

## ■ BOOK REVIEW

*Tobias T. Molander*

**Jordan J. Paust, *Beyond the Law – The Bush Administration's Unlawful Responses in the "War" on Terror*, Cambridge University Press, 2007, ISBN 978-0-52171-120-3, xiv+311 pp.**

Jordan J. Paust, a former Fulbright Professor at the University of Salzburg, takes a closer look at the Bush administration's so-dubbed "war on terrorism" in which the United States embarked after 9-11 and tries to expose violations of international and domestic law that occurred in this conduct. Not only does he intend to highlight alleged violations of law, but he also provides ample pieces of evidence to prove the authorization and acknowledgement of this "dirty war" by the President and his staff (166 out of 299 pages are dedicated to footnotes!). After a short introduction dealing with the general appreciation of the Bush administration concerning international law, Paust focuses on particular problematic areas, such as treatment and detention of prisoners, enemy status, judicial power concerning detainees, constraints on presidential power by the rule of law and the role of military commissions. Summarizing his deeply critical judgement of Mr. Bush's legacy, Paust counters the currently prevailing "unconstitutional and autocratic commander-above-the-law theory" unprecedented in US history by providing a basis of lawful responses to terrorism and highlighting the role of the judiciary in times of peril.

According to the author, a common plan to circumvent international law (especially customary humanitarian law as reflected in the 1949 Geneva Conventions) and deny protection to certain enemies captured – especially members of Al Qaeda and the Taliban – emerged early in the Afghan war against the Taliban regime in 2002. This concept, which in Paust's view stems from the idea that the President should stand above the law, forms a formidable contrast to the international and constitutional legal order. Regardless of the legal categorization of the conflict and the status of the enemy, customary laws of war provide a nonderogable minimum degree of protection to every person that is to be applied in every situation of conflict (especially Common Art 3 of the Geneva Conventions). In addition, human rights law continues to be applicable during times of conflict; many of those rights being peremptory and nonderogable even during times of emergency. All these provisions intend to ensure "humane treatment" of all persons at all times.

Despite the warnings of many people within and without the administration who pointed to the absolute applicability of the relevant norms, the US President and his staff intentionally embarked on their plan to circumvent the Geneva Conventions, the violation of which leads to criminal responsibility under domestic and international law.

Abu Ghraib, Guantanamo and secret detention centres around the world stand for the execution of the plan to avoid compliance with international law in practice. "Harsh interrogation tactics" such as hooding, stripping detainees naked, the use of dogs for interrogations, use of extreme cold and heat, "waterboarding", etc. were labelled by the ICRC (with regard to Guantanamo) as "an intentional system of cruel, unusual and degrading treatment and a form of torture" in 2004. However, instead of investigating complaints about ill-treatment and providing effective remedies for the detainees, "tough" forms of treatment continued and the given executive orders were not revoked.

Many of those subject to special interrogation techniques were also victims of forced disappearance, which is also prohibited by international law in absolute terms. It places the person concerned outside the protection of the law and makes monitoring of detention facilities by international bodies such as the ICRC and consular agents impossible. Such a system is further aggravated, when it is not possible to determine whether an executive decision to detain a person was arbitrary as the detainee is barred from access to judicial review. Considering the low threshold the state has to meet in order to justify detention in times of crisis, the denial of the right to habeas corpus becomes even more awkward. When this system was contested in the case of *Hamdi vs. Rumsfeld (Hamdi I)* the district court referred to the constitutional prescribed system of separation of powers and viable checks and balances and noted:

The standard of judicial inquiry must recognize that the concept of "national defense" cannot be deemed an end to itself, justifying any exercise of [Executive] power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart ..."

Paust further contests the notion that the US can be at "war" with Al Qaeda (in contrast to the Taliban who effectively controlled much of Afghanistan), as the organization does not meet the criteria for state, nation, belligerent or even insurgent. Consequently, members of Al Qaeda do not pass the test for "combatant" status. If the laws of war were to be applied to Al Qaeda, the Pentagon attacked on September 11 would be considered a legitimate military target, it would lead to impunity regarding atrocities committed by terrorist "combatants" targeting legitimate military targets (including collateral damage – although hijacking of a civil aircraft and using it as a means of destruction could not be considered a lawful act of war) and grant prisoner of war status to detained perpetrators.

The US tried to bypass these legal and logical problems arising with blatant violations of humanitarian and human rights law. First, by phrasing the new oxymoronic status of "unlawful enemy combatants" who should neither be granted POW status nor any other rights concerning treatment and detention. Second, these persons fall under the exclusive jurisdiction of specifically designed military commissions and could be denied even minimum due process rights guaranteed in a fair trial. This development was successfully challenged in the Supreme Court's landmark decision *Hamdan vs. Rumsfeld*, but was nevertheless set forth with continuing severe procedural improprieties in the Military Commission Act 2006.

The strength of this book is the direct link shown between violations of law and acts by President Bush, Vice President Cheney, Secretary of Defense Rumsfeld

and other top officials of abetting, authorizing and condoning these violations by putting them into context with extracts from numerous memos, letters, memoranda and quotes. These materials proved to Paust that well documented violations of humanitarian and human rights law, such as those revealed in Abu Ghraib, were not isolated cases of abuse by single soldiers but part of a greater picture.

Paust tries to counter violations of law committed in the name of the Bush administration's "commander above the law theory" during the war on terrorism with a "no man is above the law theory". This approach is characterized by the conviction that even (or especially) the President is bound by domestic as well as international law. Following this theory, the author tries (quite successfully) to prove wrong arguments claimed by the executive and elaborates on the relevant provisions under international treaty and customary law, soft law, domestic law, international as well as US case law and in historical legal documents.

Whether or not the violations of law committed during the war on terrorism will lead to legal consequences, Paust is convinced that there are already political and moral implications as the reputation of the United States has been severely stained and has thus served the terrorists' ambitions, aided the recruitment of new terrorists and exacerbated the ongoing conflict in Iraq and Afghanistan.

"Beyond the Law" reminds the reader that even in times of crises we must not sacrifice our basic values as the ends do not always justify the means: "Men who take up arms ... in public war do not cease on this account to be moral beings, responsible to one another and to God."

- *Tobias T. Molander is a doctoral candidate at the University of Salzburg, Department of Public Law / Public International Law. For comment please send an email to [ungsis@gmx.net](mailto:ungsis@gmx.net)*