

America's War on Terrorism and Constitution.*

The end of the twentieth century has been called the era of terrorism. Terrorism is not a recent phenomenon. It has existed in all the ages. Terrorism has spread its tentacles everywhere in every sector of the society. Terrorism has taken the shape of such menace which threatening the very existence of a civilized society. Terrorism is essentially a faceless and a bodiless phenomenon. The rule of law is predictable but rule of terror is unpredictable.¹ Terrorism poses a challenge not only to the state power but also to the national security. Terrorism is one of the serious problems faced by the world today and holds the democratic institutions at ransom. The attack on 11 September 2001 on the World Trade Centre in New York City, attack on tourist facilities on Bali in 2002, on commuter trains in Madrid in 2004, suicide bombings in London in 2005 and attack on the Taj hotel in Mumbai on 26 November 2008 all demonstrate the continuing threat that terrorism can pose. The perpetrators have come from all walks of life and have used a variety of deadly and diabolic weapons to carry out their plans. Whatever their origins and their methods, however, the outcomes are the same: the injury and death of innocent people.

The American "War on Terrorism" has many successful stories. The then American President George Bush from zero ground of World Trade Centre of New York on September 14 2001 after the terrorist attack, said to the terrorist "I can hear you; the rest of the world hears you. And the people who knocked these buildings down will hear all of us soon."² Further his request of cooperation from other nations was in tune of imperialism "Either you are with us or with them."The Bush Government's policies of Self-defense on terrorist led to fall of Taliban regime in Afghanistan.³ Expansion of his doctrine of self-defense to pre-emptive self-defense led to the defeat of Saddam Hussain's regime in Iraq.⁴ On 14 December 2003, Saddam was captured in operation "*Red Dawn*" and spokesperson of USA announced, "*We got him.*"⁵ The biggest man haunt ever known in the history of humankind in terms of economic, time, use of intelligence and equipments and networks, and use of police or

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¹ Justice Eswara Prasad, "Forfeiture of property-Terrorism and other crimes" journal 2005 *Cr L J P*.70.

² www.en.wikiquote.org/wiki/Gerpege_w_Bush. Accessed on 21 September 2013.

³ Security Council Resloution 1368 of September 2001, Article 51 of Charter of United Nation.

⁴ The National Security Strategy of the United Nations of America document issued by White House on, 17 September 2002.

⁵ www.en.wikipedia.org/wiki/Saddam_Husseini. Accessed on 20 September 2013.

military personal which started in the year 2001 came to an end, when the seal command of USA military gunned down the notorious and hardcore terrorist Bin Laden in his house in Abbottbad of Pakistan in the early hours of May 2, 2011, in operation of “*Neptune Spear*”. Thereafter President Barrack Obama addressed the USA and announced, “*We killed him*”.⁶ Overwhelming happy American people felt at last ‘Justice’ is done to those 3000 people who were killed in the horrible attacks of terrorist on various parts of US on September 9, 2001. US is successful even in toppling the Col Muammar Qaddafi [Qaddafi is also called as Gadaffi] government in Libya who was supporting the terrorists to attack America, with NATO forces, encasing on upspring of democracy movements in Arab World and Qaddafi was executed in cold blood.⁷

On the other hand, the darker side of the American war on terror has been not properly communicated around the world. The liberty statue in the heart of New York City, which is a symbol of American’s commitment to values of civil and political rights, is undermined by the means adopted in the war on the terror by the Bush regime, particularly in the light of Guantanamo Bay detention camp in Cuba. Norms applied to the Guantanamo Bay detention camp grossly and blatantly defied the American Constitution, which is known for its Rule of Law and Bill of Rights. Guantanamo is an insult to human civilization and American values, but it is survived as prison for nearly a decade largely because successive US administrations have peddled the myth that its cellblocks are vital frontline in the global war against terror.⁸ This Myth has been now exploded by the release and publication of more than 700 official Pentagon documents by the Wilileaks.⁹ Therefore, it is difficult to distinguish between the terrorist and Bush regime because both believed ends justify the means. Detainees of Guantanamo Bay have fought long drawn legal battle from 2001 to 2008 to acknowledge their human rights by American Government through lower court to higher court of USA legal system. Finally the Supreme Court of USA in *Lakhadae Boumediene v. George Bush President of the United States* by 5-4 majority held that the prisoner of Bay camp are having right to habeas corpus under the United States Constitution and that the Military Commission Act of 2006 (MCA) was unconstitutional which has suspended the right of habeas corpus.¹⁰

⁶ www.whitehouse.gov/blog/2011/05/02/osmon-bin-laden-dead. Accessed on 19 September 2013.

⁷ “The Killing of Qddhafi”, Editorial, The Hindu, Hubli (Ed.), 22 October 2011.p.12.

⁸ “America’s shameful secret Wiki leaked”, Editorial, The Hindu, Hubli, (Ed.), April 28 2011.p.10.

