What are the consequences of the U.S. military detention centre at Guantanamo Bay, Cuba, for International Humanitarian Law?

Introduction

"If international law is on the edge of law,

then the laws of war are on the edge of international law."[1]

The military detention facility at the United States Naval Base at Guantanamo Bay, Cuba, officially opened for business on the 11th of January 2002. Twenty suspected Al Qaeda and Taliban militants were transferred from Kandahar, Afghanistan to become the first of a total of 750 inmates remanded into the custody of the American military. Immediately following the September 11th 2001 terrorist attacks on the World Trade Centre in New York City and The Pentagon in Washington D.C., in which as many as three thousand people were killed, President George W. Bush announced the beginning of 'the war against terrorism'[2]. This would, he declared, represent the start of a new chapter in world history; the sense of security that had pervaded in the decade after the collapse of the Soviet Union and the end of the Cold War had reached an end. Not just America but the 'civilised' Western world in its entirety was under threat from a fundamentalist form of 'Islamofascism'[3]. This supposed new threat was

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[1] Jon. R. Crook 'Contemporary Practise of the United States Relating to International Law', *American Journal of International Law,* Volume 99, Number 2, April 2005, p485

[2] Address to a Joint Session of Congress and the American People: President Declares "Freedom at War with Fear", 20th September 2001, as found at: http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html, last accessed on May 10th 2007

[3] As defined by Stephen Schawartz in *What is Islamofascism* as found at: http://www.weeklystandard.com/Content/Public/Articles/000/000/012/593ajdua.asp, last accessed on

said to require new tactics with which to confront it, and the Bush administration proceeded with a policy of reinterpreting, reorganising and re-evaluating the very foundations of its approach to international conflict and the laws of war. The extent to which the White House has been successful in its goals to combat the terrorist threat is a subject for extensive debate and one which we will not be covering here. Focusing on Guantanamo Bay we will be exploring the extent to which the 'new paradigm' exists at all, the extent to which the Bush administration has sought to alter the international rules of armed conflict to meet its policy aims, and the extent to which it has been successful. I intend to demonstrate that the Bush administration has deliberately sought to manipulate and obfuscate the traditional lexicon to suit its own ends. Rather than adapting its response to deal with the reality, the executive has chosen to adapt the perception of reality to present the American people, as well as the rest of the world, with a new version of events: a new depiction of the threat, with the aim of allowing it to conduct a pseudo-totalitarian carte blanche response to an existing, not a new, threat. The U.S. military detention centre at Guantanamo Bay is an illegal operation under international law, but also domestic law. As the political winds have turned against them, with mounting criticisms from at home and abroad, from within and without the Washington establishment, the Bush administration has been forced to increasingly accept this. The rigid position that it has asserted time and again, arguing for both the legality of the centre's existence as well as the treatment of the detainees and the military commissions established to try them, has softened over time and climb-downs have occurred. Crucial to the question we are looking to answer, however, is the point that the administration *has* endeavoured to argue for the

legality of its actions within the relevant laws that constitute International Humanitarian Law. Also known as the laws of war; these include the Geneva Conventions of 1949, the additional Protocols to Geneva, The International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[4]. In the introduction to a compendium of original documents, *The Torture Papers: The Road To Abu Ghraib*, the editors state that '[t]he premise of the Bush Administration after September 11 2001, was that the end, fighting terrorism, justified whatever means were chosen' and that '[it] sought repeatedly to eliminate legal constraints on the means it adopted'[5] While I am perfectly prepared to accept the former sentiment, the latter is much more contentious. Rather than simply rejecting the application of international law out of hand – which might be said to endanger its very existence - the administration has instead tried to engage in a game of legal gymnastics to excuse themselves from having to apply them in *this case* – and even with this goal it has had only limited, short-term success. As such the laws themselves, although arguably weaker due to the American example, have remained essentially intact.

When looking at the existing laws applicable and relevant to the American detention centre at Guantanamo Bay our first port of call has to be the Geneva Conventions of 1949, in particular conventions III and IV. Geneva Convention III concerns the treatment of prisoners of war while Convention IV is "relative to the protection of civilians in times of war". Both of these have been recognized as

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[4] *What is International Humanitarian Law?*, as found at: http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf, last accessed on May 11th 2007

[5] Karen Greenberg and Joshua L. Dratel (editors), *The Torture Papers: The Road to Abu Ghraib* (Cambridge; Cambridge University Press; 2005) pxiv

constituting part of customary international law.

This essay will look at the various aspects of international law applicable to the situation at Guantanamo Bay and the "war" on terrorism. We will examine the ways in which the United States is conforming to its international legal obligations and the ways in which it is seeking to evade them. With regards to Guantanamo Bay the three areas in which international humanitarian law is most applicable concern: the detention of individuals without access to due process or the right to habeas corpus appeals; the treatment of detainees and the applicability of international torture conventions; the military commissions established to try the detainees. Lastly I intend to explore the potential repercussions of the Bush administration treatment of these laws and the extent to which, if any, international law may have been devalued as a result of U.S. behaviour. Of course we must take into consideration the fact that this is an ongoing situation and that therefore we can only speculate as to the long-term effects of Bush administration policy on international law. There is however, enough evidence to indicate that as the Bush administration's domestic and international political standing has waned, so has its capacity to withstand the pressures to conform to longstanding international norms.

