GUANTANAMO BAY: A HUMAN DISASTER AS A CONSEQUENCE OF DISREGARD TO INTERNATIONAL LAW

Faiza Ismail[1]

Background

'Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism' stated the US Department of Defense in 2005.[2]

The US Secretary of Defence Donald H Rumsfeld made this statement four years after the War on Terror began. Yet, an overview of US foreign policy prior to the War on Terror highlights the strategy that the US government followed throughout the war. During the 'War on Terror', the underlying principles of the US foreign policy as applied by the US President George W Bush (2001-2009) emerged as the so-called Bush doctrine.[3] The core objectives of this eponymous doctrine included unilateralism, preventive war tactics, regime change to control rogue states and the promotion of democracy.[4]

[1] At the time of writing, Faiza Ismail is an LL.M. student at Trinity College, Dublin.

[2] Donald H Rumsfeld, *National Defense Strategy of the United States of America*, (March 2005) 5. See also Jack L Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Nortn & Company New York 2007) 53; and Gabriella Blum, and Philip B Heymann, *Laws, Outlaws, and Terrorists: Lesson From the War on Terrorism* (MIT Press 2010) 27.

[3] The Bush doctrine was not a formal statement. It was derived from the National Security Strategic document published on 17 September 2002 by the White House. The White House, 'The National Security Strategy of the United States of America', (17 September 2002). See also Robert J Lieber, *The American Era: Power and Strategy for the 21st Century* (Cambridge University Press 2005) 43.

[4] Melvin Gurtov, *Superpower on Crusade: The Bush Doctrine in US Foreign Policy* (Lynne Rienner Publishers Inc 2006) 39-47.

Indeed, the US government considered the end of the Soviet Union in the twentieth century as the beginning of an era for the country to lead the world.[5] This tendency manifested itself in the Project for the New American Century (PNAC),[6] a neoconservative group aimed at maintaining the US's status of world superpower. [7]

Since the Bush administration's key members were PNAC signatories,[8] the organisation's objectives remained at the heart of the Bush doctrine.[9] The control of PNAC on the Bush doctrine influenced the US government's reluctance to comply with law nationally and internationally during the War on Terror. For instance, unilateralism was a usual feature of US foreign policy but emphasis on force made it '[u]ltimately unconstrained by the rules and norms of the international community'.[10] Likewise, this was not the first time US foreign policy had resorted to the pre-emptive attack policy. However unlike the Cold war scenario when US actions were justified on the grounds of defence, the preventive war policy during the War on Terror [11] was hard to justify.[12]The Bush doctrine also shared PNAC's belief in the military supremacy of the US.[13] In fact, a matchless military was necessary to rule the world so asto 'take the war to the enemy' in the words of Secretary Rumsfeld.[14] Additionally, the Bush administration introduced secrecy in the affairs of US government departments.[15] While President Bush claimed: 'we will extend the peace by encouraging free and open societies on every continent'[16], in practice, he reversed Bill Clinton's policy of openly releasing documents to the public.[17]

[5] Ibid 27-18.

[6] Paul Rogers, *Why We're Losing the War on Terror* (Polity Press UK 2008) 7.

[7]Project for the New American Century, 'Statement of Principles' (Project for the New American Century, 3 June 1997) <http://www.newamericancentury.org/statementofprinciples.htm> accessed 13 March 2011.

[8] Ibid. For instance, Vice President Dick Cheney, Secretary of Defence Donald Rumsfeld, his Deputy Secratery Paul Wolfowitz, Elliott Abrams and Zalmay M. Khalilazad in National Security Council (NSC), Richard Perle as chair of the Defence Policy Board.

[9] George Soros, *The Age Of Fallibility: Consequences of the War on Terror (*Public Affairs 2007) 129.

[10] Charles Philippe David and David Grondin, *Hegemony or Empire?: The Rendition of US Power Under George W Bush* (Ashgate Publishing Ltd 2006) 64. See also Gurtov (n 4) 42.

[11] Robert Jervis, *American Foreign Policy in New Era* (Routledge Taylor & Francis Group 2005) 85.

[12] Ibid.

[13] Project for the New American Century Statement of Principles (n 7) 7. See also Demetrios Caraley, *America Hegemony: Preventive War, Iraq, and Imposing Democracy*, (Academy of Politics 2004)14.

> The Bush doctrine embodied the traditional principles of US foreign policy except for one element, the US's right to lead the world.[18] Yet, this political atmosphere changed after the 9/11 attacks,[19] which were considered an assault that exposed the superpower's vulnerability to groups like al-Qaeda. [20]

In 2002, in his West Point address, President Bush stated that:

> America has and intends to keep military strengths beyond challenge — thereby making the destabilising arms races of other era pointless, and limiting rivalries to trade and other pursuits of peace…

[14] The White House President George W. Bush, 'President Bush Delivers Graduation Speech at West Point; United States Military Academy West Point, New York' (*The White House President George W. Bush*, June 2002) <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html> accessed 12 March 2011. See also Gurtov (n 4) 44.

[15] M M Chantiloupe, *Iraq: The War That Shouldn't Be* (Xlibris Corporation 2010) 196-197. See also Peter Jan Honigsberg, *Our Nation Unhinged: The Human Consequences of the War on Terror* (University of California Press 2009) 32.

> This belief is reflected in various moves of the executive. For instance, President Bush secretly signed orders to the National Security Agency in 2002. The orders allowed the agencies to monitor phone calls and emails of people including US citizens inside the US without obtaining prior search warrants from the US secret court under the Foreign Intelligence Surveillance Act.

[16] George W. Bush Graduation Speech at West Point (n 14). See also Paul J Bolt, Damon V Coletta and Collins G Shackelford, *American Defense Policy* (JHU Press 2005) 36.

[17] Peter Jan Honigsberg, *Our Nation Unhinged: The Human Consequences of the War on Terror* (University of California Press 2009) 33.

[18] *Gurtov* (n 4) 48.

[19] Christopher Hewitt, *Understanding Terrorism in America: From the Klan to Al-Qaeda* (Routledge 2002) 1.

On September 11, 2001, terrorists hijacked four US planes. Two of the planes crashed into the twin towers of the World Trade Center in New York City. Both towers collapsed on the spot. A third plane crashed into the Pentagon outside Washington DC. The fourth plane exploded in rural Pennsylvania. 226 passengers including nineteen hijackers killed in the blasts. The attacks resulted in the death of 3,000 people in the World Trade Centre and 125 people in the Pentagon.