⁹ *Ibid.*

¹⁰ 553 U.S. 723 [2008].

American Constitution is the second oldest and shortest in the universe.¹¹ American Constitution is highly influenced by Locke's philosophy of Natural Rights.¹² Therefore, USA Congress incorporated the Human Rights in the Constitution by first ten amendments that are known as Bill of Rights.¹³ The Fifth Amendment is most important because it says person's life, liberty or property would not be deprived without due process of law. The history of the Bill of Rights clearly showed that the authors of the amendments intended to apply only to federal laws but not to state laws.¹⁴ In *Barron v. Mayor and City Council of Baltimore*, USA Supreme Court held that none of the first ten amendments could apply to the state governments because the history of the Bill of Rights supported their application only to the activities of the newly formed central governments.¹⁵ The Supreme Court's interpretation in *Dred Scot v. Stand Ford*,¹⁶ that the Black Slaves were not citizens of USA and they were properties of their master led to the civil war in America. The end of civil war promoted the House of Congress to apply "due process clause" to state laws also. Therefore, 14th amendment was done to the USA Constitution of which section one says "... nor shall any State deprive any person of life, liberty, or property, without due process of law..." Since 1934 there has been a steady process of judicial inclusion of provisions of the Bill of Rights into the fourteenth amendment. Finally, Incorporation of all Bills Of Rights into 14th Amendment was completed in the year 1968.¹⁷ Due Process of Law is concept of Common Law, which became explicit statutory concept in USA's Constitution.¹⁸

¹¹ Draft of American Constitution was finalized on 17th September 1787 and nine states ratification is required to commence the Constitution operation. By July 26 1788 eleven states were ratified the Constitution and Constitution was made functional on 13th September 1788. Originally USA Constitution contained only seven Articles but now it contained 33 Articles, it means 26 Articles are added by way of Amendments. The last 26th Amendment to the Constitution was done in the year 1971.

¹² Great political philosopher Locke who propagated the idea that person's "Property Rights" were inalienable and cannot be deprived by the government without the consent of the person. The property rights are the gift of nature, therefore government should make effort to promote property rights rather than its restriction and destruction. The concept of "Property Right" includes life, liberty and property. See, Edgar Bodenheimer, *Jurisprudence*, (Delhi: Universal Law Publishing Co.Pvt.Ltd, 2001) .p.50

¹³ The first ten amendments came into effect on 3 November 1791. However only first eight Amendments talked about the protection of human rights.

¹⁴ Johan Nowak, *Constitutional law*, (St Paul Minnesota: St Paul Minn, west publishing Co, 1978), p.387.

¹⁵ 32 U.S. (7 Pet.) 243 [1833].

¹⁶ 60 U.S. (19 How.) 393 [1857].

¹⁷ *Duncan v. Louisiana*, 391 U.S.145 (1968).

¹⁸ The word "Due Process" in the V and XIV amendment of USA is traced from section 39th of Magna Carta, which was personal treaty between king Johan and the enraged upper class created in 1215. "Due" means, "what is just and proper". Section 39th says, "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."¹⁸ In 1225, Henry III altered that section and became final form of Magna Carta. The official phrase of "Due process of Law" was probably first time used in 1354, see, Mott, *Due Process of Law*, (New York: Da Copa Press.1973).p.3.

Due process is the principle that the government must respect all of the legal right that is owed to a person according to the law. Due process holds the government is subservient to the law of the land and protects individuals from the state. Due process is either procedural or substantive. Procedural due process determines whether government entity has taken an individual's life, and liberty without the fair procedure required by the statute.¹⁹ It may involve the review of the general fairness of a procedure authorized by legislation. When a government harms a person without following the exact course of the law it constitutes a due process violation that offends against the rule of law. Substantive due process means that the judicial determination of the compatibility of the substances of a law with the Constitution. The Court is concerned with constitutionality of the underlying rule rather than the fairness of the process of the law.²⁰ Therefore, every form of review other than that involving procedural due process is a form a substantive review. Due process in this sense judges instead of legislator may define and guarantee fundamental fairness, justice, and liberty. This interpretation has been proven controversial, and is analogous to the concepts of natural justice. This interpretation of due process is some times expressed as a command that the government shall not be unfair to the people. Various countries recognize some form of due process under their legal system but specifics are often unclear. The process of government, which deprives a person's life and liberty, must comply with the due process clause. However, the "Due Process" is not term with a clear definition and the nature of the procedure clause depends on many factors.

Largely the following ingredients are considered as part of due process of substantive and procedural in respect of criminal justice system.

1. Adversary process is the best method to safeguard the interest of accused.²¹
2. Adequate notice of charges to the accused.²²
3. Neutral or impartial Judges of Court or Tribunal.²³
4. Accused is presumed to be innocent until the prosecution proves his guilt beyond reasonable doubt.²⁴
5. Trial Right to Jury.²⁵

¹⁹ Johan E Nowak, *op. cit.*, p.381.