Chapter I – The New Paradigm

'This will be a different kind of conflict against a different kind of enemy. This is a conflict without battlefields or beachhead, a conflict with opponents who believe they are invisible. Yet, they are mistaken. They will be exposed, and they will discover what others in the past have learned: Those who make war against the United States have

chosen their own destruction. Victory against terrorism will not take place in a single battle, but in a series of decisive actions against terrorist organizations and those who harbor and support them.'[6]

Four days after the attacks of 9/11 President Bush made this statement in his weekly radio address. Perhaps the most interesting aspect of his statement regarding the novelty of the conflict America was facing was that, in and of itself, such as statement was nothing new. In 1962 President Kennedy gave the commencement address to West Point graduates containing the following passage:

'This is another type of war, new in its intensity, ancient in its origins – war by guerillas, subversives, insurgents, assassins. War by ambush instead of combat; by infiltration instead of aggression; seeking victory by eroding and exhausting instead of engaging him.'[7]

Kennedy's statement amounted to little more than a rally cry, an appeal to the American character to support the American military involvement in Vietnam. Initially it might be said that Bush's statement was no different in intention, although the administration would soon take hold of this seemingly empty rhetoric and use it as the basis of its policy to combat the terrorist threat.

In a memo to President Bush in early 2002, then White House Counsel

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[6] Quoted in William P. Yarborough 'Counterinsurgency: The U.S. Role – Past Present and Future' in Richard D. Schultz et al. (eds.) *Guerrilla Warfare and Counterinsurgency* (Lexington MA: Lexington Books: 1989) pp103-104

[7] Radio Address of the President to the Nation, September 15th 2001, transcript as found at: http://www.whitehouse.gov/news/releases/2001/09/20010915.html last accessed on May 11th 2007

Alberto Gonzales describes the war against terror as a 'new paradigm that renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges'[8]. While Gonzales' argument is in and of itself, spurious, ill-defined and inaccurate (and we shall look further into this later), his description of the war on terror as a 'new paradigm' can be, in fact, seen as fairly legitimate – but perhaps not in a way that he would probably agree with. A new paradigm is merely a new way of thinking about something. In this case, the something in question – terrorism, or Islamic fundamentalist terrorism – is really nothing new. The Bush administration was not confronted with a 'new paradigm' on September 11th 2001, it generated one; a new way of looking at terrorism in order to justify different application of age-old tactics to an age-old problem. Defining the events of 9/11 as an act of war allowed the administration to alter their approach, to seize powers and justify actions that would never have been permitted had it picked the customary response. An act of 'war', such as 9/11 was proclaimed, requires a warrior-like response and begets almost unlimited wartime powers. Had 9/11 been seen as a criminal act, the magnitude of the administration's would have been limited, as would have been the powers it could claim and the tactics it could employ. A criminal-approach would, for one thing, require deference to the criminal justice system – by framing the attacks as a declaration of war the administration was able to craft a matching response with the President, as Commander-in-Chief of the military, at its fore.

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[8] The Alberto Gonzales Memo 'Decision Re: Application of the Geneva Conventions on Prisoners of War to the Conflict with al Qaeda and the Taliban' January 25th, 2002 as found in *The Torture Papers*, pp118-125

Yet the administration was not consistent with its use of rhetoric. The consensus at the time was that "this is a new type of war"[9] but, we have to ask, is it really a war at all? And does even the White House believe it is? Clausewitz defined war as: 'a continuation of politics by other means'[10], but is this really a fair assessment of the 9/11 attacks? For Francis Heisbourg 'the attacks were not political in the Clausewitzian sense'[11] because that would imply that the perpetrators were motivated by an actual, and perhaps realistically achievable, political objective. Is there an argument that they truly seek/sought to precipitate the downfall of the United States and believed that they could? Perhaps there is, but the critical consensus seems to be that these acts occurred with the intention of inflicting upon America a grievous injury. The goal of the attacks was the attacks themselves, to kill as many Americans as possible, to demonstrate that Americans were not safe anywhere, even on their own continental landmass, and to do so as publicly and extravagantly as possible. Terrorism might be deemed a tactic of war, not unakin to the guerrilla insurgencies America fought in Vietnam, but it is not an enemy in itself. The phrase 'war against terror' would appear to have been employed initially for oratorical flair, without much thought given over to this line becoming the foundation of policy. On the afternoon of September 11th 2001, United States Attorney General John Ashcroft talked of bringing 'the people responsible for these acts, these *crimes* to justice (emphasis added)'[12]. Defence Secretary Donald Rumsfeld, when asked if the attacks were to be considered

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[9] Commonly used part of post-9/11 lexicon. One example can be found in *Statement of General Peter Pace, USMC Vice Chairman Joint Chiefs of Staff Before the 107th Congress Senate Armed Services Committee; October 25, 2001*, as found at: http://www.yale.edu/lawweb/avalon/sept_11/pace_001.htm, last accessed on May 11th 2007

[10] Commonly quoted, one particularly pertinent example can be found in Donald H. Rumsfeld, 'Transforming the Military', *Foreign Affairs* (May/June 2002)

[11] Quoted in Colin McInnes, 'A Different Kind of War? September 11 and the United States' Afghan War', *Review of International Studies* (Volume 29; 2003) p173

[12] Ibid, p169

acts of war responded simply by batting the question aside: 'What words the lawyers use will be up to them.'[13] Oxford University Scholar Adam Roberts defined the attacks as '*crimes* against humanity (emphasis added).'[14] While Bush did use the term 'war' in a television address later in the day, he would continue to employ the language of a Texan law-man: 'There's an old poster out West, as I recall' he said on the 17th September, 'that said "Wanted: Dead or Alive"'[15]. Perhaps to preserve flexibility of response, perhaps because it was unsure of the appropriate approach it itself, in word and in action the Bush administration was consistently inconsistent in its perspective on whether it saw itself as crime fighter or warrior.

