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The Guantanamo Detainees in America’s ‘War on Terrorism’

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ABSTRACT

The international humanitarian law of armed conflict ... constitutes a means to an end: the preservation of humanity in the face of the reality of war. (Kalshoven & Zegveld, 2001, p.203)

If the rule of law means anything globally, it must mean that counter-terrorism defence is undertaken consistently with international law and its institutions. (Horrigan, 2003, p. 287)

In situations of war or emergency, as in the current ‘war on terrorism’, international humanitarian law clearly defines what is permissible, particularly in terms of humanitarian and human rights legislation governing state activity. There remains, however, a lack of clarity around the terms ‘unlawful combatant’, ‘unprivileged combatant/belligerent’, widely used in case law, legal literature and military manuals, though not terms used in treaties. They raise debate concerning interpretation and consequent applicable protective processes (Dormann, 2003). This article assesses the status and treatment of the Guantanamo Bay detainees, focusing on the strength and fragility of contemporary international humanitarian law when faced with the challenges consequent upon 9/11. In so doing, it provides an overview of the key areas of concern, including the rhetoric of war, diverse legal regimes, the potency of POW status, presidential and emergency powers, and the debate on potential treaty violations. Examining this case leads to the conclusion that excesses of governments in times of crises do not justify derogation from international humanitarian rights incommensurate with the emergency. In so doing, the global community diminishes the best of democracy for that community and for individuals.
Armed conflict is governed by international humanitarian law, and combatants by the Geneva and Hague Conventions. 9/11, with its 'hyperterrorism' and consequent 'war on terrorism', offers a major challenge to such law (Megret, 2003) beyond the current “attempt to use the rhetoric of justice to overturn the laws of war, and to use the rhetoric of war to subvert the rendering of justice” (Megret, 2003, p. 327). The question is, can we simultaneously defeat terrorism and uphold the tenets of humanitarian and human rights law, given “the state-centric nature of international law” (Klabbers, 2003, p. 299 ) and the meshing of law and politics “in a tangled semiotic web, with law dutifully preparing the ground for the free-wheeling rhetoric of war” (Megret, 2002, p. 328)?

The legal situation of the Guantanamo Bay detainees – their classification and treatment – presents an opportunity to consider the reality of humanitarian law more generally (Jinks, 2004). Recent media and legal debates on this topic, however, reveal the difficulties of so doing, exemplified by opposing legal judgments handed down often only months apart in Washington.

Guantanamo Bay provides a test case for the power of state sovereignty over international humanitarian and human rights. Increasingly, the world community is asking if the US has violated its state responsibility to international humanitarian obligations (Dixon & McCorquodale, 2003). Has, indeed, the monstrosity of 9/11 led to something even more monstrous (Megret, 2002).

The horror of 9/11 led to Americans perceiving themselves as victims of terrorism and warfare. Consequently, without any excuses for the ongoing practice of torture (Taylor, 2005), nor of confusing victims and perpetrators, it would be wrong to minimise the extent of the security issue confronting the US and its allies following this event. Moreover, it would be a mistake to deny the reality of the need to provide a facility to house detainees considered possible terrorists, mindful that between 1993-2001, when more than 10,000 terrorists were produced by Afghanistan, only 70 terrorism cases were able to be prosecuted through the US criminal justice and prison system.

America’s position on the Guantanamo Bay detainees was made clear, early in 2002, when the White House announced that, while the 1949 Geneva Convention (GC) on Prisoners of War (POWs) applied to the conflict between Afghanistan and the US where the Taliban were involved, it did not apply in relation to Al Qaeda operatives anywhere; but that neither the Taliban or Al Qaeda detainees were entitled to POW status, although they would be treated humanely in accord with the Convention’s general principles (White House Fact Sheet, 7 February,
Further, Pierre-Richard Prosper, the US Ambassador at Large for War Crimes Issues, stated (20 February, 2002) that:

Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely. ... The members of Al Qaeda fail to meet the criteria to be lawful combatants under the law of war. In choosing to violate these laws and customs of war and engage in hostilities, they become unlawful combatants. And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes. (quoted in Desai, 2003, 1589-90)

The US government has denied there is any doubt about the status of the captives, whom they regard as terrorists rather than traditional combatants (www.criminology.fsu.edu/transcrime/articles/Detainees). Notwithstanding, in the ensuing period, detainees have not been accorded humane treatment and have mostly remained in legal limbo, some for long periods, mostly without any charges laid.

War?

Following 9/11, we witnessed two separate American attacks, one against Al Qaeda, a terrorist criminal organisation, wherever that organisation operated; and the other against Taliban forces in Afghanistan, representing the effective government of a state which, like the US, was a party to the Geneva Conventions and which during this international armed conflict required the application of international humanitarian law (Aldrich, 2002). The question of the legal status and nature of protections of those captured remains a debate in relation to international humanitarian law and involves some detainees facing criminal proceedings, largely but not confined to terrorist acts (Aldrich, 2002).

