



## Case Western Reserve Journal of International Law

---

Volume 37 | Issue 2

---

2006

# Why Not the Courts

John Hutson

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

---

### Recommended Citation

John Hutson, *Why Not the Courts*, 37 Case W. Res. J. Int'l L. 365 (2006)

Available at: <https://scholarlycommons.law.case.edu/jil/vol37/iss2/12>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## WHY NOT THE COURTS? \*

John Hutson †

Good afternoon. It is a pleasure to be here. As I said to Chip a little bit earlier, I was glad to see some of you actually coming back in after you all streamed back out at, what I know, has been a long day. So, I appreciate your presence and attention very much.

My remarks are going to be, probably, as non-legal as you may have heard since you've been here. But I've discovered since I've gotten older and, perhaps, wiser—that remains to be seen, that law is less important than I thought it was as compared to other human considerations.

I've been a lawyer since 1972 and the longer I'm a lawyer, the more I believe that none of this really makes any difference. I used to think that it was all the law and that was the only thing that really mattered and we would argue these little points of esoteric detail and I have come to realize that in the end, if people of ill will or un-wisdom or malevolence are working on some of these issues, it is not going to make any difference, no matter what the laws say or how we parse the various treaties and statutes and so forth. So, my remarks today are entitled, *Why Not the Courts?* And why not the courts, indeed? Why not the courts, because they are not the most capable of dealing with these tremendously important issues for two reasons. One is they do not always get the issues that are most important and the courts can only deal with that which is brought to them. So, that's one reason for us not to rely solely on the courts because the courts are not going to face the most important issues oftentimes. And the other is for those cases, those issues that do finally come to the courts they are bound by the law. And I think the more important considerations, I've come to believe than just the law, are other things, social, moral, practical and so forth. Things that we will talk about.

One of the, perhaps the only, immutable rule of international law and domestic relations is that nation states will always, always, always, without fail, do what they perceive to be in their self-interest. They will

---

\* Presented at the Frederick K. Cox International Law Center War Crimes Research Symposium: "Torture and the War on Terror" at Case Western Reserve University School of Law, co-sponsored by the Frederick K. Cox International Law Center and the Institute for Global Security Law and Policy, on Friday, Oct. 7, 2005.

† Admiral (ret.) John Hutson is President and Dean of Franklin Pierce Law Center, a former Judge Advocate General of the U.S. Navy and Plaintiffs attorney in the case against Donald Rumsfeld.

always do what they think is in their self-interest. Now, they may be wrong about what's in their self-interest. They may have misjudged it. They may not be very wise. They may be thinking short-term rather than long-term over the horizon, but they will always do what they think is in their self-interest. That self-interest is, generally, but not always, reflected in the laws and treaties that they have to deal with. I would submit that since January of 2002, at least, we've largely ignored those laws and treaties, thus, my thesis that a lot of that just does not make any difference.

I had an epiphany, I guess, over the course of the last couple of years, so, sort of to my surprise, I have come to realize and to believe that laws are less important than I thought they were and that lawyers, as a group, and just citizens as a larger group, are much more important than I thought they were.

The nation, I believe, is in sort of a legal malaise right now. We are relying altogether too much on the courts. We are not thinking for ourselves. We are not speaking out, generally, about the things that we think are important. We are not holding our public institutions and our public officials to the high standard that I think we have to in order for us to, ultimately, win the War on Terror.

The United States is the strongest nation on earth, not because of our military might. It is not because of the essential island nature of our geography. It is not a result of our economy. The United States is now and has been over the years, certainly since World War II, the strongest nation because of what it is we stand for, because of the mission that we have as a country, and because of mission that the armed forces have, that they enjoy. In over twenty-eight years in the Navy, I really came to believe that and to understand that. That is what gives us our strength.

Our enemies have only one weapon in their arsenal and that is terror. And that weapon is not aimed so much at, I believe, human life or even our will to win or our will to fight. That weapon is aimed at bringing us down to their level, to taking away our greatest weapon, which is our mission, what we stand for, what the United States represents and has represented for generations now on the world scene. You take that away from us and you have emasculated us. Then all we have got are bombs. We can just kill people and break things and it does not make any difference. We do not stand for anything.

So the enemy will have won if they can bring us down to their level and that is their goal. That is what they are trying to do. And guess what, ladies and gentlemen? They are doing it. They are winning. They are winning. How many of them can we kill? How many of them can we torture and maim? They are going to beat us unless we right the ship of state and get back onto the high road. And if we just let the courts deal with all of this, and I am not maligning the courts at all...in fact, to the extent the courts have had the opportunity to deal with these things, for the most part,

they have done a pretty good job about it. But nature affords a vacuum. The courts will fill the vacuum. The courts have always been, and should be, largely deferential to the military in questions of military policy because they understand, the courts understand, that they are not really adequately equipped to deal with the issues. So they defer to the military except in the most egregious and outrageous cases. But they are limited to the law.

I think we have seen what can happen to what we thought was the law. The Geneva Conventions. We did not enact the Geneva Conventions in the wake of World War II and drive, push for their universal acceptance...the United States did not want that because we felt it was necessary to protect our enemies from us. We wanted the Geneva Conventions to be customary law for every country to abide by them, to protect us from the enemy, we thought.

The United States, since World War II, has been more forward deployed in every way in which you can consider deployment; numbers of deployments, the duration of deployments, locations of deployments, numbers of troops deployed. The United States is more forward deployed than all other nations combined. The Geneva Conventions are there to protect us. What a novel idea. Unfortunately, the law provides the floor. It does not provide the ceiling. It is a bear minimum and sometimes, we are actually able to dig below the floor and actually get into the basement. But it is certainly not the aspiration of the United States so; the courts deal with the law.