[20] Rogers (n 6) 67. See also Charles Garraway, 'Afghanistan and the Nature of Conflict' (2009) 85 Int'l L Stud Ser US Naval War Col 157, 161.

Al Qaeda is an organisation founded by Osama bin Laden, a Saudi national, in 1988. After being expelled from various countries, the network found shelter in wartorn Afghanistan. The Taliban, the ruling party in Afghanistan, permitted al Qaeda to establish itself in its territory.

After the US government found involvement of al-Qaeda in the assault,[21] the US demanded that the Taliban government of Afghanistan close al-Qaeda camps in Afghanistan, hand over Osama bin Laden,[22] and grant the US access to terrorist training camps.[23] Furthermore, in addition to allowing al-Qaeda into their territory, the US charged Taliban with human rights violations. The US President began his address by saying:

> Afghanistan's people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practised only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.[24]

It was clear that the Taliban government was not involved in the 9/11 attacks. Moreover, the Taliban government was willing to negotiate despite the US government's insistence that the 'demands are not open to negotiation'.[25] Regardless of unmet Taliban demands for evidence of al- Qaeda's involvement in the attacks, [26] the US government decided to attack Afghanistan, in line with the preventive war strategy.[27]

[21] Alex J Bellamy and others (eds), *Security and the War on Terror* (Routledge Taylor & Francis Group 2008) 35.

[22] Douglas Kellner, *From 9/11 to Terror War: The Dangers of the Bush Legacy* (Rowman & Littlefield Publishers, Inc, 2003) 5.

[23] Myra Williamson, *Terrorism, War and International Law: The legality of the Use of Force Against Afghanistan in 2001* (Ashgate Publishing Limited 2009) 166.

[24] Trevor Conan Kearns and Jennifer L Weber, *Terrorism* (InfoBase Publishing 2010) 103. See also *Williamson* (n 23) 222.

[25] *Williamson* (n 23) 166, 171.

[26] Kogan Page, *Asia & Pacific Review 2003/04: The Economic and Business Report* (Kogan Page Publishers 2003), 2. See also Williamson (n 23) 245.

[27] Ibid 2.

In the immediate aftermath of the 9/11 attacks, the US government was able to obtain the support of the United Nations (UN) through UN Resolution 1368. The UK, NATO and other countries extended their unconditional support and stood by the US. [28] Eventually, on 7 October 2001, the war began with bombing by the US-led coalition comprising the known world against Afghanistan.[29] As expected, the Taliban government could not resist the US coalition forces and the fight ended in mid-December 2001. This resulted in the UN-led interim Karzai government in Afghanistan.[30] Thus far, the international community was satisfied with the strategies of war being employed both in the field and on the diplomatic front. All this was set to change on 11 January 2002, when Guantanamo prison began handling the first group of prisoners of the War on Terror.[31] In February 2002, the US government refused the application of the Geneva Conventions to the War on Terror.[32]

The US government's supremacism resulted in its reluctance to comply with international law, as became evident when the US government refused to allow Guantanamo detainees the protection of the Geneva Conventions by designating them as 'enemy combatants'. This status immunised US government officials from their obligations under international humanitarian law.[33]

The US government designated the prisoners of the War on Terror with 'enemy combatant' status so as to achieve two objectives: first, the protection of the USA from future attacks and second, the protection of US government officials from prosecution for war crimes under domestic and international law.[34] Torture memos were the ultimate legal tools through which the US government attempted to achieve both objectives. This paper will analyse the US government's detention policies, namely its decisions to designate prisoners of war (POWs) with 'enemy combatant' status and issue 'torture memos' to interrogate them.

[28] George W. Bush Graduation Speech at West Point (n 13).

[29] *Kellner* (n 22) 5.

[30] Frederick Henry Gareau, *State Terrorism and the United States: From Counterinsurgency to the War* (Zeb Books 2004) 196.

[31] *Honigsberg* (n 17) 76.

[32] *Gareau* (n 30) 197.

[33] Butler Clark, *Guantanamo Bay and the Judicial-Moral Treatment of the Other*, (Purdue University Press 2007) 88-89. See also *Honigsberg* (n 17) 21.

[34] *Goldsmith* (n 2) 110. See also *Honigsberg* (n 17) 20-21.

The paper shall discuss the legitimacy of the US government's detention policies during the War on Terror. This discussion will particularly delve into the consequences of these policies on the human rights of the detainees of Guantanamo Bay.

The Geneva Conventions

Prior to World War II, armed conflicts in international humanitarian law were regulated by a number of documents, including the 1864 Geneva Conventions and the 1929 Geneva Conventions, which provided rules for the treatment of the sick and wounded as well as POWs.[35] During World War II, partisans and resistance fighters operating in Nazi-held Europe were executed or shipped to concentration camps. They were not allowed any legal protection under international humanitarian law.[36] To overcome this shortcoming, four new Conventions were designed at the Diplomatic Conference held during the Geneva Conventions of 1949.

[35] Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (Oxford University Press 2010), 17-18.

[36] Ibid 20.

All four Geneva Conventions of 1949 contain an initial three Articles which are known as 'Common Articles'. The three Common Articles provide for 'respect for the convention', 'application of the convention' and explain 'conflict not of an international character' [37] respectively. Common Article 2 describes the nature of the armed conflict to which the Geneva Conventions apply:[38] it extends the situations of armed conflict to all 'declared war' *i.e.* any condition in which armed forces of states are involved. [39] This extension aims to bind all the parties by the obligations of the Geneva Conventions (GCs) to avoid human rights violations of POWs.[40]

Non-international armed conflicts, in the absence of international rules, are regulated by state laws where fighting is taking place. [41] Nevertheless, Common Article 3 provides for the basic principles of international humanitarian law to regulate non-international armed conflict on an international level. [42]

---

[37] International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter GC I); International Committee of the Red Cross, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (hereinafter GCII); International Committee of the Red Cross, Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (hereinafter GC III); International Committee of the Red Cross, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 297 (hereinafter GC IV).

[38] Howard M Hensel (ed), The *Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate Publishing Limited, 2005), 136.

[39] *Geneva Conventions* (n 37).

[40] *Crawford* (n 35) 19. See also *Crawford* (n 35) 22. Art. 2 of the Geneva Conventions states that the laws of armed conflict:

> 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 recognised by one of them. The Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

[41] Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Cambridge University Press,2007), 102.

[42] *GC III* (n 37), art 3.

