

PRISONER RIGHTS BEHIND THE DARK WALLS OF GUANTANAMO BAY: HUMAN RIGHTS PERSPECTIVE

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The United States of America has presented a national and international image of fairness, justice, and humane treatment of others, while abiding by the laws to which it is bound. However, the reputation of the United States has been tarnished by its seemingly prolonged internment of detainees at Guantanamo Bay. After reports of torture, sexual degradation, and the refusal to apply prisoner of war status to any of the detainees the world is looking to the United States for answers and demanding changes to the current situation at Guantanamo Bay.¹

The United States acquired a perpetual lease of territorial control over Guantanamo Bay from the 1903 Cuban-American Treaty.² Under the 1934 treaty, the lease of Guantanamo Bay is permanent unless both Cuba and the United States agree to its termination or the United States abandons the property altogether.³

The first prison camp in Guantanamo Bay was established in January 2002. Some 660 prisoners (among them children, as young as 13) from 42 countries were being held in the camp.⁴ The detainees were suspected Al-Qaeda and Taliban fighters, who were taken into

¹ Jerica M. Morris-Frazier, *Missing In Action: Prisoners Of War At Guantanamo Bay* 13 UDCDCSL L. Rev. 155 2010

² Yale Law School The Avalon Project, *Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations*; Feb. 23, 1903, <http://avalon.law.yale.edu/20thcentury/dip-cubaOO2.asp>

³ Yale Law School The Avalon Project, *Treaty Between the United States of America and Cuba*; May 29, 1934, <http://avalon.law.yale.edu/20th-century/dip-cubaO01.asp>

⁴ H. H. Koh, 'Rights to Remember' *The Economist*, 1-7 November 2003, 25.

United States custody in Afghanistan and elsewhere and later transferred to Guantanamo. They are held on the basis that they are 'enemy' or 'unlawful' combatants. Their detention has often become subject of international controversy as international law and standards have been violated.⁵

It is clear that a major factor in the decision to use Guantánamo Bay as the primary detention centre for 'war on terror' detainees was to obstruct detainees from challenging the legality or conditions of their detention and prosecution before United States courts due to the detention facility not being on United States soil, while still retaining control of the detainees for the purpose of intelligence gathering.⁶ Despite the total control wielded over Guantánamo Bay by the United States, it has consistently been argued that American courts lack jurisdiction over the facility, due to its location outside US territory⁷. Further, the United States has denied that detainees are entitled to the protections of the Geneva Conventions.⁸ The United States administration clearly intended for Guantánamo Bay to have no legal oversight and few legal constraints, to allow for the maximum gathering of intelligence from the detainees. Indeed, critics have described Guantánamo Bay as 'a legal black hole'⁹.

Accounts of torture from Guantánamo Bay

The United States Administration has maintained that all detainees at Guantánamo Bay are treated humanely at all times, and are provided with meals, shelter, medical care and the opportunity to worship.¹⁰ However, much of the detainees' treatment is determined by their classification into one of four levels. According to *Kathleen T Rhem* of the American Forces Press Service, includes several Levels. 'Level One' comprises those who are the most

⁵ 'United States of America, *Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay*', 12 October 2003, <http://web.amnesty.org/library/print/ENGAMR510532002>

⁶ Kenneth Roth, '*America's Guilt: the Prisoners in a Legal Black Hole*', Human Rights Watch, 21 November 2003, at <http://hrw.org/english/docs/2003/11/21/usint12997.htm>

⁷ For example see the original government motion to dismiss habeas petitions in *Rasul v Bush* (18 March 2002) at <http://GuantanamoMobile.org/pdf/2002motiontodismiss.pdf>

⁸ White House Fact Sheet, Status of Detainees at Guantánamo, 7 February 2002, at www.whitehouse.gov/news/releases/2002/02/20020207-13.html

⁹ *Supra* note 13

¹⁰ White House Press Release, President Discusses Creation of Military Commissions to Try Suspected Terrorists, 6 September 2006, at www.whitehouse.gov/news/releases/2006/09/20060906-3.html

compliant and who are willing to follow the rules.¹¹ Level One privileges include being allowed out in exercise yards attached to their living bays for seven to nine hours a day. Exercise yards include undercover picnic and table-tennis tables. 'Level Four' comprises of those who have committed 'a litany of offenses', from threatening other detainees or guards to refusing to come out of the cell when ordered.¹² Level Four detainees are housed in state-of-the-art maximum security blocks, and are permitted fewer comfort items such as toiletries, and are generally only able to exercise for an hour per day in 10ft by 20ft outdoor exercise yards.¹³

Amnesty International has reported that over 80 per cent of the detainee populations at Guantánamo Bay were believed to be held in isolation in one of the high security blocks.¹⁴ According to the Amnesty report, the high security cells have no access to natural light or air, are lit by fluorescent lighting 4 hours a day, and are ventilated through air-conditioning controlled by the guards. Detainees have little or no human contact and are fed through a slot in the wall.¹⁵ They are denied contact with family, are not allowed visits and are entitled to only one phone call per year.

