this exceptional category was highly problematic, the process turned out to be quite counter-productive for the future efforts towards anti-terrorism in the long run.

Keywords: Unlawful Enemy Combatants, Terrorism, International Humanitarian Law, War against Terrorism, International Human Rights Law.

ÖZET

Bu makale, Amerikan terörle savaşı sürecinde “kanunsuz düşman muhripleri” nitelemesinin nasıl ve niçin doğduğunu, ne tür roller oynadığını ve bu söylemin sonuçlarının ne ölçüde modern Silahlı Çatışmalar Hukuku ve Uluslararası İnsan Hakları Hukuku ile uyumlu olduğunu araştırmak üzere tasarlanmıştır. Bu bağlamda, Amerika Birleşik Devletleri’nin (ABD) sınırları dışında yürüttüğü operasyonları (özellikle Guantanamo Kampı’ndaki yakalama, gözaltına alma, muamele ve kovuşturma şartları bakımından) inceledikten sonra makale, ABD’nin bu yeni kategoriye uluslararası terör şüphelilerini hukuki bir bilinmezliğe sürüklemek amacıyla kullandığını ifade eder. Bu süreçte, Uluslararası İnsan Hakları Hukuku hükümlerinin kapsamı, yüksek güvenlik endişeleri sebebiyle hukukiliği ciddi şüpheler içeren bir şekilde sınırlandırılmıştır. Örneğin, uygulanan ağırlaştırılmış sorgulama tekniklerine ve diğer kötü muamele biçimlerine, kanunsuz düşman muhriplerinin önemli bir ölçüde güvenlik riski taşıdığı iddiasıyla meşruiyet kazandırılmıştır. Ayrıca ABD, terörle savaş operasyonları kapsamında Cenevre Sözleşmelerini uygulamayı reddettiğinde, sorumlu olduğu insancıl yükümlülüklerden de kaçınmıştır. Fakat bu istisnai kategorinin hukukiliği ziyadesiyle problemli olduğundan, süreç uzun dönemde gelecekteki terörle mücadele çabaları için oldukça zararlı bir hale dönüşmüştür.

Anahtar Kelimeler: Kanunsuz Düşman Muharipleri, Terörizm, Uluslararası İnsancıl Hukuk, Terörle Savaş, Uluslararası İnsan Hakları Hukuku.

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1. Introduction

Amongst other debateable issues in America's war against terrorism, the invocation of UEC status to identify al Qaeda and Taliban captives has become a central and highly contentious one. In fact, the exposition of that term started with the 'interpretative claims'¹ of Bush administration, and then found resonance in 'case law'.² However, despite the US efforts to make a cogent UEC discourse through its interpretive arguments and official documents³; all process from the identification of terrorist suspects to the prosecution of them in military commissions has remained substantially dubious.

On the one hand, the executive order of Bush declared that al Qaeda operations against American targets, which have been conducted after the 1990s, amount to "war"⁴. As a response, the US government internationally called for a "war" on terror to eradicate all terrorist organisations of global reach and their harbouring nations.⁵ On the other hand, it claimed that since al Qaeda and Taliban forces do not meet the requirements of 'lawful

¹ The US administration traced the use of "unlawful combatant" term in *Ex Parte Quirin*. See, *Ex parte Quirin*, 317 U.S. 1 (1942), The U.S. Deputy Secretary of Defense, "Memorandum for Secretaries of the Military Departments", July 2006, Retrieved from: <<http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>> and The U.S. Department of Defense, "The Detainee Treatment Act of 2005 (DTA)", December 2005, Section 105, Retrieved from: <<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>>

² Ingo Venzke, "Legal Contestation about 'Enemy Combatants': On the Exercise of Power in Legal Interpretation", *Journal of International Law and International Relations*, Vol.5, No.1, 2009, p.17. For instance, in *Hamdi v. Rumsfeld* (2004), *Padilla v. Hanft* (2005), *Hamdan v. Rumsfeld* (2006), and *the USA v. Omar Ahmed Khadr* (2007), captives were qualified as "enemy combatants". See, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Padilla v. Hanft*, 423 F.3d 386 (2005), *The United States v. Omar Ahmed Khadr*, CMCR 07-001 (2007)

³ See, Memorandum for Vice President et al., 7 February 2002 and Military Commissions Act (MCA) of 2006 and 2009. The White House, "Memorandum for Vice President et al", 7 February 2002, Retrieved from: <<http://www.lawfareblog.com/wp-content/uploads/2013/05/Memorandum-from-President-to-Vice-President-et-al.-Humane-Treatment-of-al-Qaeda-and-Taliban-Detainees-Feb-7-2002.pdf>>

⁴ See, Ruth Wedgwood, "Al Qaeda, Terrorism, and Military Commissions", *The American Journal of International Law*, Vol 96, No. 2, 2002, pp. 328-331 and The U.S. Code, "Military Order regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism", 13 November 2001, Retrieved from: <<http://www.fas.org/irp/offdocs/eo/mo-111301.htm>>. On the contrary, O'Connell notes that the attacks of al Qaeda and the counter-attacks of USA (except Iraq and Afghanistan Wars) were "too sporadic and low-intensity" to be thought as armed conflict. See, Mary Ellen O'Connell, "When Is a War Not a War? The Myth of the Global War on Terror", *ILSA Journal of International & Comparative Law*, Vol. 12, No.2, 2006, p.538

⁵ George W. Bush, "Declaration of War on Terrorism", 11 September 2001, Retrieved from: <<http://www.britannica.com/presidents/article-939825>>

belligerency⁶, they shall not be entitled to “normal” legal protections of “combatant status”.⁷ Accordingly, this new legal category has served as a strategic “avenue of escape” from humanitarian obligations and legal protections enshrined in International Humanitarian Law⁸ (IHL).

Besides, in the Second and Third Periodic Report to Human Rights Committee, the US argued that human rights law has no extraterritorial effect on government actions outside the boundaries of the US sovereign territory.⁹ Thereby, the “ambiguous legal status”¹⁰ of American Naval Base in Guantanamo Bay has been another excuse to disregard its obligations under the IHRL and American Constitutional Law.¹¹ Consequently, due to this exceptional category, suspected terrorists left at the mercy of the US.

Within this framework, the aim of this essay is to elucidate where the UEC belong and what kinds of roles this status may perform. In line with this goal, this paper is divided into two parts. The first part is intended to clarify what

⁶ The criteria specified in MCA of 2006 and Article 4(2) of the Third Geneva Convention.