²⁰ *Ibid.*

²¹ *Ibid.*

²² VI Amendment of USA Constitution.

²³ *Ibid.*

²⁴ *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

²⁵ V Amendment of USA Constitution. *Duncan v. Louisiana*, 391 U.S. 145(1968).

6. Right to speedy and public trial.²⁶
7. An opportunity to make oral representation before the Judges or Jury.
8. An opportunity to present evidence or witness.
9. Right to confront and cross-examine the witness.²⁷
10. Right to compulsory process of witnesses.²⁸
11. Right to pre-trial discovery of evidence.²⁹
12. Right to transcript of the proceedings in the language of accused.
13. Right to be represented by an Attorney of accused choice.³⁰
14. Right not to deny the excessive bail and punishment shall not be cruel.³¹
15. No accused shall be witness against himself.³²
16. Right not to be punished twice for the same offence.³³
17. *Ex post facto* law. No retrospective effect of criminal law.³⁴
18. Decision of Court must be supported by the reasons, i.e. speaking order.
19. Right to appeal against the error of judgment.

Whenever the USA government violates the above rights of accused, the accused is at liberty to seek the justice from the court. Further, section 9 of Article 1 of USA Constitution says that writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion of the public safety.

America's war on the terror began after the horrifying incidence of 9/11 attack on various parts of USA by Bin Laden's Al Qaeda terrorist organization. The Security Council (SC) took swift and unprecedented action in the wake of the events of September 11 2001. The SC felt that it was necessary to offer the United States a stronger form of support than sympathy. Accordingly, it recognized in its 1368 resolution the inherent of individual state or collective self-defense in accordance with the Charter.³⁵ The SC regarded the attacks of September 11 as threats to international peace and security, but it did not call for collective

²⁶ See, VI Amendment of USA Constitution. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

²⁷ See, VI Amendment of USA Constitution. *Pointer v. Texas* 380 U.S. 400 (1965).

²⁸ See, VI Amendment of USA Constitution. *Washington v. Texas*, 388 U.S. 14 (1967).

²⁹ *Jencks v. United States*, 353 U.S. 657 (1957).

³⁰ See, VI Amendment of USA Constitution. *Powell v. Alabama*, 287 U.S. 45 (1932).

³¹ See. VIII Amendment of USA Constitution.

³² See, V Amendment of USA Constitution. *Malloy v. Hogan*, 378 U.S. 1 (1964). *Miranda v. Arizona*, 384 U.S. 694 (1966).

³³ See, V Amendment of USA Constitution. *Benton v. Maryland*, 395 U.S. 784 (1969).

³⁴ See, Section 9 and 10 of Article 1 of USA Constitution. *Lindsey v. Washington*, 301 U.S. 397 (1937).

³⁵ SC/RES/1368 of 12 September 2001.

action. By invoking a state's right to self-defense, it handed over this responsibility to individual states because United Nation (UN) was aware of its limitations. The US and UK gave notification to SC of action of self-defense against the Taliban régime of Afghanistan and war in Afghanistan began on 7th October 2001. Armed forces of US, UK and the Afghan United Front (Northern Alliance) launched "Operation Enduring Freedom."³⁶

Guantanamo Bay Camp.

The Guantanamo Bay is part of Cuba but the United State assumed territorial control over the Southern portion of Guantanamo Bay under 1903 Cuban-America treaty which granted perpetual lease of the area.³⁷ The US by virtue of its complete control maintenance 'de-facto' sovereignty over the territory and Cuba retains the de-jure sovereignty. The Guantanamo Bay detention camp is detainment and interrogation facility for the danger terrorist captured in Afghanistan and Iraq by the US which is established in 2002 by the Bush Administration.³⁸ The facility is often referred as Guantanamo, G-Bay or *Gitmo*. The justice department has deliberately advised the Bush Administration to establish detention camp at G-Bay because it could be considered as outside the USA's court legal jurisdiction. The Bush Administration asserted that detainees were not entitled to any of the protections of the Geneva Conventions. The first 20-captured terrorist arrived at Guantanamo on January 11 2002. Since October 7, 2001, when the war in Afghanistan has begun nearly 775, detainees have been brought to the G-Bay camp, which were described as the "worst of the worst terrorist". Of these most have been released without charge or transferred in their countries. As on 30 April 2013, nearly 100 prisoners are still languishing in Guantanamo Camp.³⁹

Military Tribunals or Commissions in USA.

Court martial generally has the jurisdictions over the members of their own military and some times, civilians present with them. Court martial by and large comply the essential feature of judicial proceedings. A military tribunal is a kind of military court to try members of enemy forces during wartime, operating outside the scope of conventional criminal and civil proceedings. Military tribunal or commission is distinct from court martial. A military tribunal or commission is an inquisitorial system based on charges brought by military

³⁶ [www.en.wikipedia.org/wiki/war_in_Afghanistan_\[2001-present\]](http://www.en.wikipedia.org/wiki/war_in_Afghanistan_[2001-present]). Accessed on 19 September 2013.