In a testimony to the *House Committee on Foreign Affairs' Subcommittee on International Organizations, Human Rights and Oversight* on 20 May 2008, lawyer Sabin Willet described one of his clients as:

*'a man who just wants to see the sun. In the cell he can crouch at the door, and yell through the crack at the bottom. The fellow in the next cell may respond, or he might be curled in the foetal position, staring at the wall. Another Uighur told us of the voices in his head. The voices were getting the better of him. His foot was tapping on the floor. I don't know what's happened to him: he doesn't come out of the cell to see us any more'.*¹⁶

¹¹ Kathleen T Rhem, 'Detainees Living in Varied Conditions at Guantánamo', American Forces Press Service, 16 February 2005, at www.defenselink.mil/news/newsarticle.aspx?id=25882

¹² Ibid

¹³ Ibid

¹⁴ 'Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay', Amnesty International, 5 April 2007, AMR51/051/2007, at www.amnesty.org/en/library/info/AMR51/051/2007

¹⁵ Ibid

¹⁶ Sabin Willett, 'City on the Hill or Prison on the Bay? The Mistakes of Guantánamo and the Decline of America's Image, Part II', Testimony to the House Committee on Foreign Affairs' Subcommittee on

The treatment and conditions of the prisoners include the capture and transfer of detainees to an undisclosed overseas location; sensory deprivation and other abusive treatment during transfer; detention in cages without proper sanitation and exposure to extreme temperatures; minimal exercise and hygiene; systematic use of coercive interrogation techniques; long periods of solitary confinement; cultural and religious harassment; denial of or severely delayed communication with family; and the uncertainty generated by indeterminate nature of confinement and denial of access to independent tribunals. These conditions have led in some instances to serious mental illness, individual and mass suicide attempts and widespread, prolonged hunger strikes. The severe mental health consequences are likely to be long term in many cases, creating health burdens on detainees and their families for years to come.¹⁷

In 2008 Human Rights Watch report entitled *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo*, focused specifically on the issue of solitary confinement, and noted that the United States has failed to comply with the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that prisoners be provided with access to ‘natural light, regular education and recreational opportunities and regular contact with family members’.¹⁸

- ***Development of the Bush Administration’s policy on torture on the detainees***

At the commencement of the ‘war on terror’ in September 2001, the Bush Administration set out to construct and define the legal confines within which it would operate in respect of the detention and trial of detainees. *According to Albertor R. Gonzales, counsel to the President Re Standards of Conduct for Interrogation under 18 USC 2340-2340A*, believed

International Organizations, Human Rights and Oversight, 20 May 2008, at <http://ccrjustice.org/files/Written%20Testimony%20-%20Sabin%20Willett.pdf>

¹⁷ *Situation of detainees at Guantánamo Bay*: Report of the Chairperson of the Working Group on Arbitrary Detention, Ms Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Paul Hunt, 15 February 2006, Doc E/CN.4/2006/120 at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_Guantánamo.pdf

¹⁸ Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo*, June 2008, at <http://hrw.org/reports/2008/us0608/us0608web.pdf>

that while many techniques may amount to cruel, inhuman or degrading treatment, the treatment of prisoners at the detention centre do not produce pain or suffering of the necessary to meet the definition of torture'. Mr Yoo¹⁹, who followed up the 2002 memo with one in 2003 maintaining the same legal position and standards set out in the Torture Memo that allowed interrogation methods to go beyond polite questioning but fall short of torture. **Yoo states, 'the purpose of these techniques is not to inflict pain or harm, but simply to disorient'**. The United States has been accused of using tactics such as waterboarding, sleep deprivation, beatings, physical abuse, electric shocks, threats of rape and death, injection of unknown substances, sexual humiliation, temperature manipulation, use of pepper spray and inappropriate use of shackles in order to elicit information.²⁰ In May 2006, in its periodic report to the United Nations Committee on Torture, the United States reported only ten substantial incidents of misconduct at Guantánamo Bay. The argument levelled by the United States has been that, while many of these techniques may be unpleasant or amount to abuse, they are not sufficient to satisfy the definition of torture, as they do not cause severe mental or physical pain or suffering. However, the United Nation Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has concluded that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as techniques that is even more likely to amount to torture.

Legal status of the detainees

The Geneva Convention, 1949 adopted after the Second World War, when it became apparent that combatants had been tortured, dehumanised and executed. The third Geneva Convention creates a comprehensive legal regime for the treatment of detainees in armed conflict. The USA and Afghanistan are parties to the Convention. Prisoners of war are combatants in an international armed conflict who have fallen into the hands of the enemy. They are neither criminals nor hostages, but individuals who have been detained after capture

¹⁹ John Yoo, 'Commentary: Behind the "torture memos"', UC Berkeley News, 4 January 2005

²⁰ Amnesty International, USA: Guantánamo and beyond: *The continuing pursuit of unchecked executive power*, 13 May 2005, at www.amnesty.org/en/library/info/AMR51/063/2005

solely for the purpose of preventing them from rejoining the enemy's armed forces.²¹ They may be interrogated under humane treatment as provided by the Convention, but they may not be punished unless convicted of a crime. If a Prisoner of War is to be punished for a crime, he must first be convicted and sentenced by a court 'according to the same procedure as in the case of members of the armed forces of the detaining Power'. A Prisoner of War may be confined awaiting trial for no longer than three months and no trial can begin until three weeks after the detaining power has notified the prisoner's representative and the protecting power of the charges on which the prisoner is to be tried, where the prisoner is held, and where the trial will take place.²²

