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THE GUANTANAMO DETAINEES:  
A DISCUSSION OF THE LEGAL RIGHTS OF  
THE INDIVIDUALS DETAINED AT  
GUANTANAMO BAY, CUBA

LLM RESEARCH PAPER

INTERNATIONAL LAW (LAWS 509)

LAW FACULTY  
VICTORIA UNIVERSITY OF WELLINGTON

2004

093 OUDYN, S. The Guantanamo detainees.

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## ABSTRACT

For approximately two years the United States has been detaining individuals at its naval base at Guantanamo Bay, Cuba. Almost all of the detainees have been held virtually incommunicado; without charge, without access to lawyers and without any means of challenging the legality of their detention. The United States has raised a number of international law arguments in support of its treatment of the detainees. These arguments concern the legal nature of the United States naval base at Guantanamo, international human rights law and international humanitarian law. The purpose of this paper is to consider whether those arguments are consistent with the principles of international law. The paper concludes that United States' treatment of the detainees is in breach of fundamental principles of international law and could have a detrimental impact on international laws its future development.

Word Length: The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 14,844 words.



## I THE GUANTANAMO DETAINEES AND THEIR "LEGAL BLACK HOLE"

Since January 2002, the world's most powerful democracy has been detaining hundreds of suspected members of the Taliban and Al Qaeda at the United States naval base at Guantanamo Bay, Cuba ("Guantanamo"), as part of its "war on terrorism".<sup>1</sup>

The "war on terrorism" was declared in response to the terrorist attacks on the United States of 11 September 2001 in which approximately 3000 people lost their lives. Shortly after the attacks, the United States Congress passed a joint resolution authorising the President to use:<sup>2</sup>

... all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

On 7 October 2001, the President sent armed forces to Afghanistan to seek out and subdue the Al Qaeda terrorist network and the Taliban regime which provided it with sanctuary.<sup>3</sup> As a result of military operations in Afghanistan, and elsewhere, the United States has detained citizens of at least 43 countries.<sup>4</sup> Approximately 660 of those people currently find themselves at Guantanamo.<sup>5</sup>

The Guantanamo detainees are an extremely diverse group. There are detainees from Afghanistan and the Islamic States of Asia and the Middle East, but also from Australia, Belgium, Canada, Chile, Sweden and the United

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<sup>1</sup> Lord Steyn "Guantanamo Bay: The Legal Black Hole" (27th FA Mann Lecture, London, 25 November 2003).

<sup>2</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

<sup>3</sup> Presidential Address to the Nation (7 October 2001) Available at <<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>> (last accessed 28 February 2004).

<sup>4</sup> Lawyers Committee for Human Rights *Imbalance of Powers: How Changes to US Law and Policy since 9/11 Erode Human Rights and Civil Liberties* (Lawyers Committee for Human Rights, New York, 2003), 47. Available at <[http://www.humanrightsfirst.org/us\\_loss/imbalance/powers.pdf](http://www.humanrightsfirst.org/us_loss/imbalance/powers.pdf)> (last accessed 22 February 2004).

<sup>5</sup> Nancy Gibbs "Inside the Wire" (8 December 2003) *Time* New York 40.



Kingdom.<sup>6</sup> Although 85 percent of detainees are aged between 20 and 40, some are very old whereas others are juveniles.<sup>7</sup> Some are well educated and westernised, while others are not at all.<sup>8</sup> They range from the strictly secular to the deeply devout.<sup>9</sup> Most detainees were arrested in Afghanistan, but others were picked up in places as far away as Bosnia, Zambia and Gambia.<sup>10</sup>

The majority of the detainees are held in three maximum security cell blocks. These detainees live in solitary confinement, in cells measuring six-foot-eight by six-foot (fifty-four square feet), almost 24 hours per day.<sup>11</sup> Twice a week they get 20 to 30 minutes to shower and exercise.<sup>12</sup> They are also let out for interrogation sessions which can last for anywhere between one and sixteen hours.<sup>13</sup>

The names of the detainees are classified, as are the reasons for their incarceration.<sup>14</sup> However it has been reported that there are no "big fish" among those detained at Guantanamo.<sup>15</sup>

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<sup>6</sup> David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 58, 66.

<sup>7</sup> The United States recently released the three youngest detainees at Guantanamo aged between 13 and 15. However other juveniles aged 16 and 17 continue to be held. See Ian James "US officials still holding juveniles in Guantanamo prison for terror suspects" (30 January 2004) Associated Press Newswires.

<sup>8</sup> James Meek "The People the Law Forgot" (3 December 2003) *The Guardian* London 1.

<sup>9</sup> Meek, above.

<sup>10</sup> David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 58, 66.

<sup>11</sup> Rose, above, 62. See also Charles Savage "Growth at Base Shows firm stage on Military Detention" (24 August 2003) *The Miami Herald* Miami A1.

<sup>12</sup> Nancy Gibbs "Inside the Wire" (8 December 2003) *Time* New York 40.

<sup>13</sup> Gibbs, above.

<sup>14</sup> Rose, above, 66. The Bush Administration has, however, recently disclosed some information regarding some of those held at Guantanamo. Among them are terrorists involved in the attacks on the US embassies in East Africa and the USS Cole, a former bodyguard of Osama Bin Laden and an Al Qaeda explosives expert who designed a prototype shoe bomb for destroying airplanes. See Charlie Savage "US May Detain Terror Suspects for Years Looks to Appoint a Parole Board" (14 February 2004) *The Boston Globe* Boston A4.

<sup>15</sup> Bob Drogin "No Leaders of Al Qaeda Found at Guantanamo" (18 August 2002) *The Los Angeles Times* Los Angeles. See also Rose, above, 66.



Almost all of the detainees have been held virtually incommunicado; without charge, without access to lawyers and without any means of challenging the legality of their detention.<sup>16</sup> One current detainee, in a short postcard to his family which slipped past censors, described Guantanamo as a place where “you don’t have the right to have rights.”<sup>17</sup>

The position adopted by the United States in relation to Guantanamo raises a number of distinct international law issues. Firstly, there is the issue of who actually exercises sovereignty there. As discussed below, the United States acquired Guantanamo pursuant to a lease agreement which provided it with “complete jurisdiction and control” but reserved “ultimate sovereignty” for Cuba. The Bush Administration has argued that because “ultimate sovereignty” remains with Cuba, the United States domestic courts lack jurisdiction to entertain any claims made by detainees pursuant to United States domestic law.<sup>18</sup>

The Bush Administration’s view with regard to jurisdiction has been challenged in recent litigation, brought before the United States courts, on behalf of various detainees. To date, different circuits of the United States Court of Appeals have reached conflicting opinions on the issues of jurisdiction and sovereignty.<sup>19</sup> The debate is set to be resolved definitively by the United States Supreme Court later this year.<sup>20</sup>

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<sup>16</sup> It should be noted that two detainees have recently be designated for trial before US military commission and those detainees have been assigned Counsel. See Neil A Lewis “US Charges Two at Guantanamo with Conspiracy” (25 February 2004) *New York Times* New York A1.

<sup>17</sup> James Meek “The People the Law Forgot” (3 December 2003) *The Guardian* London 1.

<sup>18</sup> The United States’ position is primarily based on a 1942 decision of the United States Supreme Court which held that German nationals detained outside US sovereign territory, albeit under the control of the US military, lacked standing to bring petitions for habeas corpus in the United States domestic courts. See *Johnson v Eisentrager* (1950) 339 US 763.

<sup>19</sup> The Court of Appeals for the District of Columbia concluded that Guantanamo was not part of the sovereign territory of the United States. It held accordingly that it had no jurisdiction to hear the detainees’ claims. See *Al Odah v United States* (2003) 321 F 3d 1134 (DC Cir). However the 9th Circuit reached the opposite conclusion, finding that Guantanamo was part of the sovereign territory of the United States, and that consequently it would have jurisdiction. It is noteworthy that the 9th Circuit appears to have taken the view that it would have had jurisdiction even in the absence of technical sovereignty due to the fact that the United States exercised sole territorial jurisdiction at Guantanamo. See *Gherebi v Bush* (2003) 352 F 3d 1278 (9th Cir).

<sup>20</sup> The order granting certiorari is available at <<http://www.supremecourtus.gov/orders/courtorders/111003pzor.pdf>> (last accessed 2 March 2004).



The second type of international law issue raised at Guantanamo concerns the area of international human rights law, a body of law setting out the fundamental rights attributable to all human beings. As discussed below, the various instruments, making up the body of international human rights law, contain articles against the arbitrary detention of any individual. The Bush Administration has submitted, however, that international human rights law is inapplicable in respect of the detainees because they were captured in the course of an armed conflict and consequently their capture and detention is governed exclusively by international humanitarian law.<sup>21</sup> The Administration has also advanced the subsidiary proposition that particular human rights instruments, such as the International Covenant on Civil and Political Rights, are not binding on the United States outside its own sovereign territory.<sup>22</sup>

A third area of international law which is relevant in respect of the detainees is international humanitarian law, which is codified in the Geneva Conventions, and prescribes rules for the treatment of individuals in times of war or armed conflict. While the Bush Administration has agreed to treat the detainees in a manner consistent with the Geneva Conventions, they deny that the detainees are entitled to the protections usually afforded to prisoners of war.<sup>23</sup> They justify this stance by submitting that neither Taliban, nor Al Qaeda, detainees meet the conditions for being considered lawful combatants under the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>24</sup>

Humanitarian law provides for the convening of a "competent tribunal" in cases of doubt regarding whether a particular detainee qualifies for prisoner of

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<sup>21</sup> See Letter from the Permanent Mission of the United States to the Inter American Commission on Human Rights (15 April 2002).

<sup>22</sup> Kristine A Huskey "Gitmo, A Legal No-Mans Land: The Status of the Detainees at Guantanamo Bay, Cuba (New Zealand Centre for Public Law: Public Lecture, Wellington, 10 February 2004). The Bush Administration has raised a further argument, specifically in relation to the ICCPR, which is that it does not bind the United States as it is not a "self-executing" document. This is essentially a US domestic law issue which consequently falls outside the scope of this paper.

<sup>23</sup> See Fact Sheet: Status of Detainees at Guantanamo (7 February 2002) available at <<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>> (last accessed 27 February 2004).

<sup>24</sup> Fact Sheet: Status of Detainees at Guantanamo, above.



war status.<sup>25</sup> No individualised status hearing has ever been convened in respect to any particular detainee at Guantanamo; the US has dismissed the need to do so, asserting that “there is no doubt about their status.”<sup>26</sup>

The Bush Administration submits that because the detainees are being held in connection with the “war on terror” it is not under an obligation to release and repatriate them until the “war on terror” is won. For example in a letter to the United Nations Working Group on Arbitrary Detention they have stated:<sup>27</sup>

There is broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last. The detention of an enemy combatant is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing an enemy combatant from continuing to fight against us. There is no law requiring a detaining power to prosecute enemy combatants or to release them prior to the end of hostilities. Likewise, under the laws and customs of war, detained enemy combatants have no right of access to counsel or courts to challenge their detention.

...

We cannot have an international legal system in which honourable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war, but terrorists who violate the law of armed conflict must be released and allowed to continue their belligerent, unlawful or terrorist activities.