³⁷ www.en.wikipedia.org/wiki/Guantanamo_Bay. Accessed on 20 September 2013.

³⁸ en.wikipedia.org/wiki/Gauntanamo_Bay_detention_camp. Accessed on 20 September 2013.

³⁹ CNN News on 30 April 2013, BBC News on 30 April 2013, Al Jazeera English News on 30 April 2013.

authorities, prosecuted by a military authority, judged by military officers, and sentenced by military officers' against a member of alien force. The USA has history of custom to prefer the military commission than court martial to try the enemies during the times of declared war or rebellion. General George Washington used military commission during the American Revolution. President Franklin D Roosevelt ordered military commission for eight German prisoner accused of planning sabotage in the USA as part of Operation Pasrotuis, which was upheld by the US Supreme Court in *Ex parte Quirin*. George Bush passed the executive order to establish the military commissions to try the terrorist who are non-citizen of USA captured in the Afghanistan and Iraq on 13 November 2011.⁴⁰No doubts the military commission provides speedy justice but not free form blames. Proceedings of military commission do not satisfy the protections guaranteed under the Bill of Rights of USA Constitutions. Accused are held in detention for indefinite period without trials. Trials are held in secrecy. Judges, prosecutors and witness are from military authority. Not all evidence would be revealed to accused and hearsy evidence is admitted. Accused would not be given meaningful right to defend, accused is presumed to be guilty than innocent and standard of proof of the guilt is always below par. Decision of military commissions is never in the form of speaking order. In spite of these serious flaws, American Presidents have not stopped using the military commissions and USA Congress has also supported the Presidents by enacting Military Commission Act of 2006 and 2009, which authorizes him to establish military commissions.

Legal challenges to Guantanamo Bay detention camp.

The detainees had to knock the doors of the U.S courts several times to challenge the strategy adopted by the Bush administration in combating the terrorism. The detainees have fought hard legal battle nearly about 8 years to force the US administration to acknowledge their human rights and justice. There are nearly four historical cases on these matters. The Bush administration had made up mind that the detainees of non-citizen of USA at Bay Camp are "Enemy combatant" or "Unlawful Combatant" and they do not deserve the protection of Vienna Convention of War. Military Commission adopted the arbitrary procedure, which has blatantly defied the all norms of due process clause. In *Rasul v. Bush*,⁴¹ voluntary organization filled two Habeas Corpus petitions challenged the indefinite detention

⁴⁰“Military Order-Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism.” Executive order dated November 13, 2011, 66 Fed, Reg, 57833.

⁴¹ 542 U.S. 466 (2004).

of detainee, not conducting the trial, not informing the charges to detainees and not providing access to their counsel. The major issue before the Supreme Court of US, whether U.S courts could exercise the jurisdiction over the Guantanamo Bay detainee camp. On 28th June 2004, the US Supreme Court by 6-3 majority answered affirmatively. Justice Johan Paul Stevens who wrote majority judgment held that detainee at Bay Camp are entitled to seek the assistance of US courts to issue writs to get justice. Terrorist Rasul was British citizen challenged his detention before the Washington, D.C., District Court, and court dismissed petition on the ground that the US courts do not have jurisdiction over the Guantanamo Bay Camp because it is not the Sovereign territory of USA. District Court relied on the judgment of *Johnson v. Eisentrager*, in which the Supreme Court has ruled that U.S Courts had no jurisdiction over the Germans war criminals held in an U.S. administered German prison. An appeal was filed in the Court of Appeals for the District of Columbia Circuit of United States and court affirmed the decision of the lower court.⁴² The case came before the Supreme Court by way of appeal. Government argued that according to treaty, U.S has “complete jurisdiction” but Cuba has “ultimate jurisdiction” of de jure. Hence, the courts have no jurisdiction. On the other hand, detainee argued that whatever treaty might say the fact that U.S has full legal control over the camp and hence courts should have jurisdiction. Justice Stevens distinguished the present case from the *Eisentrager*, held that U.S for all practical purpose has complete jurisdiction and Cuba’s mere technical sovereignty jurisdiction does not disqualify the U.S courts from exercising the jurisdiction.

Yaser Hamdi captured in Afghanistan and detained in Bay camp without trial for indefinite period who was later found to be citizen of USA. His father-filed petition of habeas corpus before the court of Eastern District of Virginia, which held that Hamdi’s detention was inadequate because it was based on hearsay. The court ordered production of secret numerous documents for camera review. The government appealed to Fourth circuit court of appeal, which reversed the lower court order and held that it is not proper for any court to hear a challenge of enemy combatant status of detainee. An appeal was made before the Supreme Court. U.S. Supreme Court consisting of 9 judges’ bench in *Yaser Esam Hamdi v. Donald Rumsfeld*, recognized the power of the government to detain enemy combatant but ruled that detainee who are the citizens of USA must have the ability to challenge their enemy combatant status before an impartial tribunal.⁴³ Justice O Connors who wrote majority judgment said due process requires that Hamdi must have meaningful opportunity to

⁴² *Al Odha v. United States*, App. D.C. 189 (2003).

