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 countries 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 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 ill 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 does it seem the Geneva Conventions and those strong moral words stemming from international treaties on torture have any binding effect on those 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 US and UK governments with all the obligations and liabilities that stem from that law. What will be 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 liabilities, sanctions must not only be highlighted, but must also be enforced. If breaches of international and domestic law go without sanction, it 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 abuse.

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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…"*[3]

The Declaration is now considered internationally to be the very constitution 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."*[4]

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 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.

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

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[5], 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."*[6]

Therefore the emphasis on the norms of international human rights are 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 renditions.

[5] Charlesworth H and Chinkin C 'The Gender of Jus Cogens' 15 Human Rights Quarterly 63 (1993)
[6] 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 in the 'War on Terror', was considered to be one of the most immutable principles of international law, one that could never find 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 this rule, especially through the invocation of national security and defence.

US policies on the usage of torture[7]:

On 1st August 2002, the Assistant Attorney General Jay S. Bybee, had a memorandum leaked which showed that US policy had narrowed the definition of torture to such a great extent, that it is in direct contravention to the torture conventions. The wording of the memorandum states that in order for an act to constitute torture it must inflict pain, *"equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death."*[8]

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.[9]

In an Action Memo on Counter-Resistance Techniques to Donald Rumsfeld, William J. Haynes II General Counsel for the Department of Defense, sought approval for three counter-resistance techniques that he wished to implement in interrogations.[10] The three categories needing approval included:

1. Mild and fear-related techniques – placing a dagger on a table in front of the detainee is an example of the way in which an implicit sense of torture of danger is imminent.[11] Sexual humiliation may also be included by playing on religious sensibilities through exposure to pornographic material.[12]
2. Use of stress positions, falsified documents, isolation for 30 days, removal of clothing, preying on fears and interrogations outside of official interrogation rooms.[13]
3. Exposure to cold, water or simulated suffocation using a wet towel – these were denied approval.[14] Threats to kill or cause imminent physical harm were held not to be illegal but to be used cautiously.[15]

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[7] Based on primer by Bazelon E, Carter P and Dahlia L 'What is Torture? An Interactive Primer on American Interrogation' 28/05/2005

[8] US Office of the Assistant Attorney General 'Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A' 01/08/2002 http://www.slate.com/features/whatistorture/pdfs/020801.pdf

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

[10] William J. Haynes II General Counsel for the Department of Defense to Donald Rumsfeld 'Action Memo, Re: Counter-Resistance Techniques' 27/11/2002 http://www.slate.com/features/whatistorture/pdfs/020927.pdf

[11] Carter P 'The facts and the law' What is Torture? http://www.slate.com/features/whatistorture/taxonomy.html?http://www.slate.com/features/whatistorture/FearUp.html

[12] Jummah al-Dossari was subjected to sexual humiliation by US interrogators in Guantanamo Bay as he was held down by soldiers while a female soldier undressed herself and smeared her menstrual blood over him – Testimony of Jummah al-Dossari 07/2005 Amnesty International http://www.cageprisoners.com/articles.php?id=11641

[13] Miles S.H. 'Oath Betrayed: Torture, Medical Complicity, and the War on Terror' Random House 2006

In response to the request made by Hayne, Rumsfeld replied, *"I stand for 8-10 hours a day. Why is standing limited to 4 hours?"*[16]

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 accountable for such policies.

US practice of torture:

Torture has taken different forms at the hands of various US agencies since the beginning of the War on Terror. It would be an exaggeration to say that all forms of torture had been sanctioned by the US administration, however as established above, policies had been put into place in order to allow torture for the purposes of extracting information and breaking the will of detainees.

As early as the detention period in Afghanistan, the ill treatment of detainees had begun to be put into effect. Whether or not the abuse was part of systematic treatment sanctioned by superiors, widespread reports of torture, ill and degrading treatment came from detainees who were captured at the time. Detentions such as those in Kandahar have been renamed by the detainees to describe their time there, in the specific case of Kandahar it was renamed 'Camp Slappy'[17].

Other prisons such as the 'Salt Pit' and the 'Dark Prison' have gained a reputation for the intensity of the torture that has taken place.[18] A CIA case officer at the 'Salt Pit' ordered guards to, *"strip naked an uncooperative young Afghan detainee, chain him to the concrete floor and leave him there overnight without blankets"*, the Washington Post reported on 3rd March, after interviewing four government official familiar with the case. According to the report, *"paid by the CIA and working under CIA supervision"*, dragged the prisoner around the concrete floor of the facility, *"bruising and scraping his skin"*, before placing him in a cell for the night without clothes. An autopsy by a medic listed *"hypothermia"* as the cause of death.[19]

The detentions in themselves have not been the only form of torture carried out by US authorities. Often the manner in which detainees were transferred constituted a form of torture. The most famous and tragic example of these transfers is the Dasht-i-Leili massacre where Taliban detainees were shot and suffocated in metal containers while being taken from Kunduz to Shiberghan prison.[20] Individuals such as John Walker Lindh were in similar ways transferred to other prisons in the most horrific ways; when being taken from Camp Rhino to the USS Peleliu he was stripped naked, fastened to a

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[14] Although the official position was that the use of the cold was denied, Jamil El Banna, Bisher al-Rawi, Martin Mubanga and Saifullah Paracha all relate that at times they were exposed to extremes of temperature. Mickum G.B. 'MI5, Camp Delta, and the story that shames Britain' The Independent

[15] A statement from Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed 'The Tipton Three' is one example of the use of death threats carried out routinely in Afghanistan.

