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A FRAMEWORK FOR CLOSING GUANTÁNAMO BAY

MATTHEW IVEY*

Abstract: The treatment of the detainees Guantánamo Bay has caused an uproar both domestically and internationally. Specifically, scholars, politicians and the international community have expressed disdain with allegations of torture and the lack of process afforded to detainees at Guantánamo. As a result, the call for the closure of the prison facility at Guantánamo Bay has seemed virtually unanimous. This Note evaluates some of the proposed solutions to problems associated with closing Guantánamo. The author offers elements of a comprehensive plan to close Guantánamo Bay that attempts to balances the security needs of the free world with a respect for international law and human rights.

INTRODUCTION

President Barack Obama has described events of the past seven years at Guantánamo Bay as a “sad chapter in American history” and promised to close down the prison.1 On January 21, 2009, President Obama ordered the suspension of all prosecutions of Guantánamo Bay detainees for 120 days in order for his administration to review all detainee cases.2 Shortly after his inauguration, President Obama issued an executive order mandating the closure of Guantánamo Bay within a year.3

Well prior to the Obama administration, the global outcry for the closing of the military prison at Guantánamo Bay had been enormous.4

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4 See generally Amnesty Int’l, Memorandum to the U.S. Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay (Apr. 15, 2002) avail-
In the initial years following the attacks of September 11, 2001, the Bush administration gave inconsistent signals concerning the fate of Guantánamo detainees and the future of the prison.\(^5\) Nevertheless, in recent years, President Bush and other top officials have signaled a desire to close the facility permanently.\(^6\) As early as 2006, President Bush stated that he would like to close the facility but did not have the appropriate framework to do so.\(^7\) On December 21, 2007, Secretary of State Condoleezza Rice supported closing Guantánamo but stated that it would be difficult without the support of other countries.\(^8\) On January 12, 2008, Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, called for the closing of the prison facility as soon as possible.\(^9\) Admiral Mullen also stressed, however, that there are “numerous legal questions” to be settled before a closure decision could be finalized.\(^10\)

In addition to top U.S. government and military officials, the international community’s call for the closure of Guantánamo has been equally resounding.\(^11\) Former British Prime Minister Tony Blair, former Secretary-General of the United Nations Kofi Annan, German Chancellor Angela Merkel, and other heads of state have also unequivocally called for the closure of the Guantánamo facility.\(^12\) While the world is unanimously calling for the closure of Guantánamo, there is currently no consensus on how to make this goal a reality.\(^13\) Indeed, President


\(^6\) Laura Parker, *Bush Offers No Timeline for Closing Gitmo Prison*, USA Today, June 15, 2006, at 2A.

\(^7\) Id.


\(^12\) See Dodds, *supra* note 11 at A17; U.N. Chief: “Ban” Gitmo, supra note 11, at 30.

Obama has already encountered difficulties in executing his plan to close the facility by 2010. Many of these difficulties hinge on how to effectively balance the security interests of the free world with respect for the prisoners’ rights under international law.

This Note attempts to decipher a framework for achieving these sometimes countervailing goals by examining proposed frameworks that provide potential solutions to the problems presented by closing Guantánamo Bay. Part I explores the recent history of Guantánamo and the events that led to the world’s seemingly unanimous call for its closure. Part II includes an assessment of how U.S. Courts and Congress have handled the problems posed by the detainee treatment and discusses closure options proposed by legal scholars and politicians. Finally, Part III contains an analysis of each option and proposes a road ahead for the prisoners at Guantánamo.

I. Background

A. The Making of a “Legal Black Hole”

On September 11, 2001, four planes were highjacked by the al-Qaeda organization and used in attacks on the Pentagon and World Trade Center. Approximately one week later, Congress authorized President Bush to use military force against “those nations, organizations, or persons” determined to be responsible for the terrorist acts that occurred. After unsuccessfully demanding that the Taliban rulers of Afghanistan turn over al Qaeda’s leaders, the United States and its

14 See Williams, supra note 2, at C13.
18 See, e.g., Simard, supra note 16, at 382.
allies launched missile and air strikes on October 7, 2001. In the ensuing fighting on the ground, over 10,000 persons were captured and approximately 700 persons from a variety of national origins were sent to the facilities at Guantánamo Bay, the first arriving on January 11, 2002.

In the years prior to September 11, 2001, Guantánamo Bay Naval Station existed as a sleepy port for the U.S. Navy, used occasionally to house refugees. Following the attacks of September 11, after some consideration, the U.S. government decided to use Guantánamo as prison facility for those captured in the course of the ground war. According to some scholars and jurists, the facilities at Guantánamo Bay were chosen because the detainees would have neither constitutional rights regulating their treatment by the government, nor the ability to use federal courts to enforce any other rights (such as those available under Common Article 3 of the Geneva Conventions).