⁴³ 542 U.S. 507 [2004].

challenge his enemy combatant status before the impartial military tribunal and Hamdi undoubtedly has the right to legal counsel in such proceedings. The courts need not interfere with such findings of military tribunals. The issue and judgment was related to the detainee of USA citizen. Nevertheless, the government conceded that these privileges would be extended to all detainees. The Department of Defense of USA established the “Combatant Status Review Tribunal” (CSRT) to determine the status enemy combatant of each detainee and allowed the right to legal counsel from the advocate panel prepared by government based on Supreme Court guidelines.

Detainee Treatment Act of 2005.

Not a single terrorist was convicted by the military commission even by the end of 2005 which has commenced in the November 2001. In April 2004, picture of abuse of Iraqi prisoner by U.S troops in Abu Gharib prison surfaced.⁴⁴ Moreover, the credible evidences are emerging from different sources in the newspapers about the gross human rights violation and torture in Bay Camp.⁴⁵ The Abu Gharib and Bay detainee camp scandal intensified public outcry and criticize the tactics and legal justification used by Bush in executing the war on terrorism Further, Supreme Court has empathetically asserted that US courts have jurisdiction over the Bay Camp and even it is leaning towards interference in the proceedings of military commission to protect the detainees. Bush’s war on terror is almost converted into legal war between human right organizations on behalf of detainees and government. USA Congress wanted to control the damage by prohibiting the unethical means of interrogation of terrorist to boost its nation image of pro-civil rights. On the other hand, Bush wanted to restrict the interference of US courts in the matters of military commission proceedings in the terrorist trials. The US Congress passed the Detainee Treatment Act of 2005, which was signed by the Bush on December 30 2005. The Act has established improved standard for detainee’s treatment and interrogation techniques and it prohibited the use of cruel, inhuman and degrading (CID treatment) tortures.⁴⁶ Critic of this Act is that it explicitly restricted the jurisdiction of US courts to entertain the writ petition of Habeas Corpus by the detainees. The

⁴⁴CBS broke the story on April 28 2004 on its show 60 minutes II. Court martial in Iraq, CBS television broadcast on April 28 2004.

⁴⁵Initially the detainees were held in captive in open prison facing the mercury and laying on the naked surface of the ground, their legs and hands were chained for all the twenty-four hours, even it was not taken off during their meals, they were beaten, assaulted, battered, tortured for getting information, when detainees were on hunger strike to protest for their treatment, they were forcibly fed liquid food by tube which was causing considerable pain to detainees., detainees were not allowed to write or receive letter or interact or meet with their relatives. See, “Amnesty international Guantanamo Bay Scandal”, <http://www.amensty.org/pages/guantanamobay-index-eng>. Accessed on Jan 22 2006.

⁴⁶ Section 1002 and 1003 of Detainee Treatment Act of 2005.

Act has authorized only the U.S Courts of Appeals for District of Columbia Circuit to hear the appeals for detainee to review the final decision of CSRT and final decision of Military Commissions.⁴⁷The jurisdiction of U.S Supreme Court is excluded in the matters CSRT and Military Commissions findings.

Salim Ahmed Hamdan a citizen of Yemen and bodyguard of Bin Laden was first person to be tried before the military commission established by the Bush regime. Hamdan filed writ petition of Habeas Corpus before the District Court of Columbia on the ground that establishment of military commission is unconstitutional, violation of Geneva Convention of War and the United States Uniform Code of Military Justice. The Geneva Convention of War gives protection of certain rights to the soldier captured in the war and US Uniform Code of Military Justice prescribed minimum procedure, which has to be followed by the military tribunals. Judge James Robertson of District Court of Columbia ruled in favour of Hamdan by holding establishment of military commission was not proper. On appeal by the government, Appellate Court of District Columbia upheld the legality of military commission on the following grounds,

1. Military Commissions are legitimate forms to try enemy combatants because Congress has approved them.
2. The Geneva Convention is a treaty between nations and it does not confer individual rights.
3. Under the terms of the Geneva Convention, Al Qaeda and its members are not covered.

Hamdan filed appeal to the Supreme Court. In *Salim Ahmed Hamdan v. Donald Rumsfeld*, U.S. Supreme Court on June 29, 2006 by 5-3 majority held that establishment of military commission without authorization by the Congress legislation is ultra virus.⁴⁸ The military commission constituted on the executive order and did not comply with the US's Uniform Code of Military Justice and Geneva Convention of War. Justice Johan Paul Stevens wrote majority judgment and dismissed the government plea that jurisdiction of SC is debarred because of Section 1005 of Detainee Treatment Act of 2005. Court asserted that it is duty of Supreme Court to enforce the Constitutional rights of human being so its jurisdiction cannot be excluded but it did not say any thing about the constitutional validity of that section. Court opined that President's executive power to establish military commissions

⁴⁷ Section 1005 of Detainee Treatment Act of 2005.