[16] William J. Haynes II General Counsel for the Department of Defense to Donald Rumsfeld 'Action Memo, Re: Counter-Resistance Techniques' 27/11/2002
http://www.slate.com/features/whatistorture/pdfs/020927.pdf

[17] The Guardian 'One Huge US Jail' 19/03/2005

[18] A more complete list of prisons in Afghanistan can be found in a report by Cageprisoners 'Beyond the Law: the War on Terror's Secret Detention of Global Detentions' 12/2006

[19] Human Rights Watch 'Afghanistan: Killing and Torture by US Predate Abu Ghraib' 25/05/2005

[20] United Nations and Afghanistan
http://www.un.org/apps/news/infocusnews.asp?NewsID=259&sID=1

stretcher and placed in a metal shipping container without any treatment being given to a bullet wound he received.[21]

Torture by US agencies has not been the only technique implemented, there have been many examples of detainees having been outsourced to third-party countries where they have been abused and made to sign false confessions. After having been kidnapped from Pakistan and sold to the US military, Binyam Mohammed Al Habashi was sent to Morocco to be tortured and interrogated before being taken to Guantanamo Bay. The US were fully aware of the torture he underwent which included having his genitalia cut with a razor. Other well known examples include Mamdouh Habib[22] and Maher Arar[23] who were sent to be tortured and interrogated in Egypt and Syria respectively.

Since the arrival of detainees in the camps at Guantanamo Bay, there have been many suggestions of torture and ill treatment that have taken place. Statements released by former detainees have gone a long way in corroborating the systematic abuse that has taken place there. Murat Kurnaz gave evidence in front of a parliamentary panel explaining that, *"They tortured us with cold in solitary confinement or airlessness often to the point where I fell unconscious"*[24], and further that, *"They would hit you, tie you up and then leave you laying there for about 12 hours."*[25]

Reports of torture coming from Guantanamo Bay have not been limited to physical abuse, there are many examples of psychological forms of torture used to degrade detainees and extract information. In an article written in the New England Journal of Medicine, Greg Bloche and Jonathan Marks exposed the tactics used by the US interrogators to extract information from detainees. Their article entitled 'Doctors and Interrogators at Guantanamo Bay' states how, *"Health information has been routinely available to behavioural science consultants and others who are responsible for crafting and carrying out interrogation strategies."*[26] The report explains that psychologists and psychiatrists at the base use fear and anxiety as counter-resistive tools as this technique, *"…builds on the premise that acute, uncontrollable stress erodes established behaviour…creating opportunities to reshape behaviour."*

The war in Iraq has led to innumerable detentions resulting in some of the worst images to have been witnessed since 2001. 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.[27]

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."*[28]

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[21] http://www.wsws.org/articles/2002/oct2002/lind-o07.shtml
[22] Jackson A 'Australian Suspect 'tortured, crippled' 20/09/2006 The Age
[23] http://www.statewatch.org/cia/documents/maher-arar-chronology.pdf
[24] http://www.dw-world.de/dw/article/0,2144,2317629,00.html
[25] Ibid
[26] Bloche G and Marks J. 'Doctors and Interrogators at Guantanamo Bay' New England Journal of Medicine 353 (2005)
[27] http://www.crimesofwar.org/special/prisoner/fs.html
[28] Ibid

What seems to emerge is the 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.[29]

Much of the information that has been received relating to US administered torture techniques has 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 implemented in the known detention facilities.[30]

UK policies on the usage of torture:

As far as the UK's obligations, 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[31] provides a furthered obligation upon states. The wording of the convention provides in itself the duty on 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 their own jurisdiction but also to bring all offences of torture outside of their sovereignty within their 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.

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.