⁷ After being captured, they are entitled to “prisoner-of-war” status protected under the Third Geneva Convention. Right to commit acts of violence directly, entitlement to combatant immunity and prisoner of war treatment are some of the rights granted. See, Marco Sassoli, “Use and Abuse of the Laws of War in the War on Terrorism”, *Law and Inequality*, Vol. 22, No.2, 2004, p.196, 206, pp.206-213 and Leila Nadya Sadat, “A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror”, *Denver Journal of International Law and Policy*, Vol. 37, No. 4, 2009, p. 539.

⁸ IHL applies to armed conflicts and attempts to decrease the effects of them for humanitarian reasons. See, International Committee of the Red Cross (ICRC), “What is International Humanitarian Law?”, 2005, Retrieved from: <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf>

⁹ However, a country may carry out humanitarian intervention operations or claim the responsibility to protect beyond its borders in case of a humanitarian emergency. See, for. ex., Ümmühan Elçin Ertuğrul, “Koruma Sorumluluğu: İnsani Müdahaleyi Makyajlamak”, *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Vol. XX, No. 2, 2016, pp. 421-450 and Ümmühan Elçin Ertuğrul, *İnsani Müdahale(!)*. Uluslararası Asya ve Kuzey Afrika Çalışmaları Kongresi’nde sunulan bildiri. Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, 2011, pp. 657-671. See, Kal Raustiala, *Does the Constitution follow the flag?*, Oxford University Press, 2009, pp.187-221; Article 2 of the International Covenant on Civil and Political Rights (ICCPR) notes that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”; Harper argued that this “dual requirement” limited the ambit of the Covenant to individuals under the USA jurisdiction and within the USA territory. Statement of Conrad Harper, “Human Rights Committee Fifty-Third Session: Summary Record of the 1405th Meeting”, 24 April 1995, para.20, Retrieved from: <http://www.bayefsky.com/summary/usa_ccpr_c_sr_1405_1995.pdf>

¹⁰ The ultimate sovereignty over Guantanamo belongs to the Republic of Cuba but the USA has jurisdiction and control under the terms of the Lease of Lands for Coaling and Naval Stations Agreement, 1903.

¹¹ Paul A. Diller, “When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006”, *SMU Law Review*. Vol. 61, 2008, p.306

is meant by that label and what is the primary American objective behind the usage of that classification. Afterwards, the second section sheds some light on the implications arising from the notion of UEC in the post 9/11 period and it evaluates the cogency of that labelling in accordance with the modern LOAC.

2. The UEC Status: A “New” Division?

As a rule, a detaining state has to afford a legal status for its captives according to the rules designated under the IHL. Moreover, as each category of persons brings along different corresponding rights and privileges, true and fair determination of legal status by a “competent tribunal” is of pivotal importance.¹² Accordingly, the boundaries of each legal division are aimed to be drawn precisely under the rule of law and competent courts are authorized to scrutinise the legality. In this regard, the main goal was to prevent any abuse of power.

Yet, the US government claimed that the nature of armed conflicts is continuously moving from “pitting national rivalries...into a “murkier” type of warfare”¹³. By the same token, the Alberto Gonzales Memo argued that the Geneva Convention has “obsolete strict limitations” and “quaint” provisions to apply in war on terror paradigm.¹⁴ Similarly, in *Al-Bihani*¹⁵ Judge Brown stated that the antiquated LOAC is in an urgent need of reformation to produce an effective response to a new kind of enemy. Thereby, the inadequacy of rules and regulations was the main stimulus of a new legal regime and the development of UEC notion was claimed to be a natural product of that process.

Indeed, the Geneva Conventions of 1949, as one of the most significant founding sources of the IHL, aim at protecting the legal rights of different groups of detainees. In this respect, first two Geneva Conventions sequentially seek to ameliorate the conditions of the wounded and sick armed forces “in the field” and “at sea”. Moreover, as the Third Geneva Convention defines how to treat the POWs, the last convention, the Fourth one, is designed to protect civilians in time of war. Therefore, according to the Geneva Conventions, persons of armed conflict are classified under three groups namely: a) combatants, b) armies in need of relief, and c) civilian persons.

¹² Additional Protocol 1 Article 45(1)

¹³ United Press International, “McCain, Kaine Call for New War Powers Act”, 2004, Retrieved from: <http://www.upi.com/Top_News/Special/2014/01/17/McCain-Kaine-call-for-new-war-powers-act/UPI-57461389968945/#ixzz30IYolF9k>

¹⁴ The U.S. Department of Justice, “Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II”, 22 January 2002, Retrieved from: <<http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf>>

¹⁵ *Al-Bihani v. Obama*, 590 F.3d 866 (2010)

This understanding is recapitulated through the International Committee of the Red Cross (ICRC) Commentary to the Geneva Convention IV¹⁶ which points out that each person in enemy hands must have some status either as a prisoner of war as defined by the Third Convention, or a civilian according to Fourth Convention, or a member of medical crew of the armed forces who is covered by the First Convention. Consequently, it is widely accepted that from the humanitarian point of view, these categories are adequate to satisfy the needs of all groups of people fighting in an armed conflict and there is ‘*no intermediate status*’ between these legal categories.¹⁷ Moreover, it is reiterated that no one in enemy hands could be left outside the law.¹⁸

Taking note of these expressions, the most appropriate status for the al Qaeda and Taliban members seem to be the combatant status (considering the American declaration of war against terrorism). However, the US government rejected to grant “combatant privileges” which stems from the POW status under the Third Geneva Convention. For this reason, it might be crucial to analyse what kinds of privileges are ruled out and become inapplicable as a result of the US policies in the last decade.

Due to the mere fact of being combatants, they could enjoy the right to bear arms and engage in hostilities against enemy targets without being subject to criminal prosecution, as long as their actions do not amount to war crimes.¹⁹ Accordingly, the primary benefits of combatant status are the immunity from prosecution and the right to kill ‘legitimate targets’²⁰. Moreover, if combatants of a party’s armed forces fall into the power of an adverse party, they shall be afforded POW status upon their capture according to the Geneva Convention III, Article 4(a). This provision is strengthened by Additional Protocol I, Article 45(1) which indicates that in the event of any doubt arise regarding the entitlement of the POW status to combatants of party in enemy hands, a person shall maintain to hold such status until his/her case has been decided by a competent tribunal.²¹ Furthermore, Article 45 (2) notes that even if someone is not held as POW at enemy hands, s/he “shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.” Hence, both Geneva Convention III and Additional Protocol I emphasise the fact that armed forces in enemy hands must be entitled to protections of POW status and that entitlement might only be nullified by the decision of a lawful authority.