⁴⁸ 548 U.S. 557 (2006).

must be in accordance with “Laws of War” otherwise those tribunals must be created by the authorizations of the Congress legislations. In this case, the military commissions did not comply with the norms of US’s Uniform Code of Military Justice (UCMJ) and Geneva Convention of War. Article 36(b) of Uniform Code of Military Justice requires that proceedings before court-martials and military commissions must be uniform as far as possible. The court observed that military commission must observe minimum protection given under Article 3 of the Geneva Convention. The Bush regime’s military commissions violated both these conditions. Therefore, their establishment merely on the executive order is unconstitutional.

The US Congress decided that Bush’s war on terror should not be letdown. Therefore, Congress with majority in senate by 65 to 34 and in House by 250 to 170 passed the Military Commissions Act of 2006, which was signed by the President Bush on October 17, 2006.⁴⁹ The Act authorized the President to establish the military commissions to try alien unlawful enemy combatant engaged in hostilities against the United States.⁵⁰ The Act provided some protections to terrorist in the proceedings before the military commissions but provisions related to speedy trial, protection against self-incrimination, and protection of pre-trial investigation of Uniform Code of Military Justice explicitly not made applicable to military commissions.⁵¹

The norms of UCMJ in *Toto* were not incorporated in the Military Commission Act. Further, it explicitly stated that, No-alien unlawful enemy combatant who is subject to trial by military commission would get the protection of the Geneva Convention of War.⁵² MCA being retrospective effect has jurisdiction to try the offences committed by enemy unlawful combatant before, on, or after September 11, 2011.⁵³ This gives wide discretionary power to military commissions to try any terrorist committed offences at any time. The misery and nightmare of US citizen terrorist ended because it is applicable to only non-citizen of USA. Most controversial aspect of the MCA is it revokes the U.S. Courts Jurisdictions to hear Habeas Corpus petitions by all alien in U.S Custody as enemy combatant which reads as,

No Courts, justice or judge shall have jurisdiction to hear or consider an application for a writ of Habeas Corpus filed by or on behalf of an alien

⁴⁹ en.wikipedia.org/wiki/Military_Commission_Act_of_2006. Accessed on 20 September 2013.

⁵⁰ Section 948b of Military Commissions Act of 2006.

⁵¹ Section of 810, 831, and 832 of Uniform Code of Military Justice under chapter 47 read with 948b of Military Commissions Act of 2006.

⁵² Section 948c of Military Commissions Act of 2006

⁵³ Section 948d of Military Commissions Act of 2006

detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.⁵⁴

Whatever the inroads made by the U.S Supreme Court in protecting the right of terrorist is undone by the MCA of 2006. Now the U.S. Congress is also standing behind Bush as rock and overwhelming Bush commented that

Today, the Senate sent a strong signal to the terrorist that we will continue using every element of national power to pursue our enemies and to prevent attacks on America. The Military Commissions Act of 2006 will allow the continuation of a Central Intelligence Agency (CIA) program that has been one of America's most potent tools in fighting the "War on Terror".⁵⁵

The war of legal battle between terrorist and U.S Administration did not seem to end soon because of the intervention of MCA. Naturally, Lakhdar Boumediene, detainee of Bay camp, who is citizen of Bosnia and Herzegovina, filed writ petition before the U.S Supreme Court challenging the constitutional validity of MCA. On June 12, 2008, the U.S Supreme Court in *Boumediene v. Bush*, held that section 7 of MCA of 2006 is unconstitutional.⁵⁶ Justice Kennedy delivered majority judgment by 5-4 asserted that United States by virtue of its complete jurisdiction and control, maintains "de facto" sovereignty over the Guantanamo Bay Camp therefore the aliens detained as enemy combatant on that territory are entitled to the writ of habeas corpus protected in Article 1, Section 9 of the US Constitution. Court opined that only Rebellion or Invasion of Public Safety could suspend the writ of Habeas Corpus, which is not in this case. The court declared that except section 7 remaining sections of MCA is constitutional.

By this time, most of the detainees were released and as on may 2011, only 171 detainees were in Bay camp⁵⁷ and intensity of Bay Camp has boiled down. President Barack Obama during his Presidential election said Guantanamo Camp is a sad chapter in American history.⁵⁸ On 22 January 2009, White House spokesperson announced that detention facility would be shut down within a year. Congress of USA enacted the Military Commission Act of 2009 on October 28 2009 and replacing MCA of 2006, which made reformatations and

⁵⁴ Section 7 of the MCA of 2006.

⁵⁵ *Supra* note 49.

⁵⁶ 553 U.S. 723 (2008).