Subsequently when the case, A and Others v Secretary of State for the Home Department went before the House of Lords, Dame Eliza Manningham-Buller, Director-General of the Security Service gave evidence to justify policies of using intelligence gleaned from torture. The position was simply put that in an era of international terrorism, there was, *"the need for enhanced international cooperation"* and that due to this, *"…where the reporting is threat-related, the desire for context will usually be subservient to the need to take action to establish the facts, in order to protect life."*[32]

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[29] Ibid
[30] Ibid
[31] UKTS No 107 (1991), Cm 1775
[32] A and Others v Secretary of State for the Home Department Statement of Eliza Manningham-Buller in the House of Lords 20/09/2005

The line of argumentation used by Dame Manningham-Buller was emphatically rejected by the House of Lords. The landmark judgment for the protection of human rights despite the security risk in a post 7th July 2005 world was best surmised by the judgment of Lord Hope who said,

> *"Torture is one of most evil practices known to man. Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use ... Views as to where the line is to be drawn may differ sharply from state to state. This can be seen from the list of practices authorised for use in Guantánamo Bay by the US authorities, some of which would shock the conscience if they were ever to be authorised for use in our own country."*[33]

Despite the strength of the statement made by Lord Hope and the remaining judges on the panel, the practice of using evidence gained by torture had already been systematically used by the intelligence services. Although Dame Manningham-Buller attempted to use the example of the evidence gained from the torture of Mohamed Meguerba by the Algerian intelligence services, the example only served to work against the government due to the complete acquittal of those involved in the suspected 'Ricin Plot'.[34] It was in the Security Council that claims were made by the British government that the threat of ricin came directly from Iraq, and used it as one of its justifications for invading Iraq, this is despite no ricin ever being found.[35]

The use of information extracted from torture taking place abroad has not been limited to the security services working alongside the Home Department; it has also been found to be institutionally used by those within the UK Foreign and Commonwealth Office (FCO). The former UK ambassador to Uzbekistan, Craig Murray raised concern over the use of information gained by torture from Uzbekistan,

> *"In March 2003 I was summoned back to London from Tashkent specifically for a meeting at which I was told to stop protesting. I was told specifically that it was perfectly legal for us to obtain and to use intelligence from the Uzbek torture chambers."*[36]

Being fully aware of these policies, the FCO legal advisor, Sir Michael Wood, wrote in a letter, *"Your record of our meeting with HMA Tashkent recorded that Craig [Murray] had said that his understanding was that it was also an offence under the UN Convention on Torture to receive or possess information under torture. I said that I did not believe that this was the case…"*[37] According to the norms against torture, the practice is to be condemned regardless of where it takes place in the world, yet the UK formally recognised its acquiescence despite international condemnation.

UK complicity in the practice of torture[38]:

After the 2005 decision of the House of Lords, the law of the UK is that information gained through torture is not permitted to be produced in a court of law due to the lack of its reliability. What is of concern still, is the acceptance of this process between 11th September 2001 and the ruling in 2005. International Law has always taken a very dim

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[33] Travis A and Duncan C 'Crucial Decisions For Detention Judges' The Guardian 09/12/2005
[34] R v Bourgass [2005] All ER (D) 254 (Jul)
[35] Norton-Taylor R 'Ricin Plot: London and Washington used plot to strengthen Iraq war push' 14/04/2005 The Guardian
[36] www.craigmurray.co.uk
[37] Letter by Michael Wood to Linda Duffield 13/03/2003 Craig Murray – Written Evidence http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/574we04.htm
[38] Based on Cageprisoners 'Fabricating Terrorism: British Complicity in Renditions and Torture' 03/2006

view of those states which practise torture, especially when the process is systematic. Cases such as Zeeshan Siddiqui, Farid Hilali, Ahmad Al Iraqi, Mohamed Meguerba, Alam Ghafoor, Mohammed Naeem, Abu Faraj al-Libbi as well as 28 Pakistanis interrogated in Greece all point to a systematic policy of accepting torture evidence by various UK institutions.[39]

Zeeshan Siddiqui – MI6 were given opportunities to interrogate Zeeshan while he was being held by the Pakistani intelligence services, they were able to clearly see the remnants of torture on his face and body while interviewing him. According to Zeeshan, MI6 made their position very clear to him,

> *"They could see I was in such a state. I was unable to even talk properly. They said to me there are people from the British embassy who are designed to help people like you. We are not those people."*[40]

Farid Hilali – Having been detained in UAE, Farid was tortured by the intelligence service of the country with full knowledge of the British. A British agent made it clear to him that, *"The British Intelligence Service knows everything about you…If you want to come out of this problem, you have to cooperate with the British government."*[41] While these questions were being asked torture had already taken place, Farid was also taken to Morocco where he suffered similar treatment, *"…the torture that I suffered at the hands of the intelligence service in United Arab Emirates and Morocco has been on the direct orders of the British Intelligence Service in the UK."*[42]

Ahmad Al Iraqi – Having been questioned by MI5 before leaving for Jordan on a business trip, British intelligence let him go without any hesitation. On arriving in Jordan he was detained by the Jordanian secret service who tortured him after confessing that it was the British who requested his detention. When Ahmad refused to work for the British authorities as a spy he was returned to his cell where he was beaten until his left ear was damaged.[43]

Alam Ghafoor – Similar to the cases mentioned above, although the British intelligence officers did not carry out the torture themselves, they were instrumental in its use after having requested the detention of Alam. After constant protests and telling the truth about his status as a businessman, Dubai intelligence told him, *"Who do you think you are? You are not Tony Blair. They know you are here, and no one cares…British intelligence told us to pick you up."*[44]

Although these are just a few examples of incidents having taken place between 2001-2004, there is a definite worrying trend when placed against a line of similar abuses to others whether they be British nationals or not. Particularly disturbing is the policy of acquiescing torture at an institutional level by the intelligence services of the UK who have played a pivotal role in much of the torture. Even though they may not have been physically present during abuse, their hands cannot be cleaned of the blood that has been spilt.