The United States Defence Secretary has recently expressed a desire that none of the detainees is held for “any longer than is absolutely necessary.”<sup>28</sup> However the Administration has previously conceded that the war on terror may last for many years to come.<sup>29</sup>

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<sup>25</sup> See Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 5.

<sup>26</sup> Letter from the Permanent Mission of the United States to the Secretariat of the United Nations Commission on Human Rights (2 April 2003). Available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9a14ba739a04fb2fc1256d050035483c?Opendocument>> (last accessed 22 February 2004).

<sup>27</sup> Letter from the Permanent Mission of the United States to the Secretariat of the United Nations Commission on Human Rights (2 April 2003). Available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9a14ba739a04fb2fc1256d050035483c?Opendocument>> (last accessed 22 February 2004).

<sup>28</sup> Secretary Rumsfeld Remarks to the Greater Miami Chamber of Commerce (13 February 2004). Available at <<http://www.dod.gov/transcripts/2004/tr20040213-0445.html>> (last accessed 28 February 2004).

<sup>29</sup> See, for example, President Bush’s Address to a Joint Session of Congress and the American People (20 September 2001). Available at <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (last accessed 28 February 2004).



The United States' treatment of detainees at Guantanamo has been met by a chorus of disapproval from the international community. For example the English Court of Appeal, in considering the plight of a British detainee at Guantanamo, has stated that:<sup>30</sup>

... we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by [the United States and the United Kingdom] and by international law, Mr Abbasi is at present arbitrarily detained in a "legal black-hole."

The purpose of this paper is to consider whether the positions taken by the United States, as discussed above, are consistent with the principles of international law. The paper will commence by exploring the United States' view that Guantanamo is Cuban sovereign territory. The arguments the United States has advanced in relation to the non-applicability of international human rights law, will then be explored. The third part of the paper will consider the United States' assertions regarding the applicability of international humanitarian law. The paper will conclude by considering whether the detainees are being treated in accordance with international law. Some remarks will also be made regarding the future implications for international law, which could result from the position the United States has taken at Guantanamo.

## II THE LEGAL STATUS OF GUANTANAMO BAY

The naval base at Guantanamo is the United States' oldest offshore military base, and has been in operation for approximately 100 years.<sup>31</sup> It exceeds 45 square miles in size and is entirely self sufficient with its own water, plant, schools, transportation and entertainment facilities.<sup>32</sup> The population at Guantanamo has tripled to more than 6000 since January 2002.<sup>33</sup>

<sup>30</sup> *Abbasi v Secretary of State* (2003) 42 ILM 358, 374 (CA).

<sup>31</sup> ME Murphy *The History Of Guantanamo Bay: An Online Edition* (1964). Available at <[www.nsgtmo.navy.mil/history.htm](http://www.nsgtmo.navy.mil/history.htm)> (last accessed 22 February 2004).

<sup>32</sup> Gerald L Neuman "Anomalous Zones" (1996) 48 *Stan L Rev* 1197, 1198.

<sup>33</sup> Nancy Gibbs "Inside the Wire" (8 December 2003) *Time* New York 40.



The United States occupies Guantanamo by virtue of two 1903 lease agreements entered into with Cuba as amended by a subsequent agreement of 1934. However the unusual nature of these agreements raises major questions regarding whether Cuba can still claim to be sovereign at Guantanamo, as the Bush Administration asserts, or whether sovereignty can be said to have passed to the United States. Finding an answer to this question necessitates an examination of the terms of the Guantanamo lease and consideration of how, as a general matter, leases are treated under principles of international law. However before looking at these matters it is first necessary to briefly clarify what is meant by the term "sovereignty".

*A What is sovereignty?*

The term "sovereignty in the relations between States signifies independence."<sup>34</sup> It refers to the supreme authority which is exercised by a State independently of any other earthly authority.<sup>35</sup> The concept of sovereignty can be said to have three dimensions: external independence, internal independence and supreme authority.<sup>36</sup>

A state has external independence when it enjoys personal liberty of action outside its borders in its intercourse with other states. As a consequence, a sovereign state can, unless restricted by treaty, manage its international affairs according to its discretion; in particular it can enter into alliances and treaties, send and receive diplomatic envoys, acquire and cede territory, and make war and peace.<sup>37</sup>

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<sup>34</sup> *Island of Palmas Case (The Netherlands v. United States)* (1928) 2 UN Rep Intl Arb Awards 829, 838.

<sup>35</sup> R Jennings and A Watts (eds) *Oppenheim's International Law (Volume I: Peace)* (9 ed, Longman, London, 1992) 122.

<sup>36</sup> Jennings and Watts, above, 382.

<sup>37</sup> Jennings and Watts, above, 382.



Internal independence refers to a state's liberty of action within its borders. A sovereign state is free to: adopt any constitution it wants, arrange its administration as it sees fit, enact whatever laws and commercial policies it desires and so on.<sup>38</sup>

A sovereign state exercises supreme authority in two senses. Firstly it exercises supreme authority over all persons and things within its borders (territorial sovereignty). Secondly it exercises supreme authority over its citizens whether at home or abroad (political sovereignty).<sup>39</sup>

Sovereign states, being their own masters, are able to dispose of their sovereign rights as they please, even to the point of annihilating themselves as a subject of international law.<sup>40</sup> Accordingly once a state has undertaken certain obligations through treaties or agreements, it is bound under international law to fulfil them.<sup>41</sup>

The ability of a sovereign to give up sovereign rights by treaty is particularly relevant for present purposes because, as discussed below, it appears to be exactly what Cuba has done with regard to the Guantanamo leasehold.

### ***B The Guantanamo Bay Leasehold***

The United States acquired Guantanamo as a consequence of the Spanish-American War of 1898. On 20 April 1898 the United States Congress demanded, by joint resolution, that the Government of Spain "at once relinquish its authority and government in the Island and Cuba and withdraw its land and

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<sup>38</sup> Jennings and Watts, above, 382.

<sup>39</sup> Jennings and Watts, above, 382.

<sup>40</sup> R.P. Anaud "Sovereign Equality of States in International Law" (1986 II) 197 *Recueil Des Cours* 1, 32.

<sup>41</sup> R.P. Anaud, above, 33.



naval forces from Cuba and Cuban waters".<sup>42</sup> Interestingly for present purposes, however, the resolution provided further.<sup>43</sup>

That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over the said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

On 25 April 1898 the United States declared war on Spain. Approximately three and a half months later, on 12 August 1898, the two nations signed a "Protocol of Agreement Embodying the Terms of a Basis for the Establishment of Peace between the United States and Spain". Finally, on 10 December 1898, a treaty of peace was concluded at Paris.<sup>44</sup> The treaty relinquished Spanish sovereignty over Cuba and left the island to be occupied by the United States.<sup>45</sup>

A new independent Cuban state was established on 20 May 1902. An Appendix to the new State's constitution set out the Cuban government's intention to lease or sell Cuban land to the United States, as a means of maintaining Cuba's independence and protecting its people.<sup>46</sup> That intention was formalised pursuant to a lease agreement of 23 February 1903<sup>47</sup> (the "Lease"), which provided for the lease of Guantanamo Bay and Bahia Honda to the United States, and a supplementary lease agreement of 6 October 1903<sup>48</sup> (the "Supplementary Lease"). An additional treaty was entered into on 29 May

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<sup>42</sup> See Joseph Lazar "International Legal Status of Guantanamo Bay" (1968) 62 Am J Int'l L 730,730.

<sup>43</sup> 30 Stat 364 (1898).

<sup>44</sup> Treaty of Paris (10 December 1898) 30 Stat 1754 (United States - Spain).

<sup>45</sup> Lazar, above, 730.

<sup>46</sup> Article VII of the Appendix to the Cuban Constitution provided that: "To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States". This wording mirrored the wording that had previously been used by the United States Congress in amendment included in an Army appropriations Act. See 31 Stat 897 (1901).

<sup>47</sup> Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations (23 February 1903) TS 418 (United States - Cuba).

<sup>48</sup> Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations (16-23 February) TS 418 (United States - Cuba).



1934<sup>49</sup> to modify some of the terms of the 1903 agreements (the "1934 Treaty").<sup>50</sup>

It is possible to distinguish between two types of leases under public international law. Firstly, there are leases that provide for a lease of land together with some or all of the lessor's sovereign rights over that land. Secondly, there are leases that are more akin to the private law understanding of what constitutes a lease, involving a lease of land but no transfer in the exercise of sovereignty.<sup>51</sup> It is not always clear, and in some cases sharply controversial, whether a lease is of the private law type or includes the exercise of sovereign rights.<sup>52</sup> Each case will ultimately depend on its particular facts and the precise terms of the grant.<sup>53</sup>

The nature of the rights granted to the United States at Guantanamo is set out in article III of the Lease which provides:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Thus pursuant to the Lease, Cuba has granted the United States "complete jurisdiction and control" at Guantanamo, while reserving "ultimate sovereignty" for itself.

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<sup>49</sup> Treaty Defining Relations with Cuba (29 May 1934) TS 866 (United States – Cuba).

<sup>50</sup> The Treaty of 29 May 1934 did not relate to Bahia Honda as the United States had already relinquished that area in exchange for larger boundaries at Guantanamo. See Joseph Lazar "International Legal Status of Guantanamo Bay" (1968) 62 Am J Int'l L 730,735.

<sup>51</sup> R Jennings and A Watts (eds) *Oppenheim's International Law (Volume I: Peace)* (9 ed, Longman, London, 1992) .

<sup>52</sup> J Virzija *International Law in Historical Perspective (Volume I)* (AW Sijthoff-Leyden, Leyden, 1968) 398.

<sup>53</sup> Ian Brownlie *Principles of Public International Law* (6 ed, Oxford University Press, Oxford, 2003) 110-111.



The grant of "jurisdiction and control" to the United States undoubtedly means that the United States has acquired sovereign rights at Guantanamo. Chief among those rights is the ability to make law. Persons at Guantanamo, irrespective of whether they are United States citizens, are amenable to United States criminal and civil law.<sup>54</sup> Indeed the public affairs officer at Guantanamo has recently confirmed that all non-Americans arrested for a criminal offence at Guantanamo would be tried in a US Court, as would any civilian contractor.<sup>55</sup>

In addition, the Supreme Court of Cuba has held that the territory of Guantanamo is for all legal effects to be regarded as foreign.<sup>56</sup> This implies that Cuban law does not extend to United States military and civilian personnel on the base.<sup>57</sup>

It is also noteworthy that the Guantanamo Lease will continue in effect until either the United States abandons the base or the Lease is terminated by mutual agreement between Cuba and the United States.<sup>58</sup> Therefore the sovereign rights that the United States has acquired under the lease could continue indefinitely.<sup>59</sup>

The extent of the rights acquired by the United States under the Guantanamo leasehold has led one former commander of the base to observe:

Thus it is clear that at Guantanamo Bay we have a Naval reservation which, for all practical purposes, is American territory. Under the foregoing [lease] agreements, the United States has ... exercised the essential elements of sovereignty over this territory. Unless we abandon the area or agree to a

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<sup>54</sup> See for example *US v Lee* (1990) 906 F 2d 117 (4th Cir) in which a Jamaican national was indicted to face charges before United States domestic courts for an alleged indecent assault he committed at Guantanamo Bay.