¹⁶ Article 4 of the Geneva Convention IV

¹⁷ International Committee of the Red Cross (ICRC) Commentary to Geneva Convention IV, Article 4, p.51.

¹⁸ ICRC Commentary to Geneva Convention IV, Article 4

¹⁹ Article 3 & 5 of the Third Geneva Convention

²⁰ No civilian targeting allowed.

²¹ Article 5 of Third G.C. also includes a similar provision.

In other respects, Wittes²² argued that the existence of unlawful combatant category predates the Geneva Conventions. Furthermore, even if Protocol I requires to treat many members of adverse party as POWs; the US rejection of many provisions of that Protocol relatively legitimised the use of UEC category and the departure from existing LOAC.²³ Accordingly, the US administration ushered a practice which was not in compliance with the LOAC. In Military Order, it is declared that the attacks of transnational terrorists, including al Qaeda members, created a state of war to which the American forces have to respond immediately.²⁴ Although it is thought that the people captured in an ongoing armed conflict are expected to be entitled to POW status. The US has held those people outside the purview of both combatant and civilian categories and denied to bestow combatant privileges to them on many grounds.

Firstly, the US government argued that the Afghanistan is a “failed state”, al Qaeda is an international terrorist group and Taliban is a violent militia rather than a government.²⁵ Accordingly, the President should have the right to deny the applicability of the Geneva Conventions as a founding source of rights.²⁶ Secondly, due to their horrific acts against innocent civilians, al Qaeda terrorists do not deserve to be entitled to any combatant privileges which should only be attainable to the belligerents of “lawful war”.²⁷ Lastly, White House Press Secretary claimed that Taliban detainees failed to meet the conditions of lawful belligerency identified under Article 4(2) of the Third Geneva Convention. Under the test of that convention, a member of

²² Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*, New York: Penguin Press, 2008, p.39.

²³ Benjamin Wittes, 2008. The US ratification took 36 years and it still ratified with notable exceptions. (Signed in December, 1997 & Ratified in June 2013)

²⁴ The U.S. Code, 2001, sec.1 (a)

²⁵ See, Alberto Gonzales Memo, 2002, p.1. According to Max Weber a state has to succeed the monopoly of the legitimate use of violence. Yet, when a state failed to ensure that monopoly it could be claimed to have “failed”. Max, Weber, “Politics as a Vocation”, In: Gerth, H.H. & Mills, C. W. ed(s) *From Max Weber: Essays in Sociology*, 1948, London: Routledge and Kegan Paul.

²⁶ Even if both Afghanistan and the US are the parties to Geneva Conventions it is discussed that “al Qaeda as a non-State actor cannot be a party to the international agreements governing war” See, Military Commission Act, 2006; Alberto Gonzales Memo, 2002, p.1; William H. Taft Memo at 1 and Memorandum from White House Counsel to US President, 2002, p.3. The U.S. Department of State, “Memorandum from William H. Taft IV, Legal Adviser, to John C.Yoo”, 11 January 2002, p.1, Retrieved from: <<http://www.torturingdemocracy.org/documents/20020111.pdf>>

²⁷ See Memorandum for Vice President et al., 2002; MCA of 2006, and ‘*Ex injuria jus non oritur*’ notion which denotes that illegal acts of wrongdoer shall not generate any legal rights. See, Hersch Lauterpacht, *Recognition in International Law*, 1947, Cambridge: Cambridge University Press, pp.420-426.

volunteer corps, resistance movements or militias would have to (a) be a part of military operations under responsible command; (b) wear uniform or other fixed signs visible at a distance; (c) carry his/her arms openly and (d) engage in hostilities to be entitled to POW status.²⁸ In other respects, according to the US arguments the Taliban pursued "unlawful" terrorist goals without distinguishing themselves from civilian persons or being abided by the laws and customs of war.

In spite of these arguments and ever-increasing use of term, the US has not offered an official definition for UEC notion. The root cause this might be that the US might have wanted to be seen as an inventor of a new classification because it did not want to be seen as challenging the generally-accepted rules of international law and being over-assertive. Accordingly, the US traced the usage of similar terms in former cases. To exemplify, it claimed that a water-tight distinction between lawful and unlawful combatants was already drawn in *Ex Parte Quirin*²⁹, in 1942, by the Supreme Court.

Nevertheless, there have been a few attempts to define UEC status. At first, an order of Deputy Secretary of Defense defined 'enemy combatant' as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."³⁰ Then, the MCA of 2006 clarified the division between unlawful and lawful enemy combatants in accordance with the conditions designated under Article 4 of the Third Geneva Convention and Article 43 of First Protocol. And, it stated that UEC term means an individual "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant".³¹ Therefore, even if the UEC category has never been defined in Geneva Conventions or in any other agreement on the LOAC; it is initiated by the American Executive, codified in the MCA of 2006 and developed over time.

To ensure better understanding of these descriptions, we should also clarify the main US objective in relation to the use of UEC notion. Indeed, the primary target of the US administration might be to set a superior "de novo legal regime" by which it will be able to more flexibly regulate the conditions

²⁸ The U.S. Department of State, "White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees", 7 February 2002, Retrieved from: <<http://www.state.gov/s/l/38727.htm>>

²⁹ In that case, since German saboteurs failed to distinguish themselves from civilians during WW2, their acts were thought to be acts of unlawful belligerency, and their POW status was denied. Therefore, "unlawful combatant" term was coined in that case.

³⁰ The U.S. Deputy Secretary of Defense, 2006.

³¹ Military Commission Act, 2006, Section 948a

of capture, imprisonment, treatment and prosecution.³² Put differently, despite the existence of explicitly designated humanitarian obligations under IHRL and IHL, the use of UEC term would lead to the “dehumanisation” of a whole category of the terrorist suspects, and thus legal framework presented by the US government would be less troublesome.³³ That is why the pros and cons of opting out of the already existing international standards were comprehensively assessed by the American jurists.³⁴ Thus, the notion of UEC fundamentally stems from the American intention to legitimise its contentious legal regime which provides more room for manoeuvre.