The 'new paradigm' became a basis for actual policy only a little later as the Bush administration began to thoroughly formulate and actively quantify its policies. By formally defining the threat as something "new" the executive was in a stronger political position to manipulate and reinterpret international law in its own image. However for Joan Fitzpatrick, 'what is truly unprecedented in the response to the September 11 attacks is its conceptualisation as an open-ended "war against terror"'[16] It should be pointed out however that while Alberto Gonzales described the Geneva conventions as both 'obsolete' and 'quaint', this is really the only example of the administration actively looking to discard the restrictions of international law in its entirety, rather than simply to find ways round them. Other officials in the administration were far more concerned with international law – these will be studied in greater detail later - and Gonzales himself would later, in confirmation hearings for

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[13] Ibid, p173
[14] Ibid, p170
[15] 'Remarks to Employees at the Pentagon and an Exchange With Reporters in Arlington, Virginia', September 17th 2001, as found at The American Presidency Project: http://www.presidency.ucsb.edu/ws/index.php?pid=65079, last accessed on May 11th 2007
[16] Joan Fitzpatrick 'Speaking Law to Power: The War Against Terror and Human Rights', *European Journal of International Law* (2003; 14, 2) p244

the position of Attorney General, firmly retreat from this stance.

Rather than the war paradigm providing the United States with a way of undermining, rendering obsolete and doing away with international law completely, by creating the war framework the Bush administration demonstrates that, in fact, it was demonstrating respect for and seeking to conform to the existing restrictions of international law. The flurry of internal memos that we shall look at next might be abhorrent in their content and the goals for which they are being employed; at their heart however, is an aim to keep the existing international legal framework intact while recusing itself from its application.

For Michael Sherry '[j]ust as terrorism crossed the smudgy line between war and crime, America's responses straddled waging war and fighting crime for all the rhetorical bluster and real-life action privileging war.'[17] Operation Enduring Freedom, the military campaign against Afghanistan initially begun with the purported aim of forcing the Taliban regime to end its support for Al Qaeda but ultimately to remove the Taliban rulers from power, took a form that we would recognize as resembling a traditional war. The rules of war entitle the parties involved to certain leniencies, but only within strict legal confines. The Bush administration has sought to stretch any loopholes it can find but with limited success.

Chapter II – Detention, Habeas Corpus and Sovereignty

'In times of war, armed conflict or perceived national danger,

even liberal democracies adopt measures infringing human

[17] Michael Sherry, *Dead or Alive: American Vengeance Goes Global* Review of International Studies (December 2005) p245

rights in ways that are wholly disproportionate to the crisis'[18]

From its very inception, the detention centre in Cuba was intended to be a locale beyond the reach of legal mechanisms, the 'legal equivalent of outer space'[19]. The aim was to create a location that would be beyond not just international law, but also of U.S. domestic law and the jurisdiction of the American legal system. In a detailed memo which we shall examine later Alberto Gonzales recommends that the president deny combatant status to the Taliban and Al Qaeda members in order to simultaneously be seen to conform with the relevant passages of international saw and remove its application from this particular case. Up to a point, and particularly at first, the administration can be seen to have been successful in this aim.

On 28th December 2001, two weeks before the first detainees arrived at Guantanamo Bay from Afghanistan, John C. Yoo and Patrick F. Philbin sent a memo responding to queries from Defence Department Counsel about the possibility of the U.S. Federal Courts interfering in the government's right to hold individuals there without access to due process. They ask: would a federal district court be able to entertain a writ of habeas corpus filed by an individual held at Guantanamo Bay? Habeas corpus is literally translated from Latin as 'you have the body' and is a writ that an individual may file in order to challenge the legality of his detention; 'It does not determine guilt or innocence, merely whether the person is legally imprisoned… If the charge is considered to be valid, the person must be submit to trial, if not the

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[18] Johan Steyn, 'Guantanamo Bay: The legal black hole', Twenty-seventh F.A. Mann lecture: 25th November 2003, as found at http://www.statewatch.org/news/2003/nov/guantanamo.pdf, last accessed on May 12th 2007

[19] Quote from government official as found at: http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/casestudy_art10.shtml, last accessed on May 11th 2007

person goes free.'[20] Guantanamo Bay was deliberately chosen as the location for the detention centre/prisoner of war camp because its location was believed by the Bush administration to be beyond the realm of the U.S. courts and they could not therefore entertain such habeas corpus writs.

Referring to a case from 1950, the Yoo/Philbin memo says that because 'these prisoners at no relevant time were within any territory over which the United States and the scenes of their offence, their capture, their trial and their punishment were all beyond the territorial jurisdiction of the United States.' Their legal argument was that if the United States does not have sovereignty over the place in which the detainees are being held, then no federal court can rule over the legality of the detention. The original lease of the agreement signed with Cuba in 1903 states that 'the United States recognizes the ultimate sovereignty of the Republic of Cuba [over Guantanamo Bay, but the U.S.] shall exercise complete jurisdiction and control over and within' the leased areas[21]. Yoo and Philbin anticipate the counter-argument that could be made but say that 'we disagree that 'control and jurisdiction' is equivalent to sovereignty' and add that since 'GBC is not included within the territory defined for any district' no court can therefore make any rulings on government actions there. In a letter to the President, then Attorney General John Ashcroft concurred with this opinion stating that if the President says that a particular international treaty does not apply 'his determination is fully discretionary and will not be reviewed by the federal courts.'[22]