Convention also sets out who is entitled to the prisoner of war status; it can either be a member of an armed force, who is a party in the conflict or a member of militia forces forming part of those armed forces, and inhabitants who take up arms openly to resist the invading forces; for the latter certain conditions have to be met.²³

Not everyone is therefore entitled to Prisoner of War status. Nevertheless, where there is any doubt as to the captive's status, a competent tribunal should determine the status.²⁴ If a person is found not to be entitled to prisoner of war status on the basis of such a determination, he or she will always be entitled to the fundamental guarantees, unless he or she is entitled to more favourable treatment from other provisions of humanitarian law.²⁵ It should be noted that the above mentioned provisions is generally viewed as constituting customary law which would bind non-parties as well as parties to this instrument.²⁶

²¹ 4 M. D. Evans, *International Law* (Oxford University Press: Oxford, 2002) 809.

²² J. Elsea, *'Terrorism and the Law of War: Trying Terrorists as Law Criminals before Military Commissions'*, Congressional Research Service: Report for Congress, 11 December 2003, www.fpc.state.gov/documents/organization/7951.pdf

²³ A. Roberts and R. Guelff (eds), *Documents of the Law of War*, 3rd edn (Oxford University Press: Oxford, 2000)

²⁴ Roberts and Guelff, above n. 6, Art. 5 of 1949 Geneva Convention.

²⁵ Such more favorable status can include treatment as a prisoner of war, notwithstanding an individual's not being entitled to prisoner of war status. This is required for certain categories of persons enumerated in Article 4:4 and Article 33 of the Third Geneva Convention. These refer to civilians performing certain functions while accompanying the armed forces, officers and crewmembers of captured enemy merchant vessels and medical and religious personnel respectively.

²⁶ The customary status of Article 75 of Additional Protocol I is generally acknowledged. See inter alia Ipsen, supra note 5, pages 68-9; Greenwood, supra n.14 at 103. See also U.S. Navy, NWP9, "Annotated Supplement to

Since the status of prisoner of war status is closely related to the question of whether or not an individual qualifies as a combatant, there is little separate attention for the concept of combatant status as such and no explicit reference to the notion of (un)privileged belligerency or the possible status of an individual as an (un)lawful combatant. Instead these notions are dealt with by implication within the context of the question of prisoner of war status. If an individual qualifies as a prisoner of war, he is by implication presumed to possess combatant status. In the event the qualifications for prisoner of war status are not met, the automatic presumption will be that the individual concerned is a civilian. Anyone who is neither a combatant, nor someone falling within one of the specific categories of individuals entitled to treatment as a prisoner of war is presumed to be an ordinary civilian.

However, if a civilian or other non-combatant engages in belligerent acts or participates directly in hostilities, he commits an offence and by implication becomes what is often referred to in the literature as an unlawful combatant.²⁷ The status of an individual and the treatment he is entitled to, the relevant provisions of the international humanitarian law instruments relating to prisoner of war status and treatment make it unequivocally clear that the individuals concerned are entitled to the protections afforded by those instruments until such time as the status thereof has been determined by a competent tribunal.²⁸ The relevant provision of the Third Geneva Convention relating to prisoners of war does not specify what constitutes a competent tribunal, this is left to the individual State law to determine. Since the determination of prisoner of war status is essentially a question of fact-finding rather than

the Commander's Handbook on the Law of Naval Operations" (1989), Section 5-3 where the customary status of Article 75 is acknowledged

²⁷ By implication there are several categories of persons who have been or could be qualified as "unlawful combatants" or "unprivileged belligerents":

(a) members of militias, volunteer corps, or other organized armed groups who directly participate in hostilities without meeting the conditions laid down in Article 1 of the Hague Regulations and Article 4:2 of the Third Geneva Convention;

(b) members of a levée en masse who do not meet the conditions laid down in Article 4 :6 of the Third Geneva Convention;

(c) individual civilians or groups of civilians who are neither members of groups (a) or (b) who directly participate in hostilities;

(d) non-combatant members of the armed forces who outside the context of personal defense of themselves and of persons under their care and protection take an active and direct part in hostilities;

(e) members of the armed forces who engage in acts of espionage and or sabotage behind enemy lines while out of uniform through the use of perfidy and deception and can therefore be treated as spies;

(f) mercenaries.

²⁸ Article 5, Third Geneva Convention

adjudication, , the view of the United States government is that there is no doubt regarding the status of any of the detainees and consequently the use of such tribunals was not necessary.