3. The Main Repercussions & Cogency of UEC Discourse

Over the last decade, numerous implications have arisen from the UEC discourse and this situation has played an essential role in sculpting the American international standing. In order to understand what kinds of roles the UEC term played, this section mentions the major outcomes of the usage of that term and seeks to assess to what extent the invocation of that term has been cogent considering these repercussions. In this regard, (a) the creation of unequal belligerency conditions; (b) the abandonment of certain humanitarian and human rights obligations (arising from IHRL and IHL); and (c) the prosecution of terrorist suspects in Military Commissions will be examined as the main consequences.

3.1. Unequal Belligerency

In fact, the criminality/culpability of UEC status was the primary justification of the US administration to derogate from certain LOAC provisions.³⁵ By criminalising a whole category of people, it breached the “equality of belligerents” principle and led to unequal conditions of belligerency in the war

³² Leila N. Sadat, “A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror”, *Denver Journal of International Law and Policy*, Vol. 37, No.4, 2009, p.545.

³³ Sadat, 2009, p.541.

In order to understand the US arguments to legitimise invasion of Iraq, see, for ex., Ümmühan Elçin Ertuğrul, Ortadoğu’nun “Sarı Öküz”ü Irak. Üç Deniz Havzası Ülkeleri Ortak Yönetim Kültürü ve Yeniden Yapılanma Sorunları Sempozyumu’nda sunulan bildiri. Kamu Araştırmaları Vakfı Yayınevi, 2012, pp. 342-344.

³⁴ Colin Powell, as a Secretary of State, warned the president regarding the possible consequences of noncompliance with the Geneva Convention in Afghanistan. See, The U.S. Department of State, “Memorandum from Colin L. Powell regarding the Applicability of Geneva Convention to the Conflict in Afghanistan”, 25 January 2002, pp. 2-5, Retrieved from: <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>>

³⁵ Mark David Maxwell & Sean, M. Watts, “‘Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?”, *Journal of International Criminal Justice*, Vol. 5, 2007, pp.19-25

on terror battlefield.³⁶ For instance, according to the LOAC, each warring side is allowed to target each other without being liable for prosecution. Yet, in Military Commission Instruction (MCI) No.2, it is explicitly indicated that even an attack on the US soldiers would be thought as a war crime, unless the attacker does possess “belligerent privilege” or “combatant immunity”.³⁷ Accordingly, as the US side enjoys the right to engage in hostilities, the use of this right by the “*allegedly unlawful*” side amounts to war crime.

Moreover, the “murder by an unprivileged belligerent” is identified as a new substantive war crime triable in Military Commissions by the same instruction³⁸ and it is amended as “murder in violation of the laws of war”. Afterwards, this situation found resonance in case law. To exemplify, both *Mohammed Jawad*³⁹ *Omar Ahmed Khadr*⁴⁰ charged with these newly invented war crimes and claimed to be guilty of “treachery” and “perfidy”.⁴¹ However, since Jawad did not actually aim at disguising himself, the accusation of perfidy was not cogent.⁴² The reason behind his civilian appearance was because of the fact that al Qaeda does not have a uniform to wear. Also, it is argued that the US could certainly have prosecuted Khadr; however, a trial in civilian court was a more appropriate alternative to the Military Commissions’.⁴³ Moreover, since they were child soldiers who were refused to be entitled to juvenile status, these cases became more popular. Then, American Civil Liberties Union (ACLU) called on the US administration to immediately suspend Military Commissions proceedings against both Khadr and Jawad.⁴⁴ Briefly, these cases

³⁶ Jason Ralph, *America’s War on Terror: The State of the 9/11 Exception from Bush to Obama*, Oxford University Press, 2003, pp. 69-73.

³⁷ The U.S. Department of Defense, “Military Commission Instruction No.2”, 30 April 2003, p.14, Retrieved from: <<http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf>>

³⁸ See, Military Commission Instruction No.2.

³⁹ Jawad was charged with “attempted murder in violation of the law of war” and intentional serious bodily harm. Then, he was released by federal court order in 2009. *The United States v. Jawad*, D-008 (2008)

⁴⁰ Khadr was accused with conspiracy, murder and attempted murder by an unprivileged belligerent, and aiding the enemy. Then, he was found guilty and punished by eight-year sentence in 2010.

⁴¹ Article 37(1) (c) of Additional Protocol I prohibits killing through “perfidy,” including the murder of an adversary by an individual “feigning ... civilian, non-combatant status.” The War Crime Acts (1996) identifies “perfidy” as a war crime.

⁴² Jason Ralph, “America rewrites the laws of war for Omar Khadr”, 2010, Retrieved from: <<http://www.theguardian.com/commentisfree/cifamerica/2010/nov/02/omar-khadr-al-qaida-canada>>

⁴³ Ralph, 2010

⁴⁴ American Civil Liberties Union, “Obama Administration Should Immediately Halt Military Commissions Proceedings against Omar Khadr and Mohammed Jawad”, 16 January 2009, Retrieved from: <<https://www.aclu.org/human-rights/aclu-calls-international-bodies->

led to a renewed interest in discussing the cogency of the US policy and many academics criticised the US invention of that crime in the legal literature.⁴⁵

Additionally, all belligerents of armed conflict were deemed (a) to acquire much the same capacities to engage in a war, (b) to exercise similar legal prerogatives and (c) to be bound by the uniform code of conduct.⁴⁶ However, the al Qaeda and Taliban members were not allowed to fight on equal footing, solely because of their mere status as UECs. In order to criticize the obscure and controversial aspects of the US policy, Goheer pointed out that since the "murder by an unprivileged belligerent" is unprecedented war crime, "the charge...does not conform to any instrument or interpretation of law".⁴⁷ Similarly, in *Hamdan v. Rumsfeld*, the Supreme Court held the view that even if the common law has an evolutionary characteristic due to its very nature, "an act does not become a crime without its foundations having been firmly established in precedent".⁴⁸ Therefore, the unilateral US invention of an unprecedented war crime is thought to be at odds with the principle of "equality of belligerency" and the rule of law. Accordingly, the use of UEC status to invent new war crimes was loosely justified due to its capacity to create double standards on the set of principles regulating the war.