In 2002 the Bush administration was given legal backing for this opinion in

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[20] *A Brief history of Habeas Corpus* as found at: http://news.bbc.co.uk/1/hi/magazine/4329839.stm, last accessed on May 11th 2007

[21] Yoo/Philbin Memo to William J. Haynes dated 28th December 2001: 'Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba', as found at: http://www.msnbc.msn.com/id/5022681/site/newsweek/, last accessed on May 11th 2001

[22] Letter from Attorney General John Ashcroft to the President, dated January 27th 2002, as found in *The Torture Papers*, p126

the case of Rasul v. Bush. In this case Asif Iqbal, Shasif Rasul and David Hicks – all held at Guantanamo Bay – filed a petition for a writ of habeas corpus with Washington D.C. District Court. The court ruled in the government's favour and dismissed the case on the grounds that it had no jurisdiction over Guantanamo Bay.[23] On appeal to the United States Supreme Court however, the ruling was struck down as the petitioners won in a 6-3 ruling. The court found that it could hear petitions from Guantanamo Bay detainees citing that 'Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States."'[24] Although not explicitly saying so we can assume that 'treaties' refers to international law because the majority opinion also refers to 'common law', and that therefore the ruling is as much in support of America's international legal commitments as it is a ruling on U.S. domestic law.

While the principle, legal, purpose of a Prisoner of War camp is to detain enemy combatants away from the battlefield, the prison at Guantanamo Bay was intended 'first to aide in intelligence gathering and also to function as a holding facility.'[25] The longer the 'war' on terror has continued, and the longer individuals have been held at Guantanamo Bay, we must conclude that the value of any information any of them might have possessed to begin with has long since

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[23] Ruling of The United States District Court for the District of Columbia ' Rasul v. Bush – Petition for Writ of Habeas Corpus', as found at http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html, last accessed on May 11th 2007

[24] Ruling in Rasul et al. V. Bush, as found at: http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-334, last accessed on May 11th 2007

[25] David Forsythe, 'United States Policy Toward Enemy Detainees in the "War on Terrorism"', *Human Rights Quarterly*, May 2006 (p474)

diminished. Therefore the only conclusion one can reach is that detainees are being held as prisoners of war to prevent them from returning to the battlefield and re-engaging in hostilities against the United States; this can only be deemed legal under the laws of war if it is accepted that the War on Terror is, in fact, a war at all. Even if this is accepted, such individuals are entitled to challenge the legality of their detention – a provision, as we have seen that the Bush administration has sought to deny them but which the American courts have increasingly been accepting.

We must, of course, tread very cautiously when evoking and quoting from the literature of NGOs such as Human Rights Watch, Amnesty International and The Red Cross. These are of course overtly political organisations with overtly political agendas to pursue. It would, however, be foolhardy to disregard their legal perspectives entirely; as specialists in human rights their legal understanding is highly valuable. Anthea Roberts states that, '[h]uman rights NGOs have played a critical role in holding states accountable because they are often prepared to criticize where others remain silent'[26]. Many such organizations have publicly expressed their concerns over the acts of the Bush administration with the Red Cross saying that individuals captured in the context of an international armed conflict 'must be granted prisoner of war status and held until the end of hostilities…. POW cannot be tried for mere participation in hostilities but may be tried for any war crimes they may have committed.'[27] This is intended to remind the United States of its international legal obligations and a reiteration of The International Covenant on Civil and Political Rights stating that: 'Everyone has the right to liberty and security of person. No one

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[26] Anthea Roberts, 'Righting Wrongs or Wronging Rights: The United States and Human Rights Post-9/11', *European Journal of International Law*, Volume 15, Number 4, September 2004, p730
[27] The Red Cross, *International Humanitarian Law and Terrorism*, as found at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5YNLEV, last accessed on May 11th 2007

shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'[28] The voices of such organisations have increasingly crossed over into the mainstream discourse and added to the mounting legal pressures on the United States to either adhere to and apply POW rules or to subject detainees to competent and due legal process.

Protocol I additional to the 1949 Geneva Conventions defines the armed forces of a party to a conflict, or 'combatants' as 'all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.'[29] It goes on to state that any individual who falls into the above category of combatant is hence entitled to claim prisoner of war status. Article 75 of the same convention requires that '[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.' They 'shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.'[30] While the United States did not ratify the additional protocols 'it is generally accepted that [they] reflect customary international law'[31]; the internal discourse that occurred between the White House battalion of lawyers demonstrate a concern that it legally be held to account for such indefinite detentions, unless it was able to prevent writs of

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[28] John F. Murphy: *The United States and the Rule of Law in International Affairs* (Cambridge; Cambridge University Press; 2004)
[29] Protocol Additional to Geneva (Protocol I) as found at http://www.unhchr.ch/html/menu3/b/93.htm, last accessed on May 11th 2007
[30] Ibid (Article 75)
[31] Steyn, 'Guantanamo Bay: The legal black hole'

habeas corpus from ever finding a forum in which they could be heard. As long as the courts could be kept out then the legality of detentions could never be formally questioned and international law - such as the administration, privately at least, recognized that it applied – could not infringe upon policy in the war on terror.