<sup>55</sup> David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 58, 72.

<sup>56</sup> See *In re Guzman* (1934) Ann Dig 112,113. The issue in that case was whether duty was payable in respect of three hogs imported into Cuba by the defendants from the naval station in Guantanamo Bay. The defendants argued that no duty was payable because the hogs had already been in Cuba. The Supreme Court of Cuba disagreed noting that "the territory of the naval Station is for all legal effects regarded as foreign".

<sup>57</sup> Gary L Maris "International Law and Guantanamo" (1967) 29 JP 261, 273.

<sup>58</sup> Article III, 1934 Treaty.

<sup>59</sup> The United States has at various times through history expressed an intention to remain at Guantanamo indefinitely. See Gary L Maris "International Law and Guantanamo" (1967) 29 JP 261, 284-285.



modification in the terms of our occupancy, we can continue in the present status as long as we like.

However despite the extent of the United States' jurisdiction and control at Guantanamo this is not a *carte blanche*.<sup>60</sup> The Lease records the continuance of the ultimate sovereignty of the Republic of Cuba.

The existence of continuing Cuban sovereignty is evidenced by various obligations and restrictions placed on the United States in their administration of the base pursuant to the Lease Agreements. The restrictions require that, *inter alia*, the United States uses Guantanamo solely for the purposes of a naval and coaling station<sup>61</sup> and that it agrees not to allow the establishment and maintenance of commercial, industrial or other enterprises at the base<sup>62</sup>. The United States is also obliged to pay rent<sup>63</sup> and to allow Cuban vessels engaged in Cuban trade free passage through the waters leased to it at Guantanamo.<sup>64</sup>

The existence of these types of obligations and restrictions seems inconsistent with the view that the United States is sovereign at Guantanamo since it suggests that its authority at Guantanamo is not exercised independently of any other earthly authority.

Up until the termination of diplomatic relations between the United States and Cuba in 1961, following the Cuban revolution, the United States largely adhered to the terms stipulated in the lease agreements.<sup>65</sup> Since that time, however, the United States has begun to act in breach of some of the terms of the Lease Agreements. Those breaches have become more pronounced in recent times. For example, while the Lease restricts the use of Guantanamo to a naval base or coaling station, the base was used as a detention facility for Haitian and Cuban refugees during the 1990s and now, of course, for individuals held as part

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<sup>60</sup> See Gary L Maris "International Law and Guantanamo" (1967) 29 JP 261, 266.

<sup>61</sup> Articles I and II, Lease.

<sup>62</sup> Article III, Supplementary Lease.

<sup>63</sup> Article I, Supplementary Lease.

<sup>64</sup> Article II, Lease.

<sup>65</sup> See Gary L Maris "International Law and Guantanamo" (1967) 29 JP 261.



of the "war on terror". Similarly the fact that fast food chains such as McDonalds, Pizza Hut and KFC now operate at Guantanamo<sup>66</sup> would appear to be in breach of Article III of the Supplementary Lease, which forbids the establishment of commercial enterprises there.

The fact that the United States has been able to operate in breach of the terms of the leases without accountability has led some commentators and the majority in the *Gherebi* case<sup>67</sup> to assert that the United States, not Cuba, exercises sovereignty at Guantanamo.

It is submitted, however, that this view is incorrect. The legal basis of United States' jurisdiction at Guantanamo is the Lease; a document which reserves for Cuba, "ultimate sovereignty". The fact that Cuba lacks the political and military might necessary to enforce the terms of the Leases does not affect Cuba's ultimate sovereignty over Guantanamo. The position was put as follows by the minority in *Gherebi*:<sup>68</sup>

The ability to violate terms of an agreement with impunity does not render a party legally free to ignore the agreement. It means only that the party in breach is spared the practical consequences of its improper acts.

...

[E]ven if the United States has violated the Lease, it simply is big enough and strong enough that Cuba has been unable to enforce its legal entitlements. This difference in power does not erase the United States' obligations under the Lease, nor does it mean that Guantanamo is a part of the sovereign territory of the United States. The Lease is actually a lease, albeit a highly unusual one with a very pushy tenant.

The above view is in accordance with the view of a number of authors on the topic of international law who have expressed the view that leases of territory do not create changes in sovereignty. For example, one treatise has observed that:<sup>69</sup>

Leases of territory, regardless of the length of time specified in the relevant agreements do not confer title, do not create changes in sovereignty.

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<sup>66</sup> See Nancy Gibbs "Inside the Wire" (8 December 2003) *Time* New York 40.

<sup>67</sup> *Gherebi v Bush* (2003) 352 F 3d 1278 (9th Cir). See footnote 19.

<sup>68</sup> *Gherebi v Bush*, above, 1310.

<sup>69</sup> Gerhard von Glahn *Law Among Nations: An Introduction to Public International Law* (The Macmillan Company, New York, 1965) 269.



Authorities and statesmen have been in agreement that the conclusion of a lease treaty only effects a transfer of jurisdictional rights but does not at all effect an alienation of territory. In other words, sovereign *rights* are exercised by the leasing state, but *title* to the territory remains indisputably with the state granting the lease. This is true even when the lease entails use of the territory as a naval or military base by the leasing state, such as Guantanamo Bay in Cuba, leased but not ceded to the United States.

Moreover, it must be borne in mind that the question of who is "sovereign" in a particular territory is a legal question rather than a political one. One author has commented that:<sup>70</sup>

Undue concentration on a political interpretation of legal phenomena has had the effect of obscuring another significant example of division of territorial sovereignty, namely, the division between the exercise of sovereignty and sovereignty proper.

...  
[T]he distinction between the exercise of the rights of sovereignty and residuary sovereignty proper is significant and, it is submitted, correct in principle. There is always a danger in attempting to comprehend the realities of a situation at the expense of the realities of the law. It is not the business of the law to give a political interpretation, however closely approximating the facts, of the legal situation. The gap between the two is a creature of the parties and must not be bridged by attempts at realism.

The Permanent Court of International Justice has also held in *Lighthouses in Greece and Samos (Greece v France)*<sup>71</sup> that the giving up of sovereign rights is not the same as the giving up sovereignty. The Court there was asked to consider whether a contract entered into between a French company and the Ottoman Empire (Turkey) in 1913 in relation to a lighthouse in Crete would be binding on Greece who gained sovereignty over Crete from the Ottoman Empire following the conclusion of the First World War.

Greece argued that at the time that the contract was entered into Turkey had already ceased to exercise sovereignty over Crete, since Turkey had previously, in 1899 and 1907, conferred upon Crete full autonomy with regard to its internal and external affairs in response to international pressure.

The dissenting judge, Judge Hudson, found that the residuary sovereignty of the Sultan was "a sovereignty shorn of the last vestige of power". He urged that

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<sup>70</sup> H Lauterpacht *International Law: Collected Papers (Volume I)* (Cambridge University Press, Cambridge, 1970) 372.

<sup>71</sup> *Lighthouses in Greece and Samos (Greece v France)*(1937) PCIJ Series A/B No 71.



“a juridical concept must not be stretched to breaking point” and that “a ghost of hollow sovereignty cannot be permitted to obscure the realities of this situation”<sup>72</sup>. However the ten judges comprising the majority disagreed. They held that:<sup>73</sup>

Notwithstanding its autonomy, Crete has not ceased to be part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridical point of view.

Accordingly it was concluded that the contract between the French company and the Ottoman Empire had been duly entered into and was therefore binding on Greece as the new sovereign of Crete.

It has also been argued that the reference to “ultimate sovereignty” in article III refers to the fact that Cuba will “ultimately” reacquire sovereignty over Guantanamo on the termination of the lease but that its sovereignty is suspended over the term of the lease.<sup>74</sup> Such an argument seems flawed in at least two respects.

Firstly, the term “ultimate sovereignty” in article II is used in the phrase “the continuance of the ultimate sovereignty of the Republic of Cuba”. Read in this context, the use the word “continuance” makes it clear that Cuba’s ultimate sovereignty over Guantanamo, which it undoubtedly had prior to the signing of the Lease Agreements, will continue during the term of the lease, albeit that the exercise of its sovereignty is drastically curtailed during this time.

Secondly, as already discussed, continuing Cuban sovereignty is evidenced by the fact that the United States is restricted from undertaking certain activities pursuant to the terms of the Lease Agreements.

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<sup>72</sup> *Lighthouses in Greece and Samos (Greece v France)*(1937) PCIJ Series A/B No 71, 127.

<sup>73</sup> *Lighthouses in Greece and Samos (Greece v France)*, above, 103.

<sup>74</sup> See Joseph Lazar “International Legal Status of Guantanamo Bay” (1968) 62 Am J Int’l L 730,735. See also *Gherebi v Bush* (2003) 352 F 3d 1278, 1293-1294 (9th Cir).



While the weight of authority discussed above seems to suggest that sovereignty of Guantanamo will remain with Cuba, the decision of the International Court of Justice in the *Case Concerning East Timor (Portugal v Australia)*<sup>75</sup> provides implicit support for the notion that sovereignty is not necessarily an indivisible concept (i.e. that a territory can potentially have more than one sovereign). In that case Portugal argued that Australia, by entering into a treaty with Indonesia regarding the delimitation of the East Timorese continental shelf (the "Timor Gap Treaty"), had interfered with the right of the East Timorese people to self determination and had improperly acknowledged Indonesian sovereignty over East Timor.

The International Court of Justice held that it was unable to consider the merits of Portugal's claim because Indonesia was not a party to the action. It considered that: "Australia's behaviour [could not] be assessed without first entering into the question of why it is that Indonesia could not lawfully have concluded the Timor Gap Treaty".<sup>76</sup>

The Court noted that East Timor continued to be self governing. However, arguably, by refusing to exercise jurisdiction without the presence of Indonesia, the Court has implicitly acknowledged Indonesia may have also acquired some of the sovereign rights over East Timor.

While the *East Timor* case could be seen as raising the possibility that both the United States and Cuba are sovereign at Guantanamo it is not necessary to consider this further. This is because, as discussed below, the rules against arbitrary detention forming part of international human rights law do not turn on where the detained person is held but rather on the level of control exercised by the detaining power.

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<sup>75</sup> *Case Concerning East Timor (Portugal v Australia)*(1995) 105 ILR 226.

<sup>76</sup> *Case Concerning East Timor (Portugal v Australia)*, above, 243.



### III INTERNATIONAL HUMAN RIGHTS LAW AND THE RULE AGAINST ARBITRARY DETENTION

Freedom from arbitrary detention is a fundamental principle of the law. The principle has its origins in the Magna Carta, a seminal document on personal liberty and civil governance. In particular, Article 29 proclaims that:<sup>77</sup>

[n]o free man shall be taken, or imprisoned, or be dispossessed of his Freehold, or Liberties, or free Customs, or be outlawed or exiled...but by lawful Judgment of his Peers, or by the Law of the Land.

Since its affirmation in the Magna Carta, the prohibition against arbitrary detention has become a firmly entrenched feature of both domestic and international systems of law.