Hypothetically, if the US government regarded the detainees as Prisoners of Wars, numerous breaches of the Convention would have already occurred. These include humiliation of dignity of individual where as soon as the prisoners arrived they were displayed, kneeling on the ground, hands tied behind their backs and wearing blacked-out goggles. Detainees have been stripped of their own clothes and deprived of their possessions (Article 18). They are also denied proper mess facilities (Article 26), canteens (Article 28), religious premises (Article 34), opportunities for physical exercise (Article 38), access to the text of the Convention (Article 41), freedom to write to their families (Articles 70, 71) and parcels of food and books (Article 72). They were not released and repatriated after the cessation of active hostilities (Article 118).²⁹

It is not difficult to see why the US government is unwilling to apply the Convention; the stated reasons being that granting the detainees POW status will interfere with efforts to interrogate them; denying POW status allows the army to retain more stringent security measures, including close confinement; if the detainees had POW status, they would have to be repatriated, which would free them to commit more terrorist acts. The US authorities, however, would appear to leave open the possibility that they may be tried by military commissions.³⁰ It has taken the US military nearly two years, an inordinately long time, to extract information from some detainees, and in disregard of international humanitarian law, the intention is to hold the detainees indefinitely in order to continue to extract information

- **Overview of application of the international rules to protect detainees in Guantanamo Bay**

²⁹ G. Monbiot, 'One Rule for Them', 25 March 2003, www.guardian.co.uk/comment/story/0,3604,921192,00.html

³⁰ J. Elsea, 'Treatment of 'Battlefield Detainees' in the War of Terrorism', Congressional Research Service: Report for Congress, 11 April 2002, www.fas.org/irp/crs/RL31367.pdf,

It is prohibited to treat prisoners of war inhumanely or dishonourably.³¹ Although there is no definition of what constitutes inhumane treatment, this is a basic theme of the Geneva Conventions.³² Furthermore, what are regarded as the principle elements of humane treatment are listed, and further guidance can be found in relevant international human rights instruments. The detaining power must protect the prisoners at all times, and reprisals or discrimination against prisoners are expressly prohibited.³³ The Geneva Convention's guiding principle is that non combatants such as civilians, prisoners of war, and shipwrecked sailors are entitled to respect for their human dignity and must be protected and treated with humanity. The Third 1949 Geneva Convention is dedicated to the protection of prisoners of war. It governs the conditions and duration of prisoners of war detention, protects them from criminal prosecution for acts of violence committed on the battlefield against enemy combatants, and provides legal protections for those accused of crimes.

Persons not entitled to prisoners of war status, including so-called 'unlawful combatants', are entitled to the protection provided under the Fourth Geneva Convention. 'Unlawful combatants' are civilians who take a direct part in hostilities; they are largely unprotected by the laws of armed conflict; they can be tried and punished for their belligerent acts. According to the Convention, unlawful combatants shall be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial.

- **Humane treatment**

Unlawful combatants are entitled to humane treatment. While the detainees in Guantanamo can be denied certain rights that would endanger the security, the limitations should be absolutely necessary and applied on a case-by-case basis.

- **Interrogation**

³¹ Articles 13 and 14, Geneva III. On the treatment of POW's during the Iran/Iraq war, see *Memorandum from the ICRC to the States Party to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and the Republic of Iraq*, Geneva, (7 May 1983)

³² Article 12, Geneva I and Geneva II, and Article 27, Geneva IV. The term is taken from the Hague Regulations and the two 1929 Geneva Conventions.

³³ Articles 13 and 16, Geneva III.

While prisoners of war have extensive rights during interrogation (they only have to state their name, rank and serial number), detainees are still protected from torture and other cruel, inhumane or degrading treatment. The prohibition of torture is considered an absolute right which is respected in international human rights law and customary international law. Article 2 of the United Nations Convention against Torture 1984, which the USA has ratified, states:

*No exceptional circumstance, whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.*³⁴

- **Prosecution**

Unlawful combatants can be charged with criminal offences arising out of their participation in the armed conflict. They are not entitled to the extensive trial rights which apply to POWs, but they are entitled to a 'fair and regular trial' which is established in the Fourth Geneva Convention. It is a provision of the Convention that unlawful combatants are entitled to a trial before a properly constituted non-political court, to be informed of the charges against them, to present their defence and call witnesses, to be assisted by qualified counsel of their own choice, to have an interpreter, and to mount an appeal against their conviction and sentence.³⁵

Moreover, the Geneva Conventions are not the only international agreements governing the treatment of detainees. Others include: the *International Covenant on Civil and Political Rights (ICCPR)*, ratified by the USA in 1992;³⁶ the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*;³⁷ the *Standard Minimum Rules for the Treatment of Prisoners*;³⁸ and the *Basic Principles for the Treatment of Prisoners*.³⁹

From the discussion above, two possible breaches of human rights at Guantanamo Bay can be identified: inhumane and degrading treatment and lack of recourse to any legal mechanism.

³⁴ 'Background Paper on Geneva Convention on Persons held by US Forces', 29 January 2002

³⁵ Roberts and Guelff, above n. 6, Arts 70-73 of the 1949 Geneva Convention IV, p.303.

³⁶ United Nations GA Res 2200A (XXI) of 16 December 1966.

³⁷ United Nations GA Res 43/173 of 3 December 1988.

