Detention in the Name of the War on Terror: Violations of International Humanitarian and Human Rights Law

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Introduction

For years, the West has stood on its pedestal of the rule of law and looked down upon those States which still practice torture, illegal detention and slavery. This moral high ground was the very peak from which States such as the United Kingdom and the United States could promote their norms of human rights with the aim of establishing a basic humanity for all of mankind. However, peering over the precipice of this rule of law, these States have fallen over the edge into the very darkness which they once held to be bastions against.

Guantanamo Bay, Bagram Airbase, Abu Ghraib and an innumerable number of unhallowed locations now serve as the very evil which the international community has worked so hard to rid the world of. These locations act as the epitome in contravention of the development of human rights and international humanitarian law. No longer can does it seem that the Geneva Conventions and those strong moral words stemming from the international treaties on torture have any binding effect on the manipulative powerful who wield the law to suit their global war.

This work has been produced in order to analyse the law that is binding upon the UK government with all the obligations and liabilities that stem from that law. What will be clearly established, is that no matter how hard any government attempts to hide or manipulate the strong and deep set norms of international human rights law, they can never escape liability from non-compliance.

With breaches of obligations and the arising of liabilities, sanctions must not only be highlighted, but must also be enforced. If breaches of international and domestic law go without sanction, then this will undermine the very rule of law that is being so strongly propounded by those very States in question. The law, must be adhered to, for without it, the innocent and weak fall victim to despotic power of the oligarch.

[1] The team from the Save Omar Deghayes Campaign are to be thanked for their background research without which this report would not be possible.

The Status of the Universal Declaration of Human Rights as an Obligating Instrument

In 1948, the Universal Declaration of Human Rights (UDHR) was signed and further ratified by 48 States party to the United Nations. The number may seem small, however, at the time there were in fact only 56 States in the UN membership thus securing a large majority by those interested in the promotion of standards through international human rights. It was the defining piece of international legislation which allowed for the acceptance of the two International Covenants and the later Genocide Convention. According to Steiner the UDHR,

> "…has retained its place of honour in the human rights movement. No other document has so caught the historical movement, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole…"[2]

The Declaration is now considered internationally to be the very constitution of the whole of international human rights law from which all other conventions find their moral and legal basis. What has formed from such an important tool is the International Bill of Human Rights which comprises of the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights with its Optional Protocol. Other instruments which have helped to cement the constitutional basis of the UDHR include:

- The 1951 Convention on the Prevention and Punishment of the Crime of Genocide;
- The 1969 International Convention on the Elimination of all Forms of Racial Discrimination;
- The 1981 Convention on the Elimination of all Forms of Discrimination Against Women;
- The 1987 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and
- The 1990 Convention on the Rights of the Child

According to Lauterpacht,

> "…It is now necessary to consider the view, expressed in various forms, that, somehow, the Declaration may have an indirect legal effect.
> In the first instance, it may be said – and has been said – that although the Declaration in itself may not be a legal document involving legal obligations, it is of value inasmuch as it contains an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however imperfect, binding upon the Member States of the United Nations."[3]

Those words were written only two years after the Declaration had been agreed. Although the UDHR has no legally binding effect, what the line of conventions above show, is that according to the rules of customary international law, there is relevant State practice and *opinio juris* to justify the existence of not only a very strong norm of

[2] Steiner H (1998) 'Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond' Harvard Magazine
[3] Lauterpacht H (1950) 'International Law and Human Rights' Chapter 17

international law, but rather one that has the level of being peremptory. Thus, the only way that the norms established by the UDHR could ever be displaced, is by norms that have gained an equal or greater status under the rules of international customary law. It is clear that no such rule exists which could displace such important principles, therefore they must be treated with the utmost respect and applied fully, otherwise a State will be in breach of its obligations under the international law of human rights.

This view is backed strongly through the work of a number of academics. It is the assertion of Hilary Charlesworth and Christine Chinkin that under Article 53 of the Vienna Convention on the Law of Treaties, any law or rule that is made which is inconsistent with an established norm that is peremptory or jus cogens under customary international law, is automatically void and cannot have any legally binding effect[4], they further state,

> "All the violations of human rights typically included in the catalogues of *jus cogens* norms are of undoubted seriousness; genocide, slavery, murder, disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination."[5]

Therefore the emphasis on the norms of international human rights are clearly established as having a very strong form of binding effect on the international community. It is with the detention of the individuals under the War on Terror that major abuses have now snowballed out of control into the very anathema to human rights. The following sections deal with the substantive areas of international human rights law that have been breached through the illegal detentions and extraditions.

