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House of Horrors
The Presidents prisons
US policy in the “war on terror” and
treatment of individuals in US custody

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Abstract

Since the terrorist attacks on America in September 2001, the current US administration has put a lot of effort into capturing the individuals thought to be responsible for the attacks, in a war called “war on terror”. Once captured, they received the status of unlawful or enemy combatant, as opposed to the standard Prisoner of War status. The status of people caught up in war is important, since there are numerous treaties which specify the treatment of Prisoners of War. Some accounts have surfaced, on mistreatment or abuse of these individuals. If true, then that is in complete violation of international law and humanitarian treaties.

This article addresses the issues at hand regarding the “war on terror”, international law and violations thereof. On the grounds of national security, intelligence and information gathering has been considered so essential, that the letter of the law and rules must be bent, changed or disregarded.

The repercussions of violation of international law, could pose a great threat to the stability in the international arena, and have a ripple-effect unprecedented in modern history.

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Preface

My field of study is International relations. However the subject of this thesis crosses over from political to legal issues and is interdisciplinary in essence. Since the primary issues addressed, are of a legal nature; domestic US law, international law, humanitarian codes of conduct etc., a legal advisor was chosen to have oversight of the work in progress. I have therefore written this thesis under the guidance of Mr. Pétur Dam Leifsson, Professor of Law at the University of Iceland. His comments and advice has been invaluable, throughout the process of writing this article. Ms. Margret Westlund has read the thesis before I turned it in, and had many valuable points to alter and rethink about, and for that I thank her.

The issue of Human Rights and humanitarian law is within my field of interest and when hearing of violations thereof, the topic of the “war on terror” and treatment of individuals in US custody, was chosen. I became enthralled with the subject of Guantánamo Bay and the treatment of individuals in US custody. The more press coverage there was, and as the story progressed and as more aspects of the tale, became public knowledge, the more interest was triggered. Another aspect of the “war on terror” which provoked interest in particular, was the ideology surrounding this war. There are direct references to the glory days of the cowboy-era, or rather the cowboy movies from the United States. Other matters regarding the treatment of individuals in US custody have angered and saddened me, such as the captivity of children, the elderly and the mentally unstable, not to mention allegations of abuse and even torture of captivated individuals.

The issues relating to the “war on terror”, as they have unfolded and are still progressing, are quite bizarre; almost circus like. These events have upon investigation, triggered a feeling of when a person shouts at the masses: “Welcome to the house of horrors!” Since that is the feeling I have from reading various material on the issue at hand, i.e. the treatment of individuals in US custody in the “war on terror”, and violations of international norms and law, I have chosen that as the title of my thesis, i.e. “House of Horrors” – The Presidents prisons.

Introduction

The main emphasis of this dissertation is on the Bush administrations policy on detention of suspected terrorists, gathered and kept in US custody, after the 9/11 attacks. The primary focus is on the two known facilities, i.e. Guantánamo Bay (also written Guantanamo Bay) Cuba and Abu Ghraib, Iraq. One of the most debatable aspects of the response to the terrorist attacks on US soil has been the detainment and treatment of the people, captured in the “war on terror”, specifically, with regards to international law and humanitarian treaties, which seem to be violated again and again, in this new type of war.

The Bush administration has publicly claimed that they have the authority to capture and seize people, from all walks of life, from anywhere in the world and hold them in captivity, without disclosing their names and without due process of law, perhaps indefinitely. The US courts were to be denied access to the individuals, for the most part, on the grounds of jurisdiction. Not only have people been captured, but also subjected dubious conditions and treatment, without legal access, without charges, without international protection (e.g. the Geneva Conventions). The US administration holds people in captivity, in known facilities under US command, such as Guantánamo Bay and Abu Ghraib, but also as it seems in various secret locations in various parts of the world.

Extraditing individuals to other countries, where it is almost certain, they will be maltreated in every possible way, has also been a viable option for the current administration in the “war on terror”. The violation of international law could possibly bring future prosecution of war crimes towards the highest ranking members of the US administration, since the grave breaches have been violated.

