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Recent Developments

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RECENT DEVELOPMENTS

JOHN MERRITT LOCKWOOD

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I. AFRICAN DEBT RELIEF

Debt has been the focus of many activists campaigning against governments; the theory is that sovereign governments use debt as a tool for curbing public programs that could otherwise be used to provide healthcare for residents of developing countries. The current ratio is that for every pound that flows into these impoverished countries in the form of aid there is thirteen pounds being used to as payment for debt services. This is nothing more than a vicious cycle that has been ongoing for more than twenty years; each time the government takes out new loans to pay for old loans they simply adopt a new set of economic policies that practically spin the country deeper and deeper into debt without resolving the problem. The reality of this problem can be quite startling and the actual statistics are unsettling. In Niger, 86 percent of the population is unable to either read or write and 25 percent of the children born do not live to see their fifth birthday.¹ In Zambia, the drastic impact of the HIV/AIDS epidemic has reduced life expectancy to just 40 years.²

These countries are in need of significant help. Everyday more and more children die while their governments spend more on debt relief payments than on healthcare and education combined.³ The concept of human rights is the understanding that all human beings are born equal. This is grounded in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantees the right to sufficient food, education, shelter, clothing and the right to special care for children.⁴ Within the ICESCR the “equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and is “derive[d] from the inherent dignity of the human person.”⁵ Parties to this agreement recognized that upon signing they were le-

1. OXFAM INTERNATIONAL, DEBT RELIEF: STILL FAILING THE POOR (2001), http://www.oxfam.org/en/files/pp0104_Debt_relief_still_failing_the_poor.pdf/download.

2. *Id.*

3. *Id.*

4. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3. [hereinafter ICESCR].

5. *Id.*

gally obligated to provide these bare minimum essentials regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁶

The 2002 G8 Summit in Kananaskis resulted in the adoption of the Africa Action Plan ("AAP").⁷ The AAP contains commitments on promoting peace and security; strengthening institutions and governance; fostering trade, economic growth and sustainable development; implementing debt relief; expanding knowledge; improving health and confronting HIV/AIDS; increasing agricultural productivity; and improving water resource management.⁸ The AAP was drafted in response to the New Partnership for Africa's Development ("NEPAD") and was intended to serve as a plan for how the G8 partners would enhance their engagement with African countries.⁹ NEPAD arises from a mandate given by the Organisation of African Unity ("OAU") to the five initiating Heads of State; Algeria, Egypt, Nigeria, Senegal, and South Africa.¹⁰ This mandate was to establish an integrated socio-economic development framework in Africa by focusing on simple primary objectives.¹¹ The AAP states that the case for action within Africa is compelling and recognizes, along with NEPAD, that Africa maintains the prime responsibility for their future.¹²

The AAP consists of eight engagements that are designed in order to support NEPAD in obtaining the primary objectives.¹³ Within each engagement, the AAP outlines various commitments that will provide a roadmap as to how the engagements are to be completed. While there are eight engagements, the most publicized areas include those of growth development and debt relief, respectively engagements III and IV of the AAP.¹⁴ To generate growth, the AAP contains commitments to helping Africa attract

6. *Id.*

7. Gov't of Canada: Canada's G8 Website, Statement by G8 Leaders: G8 African Action Plan, <http://www.g8.gc.ca/2002Kananaskis/afraction-en.asp>. [hereinafter AAP].

8. *Id.*

9. *Id.*; see also Victor Mosoti, *The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion*, 5 SAN DIEGO INT'L L. J. 145 (2004).

10. See Corinne A. A. Packer & Donald Rukare, *The New African Union and its Constitutive Act*, 96 AM. J. INT'L L. 365 (2002); see also Vincent O. Nmeielle, *The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?*, 7 SING. J. INT'L COMP. L. 412 (2003).

11. See *supra* note 10. The primary objectives are as follows: a) to eradicate poverty; b) to place African countries, both individually and collectively, on a path of sustainable growth and development; c) to halt the marginalization of Africa in the globalization process and enhance its full and beneficial integration into the global economy; d) to accelerate the empowerment of women.