³⁸ United Nations Economic and Social Council Res 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³⁹ United Nations GA Res 45/111 of 14 December 1990.

Since overall the USA is refusing to apply the provisions of the Geneva Conventions referred to above, it is necessary to look at other international human rights protection agreements to see whether they can provide a remedy for the detainees.

- **International Covenant on Civil and Political Rights**

The USA is party to several international human rights conventions, the most important in the present context being the ICCPR.

- **Right to a fair trial**

Under the ICCPR, the detainees are entitled to be informed of the charges against them at the time of their arrest and shall be brought promptly before a judicial authority (Article 9). However, Article 4 permits states to derogate from certain obligations in times of national emergency. Under human rights law, therefore, detention will not be deemed 'arbitrary' if it is reasonably needed under the circumstances.⁴⁰ However, there should be no derogation from Article 7 which prohibits torture and inhumane treatment and Article 16 which states that everyone shall have the right to recognition before the law. Despite this possible derogation, Article 4(3) requires a state party to the ICPR to inform the Secretary-General of the United Nations immediately of the reasons for and the extent of any derogation. The USA has made no such communication; therefore the Covenant applies in full extent.

- **Prohibition from torture and inhumane treatment**

The ICCPR prohibits torture in Article 7, but does not define it, whereas Article 1 of the United Nations Convention against Torture 1984 provides a definition.⁴¹ The definition of torture is widely drafted and it has been held that torture is not just restricted to physical pain, but can also extend to mental suffering. **Justice Richard Goldstone** described the “... *treatment of the detainees in Guantanamo Bay as unlawful on the basis that the circumstances of their detention without trial and the prolonged interrogation cannot be justified anymore than torture can be justified; in democracies certain measures are ruled*

⁴⁰ J. J. Paust, 'Judicial Power to Determine the Status and Rights of Persons Detained without Trial', 44(2) Harvard International Law Journal (Spring 2003)

⁴¹ R. K. M. Smith, Textbook on international Human Rights (Oxford University Press: Oxford, 2003) 221.

out". The methods used are intended to obliterate the personality of the victim or to diminish his mental capacity.

- **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

The Body of Principles does not per se have the force of international law, but it is relevant in the context of Guantanamo Bay. Principle 17 entitles a detained person to have assistance of a legal counsel and to be informed of his right by the competent authority promptly after arrest.⁴² Principle 18 entitles a detained person to communicate and consult with his counsel without delay. The terms 'without delay' and 'within a reasonable time' are vague and lack precision. Nevertheless, the International Court of Justice has held that access to a legal counsel was to be given within a matter of days, a suggested period is no more than five and possibly as short as two days. In Guantanamo Bay, the detainees have never seen a legal counsel. Principle 32 permits proceedings before a judicial authority to be taken at any time to challenge the lawfulness of the detention. No such proceedings have been permitted at Guantanamo Bay.

The detainees in Guantanamo Bay are effectively held incommunicado unable to communicate with the world outside their place of detention. They are at the mercy of their captors, who are subject only to the restraints of their own personal sense of morality and to corporate discipline under the law. The provisions of the ICCPR, mainly Article 7 and Article 9, also apply to incommunicado prisoners. The International Court of Justice considers that violation of the right to liberty and security of person and the prohibition of arbitrary arrest and detention is a violation of general international law; furthermore the United Nations Special Rapporteur on Torture has argued that the use of prolonged incommunicado detention should be considered unlawful, a position which has been upheld by the United Nations Commission on Human Rights.

⁴² Office of the High Commissioner of Human Rights, Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, Principle 17,

Critics believe that such preventative measures do not require detained persons to be barred from all contact with the outside world, especially to legal advisers and their families. Significantly, it has been reported that there are no 'big fish' among the prisoners.⁴³

- **Trial by Military Commission**

The United States government military commissions authorised by President Bush in 2001 fall very far short of international due process standards.⁴⁴ Given the danger posed to the United States, the President declared that it was 'not practicable to apply to military commissions under this order the principles of law and the rules of evidence generally recognised in the trial of criminal cases in the United States district courts'. Although the rules of procedure were subsequently modified to take into account the concerns of human rights groups, serious flaws remain.⁴⁵ Most of the concerns centre on the lack of an independent structure and composition, especially in relation to the appeals, an over expansive jurisdiction and constraints on the right of counsel of one's choice.

- **Criticism regarding military commissions**

The proposal by the United States to implement military commissions has attracted widespread criticism. The provisions of the ICCPR are once again relevant: Article 14 calls for a 'fair and public hearing before a competent, independent and impartial tribunal established by law. The concepts of 'independent and impartiality' are probably the most difficult to meet for military commissions.. In that the US military commission system is similar to the UK court martial system, similar doubts to those of the European Court of Human Rights have been expressed by Amnesty International and the International Red Cross: for example, the military commission is not independent as the US President will

⁴³ J. Borger, 'Call for Release of 'low-level' Guantanamo Inmates', Guardian, 20 August 2002.