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provision:

On 12 August 1949, the US signed the 1949 Geneva Conventions which were then ratified on the 2 August 1955. Afghanistan signed the Conventions on 8 December 1949 and ratified them on 26 September 1956.[43] As such, both the US and Afghanistan constitute the 'high contracting parties' mentioned in Common Article 2.

According to Common Article 2, the Taliban government's decision to oppose the US' (and coalition forces') attacks made Afghanistan one of the 'high contracting parties'. The recognition of the Taliban as the Afghan government or its forces as official Afghan forces therefore became irrelevant in determining the applicability of the Law of Armed Conflict [44] (as some may argue), as long as the Taliban were a party to the conflict. The situation in Afghanistan therefore constituted an 'international armed conflict'. [45]

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '"*hors de combat*" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a)Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.
> (b) Taking of hostages;
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for.

[43] Jerica M Morris-Frazier, 'Missing in Action: Prisoners of War at Guantanamo Bay', [2010] 13 D C L Rev 155, 156.

[44] Law of Armed Conflict, abbreviated as LOAC.

[45] *Wilmshurst* (n 41) 99.

> If a state is unwilling or unable to deal with a terrorist group in its own territory and another State's military intervenes to remove the organisation resulting in an intense and prolonged campaign, how should such a situation is legally characterised? In the example given, there will be no difficulty in characterizing the conflict as international if the "host" state engages in hostilities against the intervening state.

It ceased to be so in June 2002 on the establishment of the Karzai government. After the establishment of the Karzai government, the multinational forces in Afghanistan were fighting on the request and with the consent of Afghan government.[46] Accordingly, the initial fighting in Afghanistan until the establishment of the Karzai government in June 2002 was an international armed conflict, whereas afterwards, the conflict changed into a non-international armed conflict. [47] According to the International Committee of the Red Cross (ICRC), the persons detained in the context of the War on Terror should therefore be dealt with on a case-by-case basis.[48] The detainees captured during the initial period of the attacks prior to the Karzai government are entitled to the protection of international armed conflict laws and those detained afterwards will be protected by the rules of non-international armed conflict.[49]

Geneva Convention III (GC III) is one of the four conventions which exclusively provides for the protection of POWs and is specifically relevant to the prisoners of the War on Terror. According to the definition provided by GC III Article 4 (1),[50] 'combatants' include the armed forces of a party to the conflict and also members of any other militia fighting by the side of a party to the conflict. Certain conditions are placed to distinguish combatants from civilians, spies and mercenaries, so that they may claim protection as POWs. The conditions which must be satisfied to qualify for protection as a POW include fighting under a command by a person responsible for his subordinates; carrying a distinctive sign recognizable from a distance; carrying arms openly; and conducting operations following the laws and customs of war.[51]

---

[46] Ibid 95.

> Owing to the changing conditions in Afghanistan with an Afghan recognised government, the armed conflict no more remains an international armed conflict. Instead it is now a non international armed conflict.

[47] Ibid.

[48] Ibid 96-97.

[49] *Hensel* (n 38) 287.

[50] *GC III* (n 37), art. 4A:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;
> (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this

Additionally, the GC III commentary extends POW status to Guantanamo detainees as it includes 'inhabitants of a non-occupied territory who, on the approach of the army, spontaneously take up arms to resist the invading forces'. It further includes detainees 'even though they may not have had time to form themselves into regular armed units as required by Common Article 1'.[52] Also GC III article 85 states '[p]risoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.'[53]

Moreover, GC III Article 5 provides detainees with the right to a neutral trial thus ensuring the protection of their basic human rights. [54] Thus, GC III ensures 'prisoner of war' protection to the detainees arrested in various circumstances during the war.

---

territory is occupied, provided that such militias or volunteer corps, including such organised 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 recognisable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war;
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power;
(4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model;
(5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law;
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

See also Hensel (n 38) 163; Crawford (n 35) 51; Geneva Conventions (n 37), Protocol I, art 43.2 Armed Forces Combatants: '[m]embers of the armed forces of a party to a conflict...that is to say, they have the right to participate directly in hostilities'.

[51] Ibid art. 4 A (2) (a). See also Hensel (n 37) 145-146.

[52] Ibid art. 4 A (6). See also Morris-Frazier (n 43) 160.

[53] Ibid art. 85.

[54] Ibid art. 5.

Nonetheless, the US government declared that the Geneva Conventions are applicable to inter-state armed conflicts and not to conflicts between a state and a transnational non-state actor group. The US government refused to grant POW status to the al-Qaeda combatants. With regard to Taliban soldiers, the US government alleged that they did not satisfy the abovementioned conditions required to qualify for 'prisoner of war' status under Article 4 of GCIII.

Consequently, the US government denied rights to the detainees of the War on Terror by claiming the absence of rules in the corpus of international law governing their detention, conditions of detention, conduct of interrogation and their release.[55] Thus, the US government has sought to create an unprecedented category of prisoners without any rights.[56]

The Torture Laws

After denying POW status to the Guantanamo detainees, the US government introduced new rules to interrogate them. This paper shall now discuss the laws defining and prohibiting torture and harsh treatment of POWs under the US Constitution and the Geneva Conventions. This discussion will specifically focus on the US government's detention policies with regard to these laws, the objectives of the resulting torture policy and its consequences.

Generally, the US Constitution, US Title 18—Crimes and Criminal Procedure, Part I Crimes, Chapter 113c (section: 2340) defines torture as:

> an act committed by a person acting under the color of law … to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.[57]

[55] *Hensel* (n 38) 151.

[56] *Crawford* (n 35) 60.

[57] US Code, Title 18- Part 1- Chapter 113C (Torture) Section 2340.

> **(1)** "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> **(2)** "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

Furthermore, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is the recognised treaty governing torture in the global community.[58] CAT Article 1 clearly defines torture and prohibits ill-treatment, even if this is meted out with the scope of extracting intelligence or confessions from prisoners.[59] Moreover, CAT Article 2 states that an emergency or a war do not justify departing from the prohibition laid down in Article 1.[60]

> (A) The intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) The threat of imminent death; or
> (D) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

[58] Bartram S Brown, 'The Relevance of International Law to the Domestic Decision on Prosecutions for Past Torture' (2009-2010) 59 DePaul L Rev 775, 778. See also Honigsberg (n 16) 191.