Research methods

This thesis is based on research. I conducted research based somewhat on the standard qualitative methods of Social sciences, and therefore use descriptive methodology. I started off with having several questions on the subject at hand, and then attempted to gather information to answer those questions. For the purposes of this article, I rely on legal writings and transcripts; media coverage and accounts; documents disclosed under the Freedom of Information Act from the US administration; books written on the subject; documentaries; established international law, customs and treaties; as well as other sources of information. In other words, articles, books, magazines, disclosed articles from the US administration and the military; legal advisors; critics, and resources on the internet. All from which I have tried to understand the sequence of events after the 9/11 attacks, formed an opinion, and organized the writing and sequence. This article is therefore a summary of events as they unfolded from September 11th 2001, i.e. the terrorist attacks in America, and the reaction of the current US administration, and violations of international customs, norms and laws. I have not gone to Guantánamo Bay, Cuba and I have not gone to Abu Ghraib in Iraq. Therefore I have not conducted interviews with detainees or members of the military, the US administration or legal experts.

Gathering information on the subject has not always been easy and has been time consuming, since a lot has been written on the subject, and some writings are rather dubious. However a lot has been written, which is credible and trustworthy and my motivation was to find those articles and conduct research based on those writings. I've read countless material on the issue, and delved into various aspects of the case.

Questions

One of the first questions that emerges, when delving into the subject of the “war on terror” is how can such a war be fought and how can a nation win such a war? When thinking of detainees and captured people, how their capture came about and why; another trail of thought, automatically follows: Does the US military, under

the command of President Bush, have the authority to capture and detain thousands of people from all over the Middle East and other regions? Do the US administration, the US military and/or the US intelligence agencies have authority to keep people incommunicado; without judicial process, without access to legal counsel; interrogate them; subject them to harsh and/or inhumane treatment and refuse the individuals the status of prisoner of war? Are all of these factors a necessary evil in “war on terror”? Necessary for national security?

Is there any credence to the persistent reports of abuse, even torture within the walls of the prisons? Furthermore, if there is no torture or maltreatment of individuals going on behind the scenes, then why did the administration see the need to redefine the definition of torture? Can reliable information be achieved from individuals who have been subjected to harsh and coercive methods? Is it justifiable on the ground of national security, to hold people in captivity in Guantánamo Bay, Abu Ghraib or other facilities? The sheer cost; the effort; the manpower; the logic; the rapid loss of respect for the United States in the international arena; the loss of respect within the United States themselves: is it all worth it?

When it comes to Guantánamo Bay itself, there was another flow of questions, such as why was Guantánamo Bay, Cuba, chosen as a detention center for the suspected terrorists? Why did the US administration not opt for using available prison facilities? Thoughts that logically follow are on who is being held at Guantánamo Bay and what is their status? What are, or rather were, the conditions they were subjected to in the beginning of captivity? What rights do these individuals have – habeas corpus? Access to counsel? Fair and just trials? Is international law, such as the Geneva conventions, being upheld and honored for detainees in US custody? Could rumors of children being detained in various prisons, be true? The elderly? Innocent people? How long can they be detained without due process of the law?

What type of evidence or information have the detainees provided to the United States officials? Can captivated individuals, without contact with the outside world, held in secret locations, some in solitary confinement, some imprisoned since 2002; provide solid and valid information, years after their capture?

Why is it important to categorize people during times of unrest, into groups of legal and unlawful combatants? Who is in fact, determining whether these individuals are indeed terrorists, as the administration claims? What “competent tribunal” is handling the screening process?

Theories on International relations

The United States has been known for honoring and upholding international law and humanitarian treaties of various natures, although ratifying the treaties has sometimes taken a while and considerable debate. Portrayal of legality and accountability has been prominent. Being a leader, especially when it comes to the treatment of individuals in times of war, the US has pursued the letter of the law stringently, e.g. when it comes to Prisoners of War (Margulies, 2006, p. 74-82; Fryer, 1991). In the “war on terror” there has been a general shift and change in emphasis regarding captivated individuals, as well as the war itself and rationalization thereof. Now, it seems like this nation is losing its long established respect in the international arena, due to various incidence and aggressive measures, as the war has progressed. Instructions to US personnel from the top levels of the administration, with regards to the treatment of individual in US custody, have lead to new or altered codes of conduct and violations of international rules. How can the US allow itself to slip into the “darker side” and work in the shadows of the intelligence and information gathering, and shroud itself in secrecy, only to be subject to international and domestic criticism for those very acts?