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[39] Cageprisoners 'Fabricating Terrorism: British Complicity in Renditions and Torture' 03/2006
[40] BBC Radio 4 Today Programme 01/03/2006 Zubeida Malik interview Zeeshan Siddiqui
[41] Statement of Farid Hilali: Farid Hilali v Central Court of Criminal Proceedings No 5 of the National Court Madrid, Spain – In the High Court of Justice – Queen's Bench Division
[42] Ibid
[43] Transcription of speech by Ahmad Al Iraqi to audience at Stop Political Terror conference: Hayes Islamic Centre, West London 12/2003
[44] Interview of Alam Ghafoor with Asim Qureshi and Yvonne Ridley 08/2005

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 ill 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 abhorrent technique.

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

> ***"No one shall be subjected to arbitrary arrest, detention or exile."***[45]
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> ***"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."***[46]

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.

What is 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.[47]

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.[48]

US policies on arbitrary detention and rendition:

On 15th June 2005, the United States Senate Committee on the Judiciary convened in order to take evidence on the subject of the treatment of detainees in Guantanamo Bay and worldwide. Opening the testimonies before the Senate, Brigadier General Thomas L Hemingway from the Department of Defense Military Commissions gave evidence on how the detainees were afforded internationally acceptable standard of treatment through the President's Military Order by giving rights including:

1. Presumption of innocence
2. Trial before an impartial and independent panel of three to seven officers
3. Notification of charges in language understood by the accused
4. Call witnesses and present evidence
5. Cross-examine witnesses and examine evidence
6. Election not to testify at trial with no adverse inference
7. Appointment of military counsel at no cost to defendant and right to hire civilian counsel at no expense to the government
8. Privileged communications with defence counsel
9. Adequate support and resources to defence counsel
10. Appointment of interpreters and translators
11. Open proceedings, except as absolutely necessary to protect national security
12. Proof of guilt beyond a reasonable doubt
13. Review of the record of trial by a three-member review panel

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[45] Article 9 of the Universal Declaration of Human Rights
[46] Article 10 of the Universal Declaration of Human Rights
[47] http://www.crimesofwar.org/special/prisoner/fs.html
[48] Qureshi A (12/10/2005) 'Report on the status of British residents held in Guantanamo Bay' Cageprisoners

From the list of rights provided by Hemingway it would seem that the 'internationally accepted standard' has been complied with, however, the extent to which these have been applied in reality would suggest otherwise.

PENTTBOM

On 11th September 2001 the FBI launched the Pentagon/Twin Towers Bombing Investigation (PENTTBOM). This was the largest criminal investigation in US history where the FBI dedicated 7,000 of its 11,000 Special Agents and thousands of its support personnel in identifying the hijackers and their possible supporters. Officially, as to June 2004, over 500,000 leads had been covered and over 165,000 interviews conducted. The 762 alien detainees arrested by FBI-led terrorism task forces pursuing investigative leads were mainly held on immigration charges with suspicion of terrorism.

There were different classifications instituted of suspects according to the alleged danger they posed. The interpretation and application of the classification of the suspect as *"of interest to the September 11 investigation"* was, however, understood by the FBI rather broadly; agents searching for a particular person on a PENTTBOM lead from a specific location often took all individuals found in that location without immigration status to be arrested. No distinction generally was made between the subjects of the lead and other individuals at the scene, for the FBI wanted to make sure that not one 'terrorist' was let to slip away.[49]

In the course of the Senate hearings, the Honourable Glenn A Fine highlighted the way in which the FBI had conducted the investigation of those detained and questioned due to the PENTTBOM investigation by stating that,

> *"…the Department instituted a policy that any detainee on the INS Custody List had to be detained until cleared by the FBI…this 'hold until cleared' policy was clearly understood and applied throughout the Department."*[50]

The 'hold until cleared' policy was not memorialised in writing as to make it a formal process, however what is known is that the policy had been made very clear to field agents working for both the Immigration and Naturalization Service (INS) and the FBI. Quite simply put, no detainee held was to be released without having been fully cleared.[51] The Office of the Inspector General in their report on the PENTTBOM detentions criticised the arbitrary manner in which the detentions took place as the policies were carried out indiscriminately against those who simply had visa irregularities as well as those who may have been possible terrorism suspects.[52]

Due to the nature of terrorism and counter-terrorism measures discussed, the domestic policies influence the foreign policy and consequentially international dynamics to a great extent. These arbitrary domestic policies of the US were still only the beginning of the manner in which the government was to implement its new detention policies which were to have a pressing impact on the international community. In early 2002 the