12. See AAP, *supra* note 7.

13. *Id.*

14. *Id.*

investment,¹⁵ provide market access for African products,¹⁶ increase funding and trade-related assistance,¹⁷ support Africa in advancing regional economic integration and intra-African trade,¹⁸ and improve and strengthen commitments by the Official Development Assistance (“ODA”) for enhanced-partnership countries.¹⁹ The ODA is designed to spur growth within low-income countries by providing humanitarian assistance. Commitment 3.6 of the AAP ensures that this humanitarian assistance is effectively used and not wasted on unproductive purposes.²⁰

The Group of Eight consists of an informal but exclusive body of the world’s leading industrial nations. Their purpose is to tackle global issues through discussion and action. On June 11, 2005, this group of the world’s wealthiest nations agreed to immediately cancel up to \$55 billion worth of debt owed by the world’s poorest nations.²¹ The United Kingdom, which holds the G8 presidency this year, hopes that in addition to the debt cancellation they will be able to secure a large increase in developmental aid for the poorest countries.²² It is widely believed that these countries will need more than just debt relief. They are already underdogs when it comes to international trade and without capital investments they will eventually drag themselves back into debt due to their inability to generate sufficient income flows.

The initial plan calls for an immediate cancellation of 100 percent of all debt owed by 18 countries.²³ There are an additional 20 countries under consideration, which could bring the grand total to \$55 billion if they meet specific requirements deemed necessary by the G8 ministers.²⁴ While there was a great deal of praise initially, skeptical doubts were simultaneously being raised as to how great of an impact this relief would truly be.²⁵ Nsaba Buturo, the Ugandan Information Minister, was quoted as saying that the debt program was “commendable” but that it is “something that should

15. *Id.* at Commitment 3.1

16. *Id.* at Commitment 3.3

17. *Id.* at Commitment 3.4

18. *Id.* at Commitment 3.5

19. *Id.* at Commitment 3.6

20. *Id.*

21. *G8 Ministers Back African Debt Deal*, CNN.com, June 11, 2005, available at <http://www.cnn.com/2005/WORLD/europe/06/11/uk.g8.africa/index.html>.

22. *Cautious Welcome for G8 Debt Deal*, BBC NEWS, June 12, 2005, available at <http://news.bbc.co.uk/2/hi/business/4084574.stm>. The agreement with the World Bank calls for an immediate write-off of 100% of the money owed by an initial 18 countries. There are nine other countries that could potentially qualify for the debt write-off within the next 18 months. These nine countries could bring the total debt cancellation up to \$55 billion. *Id.*

23. *G8 Ministers Back African Debt Deal*, *supra* note 21.

24. *Id.*

25. *Cautious Welcome for G8 Debt Deal*, *supra* note 22.

have been done yesterday.”²⁶ These statements echoed by Sofian Ahmed, Ethiopia’s Finance Minister, who felt that the debt cancellation was a good start assuming that it would not create any additional obligations of his country.

These reservations are built upon well-founded concerns. There has been minimal public discussion following the initial announcement of the debt cancellation. However, there have been reports that these countries would not necessarily receive a clean slate with their debtors. BBC News has reported that instead of receiving irrevocable and unconditional debt relief, the countries would instead receive grants that would have conditions attached.²⁷ These rumors have created concern among many sub-Saharan countries because they would be in direct contradiction to the proposed debt cancellation.²⁸

One of the documents submitted at the G8 Conference in Gleneagles was the Africa Progress Report (“Report”). The Report is in response to the 2002 African Action Plan and NEPAD, both which discuss the challenges in Africa and the compelling case for action. Africa still remains the country most likely to fall short of the Millennium Goals proposed by the UN.²⁹ The conditions there remain below standard: children are dying at a rate of almost two thousand per day, over 2.3 million died in 2005 from HIV/AIDS, and over 40 million children are still not in school.³⁰ If progress is not made by 2015 then the world will have seen 40 million children die, more and more people infected with HIV/AIDS, and many will still be forced to live on less than \$1 per day.³¹ While progress has been made on the African Action Plan, much more is needed in order to face the ever changing challenges that arise. As the Report states, deeper relationships are required in order to support African initiatives and reinforce efforts to counter the effects of HIV/AIDS and crippling debt.

In July 2005, rocker Bob Geldof and many others treated the world to a “Live 8” musical concert which was reminiscent of the 1985 “Live Aid” concert that took place in the wave of the Ethio-

26. *Id.*

27. Steve Schifferes, *G8 Debt Deal Under Threat at IMF*, BBC NEWS, July 15, 2005, available at <http://news.bbc.co.uk/1/hi/business/4686015.stm>. A document leaked to the Jubilee Debt Campaign quotes Willy Kierkens, Belgian IMF representative, as telling the executive board that “rather giving full, irrevocable and unconditional debt relief ... countries would receive grants.” The document goes on further to explain that these grants could be withdrawn at any time if the countries did not meet the requirements imposed. *Id.*

28. *Id.*

29. Africa Progress Report, http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_AfricaProgressReport,0.pdf.

30. *Id.* at 1.