3.2. The Suspension of the IHRL and IHL

As another repercussion of the use of UEC term, the humanitarian obligations, incumbent on the US government, were eschewed. As a detaining power, the US government has to employ a legal framework which takes account of the key provisions of IHRL and IHL regarding the capture, detention and treatment of individuals in an armed conflict. However, it rejected the applicability of many provisions in favour of its own *professedly superior* legal regime.

intervene-case-alleged-child-soldier-guantanamo>

⁴⁵ See, for example, Noman A. Goheer, "The Unilateral Creation of International Law during the "War on Terror": Murder by an Unprivileged Belligerent Is Not a War Crime" *New York City Law Review*, Vol.10, 2007; Ralph, 2010& 2013; David J.R. Frakt, "Double Standards in the War on Terror", 2012, Retrieved from: <<http://jurist.org/forum/2012/04/david-frakt-targeted-killings.php>>; and David J.R. Frakt, "Mohammed Jawad and Military Commissions of Guantanamo", *Duke Law Journal*, Vol. 60, 2011, pp. 1367-1409 to understand how the US unilaterally changed the rule of law for its own sake. Contrarily, Ku and Yoo argued that the executive should have a wide measure of discretion to interpret the relevant treaties, statutes and common law. Julian Ku & John Yoo, "Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch. Constitutional Commentary", No. 23, 2006

⁴⁶ Gregory M. Reichberg, "Jus ad Bellum", In: Larry May ed., *War Essays in Political Philosophy*, New York: Cambridge University Press, p.16

⁴⁷ Goheer, 2007, p.536

⁴⁸ *Hamdan v. Rumsfeld*, 2006, p.39

First of all, the non-application of the Geneva Conventions was one of the most dubious decisions taken by the executive. As a main source of IHL, these conventions primarily require humane treatment for civilian detainees and POWs. Moreover, since they have a customary character, any non-compliance would lead to harsh criticisms against the violator. Nevertheless, the White House Memo indicated that the US government should treat prisoners humanely “to the extent appropriate and consistent with military necessity”.⁴⁹ Taking note of this expression, it was noticeable that a strict precondition on the humane treatment was laid down by the US administration.

As mentioned in the earlier section, if someone is detained pursuant to an armed conflict, s/he should be entitled to POW status and certain humanitarian protections. However, the US government made a distinction between lawful and unlawful belligerency and cited *Ex Parte Quirin* to validate this distinction. However, while in that case the German saboteurs committed the war crime qualified as “perfidy”, the al Qaeda and Taliban forces did not commit such kind of crime. Thus, such reference might not be suitable.

Moreover, in *Prosecutor v. Delalic et al.*⁵⁰ it was clearly pointed out that “If an individual is not entitled to the protections of the Third Convention as a prisoner of war...he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied”. As opposed to this argument, the US side argued that since Taliban and al Qaeda forces do not meet the article 4(2) conditions, they cannot be considered as POWs. Accordingly, even if there is no gap between these two conventions, it was claimed that there was another category of persons which is not covered by both classifications.

Yet, there is an important point which illustrates that the US government claim is flawed. In fact, the Article 4(2) test is only relevant for “irregular” armed forces. According to the Article 4(1) there are not any such conditions for “members of the armed forces of a Party”. Since Taliban forces are regular enemy forces of hostility, the American arguments do not have a sound basis.⁵¹

Moreover, due to the puzzling legal status of Guantanamo Bay the US administration thought that this naval base is a convenient place to make the Geneva and Hague Conventions less conspicuously binding.⁵² Nonetheless, in *Tadic*⁵³, it was noted that IHL applies not only in combat zone or state’s boundaries. Therefore, where detainees held cannot be an ethical excuse to derogate from obligations.

⁴⁹ The White House, “Memorandum for Vice President et al”, 2002, p.2

⁵⁰ *The Prosecutor v. Delalic et al.*, the ICTY (No: IT-96-21-A), 1998, para. 271.

⁵¹ Duffy, 2009, p.399)

⁵² Rob Bejesky, “Closing Gitmo due to the Epiphany Approach to Habeas Corpus during the Military Commissions Circus”, *Willamette Law Review*, Vol. 50, 2013, p.53

⁵³ *The Prosecutor v. Tadic*, the ICTY (No: IT-94-1), 1995, para. 68, 70

Also, the US administration abandoned the application of Common Article 3 since it is only applicable to the “armed conflict not of an international character”. This argument might seem convincing; however, the principles designated under this article are also mentioned in the Article 75 of Additional Protocol I which is recognised as customary law.⁵⁴ Thus, even if the UECs are excluded from the categories under the protection of Geneva Convention III and IV, Article 75 have to be applied to provide minimum protection.

Apart from IHL provisions, the US has to comply with the provisions of the IHRL treaties as a signatory(e.g., the ICCPR, American Declaration on the Rights and Duties of Man, Convention against Torture (CAT) and alike). Nonetheless, it might suspend some principles in the case of public emergency as long as its measures are “strictly required by the exigencies of the situation and proportionate” and it follows ‘the procedures for derogation’⁵⁵. However, the US government not only eschewed procedures for derogation but also suspended non-derogable human rights. To exemplify, indefinite arbitrary detention is prohibited by the Article 9 of the ICCPR and recognised as a *jus cogens* norm. Yet, in *Hamdan v. Rumsfeld* and *al-Marri v. Spagone*⁵⁶, executive officials claimed to have a right to detain indefinitely.

Also, the prohibition on torture is enshrined in the Universal Declaration on Human Rights(UDHR), The Convention against Torture(CAT), and Article 7 of the ICCPR, and has become a *jus cogens* norm. However, as indicated by Amnesty International and the United Nations Special Rapporteurs Report, some of the treatments and interrogation methods (e.g., solitary confinement, forced grooming, hooding, use of excessive force, chaining, stripping, force-feeding and alike) amount to torture and other forms of cruel, inhuman and degrading treatment.⁵⁷

As opposed to these claims, the US used “ticking bomb scenario” to justify the torture. That means a detaining state could use “enhanced interrogation techniques”, if a detainee knows vital information like the place of a time bomb that might explode soon.⁵⁸ Also, the US administration reminded its

⁵⁴ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, 1991, p.65

⁵⁵ See, Article 4 of the ICCPR and Article 27 of the ACHR

⁵⁶ *Al-Marri v. Spagone*, 555 U.S. 1220 (2009)

⁵⁷ Amnesty International, “Briefing to the Human Rights Committee with respect to its review of the state party’s combined second and third periodic report on the implementation of the International Covenant on Civil and Political Rights”, February 2006, p.23; and the United Nations Economic and Social Council, “Economic, Social And Cultural Rights Civil And Political Rights: Situation of detainees at Guantánamo Bay”, 27 February 2006, para. 49,54, Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>>

⁵⁸ Even, Dershowitz believed that a “torture warrant” should be given to interrogator

reservations on Article 7 of the ICCPR and Article 16 of the CAT (1987) and stated that it will be abided by the prohibitions to the extent that the 5th, 8th and 14th Amendments to the US Constitution permit.⁵⁹ However, stipulating such reservations, or creating exceptional circumstances in which the torture is allowed, or failing to mention torture as a crime in domestic legislation could only lead to more criticism for the US instead of legitimising its derogations.

