

## A Response to Frédéric Mégret: 'Guantanamo is not the Problem' (3 German L.J. No. 3 – 1 March 2002)

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By Professor Michael Meltsner

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<http://www.germanlawjournal.com/index.php?pageID=11&artID=148>

[1] In his commentary (3 German L. J. No. 3 [1 March 2002]), at:

[http://www.germanlawjournal.com/past\\_issues.php?id=141](http://www.germanlawjournal.com/past_issues.php?id=141)) "Guantanamo Is Not the Problem" Frédéric Mégret argues, inter alia, that attention directed to "the issue of the prisoners" held in Cuba is a small problem compared to the "plight of the Afghan population in general" and "the conditions under which the war was waged, including...civilian casualties." Focusing on "minor violations" of "humanitarian law" simply obscures that "the use of force" remains an "unresolved issue of international law."

[2] Unfortunately, Mr Mégret offers no evidence supporting his conclusion that concern over the legal and humanitarian conditions of the Guantanamo detainees is "overinflated," except clichés. There will be, he claims, "imminent courtroom drama" but he doesn't tell us why this is so important. Of course, there *will* be judicial challenges—is he against them? —the dramatic quality of which remains to be seen. We will also have the "drumbeat of the media" over "a *cause celebre*" which he objects to because it will mask the need to debate larger issues of war and human destruction.

[3] But this story makes no sense. There is no mass of international legal analysts, journalists or—much less -- political leaders avoiding a confrontation with the political and moral issues to which he alludes *because* attention has been directed to what some observers believe violates international law and others view as a betrayal of American constitutional values. Those concerned with resolution of questions pertaining to "the use of force" under international law had (and still have) plenty of opportunity to resolve them, if resolution was possible, long before Guantanamo received its first planeload from Afghanistan. Nothing in the interrogation of the prisoners or their indefinite detention without charges, one of the possibilities raised by Secretary of Defense Donald Rumsfeld, inhibits the robust debate Mr Mégret wants to see over the terms and conditions of "the war on terrorism."

[4] Indeed, in the United States at least, the contrary is more likely true. While some wince at the civilian casualties and growing record of war on terrorism excesses, rhetorical and otherwise, Administration military actions are overwhelmingly popular. If anything is likely to produce debate over the nature of this war or stay the hand of those who want a wider series of military incursions, other than a steep cost in lives and damage to the US economy, it is the degradation of solemn ideological commitments implicated by a US role as victimizer of prisoners and a consequent world-wide hostility generated by indifference to basic legal guarantees. Writing before 300 of the detainees started a hunger strike when soldiers confiscated a makeshift turban from an apparently praying prisoner, perhaps Mr. Mégret could not fully anticipate that events he regards as symbolic and thus "small" may be the only way to contain a growing impulse to distrust all solutions but those involving force.

[5] Most interestingly, Mr. Mégret writes critically that the "West" is more "likely to worry about faults that are directly and vividly attributable to it, than ...far reaching collateral consequences of its intervention." Putting aside the totally unremarkable quality of the observation—as if any other political entity is different—such an analysis might strengthen, not weaken, one's sense of the importance of holding American politicians to their long-espoused democratic beliefs on justice under law. There is at least a set of issues here—ultimately how far will the United States go in jettisoning the typical protections of human liberty—open-minded citizens can grapple with. Commentators such as University of California law professor, Anupam Chander, point out that the Administration's actions are inviting similar treatment of American citizens, leaving us "with little to say about...future abuses." (1) Civil libertarians emphasize that along with detention of non-citizens, broader investigative tactics and a potential post-9/11 shift in what constitutes reasonable intrusion, the government is, as Chander puts it, "claiming the Constitution applies in fewer and fewer circumstances...fewer and fewer persons." (2)

[6] There is certainly an argument that the only threat to humanity that equals the threat of terrorism is state reaction to it. This is what concerns Mr. Mégret, and rightly so, but far from distracting public opinion from such issues a struggle over adherence to legal processes is one of the forms of debate where there is any chance of stimulating resistance to the claims of expediency. To require due process for, and to uphold civilized treatment of, prisoners is just one more way of fighting the polarized thinking and black-white narrative that allows more and more reliance on the use of force to the relative exclusion of other means. That such human rights concerns are no substitute for direct consideration of the human costs of war is no reason to belittle them, if for no reason other than that loss of rights have no natural stopping place. The loss can expand to a range of police state tactics that undermine moderation and faith in democracy—arrest and detention on suspicion, repression of dissent and biased adjudication.

[7] While the fate of the detainees could be decided by constitutional litigation, it is more likely that the same military – political calculus that led the prisoners to Guantanamo in the first will decide what happens to them next. It would be a significant victory for those who are concerned with the costs of wider military action should the Bush Administration decide with respect to those at Guantanamo that it is bound by the Constitution, backtracking here as it did with its initial refusal to acknowledge the Geneva convention. Argument for this result, pragmatic, moral and legal, may or may not be "symbolic" but it challenges the same unmediated impulse for violence implicated in the good versus evil rhetoric of the Administration. Mr. Mégret wants debate about what are "the real problems," not what he regards as "marginal encroachments of human rights." But at least in the United States, as long as the question is put globally, solely in terms encroachments on regimes understood here as dominated by support of terrorism, any debate forthcoming is likely to be a very one sided indeed.

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(1) Anupam Chander, GUANTANAMO AND THE RULE OF LAW:

Why We Should Not Use Guantanamo Bay To Avoid The Constitution, in: FindLaw's Legal Commentary: Writ, 7 March 2002, available at: [http://writ.news.findlaw.com/commentary/20020307\\_chander.html](http://writ.news.findlaw.com/commentary/20020307_chander.html) (last visited: 11 March 2002).

(2) *Id.*