The applicability of international humanitarian law is determined by the nature of conflict. The term 'war' is problematic, as is the ambiguity of the enemy, in an open-ended war, apparently infinite in space and time,
to be defeated instead of being solved (Fitzpatrick, 2003; Megret, 2002). Whilst some maintain that the 'war on terror' does not constitute war in terms of international law (McNally, 2004), in theory, principles of countering terrorism in a war-like response seem straightforward (Horrigan, 2003). Practice proves otherwise, as Fitzpatrick argues:

Legal rules governing permissible state responses to terrorism must be located in the distressingly murky interstices among five distinct bodies of international law (human rights, refugee law, humanitarian law, norms concerning the use of force in international relations, and international criminal law). (Fitzpatrick, 2003, p. 245)

International humanitarian law, in regulating the conduct of hostilities (jus in bello), covers conducting military activities in a humanitarian way, upholding human rights, ensuring fair treatment of prisoners, and civilians, all grounded in the Geneva Convention (1949). Especially interesting here is the Third Convention, focused on providing a code for the humane treatment of prisoners of war, originally covering members of armed forces but extended (Article 45 of Protocol 1) to anyone taking part in hostilities (armed conflict or declared war) and falling to enemy hands being “presumed to be a prisoner of war” (Office of the High Commission for Human Rights, 2006, p. 16). Within much legal ambiguity stands the clarity of Article 3 of the Universal Declaration ensuring the right to life, and Article 5 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Dixon & McCorquodale, 2003, p. 191).

In accepting the label ‘war’ in the current circumstances, and its legal implications, then, following the Geneva Conventions, humanitarian law applies to moral law (Fitzpatrick, 2003), a law not legitimizing war but ensuring basic standards of humanity in an inhumane situation where states focus on their military interests (Malanczuk, 1997). The aim is to gain a balance between security and humanitarian rights (Schorlemer, 2003).

**Legal regimes**

There are two distinct bases for rules in the ‘law of war’ - the *jus ad bellum*, governing the lawful uses of force; and the *jus in bello*, governing how war is conducted. The latter is divided into ‘Geneva law’ (four 1949 Geneva Conventions and two 1977 Additional Protocols), providing rules on how the victims of armed conflict are to be treated when subjected to an enemy authority; and ‘Hague law’ (the 1899 and 1907 Hague Conventions) prescribing both means and methods of warfare, including how those subjected to an enemy’s lethality are to be treated. Modern
international humanitarian law embraces both the ‘Geneva’ and ‘Hague’ subdivisions (Jinks & Sloss, 2004). Such law centres on distinguishing between civilians and combatants, and the obligation to ensure humane treatment, respect and protection to those no longer or not involved in hostilities (Stoffels, 2004). In international humanitarian law, in relation to hostilities, individuals are either combatants or civilians, and as unlawful combatants, fail by definition in fulfilling criteria of Article 4 (A) (1), (2), (3) and (6) of GSIII or Article 43 of P1; consequently they are civilians (Dormann, 2003; Kalshoven & Zegveld, 2001).

The categories describing the class of detainees considered POWs are found in the Third Convention in Article 4, and Article 5 clarifies any ambiguities therein. If ambiguity exists, detainees are to be protected under the Convention until their status is determined by a competent tribunal under Article 5 (Desai, 2003). This is to occur regardless of the mode of participation in hostilities or the status of individuals as members of armed rebel groups, of state armed forces, or as a civilian actively involved in hostilities (Dormann, 2003). This is supported by the 1997 US Army Regulations and the 1994 Australian Defence Force Manual (Naqvi, 2002), and by Secretary Powell more recently (Desai, 2003). Article 75 of the Fourth Convention ensures that even unlawful combatants have minimum guarantees under international humanitarian law, including: no discrimination; honouring individual religious practices; judicial protection; and protocols for arrest, detention, internment and treatment (Dormann, 2003).

Desai points out that detainees as terrorist suspects can also be provided protection by US criminal law offering safeguards through the Constitution to individuals detained for possible crimes (Desai, 2003). Furthermore, The Inter-American Commission of the Organisation of American States (OAS) has argued that “where the protections of international humanitarian law do not apply ... such persons remain entitled at least to the non-derogable protections under international human rights law as citizens” (Naqvi, 2002, p. 583).