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[4] Charlesworth H and Chinkin C 'The Gender of Jus Cogens' 15 Human Rights Quarterly 63 (1993)

[5] Ibid

Article 5 of the UDHR: The Rule against Torture

> **"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."**

This rule, before 9/11 and the detentions on the War on Terror, was considered to be one of the most immutable principles of international law, one that could never find any derogation in any shape, form or manner. However, reports and practice have shown that the governments both in the UK and US are now trying to use linguistic semantics in order to bypass the rule against torture, especially through the invocation of national security and defence.

As far as the UK's obligations go, there are two pieces of law that must be considered in relation to any abuses that have been occurring. They are the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). Both instruments clearly establish commonly under Article 3, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The terms of the articles are verbatim those of the UDHR once again reiterating the strong position that such a concept has under international law.

The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[6] provides an interesting furthered obligation upon States. The wording of the convention provides in itself the duty on States to implement as part of their national criminal jurisdiction, any offences relating to torture in line with the definition that it sets out. The requirement is specifically for parties to take effective, legislative, administrative, judicial, or other measures to prohibit torture within its own jurisdiction but also to bring all offences of torture outside of its sovereignty within its jurisdiction. Extradition proceedings must not take place where a State is in the position to charge and try a known torture criminal.

Thus all crimes of torture taking place within the UK or outside of it come under the jurisdiction of UK criminal law and must be prosecuted in compliance with both international and domestic legal obligations.

On 1st August 2002, the Assistant Attorney General Jay S. Bybee, had a memorandum issued by him leaked, which showed that US policy had narrowed the definition of torture to such a great extent, that it is in direct contravention of the torture conventions. The wording of the memorandum states that in order for an act to constitute torture is must inflict pain, "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death."

Once the issue had been raised by the international community, the US reviewed its policy to state that, "procedures calculated to disrupt profoundly the sense or personality", could not be considered torture unless there was direct evidence of long-term harm.[7] What is patently clear, is that no matter what legal and linguistic semantics the US government tries to use to justify its torture in order to interrogate, the fact remains that they are acting in direct contravention of the torture norms and should be held liable for such crimes.

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[6] UKTS No 107 (1991), Cm 1775

[7] 'Cruel. Inhuman. Degrades Us All.' Amnesty International 2005

In a report by Major General Taguba, there were clear suggestions that two senior military intelligence officers, Colonel Thomas Pappas and Lieutenant Colonel Steven Jordan, along with two private contractors were 'directly or indirectly responsible' for many of the abuses that were taking place at Abu Ghraib prison.[8]

According to Anthony Dworkin from the Crimes of War Project,

> "Beyond the most abusive actions at Abu Ghraib, there is plentiful evidence that senior officers were aware of practices like forced nudity and the use of unmuzzled dogs to intimidate prisoners. Col. Thomas Pappas, the military intelligence officer in charge of interrogations at Abu Ghraib, is reported as having openly acknowledged the use of forced nudity as part of the intelligence process."[9]

What seems to be clear though, is that there seems to be a direct correlation between the abuses that were occurring at Abu Ghraib, and the times that officials in Iraq and Washington need information about the Iraqi insurgency.[10]

Much of the information that has been received relating to US administered torture techniques have been due to information that has been leaked or declassified from Guantanamo Bay or Abu Ghraib prison. What is particularly worrying though, is the number of 'ghost detainees' that are being held in secret locations around the world. These are often suspected Al Qaeda suspects whom the US government wishes to interrogate in order to gain more information. Without transparency and access to representation for these detainees, there is a high risk of abuse and torture through a variety of techniques already been implemented in the known detention facilities.[11]

What is increasingly worrying regarding the detention of these 'ghost detainees' is the way in which it fits into the emerging practice of 'rendition', in other words, the outsourcing of torture. Reports are emerging all the time of individuals who have been flown across the world by the CIA from one country to another where they are tortured for information before they are either killed, or handed back to the US for further questioning.[12]

Refoulment to States which are known to practice torture is illegal under international law. To send a person to a State where it is known that they will be harmed breaches the strongest obligations under international law. United Nations Security Council Resolution 1566 clearly states, "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law", and by not complying, those States have automatically become liable to be prosecuted for crimes of torture.[13]

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[8] http://www.crimesofwar.org/special/prisoner/fs.html
[9] Ibid
[10] Ibid
[11] Ibid
[12] Supra 7
[13] Qureshi A (12/10/2005) 'Report on the status of British residents held in Guantanamo Bay' Cageprisoners

Instead of condemning all the above abuses in the strongest possible terms, the UK government has been complicit in the breaches of international human rights law. A particularly worrying aspect of their position stems from the UK Court of Appeal decision in August 2004 to accept in a court of law information that is extracted under torture in order to prosecute other suspected terrorists.