[59] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (GA res 39/46, 26 June 1987), art 1 states:

> 1.For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

[60] *Convention against Torture* (n 59) art. 2:

> 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

On 18 April 1988, when the US signed CAT, the US government retained the right to align the provisions of CAT concerning ill-treatment in accordance with the US Constitution.[61] In the US, CAT was therefore aligned with the Fifth and Eighth Amendments to the US Constitution. [62] The Fifth Amendment to the US Constitution protects individuals from testimony and punishment before availing themselves of the right to due process. [63]

Rochin v California (*Rochin*) plays a defining role in the application of the Fifth Amendment.[64] On July 1 1949, three Los Angeles County deputy sheriffs entered Rochin's residence without a search warrant. After forcibly entering Rochin's room, they noticed two tablets on his night stand. As soon as one of the deputies asked him about the tablets, Rochin swallowed the tablets. This prompted the same deputy sheriff to push his fingers down Rochin's mouth in an effort to retrieve the tablets. When this proved unsuccessful, Rochin was handcuffed and taken to a hospital where an emetic solution was administered to him through a forcibly inserted tube. As a result, Rochin vomited the tablets into a bucket. Subsequently, these tablets were submitted as evidence and Rochin was found guilty of unlawful possession of morphine. [65]

[61] *Brown* (n 58) 790. See also *Honigsberg* (n 17) 24.

[62] Ibid. See also *Honigsberg* (n 17) 24.

[63] *Honigsberg* (n 17) 23. The government must prove its accusations before punishing the defendant.

[64] *Rochin v California,* 342 U S 165 (1952).

[65] Ibid 166.

> Having 'some information that [the petitioner here] was selling narcotics,' three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a 'night stand' beside the bed the deputies spied two capsules. When asked 'Whose stuff is this?' Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers 'jumped upon him' and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

See also *Honigsberg* (n 17) 23.

In *Rochin,* the US Supreme Court held that the officers violated due process of law by obtaining evidence through a method which 'shocks the conscience'.[66] The United States Office of Legal Council exploited the ambiguity of the term 'shocks the conscience' to allow harsh interrogation techniques to be applied as part of US government detention policy. [67]

Meanwhile, the Eighth Amendment bans 'cruel and unusual punishment' after conviction. [68] Since the Eighth Amendment applies after conviction, it was held to be irrelevant to Guantanamo detainees. [69]

Geneva Convention III (GC III) is one of the four conventions; it exclusively provides for the protection of (POWs) and therefore GC III is relevant to the prisoners of the war on terror. In international humanitarian law, GC III Article 13 provides for the humane treatment of POWs. [70] Moreover, GC III Article 17 prohibits 'any … form of coercion.' Consequently, Article 17 prohibits torture in any form and also specifies the type of information that can be obtained from prisoners.[71] In addition, GC III Article 147 lists the acts considered to be violations of the 'preceding Article', including 'willfully causing great suffering or serious injury to body or health'. [72]

---

[66] Ibid 177.

> What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct."

See also *Honigsberg* (n 17) 23.

[67] *Honigsberg* (n 17) 24, 25.

.

[68] Ibid 23.

[69] Ibid 24.

[70] *GC III* (n 37), art. 13.

> Prisoners of war must at all times be humanely treated… Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity Measures of reprisal against prisoners of war are prohibited.

See also *Brown* (n 58) 778.

[71] Ibid art. 17.

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information….. No

The US Detainee Policies

This paper shall now consider the rules the US government introduced to interrogate Guantanamo detainees. The Office of Legal Council (OLC) in the US Department of Justice (DOJ) is responsible for advising the US government on legal matters.[73] With regard to Guantanamo detainees, the DOJ asked the OLC to advise on permissible interrogation techniques and to draft a code of conduct for interrogators.[74] So far, two memoranda drafted by OLC officials are publicly available and they are known as the 'torture memos'. [75]

> physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

[72] Ibid art. 147.

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[73] *Honigsberg* (n 17) 26.

[74] Ibid 25.

[75] Ibid 26. There might be more such memos which have not appeared in public due to the US government's secrecy policy.

These memos were drafted by John Yoo, the Secretary General of the OLC, [76] and were officially entitled 'Standards of Conduct for Interrogation under 18 USC § 2340-2340A' (dated 1 August 2002)[77] and 'Military Interrogation of Alien Unlawful Combatants Held outside the United States' (dated 14 March 2003). [78] The August 2002 memo seeks to limit the application of the US Constitution, Crimes and Criminal Procedure, Section 2340 to the Guantanamo detainees on the basis of the US President's authority.[79] In the US Constitution, Article II allows the US President to act as 'Commander in Chief of the Army and Navy of the United States' during times of war.[80]

The memo also gives a unique interpretation of the 'specific intent'[81] required so as to favor US interrogators.[82] The memo also defines 'severe pain' as one which would result in 'death, organ failure, or serious impairment of body functions — in order to constitute torture.'[83] Obviously, this definition contradicts the US Constitution, Crimes and Criminal Procedure, Section 2340 which defines torture as causing serious pain that 'disrupt(s) profoundly the senses' and conducted by a person performing 'under the color of law'.[84] Also, US detention interrogation methods ignore CAT, which defines 'torture' as methods including:

---

[76] Ibid 26.

[77] Department of Justice, Office of Legal Counsel 'Memorandum for Albert R Gonzales, Counsel to the President, **Re: Standards of Conduct for Interrogation under 18 USC § § 2340-2340A**' (Washington DC 20530, 1 August 2002). (**Re: Standards of Conduct for Interrogation).**

[78] Department of Justice, Office of Legal Counsel 'Memorandum for William J Haynes II, General Counsel of the Department of Defense, Military Interrogation of Alien Unlawful Combatants Held outside the United States' (Washington DC 20530, 14 March 2003). (Military Interrogation of Alien Unlawful Combatants Held outside the United States).

See also *Goldsmith* (n 2) 142-143.

[79] *Re: Standards of Conduct for Interrogation* (n 77) 3.

> [The US President has] asked us to address only the elements of specific intent and the infliction of severe pain or suffering. As such, we have not addressed the elements of "outside the United States," "color of law," and "custody or control".

[80] *US Constitution* art II, s 2.

[81] *Re: Standards of Conduct for Interrogation* (n 77) 3-5.

[82] Ibid 1.