At a domestic level, the rule against arbitrary detention can be seen in the form of the writ of habeas corpus. Habeas corpus is an administrative mechanism available for securing the release of an individual who is arbitrarily detained. The writ requires the person responsible for the detention to produce the prisoner before the Court and to stipulate the legal basis for why the prisoner has been detained. While habeas corpus has its origins in English law it also forms an integral part of the United States legal system,<sup>78</sup> and has been described as one of the "cornerstones" of the great legal tradition that the two countries share.<sup>79</sup>

At an international level, the rule against arbitrary detention is enshrined in the various conventions making up the body of international human rights law.

International human rights law developed from the ashes of the Second World War, through the vehicle of the United Nations. On 10 December 1948 the General Assembly of the United Nations adopted the Universal Declaration

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<sup>77</sup> Magna Carta 1 Stat. at Large (Runnigton rev. to Ruffhead, Charles Eyre et al, 1796), art 29.

<sup>78</sup> The right to habeas corpus is codified pursuant to the United States Constitution. See 28 USC §2241.

<sup>79</sup> *Abbasi v Secretary of State* (2003) 42 ILM 358, 374 (CA).



of Human Rights<sup>80</sup> which set out the fundamental rights that were attributable to all human beings. Article 9 of the Declaration provides that “[n]o one shall be subjected to arbitrary arrest, detention or exile”. The United Nations International Covenant on Civil and Political Rights<sup>81</sup> (ICCPR) codifies many of the rights set out in the Universal Declaration of Human Rights including the right not to be arbitrarily detained.<sup>82</sup> It also includes a right to habeas corpus.<sup>83</sup>

The rule against arbitrary detention is also a feature of regional human rights systems. For example, the American Convention on Human Rights<sup>84</sup> (American Convention) and the American Declaration on the Rights and Duties of Man<sup>85</sup> (American Declaration), both instruments of the Organisation of American States, and the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>86</sup> (ECHR), an instrument of the European Union, all include provisions against arbitrary detention<sup>87</sup> and giving persons detained a right to habeas corpus.<sup>88</sup>

As indicated in the first section of this paper, the Bush Administration has submitted that international human rights law will not apply for two reasons. Firstly, the Administration asserts that as those held at Guantanamo were detained in the course of an armed conflict, their capture and detention is governed by international humanitarian law, not international human rights law. Secondly they suggest that human rights law instruments, in particular the

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<sup>80</sup> Universal Declaration of Human Rights (10 December 1948) GA Res 217A(III) UN Doc A/810.

<sup>81</sup> International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171. The United States ratified the ICCPR on 8 June 1992.

<sup>82</sup> ICCPR, art 9(1).

<sup>83</sup> ICCPR, art 9(4).

<sup>84</sup> American Convention on Human Rights (22 November 1969) 1144 UNTS 123.

<sup>85</sup> American Declaration of the Rights and Duties of Man (1948) OAS Res XXX reprinted in Basic Documents Pertaining to Human Rights in the Inter American System OEA/Ser LV/II 82 doc 6 rev 1 at 17 (1992). The United States has ratified this convention.

<sup>86</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.

<sup>87</sup> See American Convention, art 7(3); American Declaration, art XXV; ECHR, art 5(1).

<sup>88</sup> See American Convention, art 7(6); American Declaration, art XXV; ECHR, art 5(4).



ICCPR, are not binding on the United States outside its own sovereign territory. Each of these arguments is considered below starting with the latter argument.

*A Are Human Rights Instruments binding on a State outside its own Sovereign Territory?*

Jurisdiction for the purposes of international human rights law is generally governed by the terms of the relevant convention under consideration. For example, article 2(1) of the ICCPR requires a member state to apply the treatment set out in the convention to "all individuals *within its territory* and subject to its jurisdiction".

Read literally, article 2(1) arguably suggests that a State is only accountable for violations under the ICCPR if those violations occurred within its own territory. However the United Nations Human Rights Committee (the "HRC"), the body responsible for monitoring State compliance with the ICCPR, has given the article a wider interpretation, so that it will also apply to violations of the covenant which a state's agent commits in the territory of another state.

In *Lopez Burgos v Uruguay*<sup>89</sup> members of the Uruguayan security forces kidnapped a Uruguayan national living in Argentina and forcibly returned him to Uruguay, where he was incarcerated. Proceedings were launched against Uruguay for various violations of the ICCPR including the article pertaining to arbitrary arrest and detention.

The HRC concluded the ICCPR would apply against Uruguay, even though the kidnapping and detention had not occurred on Uruguayan sovereign territory. It made the following statement regarding the issue of jurisdiction:<sup>90</sup>

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but this does not imply that the State party concerned

<sup>89</sup> *Lopez Burgos v Uruguay* No 52/1979 Views of the Human Rights Committee CCPR/C/13/D/52/1979 (29 July 1981).

<sup>90</sup> *Lopez Burgos v Uruguay*, above, para 12.3.



cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:

"1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

An individual opinion appended to the HRC decision provided further that:

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. ... Never was it envisaged ... to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.

The above two statements concerning jurisdiction were also included in the HRC decision in *Casariago v Uruguay*<sup>91</sup>, which had similar facts to the *Lopez Burgos* decision. In that case Uruguayan authorities had entered Brazil, seized a woman and brought her back to Uruguay for criminal proceedings. The HRC held that this violated the ICCPR "because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention."<sup>92</sup>

The Inter American Commission on Human Rights, which monitors compliance with the American Declaration, has made similar statements to the HRC regarding the extraterritorial application of human rights obligations. This is evidenced by the Commission's decision in *Coard v United States*.<sup>93</sup> In that case, several individuals commenced proceedings against the United States, alleging they had been arbitrarily detained in contravention of the American

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<sup>91</sup> *Casariago v Uruguay* No 56/1979 Views of the Human Rights Committee CCPR/C/13/D/56/1979 (29 July 1981).

<sup>92</sup> *Casariago v Uruguay*, above, para 11.

<sup>93</sup> *Coard v United States* Case 10.951 Inter-Am CHR Report No 109/99 OEA/Ser L/V/II.106 doc 6 rev (1999).



Declaration. The detentions were alleged to have occurred during a United States military incursion in Grenada. In its report the Commission endorsed the following principle with regard to jurisdiction:<sup>94</sup>

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

More recently, the Commission has reaffirmed the above principle in a letter to the United States requesting that precautionary measures are adopted in relation to the Guantanamo detainees.<sup>95</sup> The letter states:

The determination of a state's responsibility for violations of the international human rights of an individual turns not on the individual's nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state's authority and control.

Article 1 of the ECHR requires States to secure the freedom and rights of "everyone within their jurisdiction". The European Court has traditionally interpreted ECHR in a similar manner to other human rights instruments such as the ICCPR and the American Declaration. However, as discussed below, the recent decision of the Court in *Bankovic & Ors v Belgium*<sup>96</sup> seems to suggest that the ECHR has a more restricted jurisdictional scope compared to other human rights instruments.

In *Drozd and Janousek v. France and Spain*<sup>97</sup> the applicants, who were Spanish and Czech citizens, brought proceedings against France and Spain contending that their convictions for criminal offences by courts in the

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<sup>94</sup> *Coard v United States* Case 10.951 Inter-Am CHR Report No 109/99 OEA/Ser L/V/II.106 doc 6 rev (1999), para 37.

<sup>95</sup> Letter of Inter-American Commission on Human Rights to the United States requesting that the United States take precautionary measures in respect of the Detainees at Guantanamo Bay (2002) 41 ILM 532.

<sup>96</sup> *Bankovic & Ors v Belgium* (2001) 11 BHRC 435.



principality of Andorra and their subsequent imprisonment in France violated Articles 5(1) (regarding liberty and security) and 6 (regarding the right to a fair trial). Judges from both France and Spain sat in Andorran courts, and it was claimed that this meant that France and Spain had some responsibility for the decisions that were reached.

France and Spain raised preliminary objections to the admissibility of both claims. They submitted that the Court lacked jurisdiction to hear the claim because Andorra was not a party to the Convention. The Court noted that “[t]he term jurisdiction is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own authority.”<sup>98</sup> It held on the facts of the case, however, that there was nothing to support the view that Spanish or French authorities had influenced the decision reached by the Andorran Courts.

A similar conclusion with regard to jurisdiction was also reached in *Loizidou v Turkey*.<sup>99</sup> In that case the Applicant, a Greek Cypriot who owned land in Northern Cyprus, sought redress under various articles of the ECHR when she was denied access to her land as a result of the Turkish occupation of Northern Cyprus. Turkey argued the Court had no jurisdiction over the case because it did not concern acts and omissions of Turkey but those of the Turkish Republic of Northern Cyprus (TRNC), which Turkey submitted was an independent State.<sup>100</sup>

The Court disagreed holding that the Applicant’s loss of control over her land stemmed from the occupation of northern Cyprus by Turkish troops who had prevented her from gaining access to her property. In these circumstances it concluded that Article 1 of the Convention would apply to Turkey, even though

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<sup>97</sup> *Drozd and Janousek v. France and Spain* (1992) 14 EHRR 745.

<sup>98</sup> *Drozd and Janousek v. France and Spain*, above, 788.

<sup>99</sup> *Loizidou v Turkey (preliminary objections)* (1995) 20 EHRR 99.

<sup>100</sup> The United Nations Security Council had previously issued a resolution proclaiming that the TRNC was legally invalid and calling upon all members not to recognise any Cypriot state other than the Republic of Cyprus. See Security Council Resolution 541 (1983)



the acts complained of were committed outside Turkish sovereign territory. The Court made the following comments on the issue of jurisdiction:<sup>101</sup>

...the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action--whether lawful or unlawful--it exercises effective control of an area outside its national territory.

The decision in *Bankovic & Ors v Belgium*<sup>102</sup> resulted from the bombing by NATO forces of the Radio-Television Serbia (RTS) headquarters in Belgrade on 23 April 1999. The bombing occurred as part of NATO's campaign of air strikes directed against the Yugoslavia during the Kosovo conflict.

The Applicants, all Yugoslavian Nationals affected by the bombing, sought to bring proceedings against each of the NATO states that was also a Contracting State to the ECHR.<sup>103</sup> However as Yugoslavia was not a party to the ECHR, an issue arose regarding whether the Applicants had standing to bring proceedings under the ECHR. The Court made the following statement on the issue of jurisdiction:<sup>104</sup>

As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.

<sup>101</sup> *Loizidou v Turkey (preliminary objections)* (1995) 20 EHRR 99, 130.

<sup>102</sup> *Bankovic & Ors v Belgium* (2001) 11 BHRC 435.

<sup>103</sup> Those countries were: Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom.

<sup>104</sup> *Bankovic & Ors v Belgium* (2001) 11 BHRC 435, para 59.



The Court also noted, having discussed its previous decision in *Loizidou*, that the application of the ECHR extra-territorially would only be appropriate in exceptional circumstances:<sup>105</sup>

the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad is a consequence of military action or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

The Court accordingly concluded that the Applicants lacked standing to bring a claim under the ECHR.

The decision in *Bankovic* suggests that the ECHR is more restricted in application than many of its other international human rights counterparts. It will apply only in extreme circumstances where a State exercises *governmental function* over individuals extra-territorially. This would arguably suggest that if a case with facts similar to *Lopez Burgos v Uruguay* arose in a European context, it might not be afforded the protection of the ECHR.