Chapter III – Torture

The UN Convention Against Torture entered into force on June 26th 1987 and has been ratified by 142 countries thus far. It provides a particularly strong legal restriction on coercive interrogation stating that all parties to it 'shall take effective legislative, judicial or other measures to prevent acts of torture in any territory under its jursdiction.' It goes on to note that 'no exceptional circumstances whatsoever, whether a state of war or threat of war... may be invoked as justification of torture.'[32] Article 5, concerning a state's jurisdiction over acts of torture obliges signatories to take measures against acts of torture '[w]hen the offences are committed in any territory under its jurisdiction' and '[w]hen the alleged offender is a national of that state.' Article 15 provides that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.'[33]

The Bush administration has consistently maintained a strong stance against 'torture'. In 2004, on the UN International Day in Support of Victims of Torture, the President stated: 'America stands against and will not tolerate torture.'[34] Similarly one year later, the United States' report to the UN Committee Against Torture included the line: 'No circumstances whatsoever may be invoked as justification for or defense of

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[32] UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as found at: http://www.unhchr.ch/html/menu3/b/h_cat39.htm, last accessed on May 11th 2007
[33] Ibid
[34] June 26th 2004, President's Statement on the U.N. International Day in Support of Victims of Torture as found at: http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html, last accessed on May 11th 2007

committing torture.' This is essentially taken verbatim from the UN Convention itself. While these statements seem to express an intention and a willingness to uphold the standards of international law regarding torture, if we delve into the White House's internal memos we can see that the Bush administration's interpretation of the word "torture" has not always been in complete accordance with that of the international community.

The UN Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, to which the United States is a signatory, defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[35] Section 2340 of United States Legal Code indicates an adherence to the CAT, itself defining torture as an 'act committed by a person acting under the colour of law specifically intended to inflict sever physical or mental pain or suffering upon another person within his custody or control.'[36] As strict as both of these definitions might appear they were not, it would seem, tight enough to prevent the legal brains at the White House from endeavouring to find and subsequently finding what they believed to be loopholes, either justifying such acts or seeking to limit legal liability if such acts were found to

[35] UN Convention Against Torture
[36] Manfred Nowak, 'What Practises Constitute Torture'*, Human Rights Quarterly*, November 2006 (p811)

be occurring. In a memo to Alberto Gonzales, Assistant Attorney General for the Office of Legal Counsel Jay S. Bybee picked up on the word "severe", arguing that its ambiguous phraseology could be exploited. "Severe" he finds to be "the existence of an emergency medical condition entitling a patient to health benefits… the level that would ordinarily be associated with sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions – in order to constitute torture."[37] His conclusion to this section of the memo was that 'reading the definition of torture as a whole, it is plain that it encompasses only extreme acts'[38] Bybee also picks up on the term "specifically intended" to argue that, if it could not be proven that the interrogator "specifically intended" to inflict harm, 'that would eliminate any criminal liability.'[39]

The CAT however, goes further than this and does not allow such a loophole to exist. Article 16 of the convention says that '[e]ach state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[40] While the U.S. has argued for Guantanamo Bay's legal exceptionalism as to why such laws do not apply, the clause 'in any territory under its jurisdiction' does not necessitate legal sovereignty over a geographical space for it to be covered by this law.

Just as the administration has sought to excuse itself from obligations to comply with the international legal norms governing detention and prisoners of war, it

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[37] The Bybee Torture Memo, dated August 1st 2002 as found in *The Torture File*, p110
[38] Ibid
[39] Ibid
[40] UN Convention Against Torture, Article 16

has equally endeavoured to circumvent legal parameters governing treatment of detainees. Again, the detainees were deemed exceptions to this universally accepted norm of respect for anti-torture covenants. For the Bush administration, these actions were ethically, and thus legally, acceptable because they were being conducted in the interests of National Security. Although the administration denies that 'torture' is in any way an instrument of interrogative policy – when undeniable examples of this occurring have been revealed and introduced to the public realm it has cast the individuals directly concerned as rogue elements, and cut them loose without accepting responsibility much further up the chain of command – it has consistently played fast and loose with the definition of 'torture' and the extent to which the Geneva Conventions apply to both the Taliban and Al Qaeda.

In the memo from Alberto Gonzales to the President mentioned above, we find a systematic dissection of the legal parameters. He again refers to the exceptionalism of this 'new war' and says that 'the nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors.'[41]

When looking at the existing laws applicable and relevant to the American detention centre at Guantanamo Bay our first port of call has to be the Geneva Conventions of 1949, in particular conventions III and IV. Geneva Convention III concerns the treatment of prisoners of war while Convention IV is "relative to the protection of civilians in times of war". Both of these have been recognized as constituting part of customary international law. Article 4 of Geneva Convention III

[41] The Alberto Gonzales Memo 'Decision Re: Application of the Genea Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban', as found at: http://www.msnbc.msn.com/id/4999148/site/newsweek/, last accessed May 11th 2007

states that:

> *"Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:*
>
> *(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.*
>
> *(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied"*[42]

The article goes on, however to provide four specific conditions for an individual to qualify as a prisoner of war, namely that they: are "commanded by a person responsible for the behaviour of his subordinates", that they have "a fixed, distinctive sign recognizable at a distance", that they carry their arms openly, and that they conduct "their operations in accordance with the laws and customs of war"[43].