31. *Id.* at 2.

pian famine.³² The purpose of the concert was to raise awareness of the poverty and substandard conditions of Africa. The concert was attended by the likes of Nelson Mandela, Bill Gates, and Kofi Annan. The concert was strategically held in the weeks before the G8 Gleneagles Summit in order to attempt to sway some attention toward eradicating the enormous debt of African countries. The chances that the Live 8 concert had any effect on the G8 Gleneagles Summit is speculative at best, but for at least a moment in July millions watched as some of the world's greatest performers expressed their support for relief efforts in Africa.

II. GUANTANAMO BAY

The treatment of detainees held at the infamous Guantanamo Bay prison has littered the world headlines and has become increasingly troublesome for the Bush Administration. The prison, which was established in 1898 following the end of the Spanish-American War, is best known as a detainment camp for prisoners believed to have ties with al-Qaeda. Many of the prisoners held at the camp are not officially charged with any crime nor have they been deemed prisoners of war. Public outcry has grown stronger while still searching for answers to complicated questions. For example, what legal rights do the detainees have to question their confinement? Do the detainees have access to the United States court system?

In addition to the legal questions arising out of Guantanamo, there have been numerous allegations of abusive treatment and interrogations.³³ An article in the *New England Journal of Medicine* raised questions concerning the participation of U.S. medical personnel that participated in the questioning of detainees at Guantanamo Bay.³⁴ This article claimed that the medical personnel violated the Geneva Conventions and standards of professional ethics by participating in the abusive interrogations and even pos-

32. See, e.g., Live 8: Real Serious Music, CBS News Online, July 2, 2005, <http://www.cbsnews.com/stories/2005/07/02/world/main705970.shtml> ("Musicians were taking to 10 stages from Tokyo to Toronto, Berlin to Johannesburg for a music marathon to raise awareness of African poverty and pressure the world's most powerful leaders to do something about it at the [G8] summit in Scotland next week").

33. David R. Chludzinski, *A Most Certain Tragedy, But Reason Enough to Side-Step the Constitution and Values of the United States?*, 23 PENN ST. INT'L L. REV. 227 (2004); see Alan Tauber, *Ninty Miles From Freedom? The Constitutional Rights of the Guantanamo Bay Detainees*, 18 ST. THOMAS L. REV. 77 (2005); see also Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1 (2004).

34. M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go To War*, 352 NEW ENG. J. MED. 1497 (2005).

sibly torture.³⁵ These allegations have been fueled in part by documents obtained by U.S. civil liberties and human rights groups during litigation and Freedom of Information Act requests.³⁶ In addition, outrage followed released photographs that showed prisoners being held in chain-link cells and being forced to wear hoods, goggles, earmuffs, and facemasks.³⁷ U.S. authorities confirmed that in August 2003, twenty-three detainees staged a mass protest in which they attempted to hang or strangle themselves.³⁸ Following this negative publicity, the United States government began releasing photographs and press releases that attempted to depict the prisoner treatment in a favorable light.³⁹ According to the U.S. Defense Department, Guantanamo detainees receive essential dental care, comfort items, and a carbohydrate rich diet that is also "culturally sensitive."⁴⁰

Rasul v. Bush resulted when several aliens brought actions challenging the legality and conditions of their confinement.⁴¹ The Petitioners in *Rasul* were 2 Australian citizens and 12 Kuwaiti citizens who had been captured abroad and held in the custody of the U.S. military since the early part of 2002.⁴² All of the petitioners alleged that they had never been a combatant against the United States nor had they ever committed an act of terrorism.⁴³ In addition, they claimed that charges were never filed against them, counsel was not provided, and that they had no access to the courts or any tribunal for that matter.⁴⁴

The claim sought relief on the basis that the denial of rights constituted a violation of the United States Constitution, interna-

35. *Id.*

36. *Id.*

37. Rui Wang, Note, *Assessing the Bush Administration's Detention Policy for Taliban and al-Qaeda Combatants at Guantanamo Bay in Light of Developing United States Case Law and International Humanitarian Law, Including the Geneva Conventions*, 22 ARIZ. J. INT'L & COMP. L. 413, 415-416, (2005).

38. See *Mass Suicide Attempts by Suspects Confirmed*, WASH. POST, Jan. 25, 2005, at A5; See also *23 Detainees Attempted Suicide in Protest at Base, Military Says*, N.Y. TIMES, Jan. 25, 2005, at A14.