Naqvi maintains that it is a matter of life or death if detainees are denied POW status (Naqvi, 2002). Jinks adopts a different stance, arguing this makes no significant difference to what detainees are owed under international law, with rights under POW status largely mirrored in protections provided under humanitarian law (Jinks, 2004). What remains unique about POW status is combatant immunity. His argument is based on the notion that the Civilians’ Convention mirrors in crucial areas the rights POWs enjoy and that this applies to unlawful combatants unprotected by other Conventions, reinforced by appropriate provisions in Additional Protocol 1, particularly Article 45. Common Article 3 of the Convention, moreover, provides unlawful combatants with substantial legal protection, similar to those for POWs, and prohibits acts such as torture, cruelty, humiliating or degrading treatment. Rights to due judicial
process are accorded by Article 75 of Additional Protocol I, guaranteeing at least a minimum of humanitarian protection to unlawful combatants.

Whilst not party to either of the Protocols, the US is a signatory to the Geneva Conventions and other treaties that concern the conduct of war, including humane treatment to enemy prisoners; such treaties are part of the domestic law of America and must be upheld. The Bush Administration has claimed that the President, in the interests of national security and as Commander-in-Chief, can violate such treaties – in terms of law-making authority, law-breaking authority, or powers of interpreting treaty obligations. Yet, it appears that, without the authorization of Congress, there is no constitutional power to disregard such treaties, that courts ought to uphold such treaty obligations, and that in both a legal and pragmatic sense, the President remains bound by the Geneva Conventions (Jinks & Sloss, 2004).

**Guantanamo Bay**

The cure must not be as bad as the disease. (Horrigan, 2003, p.298)

... as time has gone by, it has become clearer that in practice, the legal ‘black hole’ in Guantanamo is more like a collision of partially persuasive jurisdictional claims and normative principles. (Kanwar, 2004, p. 80)

International and US constitutional law appear to have been evaded under emergency powers in the indefinite war on terror, especially in Guantanamo Bay where protection and treatment relates purely to the mercy of the President and the executive (Kanwar, 2004), and where arguments over security have won out over notions of liberty (Desai, 2003). Justice has been mandated to the military, with terrorist suspects (as defined and qualified by the President) to be tried by military courts, in the “third way” of combating terrorism, straddling a divide between crime and war (Megret, 2003, p. 386).

US Constitutional protections have been withheld from the detainees in spite of cases, including *Rasul v. Bush*, where detainees claimed their detention was unconstitutional. The Supreme Court denied the claim based on the precedent of *Johnson v. Eisentrager* and because the location was not part of America, given the lease arrangement with Cuba, it lacked sovereignty over the site (Desai, 2003).

Military response to terrorism sets up a framework that constrains options. Like other enemy combatants held by the US in Afghanistan and in the US, those at Guantanamo Bay are generally:

selected through administrative discretion, with no judicial oversight or announced criteria or process

- held indefinitely without charge, trial, access to appropriate counsel and family

- not considered prisoners of war and so not subject to regulation by the Third Geneva Convention;

- refused mandatory hearings before a 'competent tribunal'

- treated through discretionary executive policy rather than legal norms

- not charged or tried for violating humanitarian law to establish a status of unprivileged combatants

- not treated as interned civilians or enemy aliens as governed under the Fourth Geneva Convention (Fitzpatrick, 2003).

As well as overcoming legal prohibition of arbitrary detention by using an internment regime for 'enemy combatants', such treatment apparently contravenes a number of treaties, conventions, and customary legal practices. For example, Article 9 of The Universal Declaration states that "No one shall be subjected to arbitrary arrest, detention or exile" (Robertson, 1999, p. 416). The basic guarantees here are to the presumption of innocence, public trials for serious criminal offences, judicial impartiality and independence (including from government pressure), and a defendant's right "not to be compelled to testify against himself or to confess guilt" (Robertson, 1999, p. 108). Derogations from key rights are not allowed, including those of fair trial, freedom from torture, and being treated in a cruel, inhuman or degrading manner.

Moreover, some of the exceptional measures the US has taken since 9/11 have not been notified to the UN as emergency measures requiring derogation, including military commissions and arbitrary detention, potentially violations of Article 4 (2) of the Covenant (Schorlemer, 2003). The processes, including President Bush's decree that prisoners are denied the rights of war status, also seem to defy the Third Geneva convention on treatment of POWs and Article 75 of the First Protocol, updated in 1977; and, within this, to discriminate among prisoners (e.g., exemptions from the death penalty for British prisoners before their negotiated release) (Steyn, 2004). As Steyn suggests:

The purpose of holding the prisoners at GB was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess....The Court of Appeals for the District of Columbia Circuit ... ruled that the United States Government may legally evade the jurisdiction of the United States courts in the case of foreign nationals by its
choice of a place of imprisonment beyond American soil. (Steyn, 2004, pp. 8, 10)

Problems also arise with President Bush's military order, establishing military commissions rather than independent courts or tribunals. Fitzpatrick states that here,

...their use is unprecedented and legally insupportable. Any detention of terrorist suspects and trials by military commissions must conform to strict derogation standards of the International Covenant on Civil and Political Rights and the procedural minima of humanitarian law. (Fitzpatrick, 2003, p. 204)

Metcalfé claims that such commissions breach not only US but also UK and international human rights standards (Metcalfé, 2003). This is supported by Mundis who cites further potential violations such as the hooding of detainees (Mundis, 2002).