Nevertheless, if a fact situation similar to that at Guantanamo arose in a European context, it would seem that the ECHR could still be successfully invoked. As indicated above, the United States exercises complete jurisdiction and control at Guantanamo by virtue of the lease agreement with Cuba. It accordingly exercises all of the public powers normally exercised by a Government. That level of control would obviously also be sufficient to satisfy the lesser jurisdictional requirements required under the ICCPR and American Declaration.

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<sup>105</sup> *Bankovic & Ors v Belgium* (2001) 11 BHRC 435, para 71.



***B Is the approach adopted with regard to jurisdiction under international human rights law consistent with the approach that the English courts have adopted to jurisdiction in cases on habeas corpus?***

As mentioned earlier, habeas corpus, while forming an integral part of international human rights law, has its origins in English common law. It is accordingly useful to consider whether the approach to jurisdiction adopted under international human rights law is consistent with the approach that the English courts have adopted to jurisdiction in cases on habeas corpus.

One of the earliest cases to consider the jurisdictional ambit of habeas corpus was the decision of the Kings Bench in *Rex v Cowle*.<sup>106</sup> The Court was asked to issue a writ of certiorari to the town of Berwick to return indictments against the defendants. England had acquired Berwick by conquest from Scotland. However Berwick had not been formally incorporated within England and was governed by its own local charter.

The Kings Bench held that the writs of certiorari would issue. This was because the level of power and control the Crown exercised over Berwick was sufficient to make it a dominion. Lord Mansfield CJ, in delivering the judgment of the Court, made the following comments regarding the jurisdiction of the English courts to issue prerogative writs, such as habeas corpus:<sup>107</sup>

Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England.

There is no doubt as to the power of this court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the Throne of England, this court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the Plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to

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<sup>106</sup> *Rex v Cowle* 2 Burr 834; 97 ER 587 (KB).

<sup>107</sup> *Rex v Cowle*, above, 599.



Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the Treaty of Bretigny.

The Kings Bench had earlier concluded that Berwick would be a dominion of the Crown:

But, if Berwick was to be deemed a dominion of the Crown, and no part of the realm of England; it may be under the control and superintendence of the King in this court.

The constitution given to Berwick by the Crown of England, approved by Parliament, shows it necessarily is so; much stronger than in the case of counties palatine or Wales. The people of Berwick have not *jura regalia*, or a complete jurisdiction within themselves, like a county palatine: they have no sovereign courts of the King within themselves, like Wales. They are made a free borough, to hold in burgage, by rent. Such a creature of law must necessarily be collected, as part of a kingdom, and subordinate.

In *Ex parte Anderson*<sup>108</sup> the petitioners applied to the Queens Bench for a writ of habeas corpus to be issued to the sheriff of the county of York in Canada and the keeper of the gaol at Toronto. This was despite the fact that Canada had its own local independent judicature with full power to grant the same relief. The petitioners argued, however, that the Crown, through the Courts at Westminster, had the power to issue a habeas writ to any part of the Queens dominions, and therefore to Canada.

The Queens Bench reluctantly agreed with the petitioner's view that the writ should issue. They stated:<sup>109</sup>

We have considered this matter; and the result of anxious deliberations is that we think the writ ought to issue. At the same time, we are sensible of the inconvenience which may result from such a step; and that it may be felt to be inconsistent with that higher degree of colonial independence, both legislative and judicial, which happily exists in modern times. Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the rights of the superior Courts at Westminster to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queens dominions.

The *Ex parte Anderson* decision provides an illustration of the broad territorial scope of the habeas writ and of the fact that the writ was, ignoring any

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<sup>108</sup> *Ex Parte Anderson* (1861) 3 El & El 487; 121 ER 525 (QB).

<sup>109</sup> *Ex Parte Anderson* (1861) 3 El & El 487, 494-495; 121 ER 525, 527-528 (QB).



legislative restrictions, treated as running in any part of the colonies or dominions of the Crown.

The English legislature's response to the *Ex parte Anderson* decision was to enact legislation, in the form of the Habeas Corpus Act 1862. The preamble to the Act stated that it was "an act respecting the issue of writs of habeas corpus out of England into Her Majesty's possessions abroad." Section 1 of the Act provided:

No writ of habeas corpus shall issue out of England, by the authority of any Judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the writ, and to ensure the due execution thereof through such colony and dominion.

The effect of the above provision was to deny colonies and foreign dominions access to English Courts where the Crown had already established courts with the ability to issue the habeas writ. However implicitly this suggests that where the courts in a British colony or foreign colony were unable to issue and enforce habeas writs the right to petition the English Courts for relief would be preserved.

In *R v Earl of Crewe, Ex Parte Sekgome*<sup>110</sup> the King's Bench was required to consider whether a habeas writ would issue to the British Protectorate of Bechuanaland. Bechuanaland was not part of the Crown's territorial dominions, nor did the Crown enjoy any sort of sovereignty over it. The Crown did, however, control and administer the protectorate by virtue of a treaty. The writ was sought on behalf of an individual detained in the Protectorate pursuant to a proclamation allegedly made under powers confirmed by Order in Council made in accordance with the Foreign Jurisdiction Act 1890, on the grounds that the person's detention was necessary for the preservation of peace within the Protectorate.

The Court of Appeal (Vaughan Williams, Farwell and Kennedy LJJ) dismissed the habeas petition on the basis that the Order in Council had been

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<sup>110</sup> *R v Earl of Crewe, Ex Parte Sekgome* [1910] 2 KB 576 (CA).



validly made and hence Sekgome's detention was lawful. It was accordingly not strictly necessary for the judges to reach concluded views on territorial scope of the habeas writ. Nevertheless, all three judges made a number of obiter comments regarding whether the habeas writ was limited to territorial dominions of the Crown, or conversely whether it would issue in any territory over which the Crown enjoyed a sufficient level of control.

Kennedy LJ was of the view that the habeas writ would not issue beyond territorial dominions of the Crown. However both Vaughan Williams and Farwell LJJ disagreed. Vaughan Williams LJ stated:<sup>111</sup>

The judgment of Cockburn C.J. in *Ex parte Anderson* makes it clear that before the statute of 1862 the writ would have run in the colonies and other the King's territorial dominions and in countries conquered by the King, such as Calais, and could have been ordered to issue by the Court of King's Bench in England. This being so, I ask myself why, if the writ of habeas can be issued to the King's territorial dominions, the writ should not be ordered to go to any country or place under the subjection of the Crown of England whenever it is suggested to the Court in England that a subject of the Crown is illegally imprisoned.

...

The Crown, with the concurrence of Parliament, has exercised jurisdiction throughout the Bechuanaland Protectorate and has appointed judges and police officers to execute their judgment, and has established Courts which the Crown contends, I think wrongly, have power to issue a writ of habeas and enforce it; in short, has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas?

Similarly, Farwell LJ observed:<sup>112</sup>

Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ.

In *re Ning Yi-Ching*<sup>113</sup> the Court was asked to consider whether the English Courts had the jurisdiction to issue a habeas writ in respect of persons detained in

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<sup>111</sup> *R v Earl of Crewe, Ex Parte Sekgome* [1910] 2 KB 576, 605.



the British Concession at Tientsin.<sup>114</sup> This case is of particular significance for present purposes because both the British Concession at Tientsin and the United States Naval Base at Guantanamo were acquired pursuant to lease.

The Tientsin lease gave the British certain rights of administration and control in respect of the Tientsin Concession. These included allowing the British to maintain a British Supreme Court in Tientsin. The British were also given jurisdiction over their own subjects within the Tientsin concession but not over other nationalities or other Chinese subjects who committed offences against British subjects.

In 1939 four Chinese subjects were detained by the British authorities in the Tientsin Concession on certain criminal charges. They were placed in a British-run gaol within the Concession with a view to being handed over to the local district court for prosecution. A writ of habeas corpus was sought on behalf of the detained men. It was directed to the British Foreign Secretary and to certain officials at Tientsin.

Cassels J in the Vacation Court held, however, that the writ would not issue for want of jurisdiction. The Judge was reported as follows:<sup>115</sup>

He had listened in vain for a case in which the writ of habeas corpus had issued in respect of a foreigner in a part of the world which was not part of the King's dominions or realm. In Tientsin Britain had merely acquired a lease of land and had been granted by treaty the right to administer justice to its own subjects. He was compelled to hold that in the circumstances of the present case the writ could not issue.

It has been argued that the decision in *re Ning Yi-Ching* was incorrectly decided. This view stems from the fact that Cassels J seemed to be influenced by the view advanced by Kennedy LJ in *Ex Parte Sekgome* that habeas would not

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<sup>112</sup> *R v Earl of Crewe, Ex Parte Sekgome* [1910] 2 KB 576 (CA), 618.

<sup>113</sup> *re Ning Yi-Ching* (1939) 56 TLR 3 (Vac Ct).

<sup>114</sup> Tienstin is located 100 km south-east of Beijing and 50 km inland of the yellow sea and is now the third largest city in China. See David Clark & Gerard McCoy *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford University Press, New York, 2000) 151.

<sup>115</sup> *re Ning Yi-Ching* (1939) 56 TLR 3, 6 (Vac Ct).



issue beyond territorial dominions of the Crown. As noted above, however, Kennedy LJ was in the minority on that issue; both Vaughan Williams and Farwell LJJ reached the opposite conclusion.

In any event, the *re Ning Yi-Ching* decision appears distinguishable on its facts from the situation at Guantanamo. Under the Tienstin lease the British only acquired limited sovereign rights regarding the administration of justice over its own nationals within the leased area. In contrast, as previously noted, the United States exercises complete jurisdiction at Guantanamo and has the right to administer justice in respect of all persons at Guantanamo, regardless of nationality.

In *Ex Parte Mwyena*<sup>116</sup> the English Court of Appeal was asked to consider whether the habeas writ would issue to the British Protectorate of Northern Rhodesia. As was the case with the Bechuanaland Protectorate in *Ex Parte Sekgome*, Northern Rhodesia was not a territorial dominion of the Crown but the Crown, nevertheless, had control and jurisdiction over the Protectorate by virtue of a treaty.

The crown contended that English Courts only had jurisdiction to issue habeas writs to territorial dominions of the Crown, and consequently not to Northern Rhodesia. This contention was unanimously rejected by the English Court of Appeal (Lord Evershed MR, Romer and Sellers LJJ) who concluded that the writ would issue to any place under the subjection of the crown, including Northern Rhodesia. Lord Evershed MR stated:<sup>117</sup>

...But, as it seems to me, if upon a proper investigation of the facts, it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British colony or a country acquired by conquest, then, in conformity with the nature of the writ as expounded by the learned authors to whom I have referred, Bacon, Blackstone, Coke, Mansfield, I see for my part no reason for denying jurisdiction to the court.

...

jurisdiction ought not be limited to territories outside England, which are strictly labelled "colonies or foreign dominions," but will extend to

<sup>116</sup> *Ex Parte Mwyena* [1960] 1 QB 241.