Gonzales recommends that the President determine that the Geneva Convention Relative to the Treatment of Prisoners of War (hence GPW) does not apply to either the Taliban or Al Qaeda because doing so 'substantially reduces the threat of domestic prosecution under the War Crimes Act.'[44] The legal bases he finds for this recommendation include that Afghanistan was a failed state and that the Taliban did not conduct themselves in a manner accordant with that of a regular army

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[42] Geneva Convention Relative to the Treatment of Prisoners of War as found at: http://www.unhchr.ch/html/menu3/b/91.htm, last accessed May 11th 2007
[43] Ibid
[44] The Alberto Gonzales Memo

under the Geneva Conventions as defined above. Gonzales offers a list of potential negative ramifications for such a decision, including: that the U.S. would be vulnerable to reprisals in kind, that the U.S. has never before denied applicability of Geneva in an armed conflict, that it would 'provoke widespread condemnation among our allies' and that it would undermine the U.S. military culture 'maintaining the highest standards of conduct in combat.'[45] Ultimately Gonzales finds these to be 'unpersuasive' and turns to the administration's staple position: 'this is a new type of warfare,' he concludes, 'one not contemplated in 1949 when the GPW was framed – and requires a new approach in our actions toward captured terrorists.'[46]

Gonzales' legal argument was not however, met with support from the Secretary of State Colin Powell, whose response provided a combined legal and practical defence of the argument to apply GPW to both the Taliban and Al Qaeda in the War on Terror. Powell, having risen to his position through the ranks of the armed forces with a wealth of experience in service with operations for both the Reagan and Bush I administrations, was in a strong position to comment. Essentially he makes a comprehensive legal, practical and political case for GPW opining that it provides 'a more defensible legal framework, it preserves our flexibility under both domestic and international law', that it also 'presents a positive international posture, preserv[ing] U.S. credibility and moral authority' and it 'reinforces the importance of the Geneva Conventions, and generally support the U.S. objective of ensuring its forces are accorded protection under the Convention.' Powell also expressed the opinion that the argument against Afghanistan as a 'failed state' carried little water since the U.S. had previously held Afghanistan to its international treaty commitments, demonstrating an

[45] Ibid
[46] Ibid

acknowledgment of its legitimacy as an actor in the international system of states. He concluded by attacking the 'new paradigm' position stating that 'while no one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its applications.' [47] This position is backed up by State Department Legal Adviser William H. Taft IV whose opinion was that to reject Geneva completely would be to endanger U.S. troops. He stated that '[i]f the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protection as a matter of law.'[48] Like Powell, Taft recommended that the President acknowledges the applicability of Geneva as it 'demonstrates that the United States bases it conduct not just on its policy preferences but on its international legal obligations.' Ultimately however, for the Bush administration its policy preferences overrode its concerns and was swayed more by legal arguments - such as from the Department of Justice that 'concluded as a matter of law that our conflict with Al Qaeda, regardless of where it is carried out, is not covered by GPW' - that supported these than those which contradicted. However, it was nonetheless important for the administration that a legal argument existed, that its position were to be legally, if not morally defensible.

These are and have been the arguments that America has used to square away questionable coercive tactics of interrogation. President Bush, in February 2002 announced his conclusions, based on the advice of legal counsel such as Gonzales that, '[a]s a matter of policy the United States Armed Forces shall continue to treat

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[47] Powell Memo: 'Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan', as found at http://www.msnbc.msn.com/id/4999363/site/newsweek/, last accessed on May 10th 2007

[48] Memo From: William H. Taft IV, To: Counsel to the President, Date: February 2nd 2002, as found in *The Torture File*, p129

detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'[49] Essentially this statement infers that he regards international law as a matter of voluntary consent and not "law" as binding a requirement on actions. A contemptuous and arrogant position to take, he asserts what he sees as his right as commander in chief to act with impunity as long as it can be excused as essential to national security. While allowances of such exceptionalism exist in international law for military necessity they do not go so far as to permit a country to deny any individual of all legal personality. The International Covenant on Civil and Political Rights, ratified by the United States in 1992 incorporates the 'derogation clause': 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.'[50] The first thing about that which should be noted is that it only allows derogations as far as *does not* contravene other international laws including, but not exclusively, the Convention Against Torture. T.E. Holland notes that 'military necessity justifies a resort to all measures which are indispensable for securing [the submission of the enemy]; provided they are not inconsistent with the modern laws and usages of war.' [51] Secondly we should note that the derogation clause does not permit an actor to use it

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[49] Bush Memo, Date: February 7th 2002, Subject: 'Humane Treatment of al Qaeda and Taliban Detainees as found at The National Sceurity Archive: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf, last accessed on 11th May 2007

[50] International Covenant on Civil and Political Rights as found at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, last accessed on 11th May 2007

[51] As quoted in A.P.V. Rogers, *Law on the Battlefield* (Manchester: Manchester University Press: 2004) p5

when and as it sees fit. It is required that anyone wishing to use the derogation clause make such as request to the United Nations Secretary General who can allow or deny such a request. The Bush Administration has chosen not to follow the formal route and instead repeatedly rolled out the same rhetoric, that for purposes of gathering intelligence information essential to the maintenance of national security, it is entitled to employ extreme measures. However, in a similar case the Supreme Court of Israel 'rejected the use of torture even when a suspect is thought to know the location of a "ticking bomb"'[52].

Donald P. Cregg, national security adviser to George H. W. Bush, described the memos that bounced around the internal piping of the White House as having 'cleared the way for the horrors that have been revealed in Iraq, Afghanistan and Guantanamo and make a mockery of the administration's assertion that a few misguided enlisted personnel perpetrated the vile abuse of prisoners. I can think of nothing that can more devastatingly undercut America's standing in the world or, more importantly, our view of ourselves, than those decisions.'[53] These memos demonstrate a 'carefully constructed anticipation of objections'[54], or as Anthony Lewis said, 'read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.'[55] As troubling as we might find this interpretation, it is in line with and fits the view that the administration is acknowledging that, as powerful as the United States is, it is not beyond the reach of international law and unable to shrug it off completely. While it may have wanted to do so, these memos further demonstrate a learned acceptance of the United States that it cannot completely

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[52] *The Torture Papers*, pxiii
[53] Donald P. Cregg, 'After Abu Ghraib: Fight Fire With Compassion', *New York Times*, June 10th 2004
[54] *The Torture Papers*, pxiv
[55] Anthony Lewis 'Making Torture Legal' *New York Review of Books*, 15th July 2004

escape thejurisdiction and obligations of international humanitarian law; that international humanitarian law has not been rendered obsolete and impotent by 'the new paradigm'.