Steyn, one of Britain's most senior judges, maintains that suspects are held in conditions amounting to 'utter lawlessness', failing to comply with international standards and essentially putting them beyond the rule of law, action not justified in his view by the US's citation of Ex parte Quirin (1942). For him, "... unchecked abuse of power begets ever greater abuse of power" (Steyn, 2004, p.2).

Nevertheless, debates about the detainees continue. This is hardly surprising given that the United States is currently still holding 460 suspected terrorists at Guantanamo Bay; that a United Nations panel declared in May 2006 that such ongoing indefinite detention violates the global ban on torture; and that in June 2006 three inmates committed suicide. Now, even European leaders, including British Prime Minister, Tony Blair, urge closure of the prison (MSNBC News Services, 11 June, 2006).

Those supporting the validity of the US Government's current position on the status of the detainees argue that:

- Taliban prisoners, though covered by the GC, cannot be POWs because they do not accord with the four conditions in the GC or the Hague Conventions, especially in relation to a distinctive emblem/sign and operating in accordance with the laws of war (working as a guerilla force with ever changing commanders).
- Al Qaeda prisoners also fail to meet the same four conditions and are not a legitimate enemy under international laws of war.
- The 1977 Additional Protocols to the GC dilute requirements of POW status and lawful belligerency, and are not customary law but sharply contested and not ratified by either the US or Afghanistan.
Military commissions are the most practicable approach to trying war crimes because of key variables such as security, proof and evidence.

Criticism of the US policy and approach is well summarized by Jinks and Sloss (2004) who maintain that there are inconsistencies with obligations under the Geneva Conventions, including: the classification methods used for war detainees; the value of such classifications; how British detainees have been treated, including interrogation techniques; and the nature of the military trials as proposed by special military commissions. They contend that the Geneva Conventions, POW Convention and the Civilian Convention have been violated on the basis of interrogation policies and practices by including threats, coercion, intimidation, insults and apparent physical and mental torture; that the criminal trials fail the Conventions’ promise of fair trial rights through use of ad hoc military commissions; and that detainees are denied the appropriate means for challenging the conditions of their detention.

Conclusion

The U.S. has deflected human rights law altogether and partially suppressed humanitarian law. (Kanwar, 2004, p. 81)

There has been much worldwide criticism and condemnation, including by international lawyers, of the status of ‘unlawful combatants’ and their treatment by the US. And, while most agree the ‘war on terror’ challenges military operations and international humanitarian law, both it and human rights law need reinstatement (Fraser, 2002).

Last year, US Judge Green brought down a finding in favour of the detainees having constitutional protections under American law, that they challenge their detentions, and that military tribunal reviews were unconstitutional (Reuters, 1 February, 2005). Despite this, a ‘legal limbo’ remains evident in: American plans to detain suspected terrorists for lifetimes, including those for whom there is inadequate evidence to charge under military tribunals (Reuters, 3 January 2005); mounting evidence of ongoing prisoner abuse scandals; and elevation to US Attorney General of former White House Counsel, Gonzales, who argued the Geneva Conventions were not applicable to the Guantanamo Bay detainees (Attorney General Confirmation Hearings, 2004).

One could rectify the uncertainty through upholding international humanitarian and human rights law by giving the Taliban POW status because of their membership of the Afghanistan government during hostilities, with appropriate charging of those responsible for crimes
against humanity; and ensuring all unlawful combatants have guarantees under the Geneva Convention as detainees in an armed conflict.

To ensure justice is done and seen to be done, an ad hoc international tribunal, under the auspices of the Security Council, could be the best way forward (Steyn, 2003). It might prevent repercussions from Presidential policies denying international humanitarian law on national security grounds, and moving the world further from democratic ideals (Jinks & Sloss, 2004). It would be a useful response to the most recent call to close the Guantanamo detention centre, made by five independent special rapporteurs the UN Commission on Human Rights had appointed. Their report urged that the detainees ought be released or reviewed by a competent and independent tribunal (Freeland, 2006).

More recently, the 5-3 ruling by the US Supreme Court at the end of June, 2006, in the case of *Mamdan vs Rumsfeld*, has decided the legality of trying those terrorist suspects held at Guantanamo Bay by military tribunals. The ruling clearly states that such trials violate both American law and the Geneva Conventions, and suggests President Bush exceeded his authority in ordering them (Associated Press, 30 June 2006). Unfortunately, whilst the Congress and the President continue to debate the matter, the horror at Guantanamo Bay continues.

**REFERENCES**