39. Wang, *supra* note 36, at 416; see also U.S. Department of Defense, *Operation Enduring Freedom*, <http://www.defenselink.mil/photos/Operations/OperatiEndurinFreedo/page4.html>.

40. Wang, *supra* note 36, at 416-417; see *Inside Camp X-Ray: Meals*, BBC News Online, http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_ray/meals.stm.

41. *Rasul v. Bush*, 542 U.S. 466 (2004).

42. *Id.* at 470. Many of the detainees were captured by villagers who believed that the United States would offer financial rewards to those who turned them over to U.S. custody. *Id.*

43. *Id.* at 471.

44. *Id.* The Australian, David Hicks, was later permitted to speak with counsel after the petition was filed but prior to the Court's ruling. He was allegedly captured in Afghanistan by the Northern Alliance which is a coalition of Afghan groups who oppose the Taliban. *Id.*

tional law, and various treaties of the United States.⁴⁵ The case was originally dismissed by the District Court for lack of jurisdiction.⁴⁶ On appeal, the Court of Appeals affirmed the lower courts ruling that aliens in military custody with no presence in the United States do not have the privilege of litigation.⁴⁷ This ruling was appealed and the Supreme Court chose to grant certiorari on November 10, 2003.⁴⁸

The argument presented by the government was that the Supreme Court's decision should be controlled by a prior decision in *Johnson v. Eisentrager*.⁴⁹ In *Eisentrager*, the Court held that a Federal District Court lacked the authority to issue a habeas petition to 21 German citizens captured in China by U.S. Forces.⁵⁰ The Court differentiated *Eisentrager* from *Rasul* in many respects. The detainees in *Eisentrager* were at war with the United States whereas the petitioners in *Rasul* were not.⁵¹ Furthermore, they deny that they every engaged in or plotted acts of aggression against the U.S., they were never charged or convicted of any wrongdoing, and they have been imprisoned for over two years in a territory over which the U.S. exercises exclusive jurisdiction and control.⁵²

Another important differentiation was that the *Eisentrager* detainees were seeking relief under a constitutional entitlement to a habeas petition while making little mention of any statutory entitlements.⁵³ The Court has seen over 50 years of subsequent decisions that filled important statutory gaps which the *Eisentrager* court did not have the benefit of utilizing. The Court focused particularly on the holding of *Braden v. 30th Judicial Circuit Court of Ky*, that held a district court would have jurisdiction under a § 2241 claim as long as "the custodian can be reached by service of process."⁵⁴ The Court in *Braden* effectively overruled the statutory predicate to *Eisentrager's* holding that would have prevented peti-

45. *Id.* Petitioners sought to invoke the Court's jurisdiction under 28 U.S.C. §1331 and 1350. As well, they argued causes of action under the Administrative Procedure Act, the Alien Tort Statute, and the general federal habeas corpus statute. *Id.*

46. *Id.* The court relied on *Johnson v. Eisentrager*, 339 U.S. 763, (1950), in holding that "aliens detained outside the sovereign territory of the United States [may not] invoc[e] a petition for a writ of habeas corpus." *Id.*

47. *Rasul v. Bush*, 542 U.S. 466, 471 (2004). The Court of Appeals ruled that the District Court lacked jurisdiction over the claims of habeas corpus, including the claims that were not sounding in habeas. *Id.*

48. *Rasul v. Bush*, 540 U.S. 1003 (2003).

49. *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 476.

54. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-495, 93 S.Ct. 1123 (1973).

tioner's from prevailing in the exercise of a § 2241 petition.⁵⁵ The question was not raised in any briefs filed as to whether the District Court lacked jurisdiction over the petitioners' custodians.⁵⁶ As a result, the Court held that the District Court had jurisdiction under § 2241 to entertain the challenges to the legality of petitioners' detention at the Guantanamo Bay Naval Base.⁵⁷

The *Rasul* case is just one among many that have involved Guantanamo detainees in the recent years. One of the more important issues has centered on whether or not it is appropriate to subject the detainees to military tribunals. One such case involved Salim Ahmed Hamdan, a detainee who was captured by Afghani militia forces and turned over to the U.S. military.⁵⁸ On June 3, 2003, it was determined that there was a reason to believe that Hamdan was a "member of al Qaeda or was otherwise involved in terrorism directed against the United States."⁵⁹ This designation brought Hamdan within the constraints of President Bush's November 13, 2001 Executive Order, which would require an individual with such a classification to appear before a military tribunal.⁶⁰

In April 2004, Hamdan formally filed a petition for habeas corpus to challenge his classification.⁶¹ While this petition was pending before the court, Hamdan was formally charged with "conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism."⁶² More specifically, it was alleged that Hamdan was Osama bin Laden's personal driver and bodyguard, delivered weapons to various al Qaeda members, and trained at the al Qaeda sponsored al Farouq camp.⁶³ Hamdan already admitted that he was the personal driver of bin Laden, but disputed the allegations that he was ever involved in terrorist activities.⁶⁴ Pursuant to a recently released opinion, *Hamdi v. Rumsfeld*, Hamdan was granted a Combatant Status Review Tribunal that subsequently affirmed his

55. *Rasul v. Bush*, 542 U.S. 466, 478-479 (2004).