On January 4, 2002, General Tommy Franks, the commander of the U.S. forces in Afghanistan at the time, announced that some detainees would be sent to a high-security prison at the U.S. Navy base in Guantánamo Bay, Cuba. The first prisoners were housed in a very basic facility known as Camp X-Ray. At the end of April 2002, all the

prisoners in Camp X-Ray were transferred to the more modern Camp Delta.28 Currently, the prisoners are separated into smaller camps based on their level of compliance and intelligence value.29 Camp 4 houses the most compliant prisoners and Camp 6 houses the most dangerous prisoners.30 Camp 5 houses prisoners less compliant than those in Camp 4 but also less dangerous than those in Camp 6.31 Camp Iguana detains prisoners who are awaiting transfer to their nation of origin.32 In early 2008, the Pentagon announced the existence of a Camp 7, a top-secret facility where “high value” prisoners are kept.33

As of early 2009, approximately 300 people were still imprisoned at Guantánamo.34 Although President Obama has called for review of all detainee files and for the closure of the facility within the year, his plans have seen some setbacks.35 Many of the detainees have incomplete or nonexistent files.36 Further, although some detainees have been cleared for release, there has been difficulty in the repatriation process in parent countries.37

B. International Public Outcry

Calls for closing the prison facility at Guantánamo Bay have largely centered on two types of human rights abuses.38 First, much public outcry has centered on various allegations of torture.39 Second, many commentators assert that the incarceration of prisoners at Guantánamo

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30 See, e.g., Tung Yin, supra note 17, at 160-63.
31 See id.
32 See id.
33 See id.
35 Id.
36 Karen DeYoung & Peter Finn, Guantánamo Case Files in Disarray, WASH. POST, Jan. 20, 2009, at A5.
38 See Akbar, supra note 4, at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l Memo, supra note 4.
39 See Akbar, supra note 4, at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l Memo, supra note 4.
and the Military Commission system impinges on the detainees’ basic right to legal process.\textsuperscript{40}

1. Torture at Guantánamo

In 2002, the Justice Department issued a memorandum that implicitly authorized the torture of detainees.\textsuperscript{41} Many former Guantánamo prisoners have recounted testimonials of abuse and torture at the hands of prison personnel.\textsuperscript{42} These accounts allege various forms of torture, including the use of extreme heat or cold; food deprivation; isolation in cold for more than thirty days; and threats with German Shepherds.\textsuperscript{43} In early 2008, the CIA admitted to using waterboarding techniques at least three times.\textsuperscript{44} In April 2009, reports surfaced that waterboarding was employed over two hundred times on two terrorism suspects.\textsuperscript{45}

Regardless of the legal status or alleged guilt of prisoners at Guantánamo, international law expressly prohibits torture.\textsuperscript{46} The three main bodies of international law prohibiting torture that are routinely cited by scholars and politicians include the United Nations Convention Against Torture, the Geneva Conventions, and the customary law of war.\textsuperscript{47} Furthermore, the prohibition of torture is often referenced as a \textit{jus cogens} norm.\textsuperscript{48}

The United Nations Convention Against Torture provides that “no exceptional circumstances whatsoever, whether a state of war or a

\textsuperscript{40} See Akbar, supra note 4 at 197–200. See generally ACLU Calls, supra note 4; Lugar Condemns Plan, supra note 4; Amnesty Int’l. Memo, supra note 4.


\textsuperscript{44} The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Eventually, the gag reflex kicks in causing a fear of drowning. See Dan Eggen, \textit{White House Denies Cheney Referred to Torture}, Times-Picayune (New Orleans), Oct. 28, 2006, at A4.


\textsuperscript{47} See CAT, supra note 46; Geneva Convention, supra note 46.

\textsuperscript{48} See Prosecutor v. Furundzija, Case No. IT-95–17/1, ¶ 153–57 (Dec. 10, 1998). \textit{jus cogens} are international norms accepted by the community of states from which no derogation is ever permitted. \textit{Id}..
threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

The document should be construed to prohibit torture absolutely, regardless of how compelling the reasons for derogation may be.

Common Article 3 of the 1949 Geneva Conventions provides minimum standards of protection to prisoners of war in the case of armed conflict. Specifically prohibited are “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”

In addition to positive sources of law, the customary law of war also governs the use of torture. Both U.S. courts and the International Court of Justice have found that torture violates the customary law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has taken this contention even further by indicating that the prohibition of torture belongs to universal norms of jus cogens.