In sum, the ambit of applicable HRL provisions were dubiously restricted due to high security concerns and since the UECs claimed to be security risk, the invocation of that status was a way to legitimise coercive interrogation techniques and many forms of mistreatments.

3.3 Military Commissions

This section overviews why the US would prefer to use military commissions than to use federal courts and to what extent the ‘military procedures’ regulating the conditions of detention and the requirements of IHRL have been compatible.

Indeed, the US has upheld the jurisdiction of military commissions since the very beginning of war on terror. At first, the Military Order of 2001 mentioned that “any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission” (Section 4 (a)). Afterwards, the MCAs of 2006 and 2009 also authorised the use of them for the trial of “alien” unlawful/unprivileged enemy combatants. The reference to *Ex parte Quirin* was also an important drive as unlawful combatants were subjected to legal proceeding and punishment by military tribunals for their acts of unlawful belligerency.

Moreover, in order to discredit the use of federal courts as an alternative to military commissions, *the US v. Zacarias Moussaoui*⁶⁰ was repeatedly cited. In that case, the trial came to a deadlock since Moussaoui’s lawyers caused delay through exploiting the rules of procedure and evidence.⁶¹ For this reason, Yoo argued that the trial was not more than “a four-year circus, giving

(upon request) and interrogator should be scrutinised to prevent any excesses. Alan M. Dershowitz, *Why terrorism works: Understanding the Threat, Responding to the Challenge*. New Haven: Yale University Press, 2002, pp.131-163

⁵⁹ The 5th amendment declares that anyone’s right to life, liberty and property shall not be taken by Federal Government without due process of the law. The amendment 8 prohibits the imposition of excessive fines and the infliction of cruel and unusual punishment. Lastly, the 14th amendment has a requirement to ensure due process rights and equal protection. See, CAT Report, 2000, para.302.

⁶⁰ *The United States v. Zacarias Moussaoui*, the U.S. District Court (No: 01-455-A)(2004)

⁶¹ John Yoo, *War by Other Means: An Insider’s Account of the War on Terror*, New York: Atlantic Monthly Press, 2006, pp. 210-213

Moussaoui a platform to air his anti-American tirades”.⁶² Thus, the supporters of Bush administration think that the federal courts were not adequate places for the trial of terrorist suspects.

The risks associated with the prosecution of terrorist suspects in civilian courts were plentiful. Firstly, the protection of intelligence would be problematic. As indicated by Yoo international court personnel might be compelled to reveal or leak sensitive information and the means of acquiring them, and thereafter this situation would cause an intelligence bonanza for al Qaeda.⁶³ Secondly, since the federal courts only use strict and unchangeable rules of evidence, they were more exclusionary.⁶⁴

However, more inclusionary and flexible rules are needed to increase the possibility of conviction.⁶⁵ Accordingly, the risk of acquittal shall be minimised because upon their release (due to the lack of probative evidence), these violent terrorist criminals might return to combat zone and be even more harmful to the national security. Lastly, the safety/ security of prosecutors, judges and jury might not be sustained by civilian criminal system.⁶⁶ Accordingly, in order to prevent retaliations which might take place in response to the holdings of federal court, the ambit of protections shall be expanded.

These risks mentioned might demonstrate why in the midst of a war, military commissions could be more functional rather than ad hoc tribunals or state courts. However, considering the requirements of the IHRL, the trial of terrorist suspects in military courts remains deeply problematic. Indeed, states are not allowed deviate from the fundamental principles such as the “presumption of innocence”, the right to a fair trial, or the right to a judicial overview of the detention. Thereby, Human Rights Committee reiterated the fact that state of emergency cannot be a justification for acting in breach of *jus cogens* and humanitarian law.⁶⁷

Yet, despite the presumption of innocence is enshrined in the Article 11(1) of the Universal Declaration of Human Rights, the Article 14(2) of the ICCPR and the Article 8(2) of American Convention on Human Rights (ACHR), “presumption of guilt” became the legal principle which is “applicable to

⁶² John Yoo, “The KSM Trial Will Be an Intelligence Bonanza for al Qaeda”, Wall Street Journal, 2009, Retrieved from: <<http://online.wsj.com/news/articles/SB10001424052748704431804574537370665832850>>

⁶³ Yoo, 2009

⁶⁴ Wedgwood, 2002, p. 330,331

⁶⁵ Ralph, 2013, p.75

⁶⁶ Wedgwood, 2002, p.331

⁶⁷ The UN Human Rights Committee, “General Comment 29: States of Emergency, 2001, para. 11, Retrieved from: <<http://www1.umn.edu/humanrts/gencomm/hrc29.html>>

anyone accused of acts of terrorism”.⁶⁸ Hereby, even though there were serious doubts regarding whether the armed conflict threshold has been met, terrorist suspects were charged with war crimes and prosecuted in military courts.⁶⁹ Therefore, UEC might be subjected to criminal sanction by domestic courts for violations of the LOAC but the Military commissions extended the scope of culpability for people operating in such a status.⁷⁰

Moreover, the Article 75 (4) (a) of the Additional Protocol I notes that “all necessary rights and means of defence” shall be afforded the accused. Likewise, the Article 8 of the ACHR recognises everyone’s right to a hearing by impartial and competent tribunal. However, military commissions were not regularly constituted courts which provide indispensable judicial guarantees such as right to be informed the particularities of the offence.⁷¹ Additionally, military commissions were established by the executive order not by the Congress, so it was debateable whether they are really “competent”, “independent” and “fair”.⁷² Consequently, they might jeopardise the right to a fair trial.