“Great powers in the industrial age have shown a striking proclivity for self-inflicted wounds. Highly advanced societies with a great deal to lose have sacrificed their blood and treasure, sometimes risking the survival of their states, as a consequence of their overly aggressive foreign policies” (Snyder, 1991, p.1).

In the case of the “war on terror”, there is not exactly risk the survival of the state itself, but surely there is a dent in the respect the US has had in the international arena, and perhaps domestically as well, due to various conduct and incidence during the past few years, mainly on moral grounds.

In international relations, both individuals and states use moral language. This language is usually on rights and duties. Even though language can be rhetorical, i.e. that states demand from others, what they themselves do not provide, the language used, is still that of the normative school (Brown, 26-27). Immanuel Kant, a German philosopher from the Enlightenment era. He was interested in the moral world and for him, principles of action are chosen, by what is constituted as duty. However, the difficulty stems from knowing when it's duty we are acting for, or whether it is in fact our interests (Brown, 1992, p. 30).

“Politics and law must be based on morals, but this should not be taken to suggest that politics or law can make people good. Morality is a matter of choice and cannot be imposed; a public legal order can only enforce rules of conduct and would not be required if everyone were of good will and always followed the categorical imperative” (Brown, 1992, p. 31).

Therefore, morals are the basic principles on which political and legal order ought to be based, and public legal order is needed to enforce the morals proscribed therein. Law however is about rules and the enforcement of rules. Morals are about choice of principles (ibid). That is the distinction. Therefore, the principle of political order is that of the rule of law, for if there is no rule of law; the moral autonomy of individuals cannot be reflected in social institutions. Kant was concerned with war, in international relations and for him it was a scenario that kills people and destroys property, but also one where there is a direct threat to justice and security (Brown, 1992, p. 32).

In the “war on terror” these questions of morality and law are very prominent, and it's interesting to see the moral language used by officials, with regards to terrorism. Yet it is the letter of the law, which will be the deciding factor, whether this is a just war or not.

Theories on just-war, deal with the logic and justification of how and why wars are fought. There are two main branches of just-war theories. One is theoretical and the other historical. The theoretical branch, deals with the ethics surround warfare, and

the justifications of war. Historic rules, aimed at limiting warfare of a certain nature, are agreements such as the Geneva and the Hague Conventions. In those agreements, codes of conduct in war are proscribed (Moseley, 2006). In this dissertation, *jus in bello* is discussed as well as the Geneva Conventions.

One of the main prerogatives of any state, at least officially, is that of national security (Snyder, 1991, p. 10-12). This priority remains constant. Security can be acquired through coalition with other states, or in some cases alone, which depends on the state in question (Keohane, ed. 1986, p. 8-10). It is therefore understandable that there were genuine concerns for security during the first weeks and months after the 9/11 attacks. However, the very nature of terrorism is certainly not that of a normal or standard army, and terrorism is not a warfare which is conducted in a normal theatre of war, between States. This is a new entity in international relations; unpredictable and hard to handle. The size of the army is unknown and the enemy itself is non-distinguishable, in some cases the cause for fighting is unknown. All of these variables put together, add to the element of surprise and hence the difficulty in fighting such an army or preparing defense against it.

With regards to terrorism, policy makers probably concluded that the “best defense is offense.” They might also content that cumulative gains, may be acquired through aggressive action (Snyder, 1991, p. 4). That seems at least to be the case in the “war on terror”. There have been a lot of announcements and proclamations in the “war on terror”, some which have been quite logical and others that follow an ideological trail of thought. Official policy announcements do not suffice to analyze action, direction, decisions or intention, taken by the state.

Realists want to understand international relations. Therefore the primary area of interest is on states which might pose threats. By viewing why they might be a threat, i.e. can threatening states increase their power or sustain their domain, important lessons can be learned.