2. Process Concerns

In late 2001, the Justice Department began purporting that federal courts would not have jurisdiction over the detainees at Guantánamo Bay. Accordingly, the Bush administration advanced the idea that Guantánamo Bay was beyond the reach of U.S. laws, essentially a “legal black hole.” Such a situation has led to much international concern regarding the lack of due process granted to the prisoners. The issues

49 See CAT, supra note 46, art. 2, para. 2.
51 Geneva Convention, supra note 46, art. 3.
52 Id.
53 See Furundzija, Case No. IT-95–17/1, ¶ 153–157; Military and Paramilitary Activities (Nicar v US), 1986 I.C.J. 14 (June 27).
55 See Furundzija, Case No. IT-95–17/1, ¶ 153–57.
56 Memorandum from Patrick Philbin and John C. Yoo to White House, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf (concluding that the great weight of legal authority indicated that a federal district court could not properly exercise habeas jurisdiction over an alien detained at Guantnamo Bay).
fall into two main categories. First, under the legal process employed at Guantánamo, some detainees could remain in Guantánamo indefinitely without trial. Second, many legal scholars and politicians have argued that the trials afforded to the detainees have lacked fairness.

In several Guantánamo detainee appeals that have reached federal courts, Bush administration lawyers contended that many of the prisoners could be detained indefinitely. Bush administration lawyers asserted that Congress’ Authorization for Use of Military Force coupled with the inapplicability of the Geneva Conventions provided the necessary power to detain any unlawful combatant indefinitely. Legal scholars, politicians, and members of the international community responded that Guantánamo detainees should be afforded the protections of the Geneva Conventions and customary international law. Legal scholars routinely point to sections of the Geneva Conventions requiring detainees to be presumptively considered prisoners of war until a competent tribunal can determine their status. Scholars contend that, at a minimum, since the war in Afghanistan was explicitly waged against the Taliban regime, Taliban fighters should qualify for prisoner of war status under Article 4(A)(1) as “members of the armed forces of a Party to the conflict.”

The second process concern centers on the fairness of the trials that have been afforded to Guantánamo detainees. President Bush established the Military Commission system in a Military Order of No-

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59 See Farer, supra note 58, at 377. See generally Boeving, supra note 58.
65 See Gruber, supra note 64, at 1055; Sands, supra note 64, at 300; Jinks & Sloss, supra note 64, at 102.
66 See Geneva Convention, supra note 46, art. 4(A)(1); Gruber, supra note 64, at 1055.
67 See generally Lewis, supra note 61.
November 13, 2001.\textsuperscript{68} Military Commissions provided unlawful combatants with a trial, but the process was heavily subjected to security requirements.\textsuperscript{69} Because of security concerns, the detainee may not have been allowed to be present throughout the trial and may not have been able to review all the evidence against him.\textsuperscript{70} While statements obtained through torture are expressly prohibited, statements obtained through methods in “which the degree of coercion is disputed” may be admitted subject to certain conditions: (1) if the statement was obtained prior to the enactment of the Detainee Treatment Act of 2005; (2) if the presiding military judge finds that it is reliable; and (3) if the statement possesses sufficient probative value and if the interests of justice would best be served by admission of the statement into evidence.\textsuperscript{71}

Though President Bush mandated that the Military Commissions provide a “full and fair trial,” legal scholars have noted that presiding officers essentially made up procedures as the trials proceeded and were unable to articulate the legal regimes governing their courts.\textsuperscript{72} Even supporters of the use of military tribunals have questioned their fairness.\textsuperscript{73} When questioned about the decision to prosecute Zacharias Moussaoui in federal court, rather than before a military tribunal, Vice President Cheney explained that the decision was “primarily based on an assessment of the case against Moussaoui, and that it cannot be handled through the normal criminal justice system without compromising sources or methods of intelligence” and the fact that “... there’s a good, strong case against him.”\textsuperscript{74} Senator Joseph Lieberman, who once supported the use of the military tribunals, emphasized that

\begin{footnotes}


70 Id. § 5(E).


\end{footnotes}
“their use should be based on the type of crime alleged—whether it is a war crime—and not the quality of the evidence against the accused.”

II. Discussion

A. Judiciary Interpretation and Congressional Response Regarding Detainees

1. Challenges to Detention Before the U.S. Courts

In 2002, the Bush administration declared that all of the prisoners at Guantánamo Bay are “unlawful combatants,” who may be held indefinitely without trial and designated fifteen detainees eligible for trial by military commission. Several detainees have subsequently challenged their status and detention in federal courts.

In 2004, the Supreme Court held in Rasul v. Bush that U.S. courts have jurisdiction to hear challenges on behalf of detainees at Guantánamo Bay in connection with the war against terrorism. The Court left questions involving detainees’ rights and status unanswered. Also in 2004, the Court decided Hamdi v. Rumsfeld, holding that a U.S. citizen detained as an “illegal enemy combatant” must be guaranteed recourse to challenge his detention before an impartial judge.

In compliance with Rasul, the detainees at Guantánamo were afforded Combatant Status Review Tribunals in 2005, where they could challenge their status as “enemy combatants.” Congress enacted the Detainee Treatment Act, effectively denying detainees access to federal courts to file habeas corpus petitions but allowing appeals of status determinations and final decisions of military commissions.