⁴⁴ Lawyers Committee for Human Rights, *Trials Under Military Order: A Guide to the Final Rules for Military Commissions*. Briefing Paper, June 2003; Human Rights Watch, Briefing Paper on U.S. Military Commissions, 25 June 2003. See also Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Military Commission Instructions, 32-A-I-B Code of Federal Regulations, 1 July 2003.

⁴⁵ Human Rights Watch, "U.S.: Commission Rules Meet Some, Not All, Rights Concerns", 21 March 2003 and "Letter to Department of Defense General Counsel Haynes Urging Revision of Rules that Restrict the Right to Counsel and to Present a Defense before U.S. Military Commissions", 10 June 2003; "Military Commissions Shouldn't Be Used - Pentagon Rules Shortchange Justice", 25 June 2003; Amnesty International, "Final Military Commission Rules Fail to Include Fair Trial Guarantees", 11 June 2003

choose the members of the commission; the commission allows a lower standard of evidence than is admissible in ordinary courts; there is no right to appeal; the defendants only have a limited right to an effective defence, they will not see all the evidence against them and will not be able to prepare themselves adequately; and the Military Order is discriminatory as it only applies to foreign nationals.⁴⁶ In summary, the prisoners have no access to the writ of habeas corpus to determine whether their detention is even arguably justified; the military will act as interrogators, prosecutors, defence counsel, judges and when death sentences are imposed as executioners. The trials will be held in secret. Thus the military control everything.

In July 2002, after a different case had been filed, a US District Judge issued a 34-page ruling that the US legal system has no jurisdiction over detainees held in Guantanamo Bay. The military base is outside the sovereign territory of the US and the writ of habeas corpus is not available to aliens held outside the sovereign territory of the USA.⁴⁷

- **Recent Development in International Milieu**

Ms. Pillay⁴⁸ noted that four years ago, in 2009, she had welcomed the announcement by President Barack Obama saying he was placing a high priority on closing Guantánamo and establishing a system to protect the fundamental rights of detainees. She further welcomed the White House's reiteration of this commitment last week, citing Congressional legislation as the main obstacle for progress on the issue.

However, Ms. Pillay was concerned that in spite of these commitments, abuses to detainees' human rights have continued in a systematic manner year after year, leading many prisoners to take desperate measures such as going on hunger strikes.

⁴⁶USA: Unfair Trials by Military Commission', <http://web.anesty.org/webwire.nsf/September2003print/Guantanamo?OpenDocument>

⁴⁷ N. Cohen, 'When Justice is Truly Blind', 4 August 2002, <http://observer.guardian.co.uk/libertywatch/story/0,1373,768990,00html>

⁴⁸ High Commissioner for Human Rights, Navi Pillay on April 5, 2013

- **Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay⁴⁹(October 3, 2013)**

The Special Rapporteur considers the practice of indefinite detention, other conditions applied to them such as solitary confinement, as well as the use of force feeding as forms of ill-treatment that in some cases can amount to torture.

The Special Rapporteur welcomed President Obama's announcement on 23 May 2013 that he was placing a high priority on closing Guantanamo during his second term in office. The President called on Congress to lift restrictions on transferring detainees to other countries. On 26 July 2013 the President's Press Secretary reiterated the government's commitment to transfer detainees and to close Guantanamo Bay.

The recommendation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism following his 2007 country visit to the United States . He urged the US government to ensure that all detainees are held in accordance with international human rights standards, including that any form of detention is subject to accessible and effective court review, which entails the possibility of release. In addition, the recommendations made by the Human Rights Council to the US government during the Universal Periodic Review called on the authorities to ensure that all remaining detainees be tried without delay in accordance with international law or be released .

However, the human rights violations continue, and the Special Rapporteur continues to urge the United States of the America to: (a) adopt all legislative, administrative, judicial, and any other types of measures necessary to prosecute, with full respect for the right to due process, the individuals being held at Guantánamo Naval Base or, where appropriate, to provide for their immediate release or transfer to a third country, in accordance with international law; (b) expedite the process of release and transfer of those detainees who have been certified for release by the government itself; (c) conduct a serious, independent, and impartial investigation into the acts of forced feeding of inmates on hunger strike and the

⁴⁹ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E>

alleged violence being used in those procedures; (d) allow United Nations Human Rights Council mechanisms, such as the Working Group and the UN Special Rapporteurs, to conduct monitoring visits to the Guantánamo detention centre under conditions in which they can freely move about the installations and meet privately with the prisoners and without witnesses or surveillance; and (e) take concrete, decisive steps towards closing the detention centre at the Guantánamo Naval Base once and for all.

All relevant mechanisms and actors must continue to engage the United States and demand that the government state clearly and unequivocally what specific measures it will implement toward the closure of Guantanamo Bay and ensure that nothing similar is ever put in place.

- **Universal Periodic Review Recommendations on Pressing Human Rights Challenges(JANUARY 25, 2011)⁵⁰**

At the Universal Periodic Review, the United States delegation stated that the effort to close the Guantanamo Bay detention center is "enormously complex." The attempt to make the closure is even more difficult by banning the use of Defense Department funds to transfer detainees to the United States for prosecution and imposing restrictions on the use of those funds for repatriation and resettlement of other detainees. Accepting the UPR recommendations on the issue of Guantanamo will reinforce the president's longstanding commitment to close the facility and meet US obligations under international law.