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[49] The Federal Bureau of Investigation http://www.fbi.gov and Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act (as required by Section 1001(3) of Public Law 107-56) July 17, 2003 Office of the Inspector General

[50] Honourable G.A. Fine before The Senate Committee on the Judiciary on the Subject of 'Detainees' 15/06/2005

[51] US Department of Justice Office of the Inspector General 'The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks' 06/2003 http://www.usdoj.gov/oig/special/0306/index.htm

[52] Ibid

pictures of shackled men in orange jumpsuits, some hooded and wearing blacked-out goggles, emerged. These were pictures taken of detainees at the aircraft on its way to or in Guantanamo Bay, a military base in Cuba. It was Operation Enduring Freedom through the armed attack on Afghanistan that led to a new era of legal misconstruction resulting in the detentions in Guantanamo Bay. Within months, captured from over forty countries, the human cargo of 650 detainees was transferred to the base.[53]

Rendition

The legal inter-State transfer of individuals facing trial for criminal charges is governed by bilateral and multilateral agreements. Non-interference in the matters of another State is one of the main underlying principles of international law and thus these agreements are in place to ensure the accused will not escape responsibility simply by escaping to the territory of another sovereign. The rationale of the legal regulation of the inter-State transfer of an individual is to respect state sovereignty and to monitor and guarantee the individual rights of suspects in that process.[54]

The US has, however, found that amongst others, this traditional instrument of criminal law in addition to procedural rules and the laws of war concerned are all inadequate as a response to the kind of terrorist threat posed since 9/11. As a result new legal concepts were advanced and one of these was 'rendition'. Where the concept of rendition does not *per se* constitute a breach of international human rights law, this newly defined concept of 'rendition' is previously unheard of in international law and stands absolutely contrary to the fundamentals of the law of international human rights.[55]

Besides transferring captured people to Guantanamo Bay, illegal renditions have taken place to transfer individuals to other countries to face *"enhanced interrogation methods"*. As these methods comprise controversial means at times amounting to torture, cruel, inhuman or degrading treatment illegal under international law, some surrendering states have developed a policy of asking for diplomatic assurances or had memorandums of understanding signed. Both of these undertakings are legally non-binding and unenforceable agreements but have during the years of the evolving anti-terrorism measures increased in number.

These assurances and memorandums of understandings serve to discharge the sending state's obligations under international law as to the treatment and fate of the transferred detainee. The sending countries are aspiring to discharge their obligations under international law not to sent individuals in countries where they might be tortured. This lip service does not, however, discharge the duty of the sending country not to send an individual to a country where s/he is likely be tortured under any circumstances. This is because the right not to be tortured is absolute. It is not to be bilaterally contracted upon.[56]

The States in the receiving end tend to have poor record in the protection of human rights and it is evidenced that the use of torture in those countries as an interrogation method is widespread. The need to supervise the treatment of the detainee in the custody of the receiving State is thus pressing. It is, however, very difficult to supervise if the receiving State upholds the standards and norms of international human rights law or has abided by the undertaking in the memorandum or assurance for the transfers are being

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[53] Sands P *'Lawless World'* Penguin 2006

[54] The Redress Trust; Terrorism, Counterterrorism and Torture, International Law in the Fight against Terrorism", July 2004

[55] Fleur J; "Guantanamo Bay and the Annihilation of the Exception", European Journal of International Law, September 2005, EJIL 2005.16(613)

[56] Amnesty International, Index POL 30/002/2006, 19 January 2006

conducted in secret. This deprives the process of a very essential element in the protection of human rights; the transparency. For the complete lack of transparency, not only in rendition policy but in all key elements in the counter-terrorism measures, there are no safeguards in place to make sure the rights of suspects are being respected.[57]

Spider's Web

Analysis of these secret CIA rendition flights, which is mainly based on information of landing points provided by national and international air traffic control authorities, has revealed a network that resembles a spider's web reaching across the globe. This was the main notion of the report *"Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states"* published on 7 June 2006 by the Committee on Legal Affairs and Human Rights of the Council of Europe. The web has been revealed to accommodate the robust involvement of US and UK whereas also other Council of Europe Member States, which all 46 of them are bound by the European Convention of Human Rights and the European Convention for the Prevention of Torture, have been evidenced to have engaged in this secret co-operation enabling the practice either passively by tolerating it or actively facilitating the CIA policies. Worryingly, the web encompasses several countries distinctly notorious for their poor record of human rights and widespread use of torture.[58]

This clandestine web draws, however, a picture not only of the busy map of inter-state flights but reveals a fully facilitated and complete undercover detention system. The key elements of this secret detention system are disappearances, secret detentions as well as above mentioned unlawful inter-state transfers. It is known now that the secret detentions are run and facilitated by the CIA in 'black sites', officially unidentified facilities around the world which usually are located in naval or military installations. In addition to notorious CIA 'black sites', also other branches of the US Government have been suspected of running the detention facilities of similar nature within the same network.