In 2005, in In re Guantánamo Detainee Cases, the District Court for the District of Columbia held that although the government had to take

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78 Rasul, 542 U.S. at 485.
79 See id.
80 Hamdi, 542 U.S. at 532.
82 See id.
action to protect the country against enormous terrorist threats, that necessity did not negate the existence of fundamental due process rights for the detainees.\(^83\) The court further held that the Combatant Status Review Tribunal procedures violated the detainees’ due process rights.\(^84\)

In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court determined that the military commissions procedure violated numerous aspects of U.S. and international law, including the Uniform Code of Military Justice and Geneva Conventions Common Article 3.\(^85\) The Court refrained from determining whether Hamdan was entitled to all the protections afforded to a prisoner of war.\(^86\)

In response to the Court’s decision in *Hamdan*, Congress passed the Military Commissions Act (MCA) in 2006, authorizing “trial by military commission for violations of the law of war, and for other purposes.”\(^87\) Furthermore, the MCA attempted to establish what definitively constitutes a “lawful” or “unlawful” enemy combatant.\(^88\)

The MCA still faced challenges in the Supreme Court. In the consolidated cases of *Al Odah v. United States* and *Boumediene v. Bush*, the Court found the MCA to be unconstitutional.\(^89\) In doing so, the Court determined that constitutional habeas rights applied to all Guantánamo detainees.\(^90\) Furthermore, the Court described the military tribunals as “an inadequate substitute for habeas corpus” although “both the Detainee Treatment Act and the Combat Status Review Trials process remain intact.”\(^91\)

2. Congressional Response to Human Rights Violation

The McCain Amendment is perhaps the strongest attempt by the U.S. government to rectify the human rights violations in Guantánamo.\(^92\) The Amendment effectively bans torture and degrading treatment of prisoners held by U.S. authorities.\(^93\) With the intent to prevent detainee abuse, the Amendment requires military interro-

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\(^{83}\) *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 453–54.

\(^{84}\) See id.

\(^{85}\) See id.

\(^{86}\) See id.


\(^{88}\) Id.


\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) See DTA, *supra* note 81, § 1003(a).

\(^{93}\) See id.
gations to be performed in strict accordance with the U.S. Army Field Manual for Human Intelligence Collector Operations.\textsuperscript{94}

While President Bush signed the Amendment into law, he nevertheless issued a signing statement that reads, in pertinent part, as follows:

The executive branch shall construe [the amendment] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of Congress and the President, evidenced in [the amendment], of protecting the American people from further terrorist attacks.\textsuperscript{95}

While it is unclear what this statement fully meant, commentators have viewed this interpretation as an attempt by the administration to reserve the right to stray from the letter and spirit of the Amendment in the name of national security.\textsuperscript{96}

The McCain Amendment, along with President Bush’s signing statement, has been criticized as insufficient to prevent the inhumane treatment of prisoners at Guantánamo.\textsuperscript{97} Nevertheless, at a minimum, the McCain Amendment helped restore Congressional oversight to the U.S. human intelligence program.\textsuperscript{98}

On July 20, 2007, President Bush issued an executive order prohibiting cruel and inhumane treatment during the interrogation of detained terror suspects, in compliance with Common Article 3 of the Geneva Convention.\textsuperscript{99} Specifically, President Bush banned the desecration of religious articles in the interrogation of suspects.\textsuperscript{100} Some commentators have alleged that the executive order merely places a gloss on the language of Common Article 3 and gives members of al Qaeda

\textsuperscript{94} See id.


\textsuperscript{97} See Allen, supra note 96, at 907–09.

\textsuperscript{98} See Harold Hongju Koh, Can the President Be Torturer in Chief?, 81 IND. L.J. 1145, 1153–54 (2006).


\textsuperscript{100} See id. § 3(b)(i)(F).
another legal weapon. Former Commandant of the Marine Corps, P.X. Kelley, went so far as to state that the order allows the CIA “to engage in willful and outrageous acts of personal abuse.” Nevertheless, no major instance of torture or detainee mistreatment has been reported since the executive order.

B. Proposed Elements of a Plan to Close Guantánamo

1. Political Asylum

Many scholars have advocated for the immediate release of specific Guantánamo detainees that have been cleared of any wrongdoing and for accompanying that release with political asylum in the United States. In order to obtain asylum in the United States, an alien-petitioner must meet three requirements. First, an alien must prove that they have a well-founded fear of persecution or have suffered past persecution. Second, the persecution must be on account of race, religion, nationality, or membership in a particular social group or political opinion. Third, an alien must prove presence in the United States. Even if these three requirements are met, the ultimate grant of asylum is still at the discretion of the Attorney General.