The United States should accept:

1. The numerous recommendations to expedite closure of the prison at Guantanamo Bay;
2. The recommendation of Mexico to invite UN mandate holders to follow up on the 2006 joint study by the five special procedures on Guantanamo detainees; and

⁵⁰ <http://www.hrw.org/news/2011/01/25/us-accept-upr-recommendations-pressing-human-rights-challenges> last accessed on December 3,2013

3. The recommendation of Switzerland to find for all Guantanamo detainees "a solution in line with the United States obligations regarding the foundations of international and human rights law, in particular with the International Covenant on Civil and Political Rights."

Though the United States government has agreed on the recommendations to consider inviting Special Rapporteurs to visit and investigate conditions at Guantanamo Bay. However, any invitation extended to Special Rapporteurs would be hollow if the United States denies access to detainees and certain facilities at the detention center as it has in the past. Any invitation to visit and investigate Guantanamo Bay should include full and unimpeded access to all detainees in private, all facilities, and all locations within facilities.

Judicial Pronouncements

In reaction to the events of 11 September 2001 United States Congress adopted the 'Authorization for Use of Military Force' (AUMF) authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [or] harboured such organizations, or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."⁵¹ In Military Order of 13 November 2001 entitled '*Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*' President Bush authorized the Secretary of Defence to set up military commissions to try non-nationals who have (allegedly) committed acts of terrorism.⁵²

*In Hamdi v. Rumsfeld*⁵³, it has been held that No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress, that "necessary and appropriate force" language to be used while keeping prisoners in detention. It also concluded that prisoners are entitled only to a limited judicial inquiry into his detention's

⁵¹ Authorization for Use of Military Force, 115 Stat. 224, available at www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm.

⁵² Military Order of 13 November 2001, 66 Fed. Reg. 57, 833, available at www.law.cornell.edu/background/warprisoner/warprisoner/fr1665.pdf.

⁵³ *Hamdi v. Rumsfeld*, 542 U.S.

legality under the war powers of the political branches, and not to a searching review of the factual determinations underlying his seizure.

In *Rumsfeld v. Padilla*⁵⁴, Jose Padilla, a United States citizen, returned to the United States after having lived in the Middle East for four years. Upon return in Chicago he was apprehended by federal agents executing a material witness warrant issued by the District Court for the Southern District of New York in connection with its investigation into the Al Qaeda terrorist attacks of 11 September 2001. His counsel issued a motion to vacate the warrant. Padilla's motion was still pending when the President issued an order to Secretary of Defense Rumsfeld designating Padilla an enemy combatant and directing that he be detained in military custody. Padilla was then moved to a Navy brig in South Carolina where he was held *incommunicado* for more than two years. His counsel then filed a *habeas petition* in the Southern District of New York, alleging that Padilla's detention violates the Constitution, and named as respondents the President, the Secretary, and the brig's commander. The government moved to dismiss, arguing that the District Court in New York lacked jurisdiction over Padilla's immediate custodian, the brig's commander. The District Court rejected the government's argument and held that the personal involvement of the Secretary of Defense rendered him a proper respondent and that it could assert jurisdiction over the Secretary under New York's long-arm statute. On the merits the District Court accepted the government's contention that the President had authority to detain enemy combatants citizens. On appeal the Second Circuit Court of Appeals affirmed the District Court's findings. The appeals court reversed on the merits, holding that the President lacked authority to detain Padilla militarily.

The Supreme Court was divided 5-4 with Chief Justice Rehnquist delivering the opinion in which O'Connor, Scalia, Kennedy and Thomas joined. Kennedy filed a concurring opinion in which O'Connor joined while Stevens filed a dissenting opinion in which Souter, Ginsburg, and Breyer joined. This time the government's argument of lack of jurisdiction was successful and the Court, as a result, did not decide on the merits.⁵⁵ The plurality held that a proper respondent in a habeas action is the "immediate custodian" in the "district of

⁵⁴ *Rumsfeld v. Padilla*, 542 U.S. (2004)

⁵⁵ *ibid*

confinement” which is the commander of the naval brig. This follows from the language of § 2242 and 2243 of Title 28 United States Code and longstanding practice. Padilla’s counsel should have brought the habeas petition in the District of South Carolina, not the Southern District of New York. The judgment of the Court of Appeals was accordingly reversed.