The established rule against torture and the current practice by States are clearly at loggerheads with one another. The torture that is being exercised globally is producing results which should be expected from interrogations of such a nature. False confessions and lies have now become an integral part of the War on Terror, an evil which is fast spreading across the world as States with already poor torture records have been given the green light to continue with their unacceptable behaviour. It is imperative that the torture stop and that these people be given their full right to dignity and humanity, further though, they should be given every single opportunity to be represented fairly before courts in order to prove their innocence. Torture only ever leads to guilt, especially when there are no mechanisms to enforce sanctions against those who would wield such an evil technique.

> "I needed the toilet and I asked the interrogator to let me go. But he said, 'You'll go when I say so'…Finally, I squirmed across the floor and did it in the corner...He comes back with a mop and dips it in the pool of urine. Then he starts covering me with my own waste, like he's using a big paint brush…All the while, he's racially abusing me, cussing me."[14]

> "They punched me, they kicked me, once to my chin. Another time I was told to lie down and they picked me up by my neck so I was half-strangled and they said 'we are going to kill you unless you confess what you did'."[15]

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[14] Martin Mubanga, a UK national held in Guantanamo Bay: 'Cruel. Inhuman. Degrades Us All.' Amnesty International 2005

[15] Jannat Gul, an Afghani held in the US military facility Gardez, Afghanistan: 'Cruel. Inhuman. Degrades Us All.' Amnesty International 2005

Articles 9 and 10: The Rule against Arbitrary Arrest and the Right to a Fair Trial

Article 9:

> **"No one shall be subjected to arbitrary arrest, detention or exile."**

Article 10:

> **"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."**

Guantanamo Bay is living evidence that the Article 9 rule has been broken beyond all standards that are internationally acceptable. The US has acted in the most arbitrary manner with regard to the arrest and detention of thousands of suspects worldwide who now have no legal recourse other than to wait for a possible regime change in America. The UK has implemented Article 5 of the ECHR in the HRA 1998 through the same article number. Although the article states the meaning of the right given in the UDHR, there are many clawbacks attached which derogate from the completeness of the right.

The clawbacks to the rule against arbitrary arrest however are mainly based on unlawful behaviour and the specific case of infectious diseases. There is no right for people to be picked up around the world and be flown to various locations where they face the real threat of torture. At all three levels: international, European and domestic levels, the allowance of people to be detained without cause is a complete breach of their fundamental human rights and must not be encouraged or condoned in any way.

The UK has once again breached its obligations by allowing the for the CIA to land their Gulfstream jet and other another jet to land 170 times in Scotland for refuelling. These flights have all been going to Egypt, Morocco, Uzbekistan, Afghanistan, Jordan and Syria where they drop their detainees off in order for information to be extracted. This convenient method of outsourcing torture through the process of rendition is totally adverse to international human rights and the UK government has failed in its responsibility to protect those on the flights. Reports indicate that since 9/11, these jets have landed over 390 time at UK airports.[16] A special rapporteur for the UN's human rights commission, Professor Martin Scheinin commented,

> "When several states, by co-operating with each other, breach their obligations under international law simultaneously where torture might be involved, then they all bear individual responsibility. It is not unusual for governments to deny any knowledge of such operations."[17]

As with Article 9, Article 10 of the UDHR is a fundamental human right for any system of legal justice, especially when States such as the UK have ratified such a right through their domestic legislation. Article 6 of the HRA 1998 and ECHR provides for the right to a fair trial and the right to be presumed innocent until having been found out to be otherwise. The detention of the detainees has proved the opposite true in practice, once they are arrested, they are tortured until their innocence is proven.

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[16] Bruce I '170 CIA 'Prisoner Flights Have Stopped Off in Scotland" 15/09/2005 The Herald
[17] Ibid

The European Union has made a lot of headway in relation to the respect of fundamental freedoms under the Treaty of the European Union (TEU). Article 6 provides that respect for fundamental rights and freedoms constitutes one of the basic principles on which the European Union was founded. It is however in Article 6 of the ECHR and HRA that real substance is given to Article 10 of the UDHR.

The European Court of Human Rights (ECtHR) has a long line case law which has established the primacy of human rights in community law. In the case of Funke v France it was held by the court that Article 6 of the ECHR protected the right "to remain silent and not to contribute to incriminating [oneself]."[18] Of course, in the face of torture this would be an inordinately difficult task to achieve as the purpose of the torture is to contravene that right by extracting information that might not otherwise be given. This ECtHR decision was backed strongly by the European Court of Justice (ECJ) in the case of Hüls v Commission where it was reasoned,

> "The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order."[19]

As for the right to a fair hearing, according to the case of Al-Jubail, the ECJ stressed unequivocally the importance of the right to a fair hearing, and in fact during the course of the case found that such a right had been breached resulting in certain provisions of a regulation to be held void.[20] This was backed by the cases of Krombach v Bamberski[21] and Baustahlgewebe v Commission[22], where claims that had been raised on the basis of the right to a fair hearing as being a general principle of EC law were found to be successful.