> [The US President has] asked for our office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Section 2340-2340A of title 18 of the United States Code. As we understand it, this

(1)restraining in very painful conditions; (2) hooding under special conditions; (3) sounding of loud music for prolonged periods;(4) sleep deprivation for prolonged period; (5) threats, including death threats; (6) violent shaking; and (7) using cold air to chill.[85]

These memos clearly attempted to alter the US laws with regard to torture. Although the US government denied the application of the Geneva Conventions (GCs) to the War on Terror, the US Supreme Court recognised the US government's obligation to abide by the rules of the GCs in *Hamdan v Rumsfeld* 548 U.S. 557 (2006) (*Hamdan*). [86]

Salim Ahmed Hamdan was a Yemeni national captured in Afghanistan in 2001 and was moved to Guantanamo in June 2002.[87] The *Hamdan* case was filed with the US Supreme Court in 2006; he was in custody for four years without a trial. Hamdan filed for a US Supreme Court habeas review of his detention and challenged the military commission's authority to try him for conspiracy.[88] In *Hamdan*, the US Supreme Court affirmed Hamdan's right as protected by the GC III by stating 'that Hamdan be tried by a regularly constituted court affording the entire judicial guarantee which is recognised as indispensable by civilised peoples.'[89] Thus, the court granted Hamdan his right to due process.[90]

---

question has arisen in the context of the conduct of interrogation outside of the United States.

[83] Ibid 6.

These statutes suggest that 'severe pain', as used in Section 2340, must rise to a similarly high level — the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions — in order to constitute torture.

[84] *US Code on Torture* (n 57).

[85] Jordan J Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (Cambridge University Press 2007), 16.

[86] *Hamdan v Rumsfeld* 548 U.S. 557 (2006), 631-632.

[87] Ibid 566. See also Daniel Michael, 'Military Commissions Act of 2006' (2007) 44 Harv J on Legis 473, 474.

[88] Ibid, 567. See also Aaron L Jackson, 'Habeas Corpus in the Global War on Terror: An American Drama', (2010) 65 A F L Rev 263, 278.

[89] Ibid 631-632.

[90] Ibid 635.

When viewed within the context of *Hamdan*, the torture memos are revealed to run counter to GC III Article 17. Article 17 of GC III states:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information..... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.[91]

Moreover, US detention policy conflicts with many decisions of regional human rights courts and international tribunals. For instance, the European Court of Human Rights (ECHR) has held that wall standing; sleep deprivation; food and drink deprivation; hooding; and subjection to loud noise all constituted inhuman and degrading treatment under human rights law.[92] Furthermore, the International Criminal Tribunal for the Former Yugoslavia (ICTY) also describes the types of conduct amounting to 'torture' or 'inhuman' or 'cruel' treatment. [93]

Objectives of the US Policy

By claiming the US President's unilateral control over detention policy, these aforementioned memos held all laws regulating torture to be unconstitutional as they hindered the US President from collecting intelligence to save the country from further attacks: '[a]ny effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.' [94] Moreover, there is no recognition of the GCs in the memo because the US government had declared that the GCs would not be applied to the War on Terror.[95]

[91] GC III (n 37) art. 17.

[92] *Ireland v. The United Kingdom* App no 5310/71 (ECtHR, 18 January 1978).

[93] Paust (n 85) 16.

[94] Military Interrogation of Alien Unlawful Combatants Held outside the United States (n 78) 81. See also Goldsmith (n 2) 144, 148.

[95] Ibid 1-2.

The US government's detention policy with regard to interrogation methods has two objectives. Firstly, to protect the US from future attacks, the administration wants to interrogate the detainees avoiding rules and regulations. Secondly, the administration wants to protect US government officials from future scrutiny under the War Crimes Act.[96] This paper shall now proceed to examine to what extent the US government succeeded in achieving these objectives.

1. Prevention of future attacks

These memos were considered essential to prevent future attacks. As George Tenet, Director of Central Intelligence (DCI), said:

> I've got reports of nuclear weapons in New York City, apartment buildings that are going to be blown up, planes that are going to fly into airports all over again. Plot lines that I don't know. I don't know what's going on inside the United States.[97]

The US President Bush was receiving threatening information through a 'threat matrix': '[f]or each threat, the matrix lists possible targets, information on the group planning the attack, an analysis of the threat's credibility, and notes about actions taken in response.'[98] The first memo [99] was written shortly before the first anniversary of the 9/11 attacks when US officials in the Department of Justice '...were sure there would be bodies in the street'.[100]

[96] *Rumsfeld* (n 2) 110. See also *Honigsberg* (16) 20.

[97] Daniel Schorn, 'George Tenet: At the Centre of the Strom: Former FBI Director Breaks $His Silence' http://www.cbsnews.com/stories/2007/04/25/60minutes/main2728375_page3.shtml?tag=contentMain;contentBody (29 April 2007) accessed 13 March 2011.
See also: Goldsmith (n 2) 165-166.

[98] *Goldsmith* (n 2) 72.

[99] *Re: Standards of Conduct for Interrogation* (n 77) 370.

[100] *Goldsmith* (n 2) 165.

Achieving the objective of successfully protecting the country from further attacks greatly relied on intelligence extracted from prisoners through effective interrogation techniques. For this purpose, the memos defined torture as treatment resulting in pain 'associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions'; anything short of this is not considered torture. [101]

The 'ticking time bomb' scenario was put forth by the supporters of torture during the initial years of the war on terror;[102] However, this analogy fails since torture takes time to break a victim.[103] Besides, human rights lawyers and physicians believe that torture does not produce the desired intelligence. Alles S. Keller, a physician says: 'I know from years of listening to torture survivors describing their experience that individuals so brutalised will often say whatever they think the torturer wants to hear in order to stop the nightmare.'[104]

This results in false confessions and inefficient intelligence, as recounted by Shafiq Rasul:

> Eventually I just gave in and said, 'OK, it's me' ... because of the previous five or six weeks of being held in isolation and being taken to interrogation for hours on end, short shackled and being treated in that way... I was going out of my mind and didn't know what was going on. I was desperate for it to end.

[101] Ibid 144.

[102] *Honigsberg* (n 17) 29.

'the police capture a suspected terrorist who allegedly knows of a bomb about to go off...we must be permitted to torture him to save thousands of lives.'

[103] *Brown* (n 58) 784-785. See also *Honigsberg* (n 16) 29.

> Torturers know to go slowly, to give the victim time to feel the torture before he passes out from the pain. As the torture progresses, the victim tends to break down. Ironically, the longer it takes to obtain the information, the less immediate the ticking-time- bomb scenario becomes.

[104] Matthew J Morgan (ed), *The Impact of 9/11 and the New Legal Landscape: The Day That Changed Everything?* (Palgrave Macmillan 2009), 238. See also Tara McKelvey, *Monstering: Inside America's Policy of Secret Interrogations and Torture in the Terror War* (Basic Books 2008), 250.