Efforts to examine the nature and extent of these operations have faced rigid obstruction or dismissal on behalf of the States concerned and have been defeated on the grounds of national security and state secrecy. However, neither national security nor state secrecy can be invoked as a standard cover or a pretext to shield operations of this nature and scale from parliamentary and judicial scrutiny.[59]

Secret Detention/Enforced Disappearances

The main shift in the policy is due to the mandate given to the CIA to administer its own detention facilities and keep the captured individuals in its own secret detention instead of rendering them into the custody of countries where they are wanted to face justice. Detention in secret is prohibited under international human rights law and standards. Principle 6 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that *"governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyers or other persons of confidence."*[60]

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[57] Human Rights Watch document "Diplomatic Assurances Against Torture", published November 2006
[58] Committee on Legal Affairs and Human Rights of the Council of Europe: "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states",7 June 2006
[59] Ibid
[60] See also Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly resolution 47/133, Article 10, of 18 December 1992

Additionally, it relates closely to other violations fundamental human rights, international law and the Geneva Conventions. Closely related to the practice of secret detention is the policy of enforced disappearances, which is a crime under international law and involves also multiple human rights violations. The ICRC has pronounced that *"no one has the right to keep that person's fate or whereabouts secret or to deny that he or she is being detained. This practice runs counter to the basic tenets of international humanitarian law and human rights law."*[61] It has also been stressed by the General Assembly on several occasions that enforced disappearance constitute an offence to human dignity, a grave and flagrant violation of human rights and essential fundamental freedoms.[62]

Declaration on the Protection of All Persons from Enforced Disappearances states that *"any act of enforced disappearance is an offence to human dignity"*, which,

> *"places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life".*

It also states that *"No State shall practice, permit or tolerate enforced disappearances."*[63] Additionally it requires that *"Each State shall take affective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction"*[64] and adds, *"In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law."*[65]

What is more, the Rome Statute of the International Criminal Court states that *"the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time"* constitutes a crime against humanity.[66]

Further dimension in the controversy of these closely related crimes is that they together potentially allow for an impunity for the perpetrator. The dominating element is that they both take the detainee beyond the protection of rule of law while simultaneously shielding the violations of external scrutiny making the exposing of the violations very difficult.

May 2006 the US finally sent a first state delegation to the United Nations Committee against Torture since the events of 9/11 took place. The delegation was headed by the Chief Legal Advisor to the Department of State, Mr John Bellinger who oversaw the presentation. US submitted its *"exhaustive written responses"* to most of the Committee's list of issues. Its policy regarding secret detentions and intelligence activities was, however, mainly given the response of *"no comment"*.

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[61] ICRC; "Enforced disappearance must stop", Press Release 30.8.2003
[62] See for example: General Assembly resolution 47/133 of 18 December 1992
[63] Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly resolution 47/133, Article 2, of 18 December 1992
[64] Ibid, Article 3
[65] Ibid, Article 5
[66] Rome Statute of International Criminal Court, Part 2, Article 7(2)(i)

Military Tribunals

An immediate consequence of the Afghan war was the detention of several hundreds of non-Americans suspected of being or having been members or in liaison with al-Qaeda or the Taliban government, or to have engaged in acts of international terrorism to cause injury to United States or its citizens, or to have knowingly harboured such individuals. As the number of detainees held at Guantanamo Bay increased, so did in parallel the international anxiety about the legal basis for their detention and the apparent lack of respect for rights for due process.

The Executive Order of 13th November 2001 and President Bush's order of 7th February 2002 set the frame of the detainees' status as 'unlawful combatants' and of the judicial system they were to be subjected to.[67]

The November 2001 Executive Order authorised the detention of persons outside as well as within the US and established the ground rules for the conduct of military proceedings. These rules gave the US President a central role. According to the Order, the prosecutor and adjudicating panels were to be military officers accountable only to him. Accordingly, it was the President alone who was to be responsible for the final review of all verdicts given.

According to the Order, there was no appeal to any civilian court, nor were the defendants to have right of access to the courts of any country or to any international tribunals, including human rights courts. Also, they would not be able to choose their own counsel and all communication between defendants and their advisers was heavily restricted. Furthermore, the military commissions were to be conducted in secret and the prosecution may rely on secret evidence and witnesses.[68]

Lord Steyn, the British law lord has described these tribunals as *"kangaroo courts"* for their corrupted, hasty and biased proceedings with the usual outcome of harsh punishment and another member of Britain's highest Court has publicly denounced the situation as a monstrous failure of justice and Guantanamo as a legal black hole.