Chapter IV – Military Commissions

The Bush administration announced on the 13th of November 2001 the establishment of military commissions in order to try the detainees 'for violations of the laws of war and other applicable laws'[56]. The White House maintains that this has allowed them to fulfil its international legal obligations to provide an independent and competent tribunal as dictated by the Geneva Conventions. This appears to amount to little more than a rhetorical gesture as numerous critics have pointed out that there is very little about the commissions themselves that could be said to satisfy the criterion of a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'[57] Joseph Lelyveld asserts the view that if Guantanamo Bay is really nothing more than a holding camp, then 'it follows that the debate about the gestating military commissions has no bearing whatsoever on the fate of most of the detainees.'[58] His point is that any debate over the legality of the commissions is rendered moot by the fact that the United States Government is disinclined to try them anyway, and is pursuing all legal avenues to enable them not to have to.

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[56] Harvard Law Review April 2005 p1971
[57] 'Contemporary Practise of the United States Relating to International Law', *American Journal of International Law* (October 2006, Vol. 100, No. 4) p921
[58] Joseph Lelyveld, 'In Guantanamo'*, New York Review of Books*, Volume 49, Number 7; November 7th 2002

At the most basic level, no court can be deemed to be independent and competent where both the prosecutor and the ruling body stem from the same place, as it is at Guantanamo Bay the executive branch of the U.S. government and ultimately the President himself. Any ruling made is likely to be questionable at best and at worst, accusations may be levelled that the court is simply serving the wishes of the executive himself. International law, especially the additional protocols to Geneva can be seen to strictly provide the tenets of the modus operandi of any trial of individuals party to a conflict.

A Harvard Law Review evaluation stated that '[e]xisting military commission rules allow the government to exclude the accused from proceedings and allow evidence that he will never see to be introduced against him'[59] This is a clear violation of the prescriptions of a fair trial as defined in Geneva Convention III which provides that '[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality.' Article 5 of Geneva goes on to point out that 'Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a *competent tribunal*.(emphasis added)'[60]

Article 75 of Protocol I additional to Geneva provides the conditions that shall be necessary for a fair trial including the right of the accused to be present at his own trial and the right to have prior access to all evidence to be used against him in order to prepare a proper defence. While the United States signed but did not ratify the

[59] 'Secret Evidence in the War On Terror', *Harvard Law Review*, April 2005
[60] Geneva Conventions Article 5

Additional Protocols and has resisted their entry into force it has been generally accepted by the majority of UN members that they constitute customary international law and therefore that all states are bound to adhere to them. The United States Supreme Court can be said to have recognized this with its ruling that the military commissions at Guantanamo Bay constitute a violation of international law.

In the case of Hamdan v. Rumsfeld the Bush administration once again received an injury when the United States Supreme Court ruled that the military commission established to try Guantanamo Bay detainees violates both the Uniform Code of Military Justice and, more importantly as far as this essay is concerned, the Geneva Conventions of 1949. Justice Stevens opinion stated that 'whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Geneva Convention because it had the power to convict based on evidence that the accused would never see or hear.'[61] While not a blanket ruling that the commissions are innately illegal by their existence as the Geneva Conventions themselves accept military courts as the accepted means by which prisoners of war are tried, and did state the President's right to request such military powers from the legislature, the ruling can be seen to uphold the right of a detainee to due legal process. Essentially it strengthens the original laws where the White House has sought to weaken them and also denies the right of the President to act with abject impunity and appropriate excessive executive powers.

Chapter V – Repercussions of American Policy on International Law

[61] Supreme Court of the United States Ruling In Hamdan V. Rumsfeld as found at: http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf, last accessed on 11th May 2007

Human Rights Watch has expressed concern that if the government of the United States continues operating as it has done at Guantanamo Bay, denying denies access to due process, conducting aggressive and coercive interrogations and operating military commissions that amount to little more than kangaroo courts, then '[h]ard fought gains in international law and protection for basic human rights will be undermined along with the rights of the detainees.'[62] This is something of an extreme reaction but a necessary warning to other states. Guantanamo Bay's existence *is* a unique example of a state seeking alter the accepted interpretations of international law to its own policy end. Yet unless it is an example that is followed by other states it will not amount to a threat to international law itself. Although in domestic law court ruling can count as precedent and reshape/redefine law, in international law precedent is not enough to reshape law. International law is a product of *opinio juris* and custom. America has, without question, more power to reshape customary law and its example is far more likely to be followed than that of any other country, but that does not mean to say that it will be. Jordan Paust states that 'customary law, resting as it does upon the authority and practise of all is undaunting in its force, uncircumscribed by a minority of elites'[63]; that is to say, as long as the standard interpretation is maintained by a majority of countries then the effect of American behaviour on international law will be minimal.