Chris Brown wrote that the term realism is a particularly loaded term, easily used in controversial debate, rather than rationalized debate. According to Brown, realism covers two different aspects, i.e. relating to morals:

- a) where it is held that morals have no role in international relations,
- b) where it is held that morals have their origin in the society and have less to do with politics (Brown, 1992, p. 24).

Realists want to know the real reasons behind policy and actions. Do states act according to aggressive policy, because they want to increase their power or maintain it, or are there other alternative motives, such as increased clout in the international arena (Keohane, ed., 1986, p. 8-10)? In the case of the “war on terror” the probability of acquiring more influence and respect in the international arena, were most likely the initial reasons for the invasion into Afghanistan, as well as the very notion of retaliation. The US wanted to show its might, show how many countries were true allies and make sure this sort of attack (9/11) did not happen again.

Political explanations have various roots. Some theorists contend that domestic interest groups, and self-serving imperialist groups, can all but hijack the state, and can in fact orient state practice and policy towards their own interests. Within this group of theories, there is one argument which might fit into the case of the “war on terror”. Here traits such as exaggeration of foreign threats, is not uncommon from the governing elite, and imperial projects are glorified. This is to justify the use of resources from the society, and also so the legality of state action is not questioned, since actions and decisions are taken under the very powerful sentiments of nationalism. The benefits are not necessarily acquired through war, but come from other sources, such as nationalism, social solidarity and social mobilization (Snyder, 1991, p. 14-16).

The layout and logic

This thesis starts with an extract of the events that unfolded in 2001, leading to the “war on terror”. Some aspects of this new war will be specifically addressed, such as the roundup of the individuals in question and the treatment of captivated people. Chapter two covers legal issues. I start with the Constitution of the United States,

since the “war on terror” is primarily an American war. In Chapter three, international law is addressed, with due process being the main emphasis. As well as humanitarian law. The Geneva Conventions deserve special credit and therefore there is a detailed discussion on the most vital aspects of the Geneva Conventions, with regard to the individuals in US custody, such as categorization, Prisoners of War, unlawful combatants and Grave breaches, in Chapter four. In Chapter five, I discuss Guantánamo Bay, Cuba specifically, with references to Abu Ghraib in Iraq. There I attempt to answer questions on why Guantánamo Bay was chosen as a detention facility. Chapter six covers the question of torture, with small excerpts of specific cases, of both foreign nationals, as well as US personnel; the rendition program and US nationals caught up in the “war on terror”. In Chapter seven I discuss the Supreme Court rulings regarding foreign nationals. Chapter eight, is about The Military Commissions Acts of 2001 and 2006. Finally the possibility of war crime prosecutions, for the current policy and treatment of captivated people will be considered.

Chapter I

September 11th 2001

When the World Trade Center was attacked and destroyed, on September 11th 2001 (herein after called 9/11), the Western world, perhaps even a large part of the world, was in shock. The World Trade center stood out, because that was a place where civilians were predominantly stationed either visiting or working. Other public buildings were also under attack, such as the Pentagon and perhaps even the White House or the Senate. Some speculations indicated that there had been plans to attack other major buildings within the United States, but those plans did not materialize. There certainly was a worldwide outcry and countries all around the world expressed sympathy and support to the United States. How could this be? Why? Who was responsible? What would the consequences be? Many felt our world as we knew it would surely change from that day forward.

1.1 The U.S. reaction – War of ideology

The immediate response to the 9/11 attacks, from the White House was that there would be actions taken to counter terrorism. After being brought to a secure location at Camp David, President Bush said to the media: “There is no question about it. This act will not stand. We will find those who did it. We will smoke them out of their holes. We’ll get them running and we’ll bring them to justice” (Kirk, 2005-1a; CNN, 2001a).

At the time, in the first days and weeks after 9/11, this might all have sounded perfectly reasonable and logical. After all, emotions were running high and the normal reaction to a shock situation is to strike back. However, the manner and mood of the initial reaction and response was to change somewhat, and change quite quickly too. The scope of the “war on terror” as far as President Bush was

concerned and the general lines for this war were set that day. Nobody could have predicted how far the US administration was willing to go in an effort to catch those considered responsible for the 9/11 attacks, but indications were soon apparent. This can for instance be seen from President Bush's' speech to the nation on that fateful day, where he said that there would be "[N]o distinction between the terrorists who committed these acts and those who harbor them" (The White House, 2001a; Chomsky, 2006, p. 6).