What is more, already well before any proceedings had been initiated against the detainees the administration had prejudiced the trials by deciding in advance that the Guantanamo detainees were guilty; the President called the detainees *"bad people"* and Secretary of State Donald Rumsfeld described them as *"hard-core, well-trained terrorists"*. Despite the fact that The Executive Order was given already of 13 November 2001 to establish military commissions to try the detained non-Americans suspected of violating the rules governing the conduct of warfare, the first preliminary hearings were held only in August 2004.[69]

Combatant Status Review Tribunals

In November 2004 the trial of Salim Hamdan, the first trial before a military commission was halted by a federal judge in Washington, DC, who ruled that the proceedings lacked the basic elements of a fair trial and violated the Geneva Conventions. Following this decision the Bush administration began using Combatant Status Review Tribunals (CSRT) to determine the status of detainees. By doing so the obligation established by Geneva Convention III, Article 5 was to be addressed for these hearings were conducted based on the assertion by the United States that detainees were not eligible for the status

[67] Sands P *'Lawless World'* Penguin 2006
[68] See White House Press Release, "President issues Military Order" November 13, 2001
[69] Sands P *'Lawless World'* Penguin 2006

of prisoner of war as under Article 2, Geneva Convention III.

CSRT were in function from 8th July 2004 to 29th March 2005 to define the status of the detainees. 93 per cent of the then 554 detainees were classified as enemy combatants. The Court of Appeals reinstated the tribunals in July 2005.

It has been suggested CSRTs are inherently even more flawed than the initial military commissions. First of all, at times the proceedings of CSRTs have been rudimentary at best, affording the detainees few basic protections. Also, many detainees lacked counsel and the CSRT has also informed detainees only of general charges against them, while the details on which the CSRT premised enemy combatant status decisions were classified. What is more, detainees had no right to present witnesses or to cross-examine government witnesses. Indeed, it is hard to argue successfully that the procedures of CSRT would qualify as status determination under the Third Geneva Convention.

On 29th June 2006 the Supreme Court of United States in the case of Hamdan v Rumsfeld held that trying detainees under the Guantanamo military commission was illegal under Geneva Conventions and US law for the military commissions were seen to lacks the power to proceed due to its structure and procedures which violate both the mentioned Geneva Conventions and the Uniform Code of Military Justice.

In that case Judge Robertson held that the widely agreed as self-executing Geneva Convention III, could had not been complied with since a CSRT was impossible to be considered a competent tribunal as to Article 5 of the Third Geneva Convention.[70]

After criticism by the US Supreme Court of the use of Military Commissions the Bush Administration pushed for acceptance of the Commissions in Congress. At the end of September 2006, Congress passed the Military Commission Act of 2006 which essentially allowed for the Bush Administration to prosecute those who had been put through a process of secret detention by the CIA with impunity for the manner in which those detentions took place. The supposed immutable right to habeas corpus has been violated by this piece of legislation in a way that has not been seen since the Magna Carta.

Contrary to the principles of the presumption of innocence and any process of fair trials, President Bush determined that none of those detained in the War on Terror were entitled to the protection of the Geneva Conventions, even in the circumstance of being captured as part of an armed conflict.[71] Many of those caught in Afghanistan were sent to Guantanamo Bay where they were held in a completely new form of US justice which went beyond the regular civil or military law. Military Commissions were established in order to begin trying possible Al-Qaeda suspects and according to one military attorney, *"…six detainees were subject to trial by Military Commission. The plan was to begin the Commissions with guilty pleas."*[72]

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*

[70] Moeckli D *"The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'?"*, C&S Law, March 2005
[71] White House Counsel Alberto Gonzales 'Memo to President Bush' 25/01/2002
[72] Lieutenant Commander C Swift before The Senate Committee on the Judiciary on the Subject of 'Detainees' 15/06/2005

"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."[73]

UK policies on arbitrary detention and rendition:

The UK has implemented Article 6 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.

The effect of the Article 5 in essence is that there is no right for people to be detained 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, 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.

Without further action taken then or in the years to come the British Foreign Office confirmed already in January 2002 that three of the detained people by the US were British nationals. Those three were the 'Tipton Tree', Shafiq Rasul, Asif Iqbal and Ruhal Ahmed. There were, however, also two others, Feroz Abbassi and Moazzam Begg, amongst the very first detainees taken to Guantanamo Bay who held British passports.

The 'Tipton Three' were arrested in Afghanistan and went through military commission proceedings eighteen months after their arrest, in July 2003. In the proceedings they were not charged, nor were they stated to be suspected of any illegal activities in Afghanistan or elsewhere. In February 2005 when the those three British citizens were released no charges still had been pressed. The British government up to today has remained unconcerned.

After their release they told of the conditions and interrogations they experienced st the hands of their capturers. Before their release this was not possible for no information was available; they had no access to lawyers who could have voiced their agony and the correspondence with their families was arbitrarily disrupted and censored. They told that upon the arrival to Guantanamo bay the interrogation had begun without delay. The British MI5 had participated at the interrogations. In violation to international human rights law and international law they were held in solitary confinement for several months. Of all this the British establishment was well aware for they were in place to cooperate with the interrogators. Ruhal Ahmed recalls an interrogation session which took place in Afghanistan before the transfer to Guantanamo; *"All the time I was kneeling with [an MI5] guy standing on the backs of my legs and another holding a gun to my head"*. In March 2004 further five of the British detainees were released.