The British government must take steps in order to make sure that it complies with its international obligations. The fundamental principles of EU law are not merely limited to the European Court of Justice, but rather should be implemented in the domestic legislation and practice of each State. No one should ever be arrested without reason and if they are detained, then it is from the fundamental values of humanity that they be given a complete right to a fair trial in order that they may prove their innocence. Holding people on the assumption that they are guilty and then torturing them until you receive the verdict you want, is a complete breach of human rights law.

The truth of the matter can only be best described by the words of Lieutenant Commander Swift, counsel for the detainee Hamdan in Guantanamo Bay, "…I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of "negotiating a guilty plea" to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea."[23]

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[18] Funke v France, Series A, No 256A, para.44
[19] Hüls v Commission, [1999] ECR I-4287
[20] Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v Council [1991] ECR I-3187
[21] Krombach v Bamberski [2000] ECR II-1935
[22] Baustahlgewebe v Commission [1998] ECR I-8417
[23] The Senate Committee on the Judiciary on the Subject of 'Detainees'

The Geneva Conventions

Following the attacks on 11th September 2001, the Bush administration made it perfectly clear that they would hunt down Osama bin Laden at all costs. The alleged head of the organisation Al Qaeda had been located in Afghanistan where the *de facto* Taliban government was in control after having usurped the *de jure* Northern Alliance. On refusing to hand over Osama bin Laden after claiming that America had not produced sufficient evidence to link him to the World Trade Centre bombings, the United States launched 'Operation Enduring Freedom' on 7th October 2001, claiming that if the Taliban did not, "…hand over the terrorists, they will share their fate."[24]

The joint action by the United States and the United Kingdom caused an interesting situation to arise with regard to the laws of war. Regardless of the legitimacy of the United States action, once war had begun, the *jus in bello* came into force. It does not matter whether or not the belligerents recognise each other; the *jus in bello* must be complied with once active hostilities begin, as now held under customary international law.[25]

To what level does this law apply though, and to whom? Before the US and UK arrived, there was already a civil conflict ensuing between the Taliban and the Northern Alliance. With the entry of the two international actors, the international law on the laws of war became applicable. Was the Northern Alliance required, as an ally to the US, to apply the same standard as they? Could two different sets of rules be realistically applied to the Afghani troops? To compound this problem, the Afghani troops consisted of both Al Qaeda and Taliban forces. How could these adversaries be differentiated when applying the rules regarding prisoner of war status?[26] It is the opinion of this writer that in such a circumstance, the highest standard of the law should have been applied to all combatants involved in order to make sure that the rights of every individual are protected. Applying a lower standard would result in the kinds of breaches that have been witnessed with the Guantanamo detainees.

While the conflict continued, there were concerns as to the way in which detainees would be treated by the United States army under Article 4 of the Third Geneva Convention, and how such issues would be decided.[27] It was in the US Army Operational Law Handbook that the issue was clarified,

> "The initial combat phase will likely result in the capture of a wide array of individuals. The US applies a broad interpretation to the term "international armed conflict" set for in common Article 2 of the Conventions...Judge advocates, therefore, should advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the [Third Geneva Convention], at least until their status may be determined."[28]

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[24] Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1347, 1347 (Sept. 20, 2001).

[25] Green LC (2000) 'The Contemporary Law of Armed Conflict' Manchester University Press p.81

[26] Lang T. 'Civilians and War: Dilemmas in Law and Morality' http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/95

[27] 'Decision Not to Regard Persons Detained in Afghanistan as POWs' (2002) American Journal of International Law vol.96 No.2 p.475-480

[28] US Department of the Army, Operational Law Handbook 22 (2002)

It would seem then from the above clause, that despite the varying nature of the armed forces within the Afghan army, rights and protections would be given to all. Considering the difficulty of distinguishing between the Al Qaeda forces and those of the Taliban, such a standard as held in the Operational Manual would have been the most obvious and best one to apply. How then did the term 'unlawful combatant' come to be applied to the Taliban troops, leaving aside the Al Qaeda forces for the moment? The reasoning for such a classification was explained by the Virginia Federal court in the case of United States v Lindh[29] where the judgment stated,