Particularly strong arguments exist for granting political asylum for the Uighur Muslims, an Islamic group from China. The United States held twenty-two members of this Chinese Islamic group after their capture in Afghanistan. In 2005, fifteen of the Uighurs were no longer considered enemy combatants. The United States attempted repatriation, but the Uighurs expressed a strong desire not to return to...
China due to fears of persecution. The United States has since transferred five of the Uighurs to a prison in Albania and detained the remainder at Camp Six in Guantánamo Bay. In December 2008, approximately 60 detainees, including the Uighurs, were cleared for release from the facility, but remain incarcerated due to the continued difficulties in repatriation.

The U.S. Department of State has attempted to persuade almost two-dozen nations to provide refuge for the Uighurs. Nevertheless, few countries have offered any assistance. In the meantime, the U.S. government has refused to allow the Uighurs into the United States.

2. Working with the International Community

In December 2007, Secretary of State Rice stated that closing Guantánamo Bay would be impossible without the help of the international community. The United States does not repatriate prisoners from Guantánamo unless at least two requirements are met. First, the parent country must want to repatriate its national. Second, the parent country must guarantee, in some cases, that the prisoner will remain incarcerated, and, in all cases, that the prisoner will not be tortured or killed. On some level, these efforts have proved successful. Afghanistan, Britain, Australia, and other countries have successfully reclaimed their nationals.

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113 Simard, supra note 16, at 395–98; White, supra note 110, at A17.
114 White, supra note 110, at A17.
118 Simard, supra note 16, at 395–98; White, supra note 110, at A17.
119 See Rice Interview, supra note 8.
121 See, e.g., Report to the Committee Against Torture, supra note 120, Annex at 56; see also Chesney, supra note 120, at 670–80.
122 See, e.g., Report to the Committee Against Torture, supra note 120, Annex at 56; see also Chesney, supra note 120, at 670–80.
124 Id.
Many countries have been less supportive than Britain and Australia.\(^{125}\) Yemen, Saudi Arabia, and Tunisia have all refused to repatriate nationals exported from their countries.\(^{126}\) Russia and other countries have been reluctant to guarantee that the repatriated prisoner will be kept imprisoned, given a trial, or that the prisoner’s human rights will be respected.\(^{127}\)

3. Transfer to Fort Leavenworth

Several scholars have proposed the immediately closure of Guantánamo Bay and subsequent transfer of detainees to Fort Leavenworth, Kansas.\(^{128}\) Central to this proposal is the development of a Homeland Security Court.\(^{129}\) Because of the complicated legal issues surrounding intelligence gathering and the law of war, a court authorized by Congress under Article I would provide judges equipped with a background helpful to deciding national security issues.\(^{130}\) The current system of appeals for Guantánamo detainees allows for judges with no background in warfare or national security to decide cases that may be beyond the scope of their expertise.\(^{131}\)

Under a Homeland Security Court, prosecutors would be assigned to the Criminal Division of the Justice Department.\(^{132}\) Detainees would be provided uniform defense counsel in the form of judge advocates from the U.S. military and Coast Guard.\(^{133}\) Additionally, similar to the Military Commissions, a detainee could employ civilian counsel at his or her own expense, as long as the civilian counsel meets security clearance requirements.\(^{134}\) While the media would not be allowed full cov-

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\(^{127}\) See id.


\(^{129}\) See Sulmasy, supra note 128, at 10–14.

\(^{130}\) An Article I court is a court created by Congress with special rules applicable to a particular subject matter. Article I courts have inherently less power than an Article III court and are subject to the review of an Article III court. See Sulmasy, supra note 128, at 10–13.

\(^{131}\) See id.

\(^{132}\) See id.

\(^{133}\) See id.

\(^{134}\) See id.
verage of these trials, the trials would be open to U.N. observers to ensure fairness and procedural protections of the accused.\textsuperscript{135} These observers would also be subject to security clearance requirements.\textsuperscript{136} If found guilty, a Guantánamo prisoner would be detained alongside alleged and convicted criminal members of the U.S. military in Fort Leavenworth.\textsuperscript{137} Appeals could be heard through the same process afforded to criminal defendants in the armed services.\textsuperscript{138}

Despite the many appealing elements of this plan, moving the Guantánamo detainees from Cuba to Fort Leavenworth appears to be an uphill battle.\textsuperscript{139} In July 2007, the Senate voted ninety-four to three for a non-binding resolution that opposed the movement of Guantánamo prisoners to the United States.\textsuperscript{140} Furthermore, many U.S. citizens have strongly expressed opposition to the plan, arguing that it would be undesirable and dangerous to bring a collection of terrorists to their backyards.\textsuperscript{141} Finally, detainee lawyers have questioned what a move to Leavenworth would ultimately mean for the detainees, concluding that the move would not do much to improve their situation.\textsuperscript{142}

III. Analysis

The current situation at Guantánamo Bay presents complex and unique problems with no clear legal framework available to rectify the situation.\textsuperscript{143} The difficulty of the issues cannot trump basic principles of justice and human rights.\textsuperscript{144} Accordingly, if the international community and the U.S. government truly condemn the current status of Guantánamo Bay, action must accompany the rhetoric.\textsuperscript{145} In order to permanently close the facility, the United States needs to first clearly define the status of each prisoner, the international community needs to increase repatriation efforts, and guarantees of legal process and

\textsuperscript{135} See Sulmasy, supra note 128, at 10–14.