> (after months of questioning in coercive conditions, Mr Rasul admitted meeting Osama bin Laden and Mohammed Atta, one of the September 11 hijackers, in Afghanistan in 2000. In fact, he wasworking in a *Currys* store in the West Midlands.) [105]

This was actually confirmed by US Army Commanding General David Petraeus, whose role in the US military made him very well aware of the effectiveness of torturous interrogation. He stressed that '[c]ertainly, extreme physical action can make someone 'talk'; however, what the individual says may be of questionable value.'[106]

Critics have pointed out the failure of the US government to report any substantial terrorist act that was prevented as a result of the intelligence obtained through torturous techniques.[107] Moreover, the importance of retaining 'classified information' decreases with the passage of time, as highlighted by Prof Honigsberg:

> Certainly the government should not reveal classified information, but classified information consists of the sources and methods used to obtain the information. The events themselves are over. The administration could and should reveal what might have happened if we had not captured the terrorists.[108]

[105] Tania Branigan and Vikram Dodd, 'Afghanistan to Guantánamo Bay - the story of three British detainees' (*Guardian*, 4 August 2004) http://www.guardian.co.uk/world/2004/aug/04/afghanistan.usa accessed 12 March 2011.

[106] David Petraues, 'Commanding General David H Petraeus' Letter About Values' (*Global Security*, 10 May 2007) http://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm accessed 11 March 2011.

[107] Tim Otty, 'Honour Bound to Defend Freedom? The Guantanamo Bay Litigation and the Fight For Fundamental Values in the War on Terror' [2008] EHRLR 433, 438.

[108] *Honigsberg* (n 17) 29.

The effectiveness of these '[h]ighly aggressive interrogation techniques ... used against detainees in Guantanamo'[109] are exposed as questionable after reading a Federal Bureau of Investigation (FBI) agents' email to his superior. The FBI agent concluded that these methods '...have produced no intelligence of a threat neutralization nature...' [110]
One such email mentioned a meeting with the Pentagon Detainee Policy Committee and the FBI, when the agent '[v]oiced concerns that the intelligence produced [by the DOD (Department of Justice)] was nothing more than what FBI got using simple investigative techniques...'. The Committee 'finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the..... Methods.'[111]

Undoubtedly, the successful achievement of this first objective remains uncertain until the US government provides information in this respect

2. Legal protection for US officials

This paper will now consider the second objective of the US government's detention policy i.e. protecting US officials involved in interrogation from conviction under the War Crimes Act 1996. The US government needed a safety net for military personnel who would employ all methods available to extract intelligence from the prisoners, thus ensuring US security.

GC III Article 3 requires the signatory countries to criminalise torture committed by state officials. Thus, in the US, action against the breach of Common Article 3 of GC III can be brought under the War Crimes Act of 1996. [112] Nevertheless, the 'torture memos' created a safety net for US officials as they declared the War Crimes Act 1996 as well as many other federal laws unconstitutional. [113] Additionally, the defence of 'necessity' was also made available.[114]

---

[109] Joseph Marguties, *Guantanamo and the abuse of Presidential Power* (Simon & Schuster Paperbacks 2007) 5. Harrington, the deputy assistant director of the FBI Counterterrorism Division writing to Major General Donald Ryder of the Army Criminal Investigation Command.

[110] Mark Denbeaux and Joshua W Denbeaux, 'Torture: Who knew -- An Analysis of the FBI and Department of Defense Reactions to Harsh Interrogation Methods at Guantánamo' (Seton Hall Law Center for Policy and Research Reports 2009), 8.

[111] *Marguties* (n 109) 134.

[112] Daniel Michael, 'Military Commissions Act of 2006' (2007) 44 Harv J on Legis 473, 478.

[113] *Goldsmith* (n 2) 149.

> Finally, these memos suggested that interrogators can only be charged when they have acted with the express intention of inflicting pain. Any intention other than pain infliction would constitute an acceptable defence. [115] Dick Durbin, an Illinois senator, described how the application of the torture memos led to human rights violations in Guantanamo. Durbin states:
>
> If I read this to you and did not tell you that it was an FBI agent describing what Americans had done to prisoners in their control you would most certainly believe this must have been done by Nazis, Soviets in their gulags or some mad regime, Pol Pot or others, that had no concern for human beings.[116]
>
> Former head of the OLC (2003-04) Jack Goldsmith also admitted that the nature of interrogation resulting from the memos was 'unnecessarily extreme'. After seeing Yaser Hamdi[117] Goldsmith said:

Goldsmith explains that the memo

> [I]mplies that many other federal laws that limit interrogation-anti-assault laws, the 1996 War Crimes Act, and the Uniform Code of Military Justice-are also unconstitutional, a conclusion that would have surprised the many prior presidents who signed or ratified those laws, or compiled with them during wartime.

[114] Ibid 144.

'[A] necessity defense (on the theory that torture may be necessary to prevent a catastrophic harm) or self defence (on the theory that the interrogators were acting to save the country and themselves)'.

[115] *Honigsberg* (n 17) 27.

> The message of 1st August 2002 OLC opinion was indeed clear: violent acts aren't necessarily torture; if you do torture, you probably have a defence, the torture law doesn't apply if you act under color of presidential authority. CIA interrogators and their supervisors, under pressure to get information about the next attack, reviewed the opinion as a 'golden shield', as one CIA official later called it that provided enormous comfort.

[116] Darren A Wheeler, *Presidential Power in Action: Implementing Supreme Court Detainee Decisions* (Palgrave Macmillan, 2008), 89.

[117] *Hamdi v Rumsfeld,* 542 U S 507 (2004)*,* 510.

In *Hamdi v Rumsfeld*, the petitioner Yaser Hamdi was an American citizen who was born in 1980 in Louisiana and grew up in Saudi Arabia. He was captured in Afghanistan and was handed over to the US military by the Northern Alliance. In January 2002, Hamdi was held in Guantanamo; however, in April 2002, when his nationality became known, the President moved him to the US and designated him an 'enemy combatant' without any charge. At the time of trial, Hamdi was held in a naval brig in Charleston, South California.