> "…It is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity, i.e. that the Taliban satisfies the four criteria required for lawful combatant status outlined by the [Third Geneva Convention]."[30]

This reasoning was held by the Bush administration itself through the White House Press Secretary who pushed forward the same reasoning as the Virginia court.[31] What makes this situation even more strange is the fact that the Bush administration, under the advice of the Secretary of State Colin Powell agreed that despite their non-recognition of the Taliban, they would apply the rules of the Third Geneva Convention to the Taliban detainees.[32] The reasoning given by the US for labelling the Taliban detainees as unlawful combatants stems from a reading of Article 4A (2) which relates to whom may take from the protections granted by it.[33] It seems slightly convenient though, that the Bush administration failed to refer to the first sub-paragraph of Article 4A which states,

> "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[34]

There may have been a misreading of the law by the United States through their failure to take into regard this Article as they apply a law which pertains to 'militias' and 'volunteer corps' to a possible army. Could the Taliban troops really be considered to be the formal army of Afghanistan so as to come under the protection of Article 4A (1)? If the Taliban troops constitute the main army they would not have to fulfil the four conditions that have been laid down by Article 4A (2).[35] There are those within the academic circles who do apply the conditions to the whole section,[36] textually however, it does not make any sense for the paragraphs to have the four conditions to be applied in the way they are and be pertinent to both sub-paragraphs.

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[29] United States v Lindh 212 F.Supp.2d p.556
[30] ibid p.556-58
[31] Fleischer A. Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (7th February, 2002)
[32] White House Fact Sheet on Status of Detainees at Guantanamo (7th February 2002)
[33] Aldrich G.H. (2002) 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' American Journal of International Law vol.96 No.4 p.894
[34] Article 4A (1) Common Article 2, Geneva (III) Convention Relative to the Treatment Prisoners of War
[35] supra 33 Aldrich p.894
[36] Wedgwood R. (2002) 'Al Qaeda, Terrorism, and Military Commissions' American Journal of International Law vol.96 p.328

There is hardly a soul within the academic world who could reasonably consider the Taliban forces to be representative of the army of Afghanistan and thus qualify as members of the armed forces.[37] Does that make it then acceptable that this term 'unlawful combatant' has been applied in such a blanket fashion by the American army? How many armies in the world could fulfil the conditions required for combatant recognition? While the super States have their large standing armies, there are many States who simply do not have the ability to equip such a force so as to be recognised. By this standard then, very few States could actually achieve full combatant recognition with most of the world having to resort to seemingly illegal guerrilla warfare.

Clearly this would be a total misunderstanding of the purposes of the laws. The codes have been formed in order that both civilians and combatants are protected. However, if the laws are only ever applicable to one side, then the opposing belligerent would have a free licence to carry out any activities they choose to fight with, as they have already been classified as unlawful combatants. This situation would result in the clock turning back in relation to the protection of combatants as the rules would be defied.

What level of protection are unlawful combatants afforded? The United States has claimed that all the detainees in Guantanamo would be treated humanely.[38] This may seem to be a fair standard to apply as far as the American army is concerned, however, how does this apply to unlawful combatants who are being fought against in the field? If the laws of land warfare are not applied, then a licence may be given to the combatants on either side to indiscriminately kill. This of course is no kind of resolution, and thus a higher standard must be turned to.

The Taliban should have received complete protection under Article 4 of the Third Geneva Convention, but how could they be differentiated from the Al Qaeda terrorists? It is difficult to imagine a situation where an Al Qaeda suspect would be immediately recognisable against a Taliban combatant. It is here that Article 5 of the Third Geneva Convention must be implemented,

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

It seems absurd that the American army would be able to establish all their enemy combatants as being 'unlawful' in a blanket fashion. In such a situation as that in Afghanistan, it would be impossible to ascertain the status of each combatant. It should be reiterated constantly in all academic circles, that the standard that should be applied in this situation, is the highest legal one possible. At minimum, the Article 5 tribunals should have taken place, and not the blanket tribunal carried out by George Bush. The situation relating to the detention of any Afghani combatant is summed by the US Army Field Manual 'The Law of Land Warfare' where Article 5 is interpreted,

> "…The foregoing provision applies to any person not appearing to be

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[37] ibid. p.335

[38] White House Fact Sheet on Status of Detainees at Guantanamo (7th February 2002) http://www.whitehouse.gov/news/releases /2002 /02/20020207-13.html

entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any doubt of a like nature exists."[39]

This term 'unlawful combatant' should be relegated from the coinage of legal speech and instead there should be a positive move from States to reassess the changing nature of war, and to consider the varying ways in which combatants can feasibly defend their nations in a world where warfare is increasingly becoming more asymmetric. No longer can the smaller States compete with their superior counterparts. Without resorting to illegal forms of guerrilla warfare, any conflict that takes place on such asymmetric terms will always result in the technologically advanced States emerging the victors. At the moment, as the laws stand, the majority of the world has been excluded from the protection that the terminology and requirements of the combatant immunity seek to provide.