\textsuperscript{136} See id.

\textsuperscript{137} See id.

\textsuperscript{138} See id.

\textsuperscript{139} Kirsten Scharnberg, Gitmo Plan Has Kansans Uneasy; Proposal to Move Detainees Raises Legal and Safety Questions, CHI. TRIB., Aug. 20, 2007, at 1.


\textsuperscript{141} Scharnberg, supra note 139, at 1.


\textsuperscript{143} See Parker, supra note 6, at 2A.


\textsuperscript{145} See id.
human dignity need to be in place for the remaining prisoners. The preservation of global and national security must also be considered in each step of the process.

A. Categorizing the Detainees

As a threshold matter, the detainees need to be categorized in a logical and comprehensive manner, and the categorization of a detainee should ultimately determine detainees’ legal rights. Currently, the categorization of detainees focuses largely on their status as an enemy combatant. While this categorization plays some role as to what rights and privileges are afforded to each prisoner, it does not represent the full spectrum of law available to categorize prisoners.

1. Geneva Conventions Application

The Geneva Conventions provides one definition for those considered prisoners of war. Prisoners of war status, under the Geneva Conventions, encompasses members of militias and organized resistance movements, whether or not they are operating within their own territory, as long as they fulfill four requirements including: (1) command by a person responsible for subordinates; (2) fixed distinctive insignia recognizable from a distance; (3) openly carrying arms; and (4) conducting operations in accordance with the laws and customs of war.

While many scholars and commentators advocate for the categorization of the Guantánamo detainees under the Geneva Conventions, this framework falls short in light of the nature of the war on terrorism. The Geneva Conventions provide that “all prisoners of war are to be released and repatriated immediately upon cessation of active hostilities . . . .” Because the war on terrorism could continue indefinitely, the Conventions could be construed to legitimize the indefinite detention of

146 See id.
147 See generally Clover, supra note 63.
148 See, e.g., Geneva Convention supra note 46; Franck, supra note 144, at 688.
150 See generally Geneva Convention supra note 46.
151 Id. art. 4.
152 Id.
154 Geneva Convention, supra note 46, arts. 118 & 119.
the prisoners currently held at Guantánamo.\footnote{See id.} Also, as previously discussed, many prisoners currently held at Guantánamo Bay have no country willing to accept them.\footnote{See Report to Committee Against Torture, supra note 120.}

2. The Military Commissions Act and the Courts

The Military Commission Act distinguishes prisoners in terms of their status as “enemy combatants,” a status many scholars have criticized as an overbroad categorization.\footnote{In re Guantánamo Detainees, 355 F. Supp. 2d at 453–54.} In In re Guantánamo Detainees, the court concluded that the definition of “enemy combatant” utilized in military proceedings is unworkable and vague.\footnote{Id.} In order to balance the interests of fairness and security properly, one scholar called for the definition of enemy combatant to be narrowed to include only those persons who directly and voluntarily engaged in hostilities against the United States.\footnote{Jordan J. Paust, Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond, 35 Cornell Int’l L.J. 533, 534 (2002).}

The Courts have done little to clarify the current definition and, if anything, have complicated the issue further.\footnote{See, e.g., Hamdan, 548 U.S. at 775–78.} In Hamdan, the Supreme Court recognized that prisoners who are U.S. citizens should be granted additional rights under the Constitution and Geneva Conventions.\footnote{Id.} In Khalid v. Bush, the District Court for the District of Columbia found that distance from the battlefield does not mean that a detainee cannot be categorized as an “enemy combatant.”\footnote{Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005).} Nevertheless, the court in Khalid found that an off-the-battlefield capture still meant that the detainees were not extended the protections of the Geneva Conventions regardless of their status as “enemy combatants.”\footnote{See id.}

A clearer definition of what constitutes an “enemy combatant” needs to be applied to the Guantánamo detainees.\footnote{In re Guantánamo Detainee Cases, 355 F. Supp. 2d at 453–54.} As the court concluded in In re Guantánamo Detainees, the status of a detainee should turn on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them.\footnote{See id.} Fi-
nally, under general principles of international law, a detainee should be treated as a prisoner of war until a “competent tribunal” decides otherwise.\footnote{166}{See, e.g., Geneva Convention \textit{supra} note 46, art. 5.}

3. “Men Without Countries”