The dissenters held that Secretary of Defense Rumsfeld could be regarded as ‘custodian’ and favoured a more functional approach, focusing on the person with the power to produce the body. Moreover, the dissenters felt that the decision to suddenly remove Padilla to South Carolina without informing counsel, indicating that the executive attempted to circumvent judicial review, by remanding *Rumsfeld v. Padilla* on technical grounds, the court avoided dealing with the merits of a case in which the government asserted the most far-reaching powers. If the administration is right it, it could capture US citizens on American soil – far from the battlefield, unconnected to any traditional armed conflict – and detain them indefinitely without charge

Rasul v. Bush⁵⁶ has been perceived as the most revolutionary of the Supreme Court’s trilogy. The case centred on the question whether enemy combatants detained at Guantánamo Bay may bring a habeas petition in federal courts in the United States. Petitioners in this case, two Australians and twelve Kuwaitis, filed suits with the District Court of Columbia under federal law challenging the legality of their detention, alleging that they had never taken up arms against the United States or engaged in terrorist acts. They complained about the fact that they had never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or tribunals. The District Court dismissed the petition for want of jurisdiction, holding that under *Johnson v. Eisentrager*⁵⁷ aliens detained outside the United States, namely in then-occupied Germany, may not invoke *habeas corpus* relief in American federal courts.⁵⁸ The Court of Appeals affirmed.⁵⁹ The Supreme Court dismissed the Court of Appeals decision. Justice Stevens delivered the 6-3 plurality opinion. He was joined by O’Connor, Souter, Ginsburg, and Breyer. Kennedy filed a concurring opinion. Scalia filed a

⁵⁶ *Rasul v. Bush*, 542 U.S. (2004)

⁵⁷ 338 U.S. 763

⁵⁸ 215 F. Supp.2d 55

⁵⁹ 321 F. 3d 1134.

dissenting opinion in which Rehnquist and Thomas joined, representing the ‘conservative voice’ of the Supreme Court.

In *Rasul v. Bush* a revolution seems to have taken place. The *habeas corpus* statute of the United States Code received extraterritorial application and as a result habeas petitions can be submitted by non-citizens detained outside U.S. borders. United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. The District Court has jurisdiction to hear petitioners’ habeas challenges under 28 U.S.C. §2241, which authorizes district courts, “*within their respective jurisdictions,*” to entertain habeas applications by persons claiming to be held “*in custody in violation of the ... laws ... of the United States,*” §§2241(a), (c)(3).” Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.

Conclusion

In the introduction questions were raised with regard to the status and protection of unlawful combatants under international humanitarian law. At this point the following answers can be given. First of all, there is indeed room under international humanitarian law for the detention and prosecution of persons as ‘unlawful enemy combatants’. Secondly, in terms of the status, treatment and protection, unlawful enemy combatants do not fall outside the scope of the Geneva Conventions and international customary law.

The most important areas of concern in this respect include the following:

- None of the detainees have undergone a status determination in accordance with Article 5 of the Third Geneva Convention. The Combatant Status Review Tribunals do not qualify as ‘competent tribunals’ under this provision. Moreover, the detainees have not been granted the protection of the Third Geneva Convention pending the determination of their status as is required.

The military commissions that have been established to try persons accused of war crimes and other offences do not meet the standards required under international humanitarian law.⁶⁰

- The treatment of the detainees falls far short of that which international humanitarian law requires.⁶¹ The prisoners have been held for a long period under conditions, which have been widely described as being inhumane and physically and psychologically damaging. Criticisms of this regime by the representatives of the International Red Cross, human rights organizations, journalists and the military counsel assigned to defend those who have been charged to date, have not resulted in significant improvements in this respect.

- Finally, there has been little or no indication as to how long the detention of those still held may last, of how many of the detainees will be charged with an offence and ultimately brought to trial, or other matters relating to the duration of their captivity and conditions for possible release.⁶²

The tactics utilized by US forces were sanctioned at the highest levels of the Administration, and were approved with blatant disregard for domestic and international law. Yet despite international condemnation of the abuses at US-controlled detention facilities, no high-level governmental official has been held to account for the tragedies of Guantánamo, Abu Ghraib or Bagram. It will likely be years before the full scope of the Administration torture policy will be known.

Not only has the Administration been in contravention of domestic and international law in its treatment of detainees throughout their detention, it has been consistently criticised by the United States Supreme Court of seeking to shirk obligations in respect of detainees' right to habeas corpus and a fair trial. Most recently, the decision has established that detainees do in

⁶⁰ See Article 102 of the Third Geneva Convention (when the detainee is treated as a prisoner of war prior to status-determination) and Article 75 of the First Additional Protocol, constituting customary international law (when it has been - properly - determined that the detainee is an unlawful combatant).

⁶¹ Article 75 of the First Additional Protocol

⁶² See inter alia, Amnesty International, Public Statement; "Guantánamo: Military Commissions – an International Observer's notes" No. 2, AI Index AMR 51/155/2005 (Public) News Service No: 279, 5 November 2004, available on www.amnesty.org; "Combatant Trials Cannot Continue in Current Form, Judge Orders" by C.D. Leonnig, Washington Post Staff Writer, 9 November 2004 on www.washingtonpost.com; Human Rights Watch Report by S. Zarifi, Associate Director of Human Rights Watch Asia Division, "A Few Good Men at Gitmo", issued on 17 September 2004, available on www.hrw.org/english/docs/2004/09/13/usdom9344.htm

fact have a right to challenge their detention in US federal courts. However, the Military Commissions Act still allows the prosecution of Guantánamo detainees in patently unfair circumstances. Until that Act is repealed and replaced with legislation affording full fair trial guarantees, there can be no real justice for the detainees at Guantánamo Bay.