In the aftermath of 9/11 the reaction of the United States administration, was to retaliate and the hunt for terrorists was on. In some instances the initial reactions are reminiscent of the old cowboy movies; "the good guy vs. the bad guy"; the mentality of "we will win, because we are right" etc..., in other cases the Fox hunt from the English glory days springs to mind, where the sound of the bugle declares that the hunt is on. Whatever else can be said, the situation was and remains surreal, as it happened and progressed, and as it remains today. Certainly it seemed clear, soon after 9/11, from various declarations, that the "war on terror" would be fought for the most part on ideological grounds. For instance, President Bush stated on September 12th 2001, the day after the 9/11 attacks: "This will be a monumental struggle of good versus evil. But good will prevail" (The White House, 2001b).

Ideological remarks were expressed again on September 17th 2001, when President Bush said in remarks at the Pentagon to employees, on defining the spirit of America, when referring to Osama bin Laden: "I want justice. There's an old poster out west, as I recall, that said, "Wanted: Dead or Alive" (The White House, 2001c). More ideological proclamations were to follow, such as when President Bush claimed in an address on September 25th 2001, that:

"The people who did this act on America, and who may be planning further acts, are evil people. They don't represent an ideology, they don't represent a legitimate political group of people. They're flat evil. That's all they can think about, is evil. And as a nation of good folks, we're going to hunt them down, and we're going to find them, and we will bring them to justice" (The White House, 2001d).

A few days earlier, during the Presidents Address to a Joint Session of Congress and the American People on September 20th 2001, which later became known as “the Bush Doctrine”:

“[W]e will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. ... From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime” (The White House, 2001e).

In response to those statements, Senator Robert C. Byrd wrote: “... [T]he Bush statements repeatedly castigated countries which harbored terrorists as being guilty as the terrorists themselves. Such posturing struck me as all but a U.S. declaration of aggression against a large chunk of the world” (Byrd, 2005a p.84).

The very hypothetical question that follows is: how can a “war on terrorism” be fought, or won for that matter? The very nature of terrorism is certainly not as a “normal” army, not in the “normal” theatre of war. The individuals can be dispersed all over the world; in large or small numbers; of any nationality; known or unknown; identifiable by uniform – or not; women, men, children etc. The very nature of terrorism is that it’s not necessarily organized, although it might be, it is not necessarily found in one specific region or area or by a certain category of people. The whole operation can be covert or not. In other words, there is a great deal of unknown factors relating to terrorism and the element of surprise and shock, is always their strongest weapon in the battles they fight.

Even though there was shock and sorrow over the events of 9/11, some were not so sure that President Bush was equipped to handle the situation. For instance, Senator Robert C. Byrd’s remarks:

“For me ... began a day which would turn the life of our nation upside down and transform a lackluster, inarticulate, visionless president into a national and international leader, nearly unquestioned by the media

or by members of either party. That day would spur the United States Congress to hand over, for the foreseeable future, its constitutional power to declare war. It would eventually lead this nation to an unprovoked attack on a sovereign nation. In consequence, that September morning would endanger cherished, constitutionally enshrined freedoms as has almost no other event in the life of our nation. It would also alter our nation's foreign policy in profoundly disturbing ways" (Byrd, 2005b, p. 11-12).

1.2 New kind of war

Since according to US sources, the al Qaeda (also written al Qaida) terrorist organization was solely responsible for the 9/11 attacks; and since they were primarily based in Afghanistan, the main focus in the beginning of the "war on terror" was to smoke out the terrorists from Afghanistan. Osama bin Laden was the primary target, since he was considered to be the main organizer and "brains" of the 9/11 attacks and the leader of al-Qaeda.

Alberto Gonzales the chief counsel to President Bush said "[T]he war against terrorism is a new kind of war" (Cohen, 2005). So this was to be a new kind of war – a global war on terrorism. Troops from the United Kingdom, NATO and the United States were sent to Afghanistan. The aim was to destroy terrorist training camps and their infrastructure. Furthermore, as stated by Secretary of Defense Donald Rumsfeld; to gather information on al Qaeda, their operations, stations and structure, as can be seen from the Department of Defense's account on fighting the war on terror (DoD, 2002a).