There remain prisoners in Guantánamo, such as the Uigher Muslims, who simply do not have a country where repatriation is possible.\footnote{167}{Simard, \textit{supra} note 12, at 395–98.} These detainees warrant special categorization and require the assistance of the international community to ensure the protection of their basic human rights as well as their continued imprisonment if they present a security risk.\footnote{168}{Carol Rosenberg, \textit{Albania Grants Asylum to Five from China}, \textit{Miami Herald}, May 6, 2006, at A3.} As of late 2008, Albania is the only third party nation to assist in this difficult problem, granting asylum to several Uighers in 2006.\footnote{169}{See id.} Perhaps indicating a reversal of this trend, more European nations have recently offered willingness to help.\footnote{170}{See, e.g., Rotella, \textit{supra} note 115, at A10.}

\textbf{B. The International Community Needs to Become a Part of the Solution}

The U.S. government has repeatedly claimed that shutting down Guantánamo will be decidedly more difficult without increased assistance from the international community.\footnote{171}{Rice Interview, \textit{supra} note 8; see also Rory T. Hood, \textit{Guantanamo and Citizenship: An Unjust Ticket Home?}, 27 \textit{Case W. J. Int’l L.} 555, 576 (2006).} Professor Chemerinsky stated that closing Guantánamo cannot mean detainees get fewer procedural protections than already afforded and “that might happen if the U.S. sends detainees to a foreign country which argues that they’re entitled to no procedural protection at all.”\footnote{172}{Red Cross Objects to Camp Photos; \textit{A Federal Judge Will Hear Challenges to the Treatment of Al-Qaeda and Taliban Detainees}, \textit{Orlando Sentinel Trib.}, Jan. 22, 2002, at A6.} Parent countries need to reclaim their nationals and guarantee treatment in accordance with established international law and international sentiment.\footnote{173}{See id.} This means that countries must observe the international rights of suspected terrorists, respect human rights obligations and afford suspected terrorists some form of accepted legal process.\footnote{174}{See id.} If states and international organizations are going to be so vocal in their condemnation of the U.S. actions...
concerning Guantánamo detainees, then they should become part of the solution.\textsuperscript{175}

There will undoubtedly still be states that are unwilling to either repatriate or guarantee to respect the rights of their nationals.\textsuperscript{176} Even more problematic, there are Guantánamo detainees that are difficult or impossible to classify as citizens of any particular state.\textsuperscript{177} In these cases, the U.N. High Commissioner for Refugees could intervene to find third-party nations willing to accept these individuals.\textsuperscript{178} In extremely rare circumstances, the United States could perhaps offer political asylum to those prisoners who are both completely cleared of all charges and meet the requirements for political asylum.\textsuperscript{179}

The United States and the international community could also apply elements of the model employed by the ICTY.\textsuperscript{180} There, lower level offenders are granted immunity and, in some cases, a new identity and citizenship in a third-party nation for testifying or providing evidence leading to the conviction of more serious offenders.\textsuperscript{181} The U.S. government has been stymied in their pursuit and conviction of high level terrorists due to lack of evidence or intelligence.\textsuperscript{182} Providing a chance of a new life in a third party nation would probably be more compelling to at least some Guantánamo detainees than the current methods employed.\textsuperscript{183}

\textbf{C. Transfer to Fort Leavenworth Alone Is an Insufficient Solution}

By itself, transferring the Guantánamo detainees to Fort Leavenworth does not seem sufficient to cure the problems that have plagued the facility in Cuba.\textsuperscript{184} Assuming that the security concerns of moving some of the world’s most dangerous terrorists to U.S. soil are alleviated, a move to Fort Leavenworth still presents many significant legal challenges that exist at Guantánamo Bay.\textsuperscript{185} Regardless, the security

\textsuperscript{175}See Rice Interview, supra note 8.
\textsuperscript{176}See id.
\textsuperscript{177}Report to Committee Against Torture, supra note 120.
\textsuperscript{178}See id.
\textsuperscript{181}See id.
\textsuperscript{183}See id.
\textsuperscript{184}See Northam, supra note 10.
\textsuperscript{185}Scharnberg, supra note 139, at A1.
concerns of the international community need to be reconciled with international law and human rights.\textsuperscript{186}

The attorneys of Guantánamo detainees have been particularly critical of a move to Fort Leavenworth.\textsuperscript{187} Professor Falkoff, who represents seventeen detainees, stated that the actual closure of Guantánamo and subsequent transfer to Leavenworth is of far less importance than affording the detainees a trial and treating detainees in accordance with the Geneva Conventions.\textsuperscript{188} Similarly, Professor Katyal, who served as counsel to Hamdan, believes that closing Guantánamo will not do much to impact the status of Guantánamo prisoners.\textsuperscript{189}

Professor Posner has argued that even though wrongful acquittal is a risk we accept in the interest of fair justice in terms of traditional criminal law, this reasoning should not apply in the case of terrorist organizations.\textsuperscript{190} Others argue that terrorist suspects simply do not deserve the protection of the U.S. Constitution enjoyed by U.S. citizens.\textsuperscript{191} Moving some of the dangerous terrorists imprisoned in Guantánamo to U.S. soil may automatically mean that these prisoners are afforded the full protection of the Constitution because of their presence within the United States.\textsuperscript{192}