⁵⁷ Sky News on 19 may 2011.

⁵⁸ Brude Mary, "Obama:Gitmo likely won't close down in first 100 days", ABC News on Jan 11 2011.

provided more protections to the detainee in the proceedings of the military commissions. Congress strongly opposed closure of camp and pressurized the President Obama to sign Defense authorization Bill on January 7 2011, which prevented the transfer of detainee to mainland or other foreign countries, and thus it effectively stopped the closure of detention facility. President Obama even after his second term election as President could not succeed in closing down the Guantanamo Camp. Still around 100 detainees are languishing in the camp even after the lapse of 12 years since their arrest without trial.

Conclusions.

The fight against terrorism cannot be used an excuse for slackening efforts to put an end to conflicts and defeat poverty and disease. Nor can it be an excuse for undermining the bases of the rule of law—good governance, respect for human rights and fundamental freedoms. The long-term war on terrorism requires us to fight on all these fronts. Indeed the best defense against these despicable acts is the establishments of a global society based on common values of solidarity, social justice and respect for human rights.

-----Kofi A. Annan, October 2001.⁵⁹

The International community outraged and stunned when the credible evidence of transgression of human rights in Bay Camp by the authority started surfacing. On July 2 2008 the International Herald Tribune revealed that U.S. military authority has used the Chinese Communist torture technique which was used by Chinese in Korean War to obtain the coercive confessions. Military authorities have abused the religion of the detainees by disrespecting the Qur'an, tearing the Qur'an, writing and commenting on Qur'an in front of the detainees.⁶⁰ Guantanamo officials have reported 41 unsuccessful suicide attempts by 25 detainees since the U.S. began taking prisoners to the base in January 2002.⁶¹ On June 10 2006 Pentagon authority announced that three detainee were committed suicide.⁶² Amnesty International organization alleged that attempt to suicide by detainee are the result of years of arbitrary and indefinite detention.⁶³ Forced feeding accusations by hunger-striking detainees' began in the fall of attempt to suicide. Detainee said large tubes were forcibly inserted in their

⁵⁹ UN Press Release, SG/SM/7999 AFR/344, October 22 2001.

⁶⁰ www.en.wikipedia.org/wiki/Gauntanamo_Bay_detention_camp. Accessed on 20 September 2013.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ www.amnesty.org. Accessed on 20 September 2013.

noses and stomachs, with guards using the same tubes from one patient to another.⁶⁴ Human Right Watch in its paper presentation before the 59th session of UN's Commission on Human Rights described that the detainee originally held in open-air facilities with chain link wall until moved to newly constructed facility, there they spent twenty four hours in small single prison cells, except for two fifteen minute periods of solitary confinement including interrogation session.⁶⁵ As early as January 2002, reports about the situation of detainees held at Guantanamo drew the attention of the standing Special Reporters of the UN Commission on Human Rights to report regularly on torture. When credible reports and evidence generated about the pathetic conditions of detainees of Gauantanamo Bay the General Assembly went on record "deploring the occurrence of violations of human rights and fundamental freedoms in the context of the fight against terrorism."⁶⁶

The UN Commission of Human Rights issued a sharply critical report in early 2006 that stated, "The continuing detention of all persons held at Guantanamo Bay amounts to arbitrary detention in violation of article 9 of ICCPR". Called on Washington to "either expeditiously bring all Guantanamo Bay detainees to trial, in compliance with articles 9, paragraph 3, and 14 of ICCPR, or release them without further delay", and insisted on prompt closure of the facility.⁶⁷ United Nation "seemed more worried about counter terrorism measures than about terrorism itself" was the early reaction of USA to the UN's attempt to highlight the pathetic situation of detainees in Gauantanamo Bay.⁶⁸What guiding rules or principles should constitutional democracies follow in their efforts to combat terrorist violence? Walter Schwimmer, the then Secretary General of the Council of Europe said Terrorism must be defeated with the utmost vigour. However, not any cost, certainly not at the cost of the fundamental values we have learned to cherish in tragic times and have placed at the very centre of our collective functioning.⁶⁹ Society is willing to defend itself efficiently but not any cost. History taught lesson to us that if community allow excessive state violence, arbitrariness, contempt of law, discrimination, community not only risk shaking the pillars of the democratic societies that painstakingly emerged from the World War II and from the end

⁶⁴ "Guantanamo detainee pleads to die", Aljazeera English News on 30 August 2013.

⁶⁵ <http://www.hrw.org> Accessed on 20 September 2013.

⁶⁶ GA/RES/ 60/158 of 16 Dec 2005.

⁶⁷ Situation of Detainees at Guantanamo Bay, Commission on Human Rights, E/CN.4/2006/120, 27 Feb 2006.

⁶⁸ Jeffery Laurenti., "The United Nations and Terrorism", in *Democratic Response to Terrorism*, Leonard Weinberg, [Ed.], (New York: Routledge,2008) .p.78.