The US "war on terror" didn't stop there. The scope of the war was widened almost immediately, when President Bush addressed the nation in January 2002, only four months after 9/11. There he claimed that other states too, were posing a threat to the national security of the United States. These were the so called "Axis of Evil", including Iran, Iraq and North Korea (Gray, 2004, p. 1; Byrd, 2005c, p. 123). So not only was Afghanistan invaded in an effort to find the culprits, but shortly after, Iraq. Actually a "coalition of willing" nations, 30 nations in all, proclaimed support for

the invasion into Iraq (Schifferes, 2003) and troops from other countries were also sent to Afghanistan. The official reason for the invasion into Iraq was however, that Saddam Hussein needed to be overthrown, since he was in the process of making chemical, biological and even nuclear weapons, and hence posed a great security risk to the whole world (Gray, 2004; Byrd, 2005c). That Hussein was a tyrant and a practiced torture on his subjects and civilians were also reasons given for invading Iraq, since Iraq needed to be liberated and democratized.

In line with the general shift and new emphasis of the US administration, several proclamations were made by the highest members of the administration. For instance Vice President, Dick Cheney, said at the VFW [Veterans of Foreign Wars] 103rd National Convention on August 26th 2002:

“[T]here is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us. And ... his aggressive regional ambitions will lead him into future confrontations ... that will involve both the weapons he has today, and the ones he will continue to develop with his oil wealth.

...Afghanistan was only the beginning of a lengthy campaign. Were we to stop now, any sense of security we might have would be false and temporary. There is a terrorist underworld out there, spread among more than 60 countries. The job we have will require every tool at our means of diplomacy, of finance, of intelligence, of law enforcement, and of military power. ... In the case of Osama bin Laden -- as President Bush said recently -- "If he's alive, we'll get him. If he's not alive -- we already got him"" (The White House, 2002a).

1.3 The round-up and detainment of suspected terrorists

News of the capture and detainment of several individuals suspected of terrorist activities and terrorist connections soon spread. It became clear, that some of the individuals caught had been transported to Guantánamo Bay (also written

Guantanamo Bay) in Cuba. Later, others would be detained in the infamous prison of Iraq, Abu Ghraib, and Bagram airbase in Afghanistan. Many other prisons have been mentioned, such as Camp Bucca and Camp Cropper in Iraq, Camp Arifjan and Camp Doha in Kuwait, along with even more camps in secret locations around the world (MSNBC the Taguba Report, 2004). It seems like some of the camps, might be a part of a prison system, or that these names are segments or categorizations of the same prisons. With the secrecy surrounding these detainment centers, it is hard to tell.

Secretary of Defense Donald Rumsfeld said, in March 2002:

“On September 11th, the terrorists attacked the United States, killing thousands of innocent men, women and children. Less than a month later, the coalition countries responded and the Taliban had been driven from power. Hundreds of Taliban and al Qaeda terrorists have been killed, and hundreds more have been rounded up and detained by coalition forces” (DoD, 2002b).

How some of the individuals were caught, is as astonishing as many other aspects of this bizarre tale. Of course some of the people were caught by the US military or other US personnel, but it seems that people were also rounded up in a haphazard way and sent off to Guantánamo. Why? Because, among other methods, the US spread leaflets from airplanes into Afghanistan, promising rewards for the capture of certain people. One of the leaflets said: "Get wealth and power beyond your dreams. Help the Anti-Taliban Forces [sic] rid Afghanistan of murderers and terrorists" and another; "You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Aaida [sic] and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people” (Afghanistan leaflets, article not dated; Denbeaux & Denbeaux, 2006 p. 15).

Rumsfeld said in a Press Conference in November 2001, when asked if there was a leaflet operation: “Among other things. We have leaflets that are dropping like snowflakes in December in Chicago” (CNN 2001b).