\section*{D. Closing Guantánamo: A Comprehensive Solution}

The closure of the facility at Guantánamo Bay and subsequent transfer to Fort Leavenworth coupled with the creation of an Article I Homeland Security Court or similar body is, perhaps, the best compromise between the demands of national security and international law.\textsuperscript{193} Establishing such a court would protect security interests by appointing judges and prosecutors with security clearances required to evaluate the evidence to be used against terrorism suspects without compromising national security.\textsuperscript{194} A Homeland Security Court would be subject to greater public scrutiny than the Military Commission sys-


\textsuperscript{187} \textit{See} Bennett, \textit{supra} note 142, at D1; Mazzetti \\ & Hendren, \textit{supra} note 142, at A16.

\textsuperscript{188} Bennett, \textit{supra} note 142, at D1.

\textsuperscript{189} Mazzetti \\ & Hendren, \textit{supra} note 142, at A16.

\textsuperscript{190} \textit{See id.}

\textsuperscript{191} \textit{See id.}

\textsuperscript{192} \textit{See id}; \textit{see also} Johnson v. Eisentrager, 339 U.S. 763, 769–771 (1950).

\textsuperscript{193} Sulmasy, \textit{supra} note 128, at 10–13.

\textsuperscript{194} \textit{See id.}
tem of trials. Furthermore, Congressional establishment of such a court would allow the detention of those who have yet to commit a terrorist act but have the substantial propensity to do so, similar to how U.S. Courts allow detention of the insane, child molesters, and people with infectious diseases, because of their great potential danger. Even Professor Katyal, one of the staunchest advocates for detainee legal protections, supports such an idea. Finally, an Article I court would not necessarily be subject to all the restrictions of domestic criminal law, but would operate in accordance with the Constitution and international standards.

The good that closing the Guantánamo Bay facility will do for the United States on the global stage cannot be understated. The continued operation of Guantánamo makes for easy rhetorical attacks by those who oppose the United States’ commitment to democracy and freedom. Heads of states who are suspected of human rights violations, including Robert Mugabe of Zimbabwe, Vladimir Putin of Russia, Bashar Assad of Syria, and Mahmoud Ahmadinejad of Iran, have all pointed to Guantánamo to deflect attention from their own misdeeds. Concurrently, the State Department has reported increased difficulty promoting human rights policies abroad. The continued operation of Guantánamo Bay only encourages the enemies of the United States, making martyrs, in a sense, of the people detained there.

Closing Guantánamo Bay will be a positive step toward restoring the United States’ reputation as a global leader in human rights. During trying times, the balance between human rights and security is often tipped in favor of security interests. Nevertheless, it has become abundantly clear that human rights are intrinsically connected with the

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195 See id.
199 See Koh, supra note 13, at 658–60.
201 See id.
204 See Efron, supra note 202, at A4.
205 See id.
values we wish to protect through national security. Many military
leaders have noted that the breaches of international law at
Guantánamo will lead to the mistreatment of U.S. prisoners of war. Undoubtedly, national security and human rights are both important to preserve, but the United States cannot sacrifice one in the name of the other without consequences.

CONCLUSION

If the United States wishes to reclaim its status as a leader of human rights in the international community, the prison at Guantánamo Bay needs to be closed as soon as possible. Despite the legal and foreign policy challenges that may exist, the executive and legislative branches of government need to reach out to the international community and find a workable alternative to the system currently in place. Otherwise, the United States will continue to be rhetorical fodder for those who oppose democracy and fuel U.S. enemies in the war on terrorism.

As a threshold matter, the United States needs to develop internal policy to categorize prisoners in a clear and logical manner. This policy should clarify ambiguities in international standards such as the Geneva Conventions. To the greatest extent possible, prisoners should be transferred to their country of origin. The remainder could be transferred to Fort Leavenworth, Kansas, or a similar facility. This will provide the government, media, and human rights organizations greater oversight of detainee treatment and prison operations.

A transfer to Fort Leavenworth alone will not remedy all the problems that exist in Guantánamo. The executive branch and Congress should consider establishing an Article I Homeland Security Court to provide a full and fair trial for prisoners that also respects the security needs of the free world. As the war on terrorism may continue indefinitely, the problems presented by fighters from terrorist organizations will not go away. Accordingly, a court equipped with judges and rules suited for the challenges presented by the war on terrorism will help prevent the legal quagmire caused by the tactics employed at Guantánamo.

Finally, the United States needs to reach out and work with the international community to bring full closure to the issues surrounding the operation of Guantánamo Bay. The United Nations and third-party
nations need to help with the repatriation of certain detainees. Further, the international community needs to respect the human rights and security risks presented by detainees transferred to their custody. These measures will restore the United States as a beacon for human rights and respect for international law.