<sup>117</sup> *Ex Parte Mwyena* [1960] 1 QB 241, 303.



territories which, having regard to the extent of the dominion in fact exercised, can be said to be "under the subjection of the Crown" and in which the issue of a writ will be regarded (In Lord Mansfield's words) as "proper and efficient". In other words I would hold that we ought not in this case to lay it down, in disregard (as it seems to me) of what has been said by the highest authorities, that the jurisdiction is limited to colonies and foreign dominions strictly so called...

In a similar vein Sellers LJ noted:<sup>118</sup>

The submission of the Attorney-General and Mr. Cumming-Bruce was that there was a strict territorial boundary which was conclusive as to the scope of the writ.

If this restriction had throughout history always been the confines of England and the normal territorial boundaries of the court, the argument would have been compelling. But once the writ has gone beyond our shores, as it has, and outside the normal jurisdiction of the court, why should the writ be limited by territorial boundaries? The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it.

The above cases provide evidence, that as a matter of English law, jurisdiction to grant habeas relief will exist whenever an individual is detained in territory over which the Crown exercises a sufficient level of authority and control. Whether the Crown exercises technical sovereignty over the territory is irrelevant. The approach to jurisdiction under English common law is therefore entirely consistent with the approach adopted under international human rights law.

Accordingly, it would appear that international human rights law should apply in respect of the detainees at Guantanamo since they are under the complete authority and control of the United States. The Bush Administration disputes this, however, contending that because the detainees were captured as part of an armed conflict, international human rights law will not apply. This argument is considered below.

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<sup>118</sup> *Ex Parte Mwyena* [1960] 1 QB 241, 309.



C *Does International Human Rights Law Apply in Times of Emergency or War?*

In times of war and emergency the executive assumes power to restrict personal freedom in the name of security. The role of the courts consequently becomes particularly important since they stand between the government and individuals. However, historically, domestic courts have “played a less than glorious” role in times of crisis, on account of their tendency to defer to the executive on matters of discretion.<sup>119</sup>

A classic example of this tendency comes from the decision of the House of Lords in *Liversidge v Anderson*.<sup>120</sup> In that case a person was detained pursuant to a defence regulation which provided that the Home Secretary could order a detention “if he has reasonable cause to believe” the person to be of hostile origins or associations. The detainee sought habeas relief on the grounds that, objectively, the Home Secretary did not have reasonable cause for the detention.

Lord Atkin endorsed an objective interpretation of the provision: the Home Secretary needed to have reasonable grounds for the detention. He noted that “amid the clash of arms, the laws are not silent”<sup>121</sup> and cautioned that judges should not when facing “claims involving the liberty of the subject show themselves more executive minded than the executive”.<sup>122</sup> Unfortunately Lord Atkin’s colleagues, who formed the majority, disagreed holding that the application of the provision only required the Home Secretary *to think* he had reasonable grounds for the detention. Thus the decision precluded virtually any review of the Home Secretary’s discretion to detain. Subsequent decisions of the House of Lords have, however, endorsed Lord Atkin’s view.<sup>123</sup>

<sup>119</sup> Lord Steyn “Guantanamo Bay: The Legal Black Hole” (27th FA Mann Lecture, London, 25 November 2003).

<sup>120</sup> *Liversidge v Anderson* [1942] AC 206 (HL). See also *Greene v The Secretary of State for Home Affairs* [1942] AC 284 (HL).

<sup>121</sup> *Liversidge v Anderson* [1942] AC 206, 244 (HL).

<sup>122</sup> *Liversidge v Anderson*, above, 244.

<sup>123</sup> See *Nakkuda Ali v Jayaratne* [1951] AC 66. Similarly, Lord Reid has described *Liversidge* as a “very peculiar decision”. See *Ridge v Baldwin* [1964] AC 40, 71 (HL).



The historical trend of deferring to the executive in times of emergency extends to both sides of the Atlantic. In *Korematsu v United States*<sup>124</sup> the petitioner was arrested for being in a place from which all persons of Japanese ancestry were excluded pursuant to a military order. The petitioner, who was born in the United States but of Japanese descent, sought to challenge the constitutionality of that order on the basis that it amounted to discrimination on the basis of race.

The Supreme Court held that, while "legal restrictions which curtail the civil rights of a single racial group are immediately suspect",<sup>125</sup> the order was not unconstitutional. Justice Black who delivered the majority judgment stated:<sup>126</sup>

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue... Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders--as inevitably it must-- determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot--by availing ourselves of the calm perspective of hindsight--now say that at that time these actions were unjustified.

The conviction received by the petitioner was subsequently overturned in 1984 on the basis that the government had withheld information from the courts when they were considering the critical question of military necessity.<sup>127</sup>

Unlike the availability of habeas corpus under domestic law, which can be limited by domestic legislation, the availability of habeas corpus under international human rights law will be determined by the particular human rights body charged with the administration of the convention under consideration. A

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<sup>124</sup> *Korematsu v United States* (1942) 323 US 214.

<sup>125</sup> *Korematsu v United States*, above, 223-224.

<sup>126</sup> *Korematsu v United States*, above, 216.

<sup>127</sup> See *Korematsu v United States* (1984) 584 F Supp 1406 (ND Cal).



discussion of the approaches that the major human rights bodies have adopted on the issue of habeas corpus in emergency situations, follows.

Article 4(1) of the ICCPR allows states to derogate from certain rights contained in the convention, but only in strictly defined circumstances.<sup>128</sup> For derogation to be possible two conditions must be met: there must be a situation which amounts to a public emergency that threatens the life of the nation, and the state party must have officially proclaimed that a state of emergency exists.<sup>129</sup> In addition, pursuant to article 4(2) certain rights are deemed to be non-derogable in any circumstances. These include the right to life, the right against torture, the right against slavery, and the right to freedom of thought, conscience and religion.

The HRC has issued a detailed General Comment on the application of Article 4. The General Comment notes that states may in no circumstance:<sup>130</sup>

invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, *through arbitrary deprivations of liberty* or by deviating from principles of fair trial, including the presumption of innocence.

In addition the HRC has said that:<sup>131</sup>

[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

Read together, these comments suggest that even in a state of emergency habeas corpus will be available, as it provides a necessary safeguard against abuse of the non-derogable rights set out in Article 4(2) of the convention.

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<sup>128</sup> *Millian Sequeira v Uruguay* CCPR/c/10//d/6/1977 (1980) para 14.

<sup>129</sup> ICCPR, art 4(1).

<sup>130</sup> Human Rights Committee "General Comment No 29 States of Emergency (article 4)" UN Doc CCPR/C/21/Rev 1/Add 11 (2001), para 11 (emphasis added).

<sup>131</sup> Human Rights Committee "General Comment No 29 States of Emergency (article 4)" UN Doc CCPR/C/21/Rev 1/Add 11 (2001).



The Inter-American Court of Human Rights concluded similarly in an Advisory Opinion on whether the right to habeas corpus under the American Convention on Human Rights can be suspended in times of emergency.<sup>132</sup> The Court stated that habeas corpus could not be suspended in any circumstances because it was a “judicial guarantee essential for the protection of certain non-derogable rights set out in the Convention.”<sup>133</sup>

The Inter American Commission on Human Rights has also taken the view that habeas corpus is non-derogable. For instance in *Coard v United States* the Commission noted that:<sup>134</sup>

Supervisory control over a detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority. This is an essential rationale of the right of habeas corpus, a protection which is not susceptible to abrogation.

Based on the above, it appears that habeas corpus, for the purposes of international human rights law, is a fundamental, largely non-derogable, right for the purposes of international human rights law which applies equally in times of peace and times of emergency. This arguably suggests that the Guantanamo detainees should be entitled to some level of protection, under international human rights law; including protection from arbitrary detention.

The United States has, of course, challenged this conclusion asserting that only international humanitarian law applies with respect to the situation at Guantanamo. The applicability of international humanitarian law is considered below.

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<sup>132</sup> Inter-American Court of Human Rights “Habeas Corpus in Emergency Situations” Advisory Opinion OC-8/87 (30 January 1987). It should be noted that the United States has never become a party to the American Convention. It nevertheless provides further support for the view that for the purposes of International Human Rights law, the right of habeas corpus cannot be suspended. OAS can advise

<sup>133</sup> Inter-American Court of Human Rights “Habeas Corpus in Emergency Situations” Advisory Opinion OC-8/87 (30 January 1987), art 23.

<sup>134</sup> *Coard v United States* Case 10.951 Inter-Am CHR Report No 109/99 OEA/Ser L/V/II.106 doc 6 rev (1999), para 55 (emphasis added).



#### *IV HUMANITARIAN LAW*

The law of war, also known as the law of armed conflict or humanitarian law, is a branch of international law which has evolved through centuries of efforts to mitigate the harmful effects of war. Recognising the impossibility of eliminating warfare altogether, states have agreed to abide by rules limiting their conduct, in return for the enemy's agreement to abide by the same rules.<sup>135</sup>

The laws of war can be divided into two subsets. The first subset is made up of the laws of engagement during times of conflict and is based on the key tenets of military necessity and proportionality.<sup>136</sup> The second subset is made up of laws relating to the treatment of prisoners captured in the course of war.<sup>137</sup> For present purposes only this latter subset is of relevance.

Today's humanitarian law is the product of a long period of evolution. Originally prisoners of war ("POW's") were the object of their captor's mercy or cruelty. A conquering state did what it wanted with its prisoners and answered to nobody for its decisions.<sup>138</sup> By the eighteenth century, however, it came to be accepted that captivity was essentially a device to prevent a POW from returning to the war, and further, that a POW "was not a criminal but a man pursuing an honourable calling who had had the misfortune to be captured."<sup>139</sup> By the early twentieth century the key principles of humanitarian law had begun to be codified: first through the Hague Regulations, then through the Geneva Convention of 1929 and finally through the four Geneva Conventions of 1949. The latter four conventions form the basis of international humanitarian law today.

The Geneva Conventions of 1949 provide a comprehensive code for the treatment of detainees in an armed conflict. The four conventions provide

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<sup>135</sup> Jennifer Elsea "Treatment of Battlefield Detainees in the War on Terrorism" (11 April 2002) Congressional Research Service, 6.

<sup>136</sup> Elsea, above, 6.

<sup>137</sup> Elsea, above, 6.

<sup>138</sup> G Draper "The Geneva Conventions of 1949" (1965 I) 114 *Recueil Des Cours* 64, 101.

<sup>139</sup> Draper, above, 101.



protections for four different classes of people: the military wounded and sick in land conflicts; the military wounded, sick and shipwrecked in conflicts at sea; military persons and civilians accompanying the armed forces in the field who are captured and qualify as prisoners of war (the "POW Convention"); and civilian non-combatants who are interned or otherwise found in the hands of a party (e.g. in a military occupation) during an armed conflict.

As indicated in the first section of this paper, the Bush Administration has contended that neither Taliban nor Al Qaeda detainees qualify for POW status under the POW Convention. The rationale for the Administration's view was set out in a Fact Sheet released by the White House on 7 February 2002. The Fact Sheet stated:<sup>140</sup>

- Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.
- Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.

The position adopted by the United States, regarding the operation of the POW Convention, gives rise to a number of issues including: when the Convention will apply, what is meant by the term "prisoners of war" and what mechanisms are available for determining whether an individual qualifies as a POW. Each of these issues is considered below together with the residual rights that the detainees will have under humanitarian law if the POW Convention does not apply.