56. *Id.* at 484.

57. *Id.*

58. *Hamdam v. Rumsfeld*, 415 F.3d 33, 34 (D.C. Cir. 2005).

59. *Id.*

60. *Id.*

61. *Id.* Hamdan's petition also alleged that the President violated the separation of powers doctrine by establishing the military commissions. The argument was that Article I of the Constitution gave Congress the power to establish military commissions and that the President has no inherent power under Article II. The Appeals Courts held that Congress had in fact authorized such commissions in a joint resolution that was passed in response to September 11, 2001, and in 10 U.S.C. §821 and 10 U.S.C. §836. *Id.*

62. *Id.*

63. *Id.*

64. *Hamdam v. Rumsfeld*, 415 F.3d 33, 34 (D.C. Cir. 2005).

status as an enemy combatant.⁶⁵ On November 8, 2004, the district court granted Hamdan's habeas petition holding that a competent tribunal must determine he was not a prisoner of war under the 1949 Geneva Convention before a military tribunal could be held.⁶⁶ This ruling dealt a significant blow to the Bush administration's policy of conducting military tribunals for Guantanamo detainees.

On Friday, July 15, 2005, a three judge panel of the U.S. Circuit Court of Appeals for the District of Columbia ruled that the Bush administration's plan to use military tribunals to try detainees at Guantanamo Bay was constitutional.⁶⁷ This overruled the lower court's ruling that protected Hamdan from being subjected to the tribunals. The court paid particular attention to *Johnson v. Eisentrager*⁶⁸ and *Holmes v. Laird*.⁶⁹ The Supreme Court in *Eisentrager* concluded that an individual has no right to a habeas petition if:

he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁷⁰

The decision in *Eisentrager* was used in *Holmes* to deny the enforcement of the individual rights provisions of the NATO Status of Forces Agreement.⁷¹ *Eisentrager* is still considered good law despite its age and recent negative treatment in *Rasul v. Bush*. The holding in *Rasul* did not elaborate on the power of courts to enforce any of the Geneva Convention's provisions; rather, the holding of *Rasul* only applied to the federal courts ability to entertain a habeas petition of detainees.⁷² There was a brief discussion on the issue that *Eisentrager* dealt with the 1929 Geneva Convention whereas the petitioners in *Hamdam* were seeking relief under the

65. *Id.*

66. *Id.*

67. *Id.* This case became another focal point of the media after it was learned that recent Supreme Court nominee John Roberts was one of the judges that signed onto the opinion.

68. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The court lacked authority to issue a writ of habeas corpus to 21 German nationals who were captured by U.S. forces in China. An American military tribunal tried the Germans and convicted them of war crimes. *See id.*

69. *Holmes v. Laird*, 459 F.2d 1211, (D.C. Cir. 1972).

70. *Johnson*, 339 U.S. at 781.

71. *Hamdam v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir. 2005).

72. *Rasul*, 542 U.S. at 483-484.

1949 Convention, but the Court could discern no relevant differences that would render *Eisentrager* inapplicable to the proceedings.⁷³

The Court leveraged these differences against Hamdam by holding that a military commission was a competent tribunal for his claims to be asserted.⁷⁴ This decision may well be considered a difficult blow to human rights activist across the world, but it does have the capability of bringing some closure to this difficult issue. On August 8, 2005, Hamdan's attorneys filed a petition for certiorari to the United States Supreme Court. The Court in turn granted this petition.⁷⁵ This case will allow the Court the opportunity to clarify the threshold legal requirements for the use of military tribunals in detainee cases.

73. Hamdam, 415 F.3d at 40.

74. *Hamdam*, 415 F.3d at 43. The Court made remarks that there were several problems with Hamdam's arguments under the 1949 Geneva Convention such as whether al Qaeda members could seek redress under its provisions. *Id.*

75. *Hamdam v. Rumsfeld*, 2005 WL 1874691, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).