Its legal arguments in defence of its actions have been fragile even at their strongest and have received critical rather than warm appraisals from NGO's and most

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[62] Human Rights Watch, *Guantanamo Bay Two Years On U.S. Detentions Undermine the Rule of Law,* as found at: http://hrw.org/english/docs/2004/01/09/usdom6917.htm, last accessed on May 11th 2007
[63] Jordan Paust, *International Law as Law of the United States* (Durham, N.C.; Carolina Academic Press; 1996) p2

other countries. While the detention centre at Guantanamo Bay is still in operation the number of detainees is currently less than half that which it was at its highest; politicians and statesmen of various high profile countries, including the United States itself, have added their own condemnations of the operation to those of human right organizations, as well as calling for its closure as soon as possible.[64] At the same time, the 'war on terror' rhetoric has been on the decline, indicating both a substantial weakening of the term as a legal justification for the operation and action at Guantanamo Bay, and an inclination of the international community to return to the legal standards that constituted the status quo of the pre-9/11 period.[65] Colin McInnes' assertion that 'The worldwide, near universal condemnation that followed the attacks suggested that norms had been broken and that there was a desire to maintain these not dispense with them.'[66] Fears that the actions of the United States would lead to a new, anarchic world order in which the policy of states defines and shapes international law have not come to fruition as international humanitarian law remains a strong guiding force on the behaviour of states. The United States might be seen to conduct itself on the edge of international law but no more than it has always done. With regards to Guantanamo Bay it has not set a long-term precedent, its example has not been followed and its policies have not been universally adopted..

While the Bush administration has posited that the Geneva Conventions are outdated and inapplicable within the context of this 'new paradigm', with little or no concurrence of this position it is one that stands very little chance of becoming a

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[64] Margaret Beckett - '*Guantanamo Bay unacceptable'*, October 12th 2006, as found at: http://news.bbc.co.uk/1/hi/uk_politics/6044588.stm, last accessed on May 11th 2207
[65] Paul Reynolds, *Declining Use of 'war on terror', BBC New Online,* Tuesday April 17th 2007, as found at: http://news.bbc.co.uk/1/hi/uk_politics/6562709.stm, last accessed on May 11th 2007
[66] McInnes, p116

characteristic element of international law. Anthea Elizabeth Roberts, to a certain extent, can be seen to be sympathetic to the Bush administration position as stated above: 'Laws must bear some relation to practise if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten. This particularly applies to decentralized systems of law such as international law, where traditional enforcement mechanisms are unavailable or underdeveloped.'[67] However, her point stresses that essentially, one swallow does not make a summer. As long as the Bush White House is the only place where the relevance and application of existing law is being contested it is unlikely to have much impact on these fundamental elements of international law.

Conclusion

While it might be said that America has indelibly altered the tenets of international law, I would maintain that this has not been the case. While the Bush administration may be seen to have repeatedly broken international law it has continually sought to argue that this is not what it has been doing. In truth America has not even *sought* to change international law itself, but has instead endeavoured to work within the existing international boundaries in order to find a way of operating that allows it to act as it has desired without allowing others to do the same. The Bush administration can be seen, at most, to have been trying to draw upon a new interpretation of the existing laws but not to fundamentally alter or do away with them. Even as far as these fairly limited goals it has not been particularly successful. As we have seen, the Bush administration has only been able to act as political expediency has permitted.

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[67] Anthea Elizabeth Roberts *Traditional and Modern Approaches to Customary International Law: A Reconciliation,* American Journal of International Law (Volume 95, No. 4, October 2001) p763

The further we have gone, the more distance has been travelled from the September 11th attacks, the less blanche the administration's carte has become. While in the immediate aftermath of that fateful late summer's day the U.S. judiciary and the legislature were willing to be much more than less permissive to the executive's conduct, this has not been sustained. The congress was prepared to pass whatever legislation Bush requested and the courts were willing to defer to the executive's prerogative to conduct itself in a fashion consistent with a wartime presidency – even when this involved reneging on internationally accepted norms, rules and obligations. Almost as permissive, at least at first, was the international community, willing as it was to overlook certain misbehaviours in the name of compassion for the injury suffered on the American mainland. As time has passed however, this collective mindset of tolerance has fallen away significantly. The American courts have been increasingly prepared to impose themselves on the administration, with the Supreme Court overturning a number of rulings that had previously gone in the executive's favour, and thus weakened the administration's positions. Hamdan v. Rumsfeld and Rasul v. Bush both provide important examples of this. The legislative branch has also begun to take the view that the political injuries America is suffering, due to the ruthlessly arrogant actions of the executive, are far more hazardous to the national health, both domestically and from the point of view of prestige and reputation within the international realm, than any it might bear as a result of conforming to the international status quo. Referring to a law passed in 2006 that banned non-citizens from using habeas corpus petitions to challenge the legality of their detentions, Senate Judiciary Chairman Patrick Leahy said: "This new law means that any of these people can be detained forever ... without any ability to challenge their detention in federal

court, or anywhere else, simply on the government's say-so that they are awaiting determination as to whether they are enemy combatants." The Vermont senator further stated that "[t]his is wrong. It is unconstitutional. It is un-American."[68] The effect of Guantanamo Bay on international law can be best found not in the actions of the Bush administration alone but in the policies of future administrations and actions of others states which have been far more inclined to rebuke than imitate the Bush administration's interpretations of the laws of war. Far from acting as a precedent Guantanamo Bay will be seen as an anomaly; its rejection as a course of behaviour will serve to strengthen, not weaken, the conventional interpretations of the treaties, customs and legislation that make up International Humanitarian Law.

[68] Susan Cornwell 'Senators vow to restore rights to detainees' Washington Post , April 26th 2007 as found at: http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042601649.html, last accessed on May 11th 2007

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