Now, I will not presume to talk to you about morality. We have all got our own standards, I suppose. We all derive those standards from a variety of sources and my sources are probably completely different than your sources...unless we happen to be brothers and sisters, because I believe we get a lot of it from my parents. So, I will let you deal with what you think is moral and whether you think what we have been doing is right in the sense of morality, but let's look at it from a couple of other points of view. Let's look at it from the point of view of diplomacy, for example.

It is going to become increasingly difficult for the United States to gain coalition partners to fight wars in the future, which we all agree we need, if those partners cannot trust the United States to comply with international law. If the United States says the President of the United States, in his capacity as Commander-in-Chief, is above all laws, foreign and domestic—which is not the oath that I took, every time I was promoted; I do not remember it that way and I do not think the President should remember it that way—then they cannot trust us to behave ourselves when we are fighting wars. So that it is not good for us, diplomatically, it is not good for us in the sense that—we could talk about each of these treaties on its own merits, the Rome Statute of the International Criminal Court,<sup>1</sup> Kyoto,<sup>2</sup> Land Mines,<sup>3</sup>

---

<sup>1</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

the law of the sea.<sup>4</sup> This is just another one that we are not complying with or agree to. And it does not help us.

Look at it from the military point of view. The pictures out of Abu Ghraib are recruiting posters for the enemy. They embolden the enemy. They make war fighting even worse, now and in the future. It is not good for us militarily.

Look at it from a practical point of view. Torture does not work. All the literature, all the experts will tell you torture does not work. What works is causing the enemy to forget or not focus on the fact that you are enemies. Bringing them, to some extent, around to your side, which happens to take a little bit of time or a lot of time. It takes some talent. It takes some patience but then you end up with intelligence that you can actually use. You have not just beaten the snot out of them and they have not told you anything in order to make you stop the pain.

So, if we leave it to the courts, first of all, they are not going to get the cases and secondly, when they deal with the cases they are going to have to deal with them without paying attention to morality, to diplomacy, to the needs of the military or to the practicality of the issues.

I can tell you that we could stop this and it could be stopped in no time if somebody in authority—let me see if I can think of somebody that might be in authority. Oh yeah, the Commander-in-Chief. Let's say him, for example—said, not in a press conference or in an off-handed manner or through Scott McClellan, his press guy—if the President of the United States said in a military order number... I think it would be three now... that the United States does not condone torture, cruel, inhuman or degrading treatment in any manner, shape or form and that the first general in the chain-of-command in which it happens again, will be relieved for cause that day and investigated for possible court-martial charges for dereliction of duty, orders violations, any one of a number of different things. If it were absolutely unequivocal we could stop it.

The great strength of the military is the result of the chain-of-command. Without the chain-of-command the military will not work; it will devolve to chaos; utter disrepair. We do not want our soldiers, sailors, Marines and airmen to have to second-guess any orders. We do not want them to think about the orders they are given. What we want is for them to follow their orders mindlessly; just do it. Do not think about it; just do it. But for them to do that requires accountability up the chain-of-command. The or-

---

<sup>2</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

<sup>3</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

<sup>4</sup> United Nations Convention on Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

ders come down the chain-of-command like a rock. Everybody knows. Lindy Englund did not have to talk to Donald Rumsfeld or Alberto Gonzalez to know what it was they were thinking. She knew because the generals knew, so the colonels knew, so the majors knew, so the captains knew, so the sergeants knew and Lindy Englund knew. That is the way we want it to work. It does not have to be confusing. It should not be confusing. It has to be crystal clear. That is the way we want it to work. But the quid pro quo for that—that may be the closest as I get to a legal statement here—the quid pro quo for that is accountability up the chain-of-command. The people giving the orders need to know that they will be held accountable for their failure to offer orders that are legal or right or moral, or diplomatic or practical and consistent with the needs of the military. If they fail to do that they are going to get into some sort of trouble.

What we have failed to do as a nation, up to now, is engage in any sort of accountability. We have prosecuted a few bad apples and they are bad apples, to be sure, they should be prosecuted. But there is so much more left to be done. We have a systemic problem that we have simply failed to address. It is not a legal problem. It may be a recruiting problem. It may be a training problem. It may be a supervision problem. It may be leadership problem. You know, there are lots of potential problems there but we do not have the moral courage or wisdom to deal with it. And what will happen, as a result of that, as sure as I am standing here with a minute and thirty seconds left to go, is that this is going to happen again. It will not be Abu Ghraib; it probably will not even be a prison. It may be Tailhook; it may be the drug problems on the USS Ranger but we will look back on it and we will say, it is the same genesis as what happened at Abu Ghraib. The chain-of-command did not work. They issued fuzzy, unclear, malevolent, immoral direction to our subordinates and then we let them take the heat for it. Lindy Englund got what she deserved, in some respects. But she did not get what she deserved in a lot of respects. She did not get the leadership. She did not get the guidance. She was not sent out on a mission that she could be proud of and feel good about. She got what she deserved but she did not get what she deserved either as a United States soldier. And if we let the blame lie at her feet and dust ourselves off and say, by George, we took care of that problem, we court-martialed half-a-dozen of them, it is going to happen again. It is not a legal issue. It is not an issue the courts can deal with. It is an issue for us. It is an issue for the United States Congress, which has up until two days ago, taken a pass. Thank you all.