Article 5 clearly provides that while the US has not ascertained the status of those it has detained, it must provide complete combatant protection in compliance with the Geneva Conventions. From this understanding stems their liability under international humanitarian law for having committed crimes contrary to the conventions.

Article 13 of Geneva Convention III relating to Prisoners of War states,

> “Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the Present convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.
> Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.
> Measures of reprisal against prisoners of war are prohibited.”

As established earlier in the earlier section relating to the rule against torture, no rule or principal can override the norm against the use of torture by an individual or a State. Clearly the US military and those who have commissioned the use of torture are in contravention of such a rule. However, what constitutes a ‘serious’ breach as under Article 13? Although no definition is given to ‘serious’ breaches, the convention does highlight when ‘grave’ breaches have occurred, which being of a higher level of breach than a ‘serious’ one, would automatically encapsulate the serious breaches as well. Article 147 of Geneva Convention IV relating to Civilians states,

> “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person

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[39] US Department of the Army (1956) ‘The Law of Land Warfare’ Field Manual 27-10 para.73 http://www.adtdl.army.mil/atdls.htm

> to serve in the forces of the hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention of property, not justified by military necessity and carried out unlawfully and wantonly."

These breaches are considered to be of such importance in terms of the protection of international humanitarian law, that Article 148 which directly follows the 'grave breaches' provision, states that parties to the convention cannot absolve themselves from liability of such crimes, and neither can they absolve another party in respect of the breaches. Neither the Americans nor British can absolve themselves of their responsibility to take action against the breaches of the Geneva Conventions that have taken place against the detainees held as part of the War on Terror. In fact the obligation goes much further through Article 146 which requires,

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."

For war crimes, universal jurisdiction applies to any 'grave breach' committed in any conflict throughout the world, regardless of whether or not the State prosecuting the individual was a party to that conflict. The British government, in compliance with its obligations, must not just take responsibility, but must actively seek any individual within its jurisdiction who has committed a war crime. This applies to any action that has been taken against any detainee held as part of the War on Terror, as they should all have the status of a 'protected person'. Many have been tortured or are on their way to torture, which in turn should force the hand of the government to intervene every time a UK airport is used to help render a detainee to a torture State. By not fulfilling this obligation, the UK itself is in breach of international humanitarian law, and can be seen as being complicit to the torture, thereby by held accountable under the laws of war.

International Humanitarian Law was developed in order to make combat safer for both civilians and combatants. The US has breached all of its obligations against the strongest norms of international law in protection of rights and duties for their enemy belligerents. With such a manifest abuse, must come the correct implementation of the law in order to hold those people who committed atrocities to account for their crimes. Torture has taken place, the detainees have been refouled to States which consistently practice torture, and these people have not been given fair hearings, all surmounting to complete liability for war crimes under international law.

International Criminal Law: Crimes against Humanity

War crimes can be committed in either international or internal armed conflicts. There are generally two types of crimes that can be committed: crimes against those no longer taking part in active hostilities and crimes against those who are involved in active hostilities, but with prohibited methods of warfare. For the purposes of this discussion, only the former category will be analysed in relation to the treatment of those detained by the US as part of the global War on Terror.

With regard to the crimes which are committed *against persons not taking part, or no longer taking part, in armed hostilities*, according to Antonio Cassese,

> "In practice by far the most numerous crimes are committed against civilians, or armed resistance movements in occupied territory, and include sexual violence against women. In particular, they are perpetrated against persons detained in internment or concentration camps. They are also committed against prisoners of war."[40]

As mentioned in the previous section, these crimes are considered as 'grave breaches' of international humanitarian law and thus automatically constitute war crimes. Definitions for grave breaches can be found in: Articles 50, 51, 130, and 147 of the First, Second, Third and Fourth Geneva Conventions respectively, as well as Article 85 of Additional Protocol I to the Geneva Conventions. These are generally the easier crimes to establish under international criminal law and can hold individuals liable for their own acts.