Placing a reward for individuals is very reminiscent yet again, of the old cowboy days. However, asking the underprivileged and poor people of Afghanistan to find terrorists, and award them money for doing so; seems strange. This is bound to result in a lot of wrongful captures and wrongful accusations against potentially innocent individuals. Certainly it must be questionable if all the “tips” are correct and there cannot be a whole lot of trustworthy information passing between the person who points a finger at someone and the person who in turn, captivates an individual based on that information. This sort of practice is wide open for abuse, of any kind. This also partly explains, or gives credence to, the proclamation of some of the detained individuals, that they were in fact farmers, taxi drivers, teachers, shoppers in a market or innocent bystanders, upon capture.

According to research carried out by Denbeaux and Denbeaux (2006), only 5% of the individuals captured in the round-ups, were actually captured by US forces. Leaving more than 85% of the detainees caught by others, and then turned over to the United States. This is a staggering amount, and the high percentage of detainees caught by others, poses the question, whether all these individuals were in fact terrorists, or simply bystanders, caught up in the fog of war, i.e. in the wrong place, at the wrong time.

And so the story began ...

1.4 Inhumane and inappropriate treatment

No sooner did news of the captures spread, then reports of inhumane and inappropriate treatment of the detainees surfaced. Some reports revealed that torture was being applied towards the detained individuals in US custody. If true, then it is in complete violation of the Geneva Convention agreements, which the US signed as a member of the High Contracting Parties in 1949, as well as other treaties of International law, such as the UN Convention against Torture and Inhuman Treatment from 1984 (enforced by the US in 1994). Actually Afghanistan had also ratified the Geneva treaties in 1956, but the US Administration would go on to say, that al Qaeda (then, considered to be based primarily or located in Afghanistan) and

Taliban (the regime of Afghanistan at the time) did not apply to the Conventions because they were indeed not a sovereign nation or a legal regime. This can be seen for instance, from the memorandum of John Yoo, Deputy Assistant Attorney General and Robert Delahunty, Special Counsel, which was written to William J. Haynes II, General Counsel; Department of Defense on January 9th 2002. This memorandum states:

“... Al Qaeda is merely a violent political movement or organization and not a nation-state. As a result, it is ineligible to be a signatory to any treaty. Because of the novel nature of this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva conventions might apply. Therefore, neither the Geneva Conventions nor the WCA [War Crimes Act] regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

... We believe the Geneva Conventions do not apply [to the Taliban militia] for several reasons. First, the Taliban was not a government and Afghanistan was not - even prior to the beginning of this present conflict - a functioning state during the period in which they engaged in hostilities against the United States and its allies. Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions” (Yoo & Delahunty, 2002).

So that's clear – members of al Qaeda or citizens of Afghanistan are not entitled to protection under the Geneva Conventions. Why? Apparently because the Taliban regime is a failed state, and because al Qaeda is a violent political movement and not a nation-state.

1.5 The pictures

Putting that aside, the question still remains; was there or is there, inhumane and inappropriate treatment of these people who appear to have no legal claims to protection under well established international law, regarding their treatment and detention? Sure enough, shortly after the operation of retaliation commenced, in the fall of 2004, pictures of prisoners' abuse from Abu Ghraib spread around the world at record speed.

Images of a person, naked beneath a black robe, standing on a box, with outstretched hands and hooded, can hardly be erased from memory. This person seemed to have been hooked up to wires of a sort, indicating electric shock (The New Yorker, 2004).

Another picture showing a human pyramid of naked individuals, hooded and obviously forced into these positions, as the US military personnel gave the "thumbs-up" and smiling, happy of their achievement in guarding, or as it appears, humiliating the prisoners at Abu Ghraib (ibid).

Yet another picture showed the sheer fear of an individual, as a dog appeared to be in the process of attack on that individual (Daylife photo, not dated). The list of images goes on and on, and would be too lengthy to describe all of them in this forum.