Lastly, human rights jurisprudence protects the detainee’s right to challenge the legality of arrest through the writ of habeas corpus.⁷³ However, in violation of that principle, the UECs were not allowed “seek any remedy or maintain any proceeding, directly or indirectly...” (Presidential Military Order, 2001, Section 7 (b) (2)). Admittedly, there are circumstances in which a country might suspend the application of some articles.⁷⁴ However, the US government violated many provisions which are not possible to derogate from such as right to life (Article 4), right to humane treatment (Article 5), and freedom of conscience and religion (Article 12).⁷⁵ Thus, considering these infringements, the US administration did not comply with international minimum standards of trial and the usage of military commissions undermined the US credibility.⁷⁶

⁶⁸ Sadat, 2009, p.541

⁶⁹ Helen Duffy, *The “War on Terror” and the Framework of International Law*, Cambridge: Cambridge University Press, 2005, p.419.

⁷⁰ Maxwell & Watts, 2007, 25.

⁷¹ See, Common Article 3, Article 75(4) of Additional Protocol I and the Court’s comments about the legality of military courts in *Hamdan vs. Rumsfeld*.

⁷² It was against the separation of power principle.

⁷³ See, for example, the ACHR Article 7(6) and the US Constitution Article 1, Section 9

⁷⁴ Article 27 of the ACHR

⁷⁵ Article 27(2) of the ACHR prohibits their derogation.

⁷⁶ Harold H. Koh, “The Case against Military Commissions”, *American Journal of International Law*, Vol. 96, No.2, 2002, pp. 337-344

4. Conclusion

In conclusion, when transnational terrorist suspects were named as UEC, it became easier to drag them into “a legal limbo relieved by few rights”.⁷⁷ *During the process*, instead of competent tribunals, the Secretary of Defense and the President had plenary authority to decide about the status of detainees.⁷⁸ *For this reason, the application of all rights granted by either domestic or international law turned out to be an issue of “executive grace”.*⁷⁹ Afterwards, as re-defining the LOAC according to the UEC, the US did enjoy the flexibility of its *de novo* legal regime.

Although the use of this new division was a “legal convenience” which provides asymmetrical advantages for the US government over transnational terrorist suspects, the detrimental effects of these unprecedented rules are already undeniable and they violate the underlying principles of law.⁸⁰ As the issue of vulnerability of innocent people come up through the tailored legal regime, anti-American sentiments unsurprisingly start to increase and this situation pave the way for the emergence of new terrorist organisations. Therefore, it is highly-likely that the less the US responds to existing LOAC today, the more vulnerable it will become in the long run.



REFERENCES

American Civil Liberties Union, “Obama Administration Should Immediately Halt Military Commissions Proceedings against Omar Khadr and Mohammed Jawad”, 16 January 2009, Retrieved from: <<https://www.aclu.org/human-rights/aclu-calls-international-bodies-intervene-case-alleged-child-soldier-guantanamo>>

Amnesty International, “Briefing to the Human Rights Committee with respect to its review of the state party’s combined second and third periodic report on the implementation of the International Covenant on Civil and Political Rights”, February 2006, p.23

Bejesky, Rob, “Closing Gitmo due to the Epiphany Approach to Habeas Corpus during the Military Commissions Circus”, *Willamette Law Review*, Vol. 50, 2013, p.53

⁷⁷ Allison M. Danner, “Defining Unlawful Enemy Combatants: A Centripetal Story”, *Texas International Law Journal*, Vol. 43, No.1, 2007, p.1.

⁷⁸ See, Memorandum for William J. Haynes II, 2002, p.1

⁷⁹ Sadat, 2009, p.541

⁸⁰ /Maxwell & Watts, 2007, p.19

Bush, George W., “Declaration of War on Terrorism”, 11 September 2001, Retrieved from: <<http://www.britannica.com/presidents/article-939825>>

Danner, Allison M., “Defining Unlawful Enemy Combatants: A Centripetal Story”, *Texas International Law Journal*, Vol. 43, No.1, 2007, pp.1-14.

Dershowitz, Alan M., *Why terrorism works: Understanding the Threat, Responding to the Challenge*. New Haven: Yale University Press, 2002.

Diller, Paul A., “When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006”, *SMU Law Review*. Vol. 61, 2008, pp. 281-336.

Duffy, Helen, *The “War on Terror” and the Framework of International Law*, Cambridge: Cambridge University Press, 2005.

Ertuğrul, Ümmühan Elçin, “Koruma Sorumluluğu: İnsani Müdahaleyi Makyajlamak”, *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Vol. XX, No. 2, 2016, pp. 421-450.

Ertuğrul, Ümmühan Elçin, İnsani Müdahale(!). Uluslararası Asya ve Kuzey Afrika Çalışmaları Kongresi’nde sunulan bildiri. Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, 2011, pp. 657-671.

Ertuğrul, Ümmühan Elçin, Ortadoğu’nun “Sarı Öküz”ü Irak. Üç Deniz Havzası Ülkeleri Ortak Yönetim Kültürü ve Yeniden Yapılanma Sorunları Sempozyumu’nda sunulan bildiri. Kamu Araştırmaları Vakfı Yayınevi, 2012, pp. 340-352.

Frakt, David J.R., “Double Standards in the War on Terror”, 2012, Retrieved from: <<http://jurist.org/forum/2012/04/david-frakt-targeted-killings.php>>

Frakt, David J.R., “Mohammed Jawad and Military Commissions of Guantanamo”, *Duke Law Journal*, Vol. 60, 2011, pp. 1367-1409.

Goheer, Noman A., “The Unilateral Creation of International Law during the “War on Terror”: Murder by an Unprivileged Belligerent Is Not a War Crime” *New York City Law Review*, Vol.10, 2007, pp.533-561.

Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man, 2 May 1948

International Committee of the Red Cross (ICRC), “What is International Humanitarian Law?”, 2005, Retrieved from: <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf>

International Committee of the Red Cross (ICRC), Commentary to Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Retrieved from: <http://www.icrc.org/ihl/COM/380-600007?OpenDocument>

International Committee of the Red Cross (ICRC), Common Article III, 12 August 1949, Retrieved from: <<http://www.icrc.org/ihl.nsf/WebART/375-590006>>

International Committee of the Red Cross (ICRC), Geneva Convention, 12 August 1949, Retrieved from: <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>>

International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Retrieved from: <<http://www.refworld.org/docid/3ae6b36b4.html>>

International Committee of the Red Cross (ICRC), What is International Humanitarian Law?, 2005, Retrieved from: <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf>

John Yoo, "The KSM Trial Will Be an Intelligence Bonanza for al Qaeda", *Wall Street Journal*, 2009, Retrieved from: <<http://online.wsj.com/news/articles/SB10001424052748704431804574537370665832850>>

Koh, Harold H., "The Case against Military Commissions", *American Journal of International Law*, Vol. 96, No.2, 2002, pp. 337-344.

Ku, Julian & Yoo, John, "Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch", *23 Constitutional Commentary*, 2006, pp.179-225.

Lauterpacht, Hersch, *Recognition in International Law*, 1947, Cambridge: Cambridge University Press.

Maxwell, Mark David & Watts, Sean M., "'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?", *Journal of International Criminal Justice*, Vol. 5, 2007, pp.19-25

Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press, 1991.

O'Connell, Mary Ellen, "When Is a War Not a War? The Myth of the Global War on Terror", *ILSA Journal of International & Comparative Law*, Vol. 12, No.2, 2006, pp. 536-539.

Ralph, Jason, "America rewrites the laws of war for Omar Khadr", 2010, Retrieved from: <<http://www.theguardian.com/commentisfree/cifamerica/2010/nov/02/omar-khadr-al-qaida-canada>>

Ralph, Jason, *America's War on Terror: The State of the 9/11 Exception from Bush to Obama*, Oxford University Press, 2003.

Raustiala, Kal, *Does the Constitution follow the flag?*, Oxford University Press, 2009

Reichberg, Gregory M., "Jus ad Bellum", In: Larry May ed., *War Essays in Political Philosophy*, New York: Cambridge University Press, 2008.

Sadat, Leila N., "A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror", *Denver Journal of International Law and Policy*, Vol. 37, No.4, 2009, pp. 539-553.

Sadat, Leila Nadya, "A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror", *Denver Journal of International Law and Policy*, Vol. 37, No. 4, 2009, pp. 539-553.

Sassoli, Marco, "Use and Abuse of the Laws of War in the War on Terrorism", *Law and Inequality*, Vol. 22, No.2, 2004, pp.195-221.

Statement of Conrad Harper, "Human Rights Committee Fifty-Third Session: Summary Record of the 1405th Meeting", 24 April 1995, para.20, Retrieved from: <http://www.bayefsky.com/summary/usa_ccpr_c_sr_1405_1995.pdf>

The U.S. Code, "Military Order regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism", 13 November 2001, Retrieved from: <<http://www.fas.org/irp/offdocs/eo/mo-111301.htm>>

The U.S. Department of Defense, "Military Commission Instruction No.2", 30 April 2003, p.14, Retrieved from: <<http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf>*>*

The U.S. Department of Defense, "The Detainee Treatment Act of 2005 (DTA)", December 2005, Section 105, Retrieved from: <<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>>

The U.S. Department of Justice, "Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II", 22 January 2002, Retrieved from: <<http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf>>

The U.S. Department of State, "Memorandum from Colin L. Powell regarding the Applicability of Geneva Convention to the Conflict in Afghanistan", 25 January 2002, pp. 2-5, Retrieved from: <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>>

The U.S. Department of State, "Memorandum from William H. Taft IV, Legal Adviser, to John C.Yoo", 11 January 2002, p.1, Retrieved from: <<http://www.torturingdemocracy.org/documents/20020111.pdf>>

The U.S. Department of State, "White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees", 7 February 2002, Retrieved from: <<http://www.state.gov/s/l/38727.htm>>

The U.S. Deputy Secretary of Defense, “Memorandum for Secretaries of the Military Departments”, July 2006, Retrieved from: <<http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf>>

The UN Human Rights Committee, “General Comment 29: States of Emergency, 2001, para. 11, Retrieved from: <<http://www1.umn.edu/humanrts/gencomm/hrc29.html>>

The United Nations Economic and Social Council, “Economic, Social And Cultural Rights Civil And Political Rights: Situation of detainees at Guantánamo Bay”, 27 February 2006, Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>>

The White House, “Memorandum for Vice President et al”, 7 February 2002, Retrieved from: <<http://www.lawfareblog.com/wp-content/uploads/2013/05/Memorandum-from-President-to-Vice-President-et-al.-Humane-Treatment-of-al-Qaeda-and-Taliban-Detainees-Feb-7-2002.pdf>>

United Press International, “McCain, Kaine Call for New War Powers Act”, 2004, Retrieved from: <http://www.upi.com/Top_News/Special/2014/01/17/McCain-Kaine-call-for-new-war-powers-act/UPI-57461389968945/#ixzz30IYolF9k>

Venzke, Ingo, “Legal Contestation about ‘Enemy Combatants’: On the Exercise of Power in Legal Interpretation”, *Journal of International Law and International Relations*, Vol.5, No.1, 2009, pp. 155-184.

Weber, Max, “Politics as a Vocation”, In: Gerth, H.H. & Mills, C. W. ed(s) *From Max Weber: Essays in Sociology*, 1948, London: Routledge and Kegan Paul.

Wedgwood, Ruth, “Al Qaeda, Terrorism, and Military Commissions”, *The American Journal of International Law*, Vol 96, No. 2, 2002, pp. 328-337.

Wittes, Benjamin, *Law and the Long War: The Future of Justice in the Age of Terror*, New York: Penguin Press, 2008.

Yoo, John, *War by Other Means: An Insider’s Account of the War on Terror*, New York: Atlantic Monthly Press, 2006.

Table of Cases

Al-Bihani v. Obama, 590 F.3d 866 (2010)

Al-Marri v. Spagone, 555 U.S. 1220 (2009)

Ex parte Quirin, 317 U.S. 1 (1942)

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

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

Padilla v. Hanft, 423 F.3d 386 (2005)

The Prosecutor v. Delalic et al., the ICTY (No: IT-96-21-A) (1998)

The Prosecutor v. Tadic, the ICTY (No: IT-94-1) (1995)

The United States v. Jawad, D-008 (2008)

The United States v. Omar Ahmed Khadr, CMCR 07-001 (2007)

The United States v. Zacarias Moussaoui, the U.S. District Court (No: 01-455-A) (2004)