It is the issue of whether or not the detention of those in Guantanamo Bay has now reached seriousness of being considered a *crime against humanity*. The generally understood features of those crimes which are considered sufficiently serious as to be against humanity are laid out as follows:

- A serious attack on human dignity or a grave humiliation or degradation of one or more human beings which is considered to be a particularly odious offence.
- That it is not merely a single isolated or sporadic occurrence, but rather forms as part of a widespread policy which is acquiesced by a government or an authority.
- That it is a completely prohibited act which therefore can be punished in both times of peace and war.
- The victims of the crime are either civilians or as under customary international law, enemy combatants (not under the statutes of the ICTY, ICTR or ICC).[41]

Whether one turns to a strongly established customary international law, or Article 7 of the Statute of the International Criminal Court (ICC), there are now clearly established contours of the *actus reus* which can examine the possibility of a crime against humanity having arisen. Although there are nine such crimes, for the purposes of the subject area, this work will only focus on: deportation of a population, imprisonment and torture. By taking each topic in turn, what will be shown is that the US treatment of the detainees has reached such a level, that now it can easily be considered a crime against humanity.

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[40] Cassese A (2003) 'International Criminal Law' Oxford, p.55
[41] Ibid

Deportation or forcible transfer of population:

> **"…means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."**[42]

The type of movement was clarified by a Trial Chamber of the ICTY in the case of Kristić, "Both deportation and forcible transfer relate to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State."[43]

The forced deportation of over 2000 Afghani troops (whether Al Qaeda or Taliban) to various regions before being take off to Guantanamo Bay and an estimated 10,000 people who have been rendered by the US military to unknown locations around the world have culminated in a real modern crime against humanity. The decisions made by the Commander-in-Chief of the US Forces, George W. Bush, provide a direct link between his decision to use the naval base and the forced deportation of the Afghanis.

Imprisonment:

Although not included in the Statute of the ICC, imprisonment does have a very strong place as a recognised crime against humanity under customary international law. In the cases of Kordić and Čerkez, a Trial Chamber of the ICTY held that imprisonment as a crime against humanity must, "be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population."[44]

The policy of imprisonment that has been implemented by the US can only ever fit the description put forward by the ICTY. The detainees have had absolutely no due process and this has taken place worldwide against anyone who fits a Muslim profile or is seen as a sympathiser to their cause. The detention of US Former Army Chaplain James Yee, who was imprisoned after taking his responsibility to the detainees in Guantanamo seriously and complaining of their conditions. He was imprisoned for being a Muslim sympathiser, thus proving that the detentions are part of a widespread attack against a civilian population.

Torture:

> **"…means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."**[45]

A Trial Chamber of the ICTY in the case of Delalić and others[46] found that customary international law provided a strong understanding of what is considered to be torture

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[42] Article 7(2)(d) of the Statute of the International Criminal Court
[43] Kristić Trial Chamber of the ICTY, para.521
[44] Kordić and Čerkez Trial Chamber of the ICTY, para.302
[45] Article 7(2)(e) of the Statute of the International Criminal Court
[46] Delalić and others Trial Chamber of the ICTY, para.459

through the line of conventions that had been ratified. Similarly in Furundžija[47] the Trial Chamber agreed with the earlier case, however stated that in armed conflicts there were the additional elements that it,

> "(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition, (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity."

When one considers the opinion issued by the Office of the Legal Counsel in the Attorney General's office allow for, "…procedures calculated to disrupt profoundly the sense or personality", it becomes clear that the situation in Guantanamo more than adequately subscribed to the conditions laid out by the ICTY. The tribunal did go on to mention that, "…among the possible purposes of torture one must also include that of humiliating the victim."[48] The pictures coming out of Abu Ghraib and statements from Guantanamo are more than a testament to this almost daily occurrence.

Whichever of the three crimes one looks at, a clear link can be made between the definition of crimes against humanity, and current US sanctioned military action against the War on Terror detainees. In order to unequivocally prove the case for a crime against humanity though, the Courts insist upon three elements to be present for such a classification to be given.[49]

The first condition is that there must be relevant intent. The deportations, imprisonment and torture of the detainees could never have occurred without the express permission of the US administration. They intended to place the detainees into a legal black hole where the law could not touch them.

The second condition requires that the person who acts as an agent to the system, and does not directly take part in the act, be aware of the risk his decision might make. Also the third and final condition that is required by the courts is that the agent must be cognisant of the link between his misconduct and a policy of systematic practice. In the case of the US, the media coverage of the torture and the countless explanations given by Donald Rumsfeld show a direct understanding of the risk that these techniques might bring to those who fall victim to them.

What has been established is a clear violation of both international humanitarian and international human rights law. The systematic abuse and torture against the detainees has resulted in some of the worst crimes against humanity that have been seen since the Soviet Gulags and German Concentration Camps. All nation States should issue warrants of arrest as they are obliged to do under international humanitarian law for those who have allowed this situation to arise. They must be made accountable for the atrocity that is the War on Terror, whether it be the average soldier, or a head of State.