> Before I saw him on the closed-circuit television, I had no sympathy for Hamdi, whom I knew had volunteered to fight for the tyrannical Taliban. Witnessing the unmoving Hamdi on that fuzzy black-and-white screen however moved me. Something seemed wrong. It seemed unnecessarily extreme to hold a twenty-two-year-old feet soldier....isolated from almost all human contact and with no access to a lawyer.[118]

The following observation was found in an FBI Report:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves, and had been left there for 18-24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room. And had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.[119]

Sleep deprivation would usually form part of the interrogation techniques. There were complaints about the use of dogs for interrogation purposes,[120] and frequent complaints of sexual assault and harassment were also received. [121] Notably, all this information regarding interrogation techniques was reported by the FBI agents to their superiors [122] It supplements the allegations made by the detainees themselves. [123]

---

[118] *Goldsmith* (n 2) 159.

[119] *Denbeaux* (n 110) 8. See also *Honigsberg* (n 17) 99.

[120] Ibid 35.

> The dogs were under control of the MP handler. They would have the dogs look at the detainees [...] Keep in mind, they don't like dogs. Unless the dogs

According to these reports, the US military personnel are 'willfully causing great suffering or serious injury to body or health'. They are therefore breaching Article 17 and can be prosecuted under GC III Article 147.[124] Also, the US government officials responsible for the unlawful policies can be prosecuted under the US Code - Section 2340 (A) which considers torture a punishable act.

> Torture: (a) Offense: Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. [125]

So far, US government officials have not been convicted or charged for inhuman treatment of detainees.[126] However, efforts are being made to start investigating the 'torture memos'.[127] Thus, the success of this second objection remains unclear.

The Guantanamo Detainees

> are on patrol, they would be in an interrogation room. Using dogs is equal to the Fear Up technique. It breaks their concentration in their response to the interrogation techniques. They would be thinking about that dog.

[121] Ibid 29.

> One use of sexual tension was to have a female interrogator rub perfume or lotion onto the detainee. The sexual nature of the rubbing is apparent in that various Defense Department personnel refer to the lotion rubbing as a 'lap dance.' The Muslim detainees found this contact offensive because it made them unclean and prevented them from praying. One detainee struggled so violently to avoid the contact that he chipped his tooth on a chair.

[122] Ibid 19.

[123] *Afghanistan to Guantanamo Bay* (n 105).

[124] *GC III* (n 37) art. 147.

[125] *US Code on Torture* (n 57).

[126] 'US Must Begin Criminal Investigation of Torture Following Bush Admission', (*Amnesty International*, November 2010) http://www.amnesty.org/en/news-and-updates/us-must-begin-criminal-investigation-torture-following-bush-admission-2010-11-10 accessed 13 March 2011.

[127] *Brown* (n 58) 796, 802.

Certainly, the success of the US's detention policy remains ambiguous, but the resulting human rights violations in Guantanamo became a symbol of disregard to the law spurred on by supremacism.

Mark Denbeaux, a law professor and one of the *habeas corpus* lawyers for Guantanamo detainees, conducted research on various issues relating to the Guantanamo detainees and published reports on the basis of this research.[128] All these reports are based on data officially published by the US government and exclude classified information.[129]

[128] Denbeaux, Mark P, Professor of Law http://law.shu.edu/Faculty/display-profile.cfm?customel_datapageid_4018=16006 accessed 13 March 2011.

[129] Mark Denbeaux and Joshua W Denbeaux, 'Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data', (Seton Hall Public Law Research 2006) 5.

> The data in this Report are based on written determinations the Government has produced for detainees it has designated as enemy combatants. These written determinations were prepared following military hearings commenced in 2004, called Combatant Status Review Tribunals designed to ascertain whether a detainee should continue to be classified as an 'enemy combatant'.

The first report disclosed that the Guantanamo detainees were arrested through a bounty system [130] designed by the US military to capture 'the worst of the worst'. The Denbeaux report showed that 5% of detainees were actually arrested by the US military [131] whereas 86% of the detainees were captured by the Northern Alliance (Afghanistan) or the Pakistani government under the bounty system.[132] Since these detainees were being handed over to the US military for a bounty, they would not necessarily be vigilantly captured from the battlefield.[133] Under the bounty system. the Northern Alliance and the Pakistani government sold each detainee for $5,000. As the detainees reported: 'We could hear [the Americans] counting money and saying to the Pakistanis: "Each person is $ 5,000. Five persons $25,000. Seven persons $35000".'[134] Nevertheless, Douglas Feith, the former US Undersecretary of Defence insisted that '[i]ntelligence is in the heads of these people. We need to extract it.'[135]

[130] Ibid 2. See also *Denbeaux* (n 129) 23, 25.

> Under the bounty system the US planes would drop flyers which read, 'Get wealth and power beyond your dream help the anti-Taliban force to rid Afghanistan of murderers and terrorists.' Another goes, 'The reward about $4,285 would be paid to any citizen who aided in the capture of Tabilan or al-Qaida fighters.'

[131] Ibid 2. See also *Otty* (n 107) 448.

[132] Ibid 2.

[133] Ibid 15.

[134] Laurel E Fletcher and Eric Stover, *The Guantanamo Effect: Exposing the Consequences of U.S. Detention and Interrogation Practices* (University of California Press,2009), 21. See also Denbeaux (n 129) 15.

> Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing; as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual's detention in Guantanamo, there would be little ability either for the Government to corroborate or a detainee to refute such an allegation.

[135] Ibid 2.

Furthermore, the second report pointed to the inconsistencies in the lists of terrorist organisations. One list was drawn up by the Department of Defence, while the other was prepared by the State Department.[136] The Department of Defence list was used to determine 'enemy combatant' status by the Combatant Status Review Tribunals (CSRTs).[137] Meanwhile, the State Department list [138] was provided to the government to ensure the security of US borders by preventing terrorists (members of the enlisted organizations) from entering the USA.[139] This report, after establishing the inconsistencies in the Department of Defence and State Department lists, held that the irregularities showed that either the State Department had failed to prevent terrorists from entering the US or that the Department of Defence had been detaining individuals unnecessarily.[140] The report went on to conclude that the latter case was more likely to be true.[141]

This conclusion is further confirmed when one examines the facts of Shafiq Rasul. Shafiq Rasul was detained by the US government for his presence in a training camp in Afghanistan. A video showed Rasul attending an address by Osama bin Laden in 2000. However, later it emerged that in 2000 Rasul was in Birmingham working as a shop assistant in a *Currys* store and therefore, the US military had made the mistake.[142]

---

[136] Mark Denbeaux and Joshua W Denbeaux, 'Second Report on the Guantanamo Detainees: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy' (20 March 2006) 3.