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<sup>140</sup> See Fact Sheet: Status of Detainees at Guantanamo (7 February 2002) available at <<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>> (last accessed 27 February 2004).



A *When will the POW Convention be applicable?*

All four Geneva Conventions share an identical article 2. The first paragraph of that article sets out when each convention will apply. It provides:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Thus applicability of each convention will turn on whether there is a declared "war or other armed conflict" which has arisen between two or more "High Contracting Parties".

"War" has traditionally been defined as a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.<sup>141</sup> Central to the concept of war is the premise that it must be between states. For example, one treatise has observed that:<sup>142</sup>

To be war, the contention must be *between States*...A contention may, of course, arise between the armed forces of a State and a body of armed individuals, but this is not a war.

The Bush Administration has repeatedly made the assertion that the United States is conducting a war against terror, and more particularly, the Al Qaeda terrorist network.<sup>143</sup> For example, in his 2004 State of the Union Address the President stated that:<sup>144</sup>

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted, and sent to prison. But the matter was not settled. The terrorists were still

<sup>141</sup> H Lauterpacht (ed) *Oppenheims International Law: A Treatise (Volume II: Disputes War and Neutrality)* (7 ed, Longmans, London, 1963), 202.

<sup>142</sup> Lauterpacht, above 203 (emphasis in the original). See also Jordan J Paust "War and Enemy Status after 9/11: Attacks on the Laws of War" (2003) 28 Yale LJ 325.

<sup>143</sup> See for example: The State of the Union Address (20 January 2004) available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

<sup>144</sup> State of the Union Address (20 January 2004) Available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last accessed 1 March 2004)



training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.

However the “war against terror” would not appear to constitute a “war” for the purposes of international law since it lacks the essential requirement of being a contention between states. Al Qaeda is a clandestine organisation, consisting of elements in many countries composed of people of various nationalities. It is dedicated to the advancement of certain political and religious agendas by committing terrorist acts directed against the United States and other western nations.<sup>145</sup> As such, it does not constitute a State, is not a subject of international law, and lacks an international legal personality.<sup>146</sup>

Moreover, Al Qaeda is not a High Contracting Party to the Geneva Conventions and nor could it ever be. The POW Convention would consequently not be applicable in respect of the Al Qaeda terrorist network itself; although, as discussed below, individual members of Al Qaeda might arguably be able to rely on the Convention depending on the circumstances surrounding their capture.

The applicability of the POW convention to the Taliban is more straightforward. The United States military actions in Afghanistan occurred after the Taliban, as Afghanistan’s effective government, refused to expel the Al Qaeda network and instead provided them with sanctuary.<sup>147</sup> Consequently the United States’ military action against the Taliban would appear to constitute a “war” for the purposes of international law, being a contention between the governments of the United States and Afghanistan. Moreover since both the United States and Afghanistan are High Contracting Parties to the Geneva Conventions it would appear that the POW Convention should apply in respect of the Taliban detainees.

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<sup>145</sup> George H Aldrich “The Taliban, Al Qaeda, and the Determination of Illegal Combatants” (2002) 96 Am J Int’l L 891,893.

<sup>146</sup> Aldrich, above, 893.

<sup>147</sup> Aldrich, above, 893.



However whether the Taliban detainees are entitled to the protections set out in the Convention will depend on whether they can be categorised as being "prisoners of war". That issue is considered below.

### *B "Prisoners of War"*

POW's enjoy a privileged status under international law. There are a number of advantages which flow from POW status including the right to humane treatment,<sup>148</sup> the obligation to furnish only very limited information to the detaining power,<sup>149</sup> the right to be accommodated in accommodation of the same standard as that enjoyed by members of the detaining power in the same area<sup>150</sup> and the right to be released from captivity, without delay, on the cessation of hostilities.<sup>151</sup> However the key advantage is that of combat immunity. A detainee cannot be prosecuted for any lawful belligerent acts that he or she committed during the course of armed conflicts against legitimate military targets.<sup>152</sup>

Article 4 defines the meaning of the term "prisoners of war" for the purposes of the POW convention. Subparagraphs 4A(1) and 4A(2) provide that the term "prisoners of war" will include:

- (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.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory,

<sup>148</sup> Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 13.

<sup>149</sup> Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 17. Pursuant to article 17 a POW is only obliged to give his or her surname, first names and rank, date of birth, and army, regimental, personal or serial number or failing this equivalent information. Moreover, all forms of coercion to elicit other information are expressly prohibited.

<sup>150</sup> Geneva Convention Relative to the Treatment of Prisoners of War, above, art 25.

<sup>151</sup> Geneva Convention Relative to the Treatment of Prisoners of War, above, art 118.

<sup>152</sup> Article 87 of the POW convention provides that combatants "may not be sentenced ... to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." To similar effect article 99 states that "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." Read together, these articles indicate that a State in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war.



even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

The United States has asserted that Taliban detainees do not qualify for POW status under the POW convention. The White House Press Secretary has offered the following justification for this stance:<sup>153</sup>

Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

There are, of course, obvious strategic advantages to the United States which flow from the denial of POW status to the Guantanamo detainees. In particular, the granting of POW status would have the potential to severely curtail the effectiveness of interrogations carried out by the US on detainees at Guantanamo. As indicated above, article 17 only obliges prisoners to give a few personal facts such as name, rank and serial number.

However the requirements referred to by the Press Secretary, of having a fixed distinctive sign recognizable at a distance and conducting operations in accordance with the laws of war, are only explicit features of article 4A(2). Pursuant to article 4A(1), all that must be shown is that the detainees are members of the "armed forces" of a party to the conflict (or of militia or

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<sup>153</sup> Statement by the Press Secretary on the Geneva Convention (7 May 2003). Available at <[www.whitehouse.gov/news/releases/2003/05/20030507-18.html](http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html)> (last accessed 31 January 2004).



volunteer corps forming part of those armed forces). Accordingly, based on a purely literal interpretation of article 4A(1) Taliban troops, as members of the armed forces of the effective government of Afghanistan would, *prima facie*, appear to qualify for POW status.

Arguments have been raised, however, that article 4A(1) should be augmented by the four requirements set out in article 4A(2) as these requirements are inherent requirements of any States' armed forces.<sup>154</sup> Indeed the official commentary on article 4 provides implicit support for this proposition. In the context of its discussion of paragraph 4A(1) it provides the following explanation regarding why the paragraph does not specify any sign which members of armed forces must have for recognition:<sup>155</sup>

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.

Thus the commentary appears to take the view that there was no need to explicitly specify signs for armed forces, as there was already an obligation for a state to ensure that its armed forces are distinguishable from its civilians.

The applicability of the POW convention to members of the Taliban has also received judicial consideration by the United States District Court in *United States v Lindh*.<sup>156</sup> In that case the defendant, a United States citizen who was a member of the Taliban, sought to invoke the POW convention to defend charges of conspiring to murder nationals of the United States. The Court held that a member of the Taliban could not qualify as a lawful combatant under the POW convention because the Taliban did not meet the four criteria contained in article

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<sup>154</sup> See for example: Ruth Wedgwood "Al Qaeda, Terrorism, and Military Commissions" (2002) 96 Am J Int'l L 328,335.

<sup>155</sup> ICRC Commentary on the Geneva Convention relative to Prisoners of War <<http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=3#3>> (last accessed 4 March 2004).

<sup>156</sup> *United States v Lindh* (2002) 212 F Supp 2d 541 (ED Va).



4A(2).<sup>157</sup> The court made no reference to the potential applicability of article 4A(1).

It has been said that the four requirements specified in article 4A(2) are reflective of customary international law in defining the characteristics of any lawful armed force.<sup>158</sup> However it seems counter-intuitive to contend that Taliban troops, although fighting on behalf of the effective government of Afghanistan at the time of the United States intervention, are unable to be regarded as being members of the Afghan armed forces.<sup>159</sup> Moreover it is arguable that the government of Afghanistan has the right, as a sovereign nation, to determine how its armed forces should be run in any event.<sup>160</sup>

Even though the Al Qaeda terrorist network could never be a party to the POW convention *per se*, arguments can nevertheless be made that its members might qualify for POW status. For example, it has been reported that at least one Al Qaeda battalion was incorporated into the Taliban combat forces.<sup>161</sup> It accordingly might be argued that members of that battalion, by virtue of their close relationship with Taliban forces, constituted part of the "armed forces" of Afghanistan and should consequently be accorded POW status pursuant to article 4A(1).

Similarly, even if Al Qaeda is not part of the "armed forces" of Afghanistan its members could still qualify as POWs under article 4A(2) if they could be said to "belong to" a party to the conflict (i.e. Afghanistan) and meet the other criteria set out in that article. The United States has asserted, however, that Al Qaeda

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<sup>157</sup> *United States v Lindh*, above 558.

<sup>158</sup> *United States v Lindh*, above.

<sup>159</sup> It is also noteworthy that historically, the most important consideration given to POW status has been whether there is evidence that the prisoner(s) serve a government or political entity that exercises authority over them. See Jennifer Elsea "Treatment of Battlefield Detainees in the War on Terrorism" (11 April 2002) Congressional Research Service 22.

<sup>160</sup> Lawrence Azubuike "Status of Taliban and Al Qaeda Soldiers: Another Viewpoint" (2003) 19 Connecticut Journal of International Law 127,147.

<sup>161</sup> Douglass Cassel "What defines a POW? It's not an easy call" (3 February 2002) *Chicago Tribune* Chicago C1.



has not acted in accordance with the laws of war.<sup>162</sup> If this assertion is accepted then article 4A(2) will not apply to Al Qaeda forces, since it only applies where the relevant party has operated in accordance with the laws of war.

### *C Article Five Tribunals*

In cases of doubt regarding whether a prisoner is entitled to POW status, article 5 of the POW Convention provides that the prisoner shall enjoy the protections afforded therein until the prisoner's status is determined by a "competent tribunal".<sup>163</sup> The Convention makes no attempt to define such a tribunal.

To date, no "competent tribunal" has ever been convened by the US to consider whether any of the Guantanamo detainees might qualify for POW status. The US has offered the following rationale for not convening tribunals:<sup>164</sup>

Members of the Taliban and al Qaida detained at Guantanamo are not entitled to Prisoner of War status under the Third Geneva Convention, and there is no need to convene an Article 5 tribunal to make individualized status determinations. Article 5 does not require a party to the Geneva Convention to convene tribunals to consider status determinations unless there is doubt. For members of al Qaida and the Taliban, captured while engaged in ongoing hostilities or directly supporting hostile operations, there is no doubt about their status. Article 5 states that "[s]hould any doubt arise," detainees "shall enjoy the protection of the [Geneva Convention] until such time as their status has been determined by a competent tribunal."

Essentially the US has argued that the obligation to convene a tribunal only arises where there is doubt regarding a prisoner's status and that there is no doubt regarding the status of those detained at Guantanamo; they are all "enemy

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<sup>162</sup> Letter from the Permanent Mission of the United States to the Secretariat of the United Nations Commission on Human Rights (2 April 2003). Available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9a14ba739a04fb2fc1256d050035483c?Opendocument>> (last accessed 22 February 2004).