Further on, the UK has also breached its obligations by allowing 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.[74] A special rapporteur for the UN's human rights commission, Professor Martin Scheinin commented,

[73] Ibid

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

> *"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."*[75]

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.

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]."*[76] 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."*[77]

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.[78] This was backed by the cases of Krombach v Bamberski[79] and Baustahlgewebe v Commission[80], 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.

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[75] Ibid
[76] Funke v France, Series A, No 256A, para.44
[77] Hüls v Commission, [1999] ECR I-4287
[78] Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v Council [1991] ECR I-3187
[79] Krombach v Bamberski [2000] ECR II-1935
[80] Baustahlgewebe v Commission [1998] ECR I-8417

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 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."*[81]

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.[82]

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.[83] 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."*[84]

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[85] 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]."*[86]

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.[87] 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

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81 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).
82 Green LC (2000) 'The Contemporary Law of Armed Conflict' Manchester University Press p.81
83 'Decision Not to Regard Persons Detained in Afghanistan as POWs' (2002) American Journal of International Law vol.96 No.2 p.475-480
84 US Department of the Army, Operational Law Handbook 22 (2002)
85 United States v Lindh 212 F.Supp.2d p.556
86 ibid p.556-58
87 Fleischer A. Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (7th February, 2002)

detainees.[88] 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.[89] 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."*[90]

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).[91] There are those within the academic circles who do apply the conditions to the whole section,[92] 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.

It is reasonable to consider the Taliban forces to be representative of the army of Afghanistan and thus qualify as members of the armed forces due to the *de facto* status of the Taliban regime.[93] 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 were 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.[94] 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.

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88 White House Fact Sheet on Status of Detainees at Guantanamo (7th February 2002)
89 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
90 Article 4A (1) Common Article 2, Geneva (III) Convention Relative to the Treatment Prisoners of War
91 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
92 Wedgwood R. (2002) 'Al Qaeda, Terrorism, and Military Commissions' American Journal of International Law vol.96 p.328
93 Aldrich G.H. (2002) 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' American Journal of International Law vol.96 No.4 p.335
94 White House Fact Sheet on Status of Detainees at Guantanamo (7th February 2002) http://www.whitehouse.gov/news/releases /2002 /02/20020207-13.html

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 W. 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 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."*[95]

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 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,

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

> *"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 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."*[96]

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).[97]

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.

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."*[98]

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[96] Cassese A (2003) 'International Criminal Law' Oxford, p.55
[97] Ibid
[98] Article 7(2)(d) of the Statute of the International Criminal Court

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."*[99]

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."*[100]

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 eventually being accused of adultery in order to find some semblance of guilt.

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."*[101]

A Trial Chamber of the ICTY in the case of Delalić and others[102] found that customary international law provided a strong understanding of what is considered to be torture through the line of conventions that had been ratified. Similarly in Furundžija[103] 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*

[99] Kristić Trial Chamber of the ICTY, para.521
[100] Kordić and Čerkez Trial Chamber of the ICTY, para.302
[101] Article 7(2)(e) of the Statute of the International Criminal Court
[102] Delalić and others Trial Chamber of the ICTY, para.459
[103] Furundžija Trial Chamber of the ICTY, para.162

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."*[104] 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.[105]

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.

[104] Ibid

[105] Cassese A (2003) 'International Criminal Law' Oxford

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 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*.[106]

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.[107] 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."*[108]

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]nternational 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."*[109]

Cassese clarifies the position of the dichotomy by stating,

> *"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*

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

sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected States agents acting in their official capacity."[110]

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 and in prisons worldwide.

[110] Cassese A (2003) 'International Criminal Law' Oxford

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 suggestion of a crime reaching the level of being a crime against humanity is one that is severe in not only itself but also in terms of its implications for those who are found guilty. With the execution of Saddam Hussein in December 2006 it is of even more importance that it be clearly established that actions by states have sufficiently fulfilled the standard required of being a crime against humanity before such crimes are prosecuted.

This article has set out to not only establish the law relating to the detentions in the War on Terror, but also to highlight the way in which these detentions have been used to breach some of the most fundamental values held by the international community in the most tragic and widespread ways. Guantanamo Bay exists as a microcosm of the illegality of the policies, however once the wider issues are exposed the true extent of the horror begins to surface.

The key aspect of the detentions are the way they have been used indiscriminately against those who seem to be Muslim, not just by the US and UK, but rather by all countries complicit in the detentions. Whether it be the PENTBOMM detentions in the US or the third party request for detention in a third party state, these detentions all form as part of the same policies to detain those of a Muslim belief or name as part of the War on Terror. The key is not just the numbers that are innocent, rather the numbers who have been placed through the various methods of illegal detention despite their innocence or guilt.

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.

From the analysis that has been produced it could be said that the War on Terror in the way that it has been carried out has in itself resulted in a crime against humanity in which many states around the world, particularly the US and UK have played a pivotal role. Such crimes should be brought before international courts and tribunals in order to make sure that no state can ever believe itself to be beyond the international rule of law.