⁶⁹ Wolfgang Benedek, *Anti-Terrorist Measures and Human Rights*, (Boston:Martinus Nijhoff Publishers,2004) .p.v.

of communalism, community also risk feeding terrorism or increasing the understanding and support for terrorism.⁷⁰

Draconian type of anti-terrorist laws leads for State terrorism that would ensures the victory for terrorist. Terrorist theoretically see it as major aim to force government to pass the increasingly server laws. This victory will be enhanced if the legislation is operated in such way as to alienate that part of the community, which the terrorists claim to represent. If that happens, they will not only be likely to gain increased support from the within community, they will be assisted to project themselves as its legitimate protectors.⁷¹The need to respect human rights is in no circumstances an obstacle to the efficient fight against terrorism. On this subject, the General Assembly has passed a number of resolutions at appropriate time providing and reminding the legal framework of human rights while combating terrorism by state. General Assembly resolutions under the title of “Measure to Prevent the International Terrorism” had requested the States to observe the human rights other wise its gross abuse would provide fertile ground for breeding the terrorism.⁷²General Assembly cautioned the enthusiastic States at regular time that in the process of combating terrorism they must not overstep their authority by remanding their obligation to respect the international standard of human rights under the resolutions titled as” Measures to eliminate international terrorism”.⁷³

General Assembly adopted another series of resolutions for the protection of human rights under the headings of “Protection of human rights and fundamental freedoms while countering terrorism”.⁷⁴ Unique feature of these resolutions that certain human rights are recognized as non-derogable under any circumstances in accordance with the article 4(2) of the International Covenant on Civil and Political Rights.⁷⁵Terrorist violate human rights, including the right to life. Suspected terrorist often claim respect for their human rights-some of the very same rights they have violated themselves in their acts. This raises the question whether terrorist too should be allowed to enjoy rights. The answer is ‘yes’. People accused

⁷⁰ *Ibid.* at, p.vi.

⁷¹ Krishna Mathur, *Police, Law and Internal Security*, (New Delhi: Gyan publishing house 1994), pp.111-112.

⁷² General Assembly Resloution No/44/29 of 7 Dec 1987, GA/RES/42/159/ of Dec 1987, GA/RES/46/51 of Dec 1989, GA/RES/40/61 of Dec 1989.

⁷³ General Assembly Resloution No/49/60 of 17 Feb of 1995,GA/RES/50/53 of 11 Dec 1995, GA/RES 51/210 of 17 Dec 1996, GA/RES/52/165 of 15 Dec 1997, GA/RES/ 53/108 of 8 Dec 1998, GA/RES/54/110 of 2 Feb 2000, GA/RES/ 59/ 46 of 16 Dec 2004, GA/RES/ 60/ 43 of 6 Jan 2006

⁷⁴ GA/RES/57/219 of 27 Feb 2003, GA/RES/58/187 of 22 March 2004, GA/RES/59/191 of 10 March 2005, GA/RES/60/158 of 28 February 2006.

⁷⁵ See, 2nd Paragraph of GA/RES/59/191 of 10 March 2005.

of terrorist acts have human rights. That is exactly difference between a situation of the Rule of Law and situation where law is arbitrary.⁷⁶ Do they have the same rights as victims? Again, the answer is “yes”, although this might go against our own feelings of justice.⁷⁷

State can derogate from certain human rights during an emergency. Nevertheless such extraordinary measures should be limited in scope and time. Steam and broad repressive measures alienate large sectors of society from the government and tend to produce new recruits for terrorist organizations.⁷⁸ Terrorists know very well that overreaction by government to their provocative attacks can play into their hands.-though at times, overreaction has also led to the elimination of terrorist organization. In the words of the Secretary-General

“While the international community must be resolute in countering terrorism, it must be scrupulous in the ways in which this effort is perused. The fight against terrorism should not lead to the adoption of measures that are incompatible with human rights standards. Such developments would hand a victory to those who so blatantly disregards human rights in their use of terror. Greater respect for human rights, accomplished by democracy and social justice, will in the long terms prove effective measures against terror. The design and enforcement of means to fight terrorism should therefore be carried out in strict adherence with international human right obligations”.⁷⁹

United Nations organs have reaffirmed repeatedly that terrorist acts are unjustifiable under any circumstances, wherever and by whoever committed. Nevertheless, the major standard-setting achievements of the UN in the field of human rights and numerous pronouncements of its organs teach that human right violations are also unjustifiable under any circumstances, wherever and by whosoever committed.

⁷⁶Alex Schmid, “United Nations Measures against Terrorism and the Work of the Terrorism Prevention Branch: The Rule of Law and Terrorism”, in, Wolfgang,[Ed.], *Anti-Terrorist Measurers and Human Rights*, (Boston: Maritinus Nijhoff Publishers).p.59.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Kofi Annan, Message to the African Union’s High Level meeting on Terrorism. Algiers, 11 September 2002.