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[47] Furundžija Trial Chamber of the ICTY, para.162

[48] Ibid

[49] Supra 40

State Immunity v the Norm of against Torture

There has been a battle raging between the need to protect the heads of Sovereign States in order to keep effective international relations against the need to protect humanity from the evil scourge of abuse and violence. Many leaders have traditionally managed to get away with some of the worst atrocities against their people simply for the sake of protecting the inviolability of State officials. The ever emerging norm of human rights has, however begun to make a place for itself in the world. The question is, to what extent can Bush, Blair, Rumsfeld, Straw and their cohorts be found criminally liable for their active role in the promotion of torture and abuse.

The International Court of Justice (ICJ) in the Congo v Belgium- Arrest Warrant case indicated that there was probably a limited role for the jus cogens of human rights in practice. The Belgium government wished serve an arrest warrant against the Congolese foreign minister for breaches of the Geneva Conventions. Congo immediately replied back saying that customary international law relating to the inviolability of officials took precedence over the emerging norm of human rights. Belgium tried to argue that immunities could not be invoked against war crimes, however the court distinctly held that certain high-ranking officers held immunity from civil and criminal process and that all Belgium could do was to declare him persona non grata.[50]

The European Court of Justice also took the approach of the ICJ by stating that not even a peremptory norm against torture could justify the depravation of a State to sovereign immunity.[51] The important thing to note though, is that the court did specifically call the rule against torture a peremptory norm, thereby helping to establish its status into the highest category of norms. This was backed by the ICTY who stated,

> "Because of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force…Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[52]

The famous UK case of ex parte Pinochet highlighted the issue of sovereign immunity, especially in relation to a head of State. The opinion by Lord Millet in the case stated that, "[i]international law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose."[53]

Cassese clarifies the position of the dichotomy by stating,

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[50] Arrest Warrant case of 11 April 2000 (Democratic Republic of Congo v Belgium)
[51] Al-Adsani v United Kingdom, Judgment, 21 November 2001
[52] Furundžija Trial Chamber of the ICTY, para.162
[53] R v Bow Street Metropolitan Stipendiary Magistrate and other, ex parte Pinochet Ugarte [1999] 2 All ER 97 (HL), p.79

> "The rationale behind the forfeiture of a right to immunity by State officials who have perpetrated international crimes is simple: in the present international community respect for human rights and the demand that justice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for State sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected States agents acting in their official capacity."[54]

There are many treaties that when looked at in an implicit fashion, hold firm that immunities may not relieve an official of any responsibility for the international crimes that have been envisaged. Article 4 of the 1948 Genocide Convention, Article 4 of the 1984 Convention on Torture, Article 7(2) of the ICTY, and 6(2) of the ICTR hold strongly to the rule against immunity for war crimes. The latter two provide in their respective articles, "The official position of any accused person, whether as a Head of State or Government or as responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." However, despite all the general phrases, it is only the International Criminal Court which completely excludes any right to claim immunity.

Those who breach their obligations under international humanitarian and human rights law must be held accountable for their crimes. This is not merely a right, but rather an obligation on all States in order to promote the international rule of law and legal order. Heads of State and governmental officials can no longer hide behind the protection of sovereign immunity but rather must face the consequences of any actions that they take contrary to fundamental humanity. It is now up to the nation States of this world and the international tribunals to hold to account those who have committed the horrendous atrocities that are still taking place today in Guantanamo Bay.

[54] Supra 40

Conclusion

International law and international legal order are very much based around the concept of the international rule of law. Without such a rule, there can be no move forward for all the nations of this world, as there is nothing to police the oligarchs and despots who would choose to wreak havoc in their own spheres of influence. Some, like Mugabe, have committed terrible crimes within the tiny jurisdiction that they control, however, their crimes are enough to constitute a wrong against the whole of humanity. Others though, like the US, have used their power in such a relentless way that whole societies have been left in ruins by their own ideals of global order.

International humanitarian and human rights law makes no distinction between the rich, poor, strong or weak. It is a standard that applies to all human beings solely for the betterment of their condition so that it may be possible to live in a safer and more secure world. The manifest abuses taking place in the detention facilities set up by the US government worldwide are only serving to destroy the very norms that have taken over fifty years to properly establish.

The norm against torture is one that has struggled to gain recognition as a peremptory norm of international law, and now that it has finally reached the pinnacle of its ascent, it must be used in the most constructive way in order to promote the cause of human rights and ease the pain of human suffering. Whenever there is a wrong committed in the face of this norm, then immediately the international community must react in order to bring to justice those who would abuse such an important fundamental principle of the international rule of law.

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