<sup>163</sup> Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 5.

<sup>164</sup> Letter from the Permanent Mission of the United States to the Secretariat of the United Nations Commission on Human Rights (2 April 2003) <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9a14ba739a04fb2fc1256d050035483c?Opendocument>> (last accessed 22 February 2004).



combatants". However this argument appears difficult to accept for a host of reasons.

First and foremost, it appears likely that a number of those detained at Guantanamo have no connection with either the Taliban or al Qaeda. Indeed one military official at Guantanamo has been reported as saying that some of the detainees were victims of circumstance and probably innocent.<sup>165</sup> There have also been reports of detainees who were the victims of bounty hunters, who were paid in dollars after abducting "terrorists" and denouncing them to the US military.<sup>166</sup> Other detainees were arrested after getting into land disputes.<sup>167</sup>

One of the reasons that the US have contended that the Taliban detainees do not qualify for POW is because they have failed to distinguish themselves from the civilian population of Afghanistan. However given the US assertion that the Taliban were not distinguishable from the general civilian population of Afghanistan there must surely be a possibility that some of those detained were simply civilians who were caught in the wrong place at the wrong time.

In addition, as discussed earlier, there appears to be some doubt regarding correct interpretation of article 4(1)(A) of the POW convention. Such doubts would obviously need to be resolved before it would be possible to make a definitive determination regarding whether detainees would qualify for POW status.

Against this background, the failure of United States to convene an article 5 tribunal raises grave concerns under humanitarian law and suggests that at least

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<sup>165</sup> Katharine Q Seelye "A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp (16 March 2002) *The New York Times* New York A8. Similarly, it has been reported that 64 detainees innocent of any terrorist connection have already been released from Guantanamo with authorities admitting there may be many more to come. See David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 58, 60.

<sup>166</sup> David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 88.

<sup>167</sup> David Rose "Operation Take away my Freedom: Inside Guantanamo Bay" (January 2004) *Vanity Fair* New York 88.



some of those at Guantanamo should be granted POW status until their status has been determined by a “competent tribunal”.

*D Other protections available under the Geneva system*

Where a detainee fails to qualify as a POW under the POW convention, they will generally be protected by the Fourth Geneva Convention (the “Civilian Convention”). The Civilian Convention provides protections similar to those set out in the POW Convention. However there is one important difference. Civilians who participate in conflict are not entitled to combat immunity and therefore are able to be held legally accountable for any belligerent acts they have committed. Traditionally such a person has been regarded as an “unlawful combatant”.<sup>168</sup>

The prosecution of unlawful combatants is dealt with according to the laws of the criminal jurisdiction in which the acts occurred.<sup>169</sup> The accused is entitled to a number of trial rights as set out in the Convention. These include the right to a regular trial,<sup>170</sup> the right to counsel of the accused’s choice who must be allowed free access to the accused and provided with all of the necessary facilities for preparing a defence,<sup>171</sup> the right to call witnesses<sup>172</sup> and the right of appeal to the extent that this is provided for by the laws applied by the court.<sup>173</sup>

Individuals to whom the civilian convention applies are referred to as “protected persons”. The meaning of that term is defined in article 4 to include:

those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

<sup>168</sup> Jennifer Elsea “Treatment of Battlefield Detainees in the War on Terrorism” (11 April 2002) Congressional Research Service 11.

<sup>169</sup> Jennifer Elsea “Treatment of Battlefield Detainees in the War on Terrorism” (11 April 2002) Congressional Research Service 11.

<sup>170</sup> Geneva Convention Relative to the Protection of Persons in Time of War (12 August 1949) 75 UNTS 287, art 71.

<sup>171</sup> Geneva Convention Relative to the Protection of Persons in Time of War, above, art 72.

<sup>172</sup> Geneva Convention Relative to the Protection of Persons in Time of War, above, art 72

<sup>173</sup> Geneva Convention Relative to the Protection of Persons in Time of War, above, art 73.



However paragraph two of article 4 excludes from this definition nationals of a co belligerent state, together with nationals of neutral states in the home territory of a party to the conflict, as long as such states have normal diplomatic relations with the detaining power. Accordingly, article four would only appear to have limited application in respect of the Guantanamo detainees who were detained in Afghanistan. While it would appear to apply in respect of Afghan nationals, a number of foreign nationals were also detained in Afghanistan. Those foreign nationals would not constitute "protected persons" for the purposes of the convention unless their country did not have normal diplomatic relations with the US.

Where a person falls outside the categories of persons protected by the Geneva Conventions they may still be protected pursuant to article 75 of the terms of the First Protocol Additional to the Geneva Conventions, to the extent that its contents form part of customary international law.<sup>174</sup> Article 75 is intended to be a residual provision applying to all persons who are detained in the course of a conflict who do not receive greater protections under other provisions of international law.

Many of the provisions of article 75 are pertinent. Article 75(2) prevents torture and other outrages to personal dignity. Article 75(3) requires that the detaining party informs the prisoner of the reasons for the detention and that the prisoner is released when the circumstances justifying the detention cease to exist. Article 75(4) provides that no sentence may be passed except pursuant to a conviction pronounced by "an impartial and regularly constituted court respecting the internationally recognized principles of regular judicial procedure". Therefore, at the very least, the detainees should be entitled to these minimum protections under international law.

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<sup>174</sup> The US has not ratified this protocol but it is generally thought to reflect customary international law which would hence be binding on the United States. See Lord Steyn "Guantanamo Bay: The Legal Black Hole" (27th FA Mann Lecture, London, 25 November 2003). Indeed in deciding not to ratify the protocol the United States had already been advised that it reflected customary international law. See Theodor Meron *Human Rights and Humanitarian Norms of Customary Law* (Clarendon Press, Oxford, 1989) 62-69.



## V CONCLUSIONS

Over two years have passed since the opening of the Guantanamo detention facility and the detainees still find themselves incarcerated, without rights, in connection with a "war" of an indeterminate duration, which the Bush Administration has conceded "may not end with anything as clear-cut as a surrender ceremony on the USS Missouri."<sup>175</sup>

The Administration has invoked humanitarian law as justification for the continued detention of those at Guantanamo. However, as discussed above, a "war on terror" does not appear to constitute a war to which humanitarian law would apply, at least as traditionally understood, given that it is not fought between states. There was, of course, a conflict between the United States and Afghanistan, when the Taliban controlled Afghanistan, which would appear to fit within the traditional definition of a "war". However that conflict has long since ended, the Taliban have been driven from power and a new Afghan government has been installed.

The Administration continues to deny that Taliban soldiers detained during the Afghan conflict are entitled to prisoner of war status, despite the fact that they were fighting on behalf of the effective government of Afghanistan at the time of their capture. Moreover they refuse to convene any sort of competent tribunal to assess whether any of those detained at Guantanamo should qualify for POW status. The Administration's refusal to convene individualised status hearings is particularly concerning since, as previously discussed, there seems to be a reasonable likelihood that some of the detainees may simply be innocent victims of circumstance, without connection to either the Taliban or Al Qaeda.

The United States has sought to avoid the rules against arbitrary detention set out in various human rights instruments by asserting that the detainees are enemy

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<sup>175</sup> Secretary Rumsfeld Remarks to the Greater Miami Chamber of Commerce (13 February 2004). Available at <<http://www.dod.gov/transcripts/2004/tr20040213-0445.html>> (last accessed 28 February 2004).



combatants captured as part of the war on terror, and that therefore their treatment is governed by humanitarian, rather than human rights, law. However, as already discussed, international human rights law instruments generally continue to apply in war as they do in peace. Indeed certain rights are considered so fundamental that they are unable to be derogated from in any situation. A continuing right to habeas corpus in times of war has been regarded as being essential as it ensures that fundamental human rights are not being abused.

The United States has also suggested that international human rights instruments, such as the ICCPR, only apply to it within its own sovereign territory. The analysis conducted above tends to suggest, on balance, that Guantanamo constitutes Cuban, rather than United States, sovereign territory. However, as also noted above, human rights instruments apply to all persons subject to a state's authority and control irrespective of the actual location of the detention.

The United States Defense Secretary has recently noted that those at Guantanamo are enemy combatants and terrorists, being detained for acts of war against the United States and consequently "different rules have to apply."<sup>176</sup> However it is difficult to see what rules actually do apply at Guantanamo since the stance the United States has adopted, effectively allows it to operate free from all legal constraint.

There are a number of implications for the future of international law which flow from the stance the United States has adopted at Guantanamo.

Firstly, with respect to international human rights law, it is noteworthy that many nations have used the Guantanamo situation and the war on terror, to justify their own policies which curtail human rights.<sup>177</sup> For example, Egypt recently extended an emergency law which allows it to detain individuals, who

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<sup>176</sup> Secretary Rumsfeld Remarks to the Greater Miami Chamber of Commerce (13 February 2004). Available at <<http://www.dod.gov/transcripts/2004/tr20040213-0445.html>> (last accessed 28 February 2004).

<sup>177</sup> Lord Steyn "Guantanamo Bay: The Legal Black Hole" (27th FA Mann Lecture, London, 25 November 2003).



are suspected national security threats, almost indefinitely without charge.<sup>178</sup> The Egyptian President announced that America's parallel policies proved that "we were right from the beginning in using all means, including military tribunals, to combat terrorism."<sup>179</sup> Similarly, the Australian Government has enacted legislation allowing it to forcibly remove, refugees seeking asylum in Australia, to detention facilities in Nauru. The Australian Defence Minister indicated that the legislation was necessary to ensure that Australia did not become a "pipeline for terrorists."<sup>180</sup> Furthermore, Indonesia has cited the American use of Guantanamo to propose building an offshore prison camp to hold people it suspects of being terrorists.<sup>181</sup>

Secondly in relation to international humanitarian law, the United States' refusal to even consider whether individuals may be entitled to POW status may return to haunt it should United States soldiers fall into enemy hands in the course of a future armed conflict.

Historically, the United States has been regarded as a champion of human rights and international law. However the approach it has adopted at Guantanamo, and in respect of the "war on terror" generally, has tarnished that image and led one commentator to observe that "in a remarkably short time, the United States has moved from being the principal supporter of [human rights and international law] to its most visible outlier."<sup>182</sup> Only time will tell whether this change in approach is permanent, or simply a temporary eclipse in the United States' attitude towards international law.<sup>183</sup>

The third anniversary of the 11 September attacks approaches later this year and the dramatic images of the attacks, and their aftermath, continues to leave an indelible mark on the memory of all of those who witnessed the events unfold.

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<sup>178</sup> Harold Hongju Koh "Rights to Remember" (1 November 2003) *The Economist* London 23, 24.

<sup>179</sup> Koh, above, 24.

<sup>180</sup> Koh, above, 24.

<sup>181</sup> Koh, above, 24.

<sup>182</sup> Koh, above, 24.



No one can deny the importance of bringing those behind the attacks to justice and in taking steps to ensure that such attacks can never happen again. However in responding to terrorism, a measured response is desirable, consistent with the principles of the law. For as Theodore Roosevelt noted in his Third Annual Message to the United States Congress, delivered almost 100 years ago: “[n]o man is above the law and no man below it.”<sup>184</sup>

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<sup>183</sup>Koh, above, 26.

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