[137] Paul Wolfwitz, 'Order Establishing Combatant Status Review Tribunal', (1010 Defense Pentagon, Washington DC 20301-1010, 7 July 2004). See also Wheeler (n 115) 39.

[138] *Denbeaux* (n 135) 4.

[139] Ibid 2.

[140] Ibid 2.

> This inconsistency leads to one of two equally alarming conclusions: either the State Department is allowing persons who are members of terrorist groups into the country or the Defense Department bases the continuing detention of the alleged enemy combatants on a false premise.

[141] Ibid 2, 10.

> There is something wrong when the State Department and Defense Department are not closely coordinating with one another on issues of national security... While this issue is certainly a matter of national security, there is the less alarming possibility that the Defense Department has simply not properly identified terror organizations the State Department has declined to so identify.

[142] *Afghanistan to Guantánamo Bay* (n 105).

During his interrogation, Rasul was repeatedly asked about Osama bin Laden, Mullah Omer and other people that he did not know. According to Rasul, at one point, his interrogators reportedly told him: 'Just say you went to Afghanistan to wage *jihad*, that you went to fight for the Taliban, and you'll be on the way home.' [143] Rasul's assertions particularly gain ground when one reads the following excerpt:

> Sayed Rahmutullah Hashemi...[who] joined the Taliban as a young man. He became a party spokesman. Osama bin Laden came to his office. Is Rahmutullah at Guantanamo? No. He is a freshman at Yale.[144]

Additionally, it is essential to remember that one of the two causes of the US attack on Afghanistan was the alleged human rights violation of the Afghan people at the hands of the Taliban.[145] However, instead of liberating Afghans, the US government began capturing the '[p]rivate, orphans, the poor, conscripts, cooks, drivers. The mayors, the ministers, the Taliban generals— they're not there.'[146] Indeed '[s]ome of ... Taliban colleagues are now in the Afghan parliament that the United States helped created. The desperately poor kids they employed as drivers and cooks sit in Guantanamo.'[147]

The deliberate violation of human rights emerges from one detainee's harrowing description of his experience:

> We were given milk and I had an orange and I just squished the orange into the milk. The milk turned into yoghurt so I was breaking my fast with the yoghurt. When the US soldiers saw what I had done, they took me to a dark room and punished me there for 20 days and nights.[148]

However these men found most indignation in the punishment of stripping their clothes off. 'I would rather be killed than be treated in that way,' one detainee has said.[149] The fact that most of the

[143] David Rose, *Guantanamo: America's War on Human Rights* (Faber and Faber Limited 2004) 86.

[144] Mark Denbeaux and others, *The Guantanamo Lawyers: Inside a Prison Outside the Law* (NYU Press 2009), 10.

[146] Denbeaux, *The Guantanamo Lawyer: Inside a Prison Outside The Law* (NYU Press, 2011) 143.

[147] Ibid 10.

[148] *Fletcher* (n 134) 71.

[149] Ibid 29.

detainees were not involved in hostilities against the US remains the most unfortunate part of this human disaster, as they suffered for no apparent reason.

Conclusion

Certainly, the US government's detention policies proved to be a violation of both domestic and international law. This paper shows the US government's failure not only to comply with law, but also to justify its stance in the interest of national security.

More importantly, the US government interrogation techniques relied on the bounty system which channeled the civilians into Guantanamo. While the US government employed sophisticated technologies to obtain threat information[150] and mobilised significant resources to 'legalise' torture in the national interest, state officials remained unable to decide upon the innocence of the detainees. It has been held that '[m]uch more needs to be disclosed about the factual grounds for initial and prolonged detention, the use of extraordinary rendition and secret detention sites, and the extent and nature of detainee abuses.'[151]

In January 2009, US President Barack Obama recognised the unjust detention policies of the US government and ordered the closure of Guantanamo. He has stated:

> In view of the significant concerns raised by these detentions, both within the US and internationally, prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities … would further … the interest of justice.[152]

Eventually, Obama revoked the rules related to 'detention or the interrogation of detained individuals' in conflict with the US Constitution, the GCs and CAT. [153] He has also made assurances that US detention policies will comply with national and international law.[154] Nonetheless, although a task force has been set up to consider

---

[150] *Schorn* (n 97).

[151] Lisa Magarrell and Lorna Peterson, *After Torture US Accountability and the Right to Redress*, (International Center for Transitional Justice 2010) 27.

[152] Executive Order No 13492, (74 Fed Reg 4897, 27 January 2009), s 2 (b).

[153] Executive Order No 13491, (74 Fed Reg 4893 27 January 2009), s 1.

[154] Ibid.

various options regarding US government detention policies [155], the task force did not meet its deadline.[156] Moreover, on account of various legal complexities, the US Congress is reluctant to close Guantanamo.[157]

Guantanamo detainees have been subject to heinous human rights violations and therefore 'the law requires that meaningful forms of redress should be accessible to all victims of mistreatment who would seek it or welcome it if offered.'[158] Unfortunately, there are currently no official discussions for the compensation of detainees or for the prosecution of US government officials responsible for the violations. [159] Thus '[e]ven after a change in government in 2009, acknowledgment of the truth has been slow to come, partial at best, and made with the express refusal to look back and come to terms with what happened.'[160]

The US President has declared that he will continue the war against al-Qaeda. [161] The question remains whether this will lead the world to

---

[155] Executive Order No 13493, (74 Fed Reg 4901 27 January 2009), s 1 (e).

'To conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflict.. '

[156] Michael John Garcia and others, 'Closing the Guantanamo Detention Center: Legal Issues' (Congressional Research Service, 11 February 2011) 5.

[157] Ibid 6.

'Several measures enacted in the 111th Congress barred the use of appropriated funds to release any Guantanamo detainee into the United States (even in cases where the detainee is no longer believed to have participated in hostilities)…'

[158] *Magarrell Lisa* (n 151) 27, 28.

> As a party to CAT and ICCPR as well as at the imperative of customary international law and its own principles and longstanding tradition of redress for harm after wrongdoing, the United States has an obligation to provide reparations to victims of torture and other serious human rights violations.

[159] *Brown* (n 58) 799.

[160] *Magarrell Lisa* (n 151) 27.

[161] John B Bellinger, 'Terrorism and Changes to the Laws of War', (2009-2010) 20 Duke J Comp & Int'l L 331, 335.

'the right to use force in self defence anywhere in the world where the United States is threatened or being attacked by al Qaeda.'

witness more human rights violations in the name of national security.