Needless to say, images of hooded, shackled detainees, dressed in orange jump-suits were also vividly displayed in the world media, i.e. people in US custody in Guantánamo Bay. Some images showed detainees being brought from one place to another, shackled hand, foot and sometimes at the waist too, to what seems to be human wheel-barrows, and unable to move at all. Others were being escorted between military police, shackled hand and foot and hooded in some cases, from one place to another and the presence of vicious guard dogs close by. Yet other pictures, showing rows of inmates, with dark goggles over their eyes, forced to kneel in the gravel while waiting for whatever else was to happen (Gray Panthers,

2004; Global Security, Guantanamo Bay, Camp X-Ray; Alvarez, 2006; Zagorin & Duffy, 2005)

If that is not testimony to maltreatment, then what is? These actions had to be sanctioned at the highest levels of command, certainly in the case of the Guantánamo detainees, where they were shackled, hooded or with all the senses covered with goggles and surgical masks and earmuffs.

Major General Antonio Taguba wrote in his report that there were severe failures by the Army command at Abu Ghraib, and there were numerous cases of “sadistic, blatant, and wanton criminal abuses” (Hersch, 2004). The wrongful actions included:

“Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; ... sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee” (Hersch, 2004).

These acts are in direct violation of the general code of conduct, as described in The Geneva Conventions (addressed later in this article) and the US Army Field Manual 34-52 from 1992, which:

“[E]xpressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army” (US AFM, 1992, p. 14).

And defines “physical torture” to include “infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape), and “Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” (ibid).

There were immediate attempts made for “damage control”, after these pictures became public, such as when James Schlesinger, Secretary of Defense in 1973 – 1975, said in 2004: “There was sadism on the night shift at Abu Ghraib. Sadism that was certainly not authorized. It was kind of Animal House, on the night shift” (Kirk, 2005-1b). He went on to say: “The MPs [Military Police] at Abu Ghraib were undertrained for detention operations and they had arrived not in units and with equipment missing” (Garamone, 2004).

Damage control would have been more effective, if the administration had publicly and with sincerity, acknowledged the negative image which had surfaced with the publication of those pictures. As would it have been, if the people genuinely responsible for the acts were to be held accountable for these actions (Carter, 2004). A lot of national and international media attention surrounded the scandal that these pictures brought with them. Questions on the legitimacy of detention and treatment of individuals soon became the highlights of the media coverage, worldwide. The administration did not acknowledge responsibility or accountability, rather dismissed the actions at Abu Ghraib, as that of a “few bad apples” (ibid).

The policies of the administration were flawed, by bending rules and removing military constraints, with regards to the treatment of prisoners. The whole operation was organized and exercised in haste and hence was probably not carefully planned, enough for the captivity of these individuals to succeed (ibid).

1.5.1 Groundwork for torture

Some public figures had set the groundwork for a positive attitude towards maltreatment of terrorist suspects (perhaps inadvertently), such as Alan Dershowitz, Harvard University Law Professor. CNN’s Wolf Blitzer interviewed Dershowitz, and asked among other things, if there are right times for torture? The most striking answer revealed a new emphasis and a major shift from 150 years or more in US wartime affairs and conduct, where policies against torture had been prominent.

“We won't know if he [the person in custody] is a ticking-bomb terrorist unless he provides us information, and he's not likely to provide information unless we use certain extreme measures... non-lethal torture, say, a sterilized needle underneath the nail, which would violate the Geneva Accords, but you know, countries all over the world violate the Geneva Accords... If we ever came close to doing it ... I think we would want to do it with accountability and openly and not adopt the way of the hypocrite... If torture is going to be administered as a last resort in the ticking-bomb case, to save enormous numbers of lives, it ought to be done openly, with accountability, with approval by the president of the United States or by a Supreme Court justice” (Blitzer, 2003).

So it's apparently in order to torture people as long as it's done openly and with accountability, and within the law (posing a need to make new law), according to this distinguished Harvard University Law Professor. As long as the “higher-ups” are doing the torturing or at least sanction it, it's OK. This is certainly a, “since everybody does it (i.e. violates international law), then why not us too?” mentality that is emerging. Professor Dershowitz is not an advisor to the US Government, but non-the-less his position on the torture issue is aired and thus out in the open, and as such listened to. The logic of it might even be used as justification for the official policy. It reveals a shift in the position of people considered as responsible and enlightened, towards torture and reveals an overall acceptance of violating the basic rights established within the Geneva Conventions and established International law.

Chapter II

The Constitution of the United States

The basis of American law lies in its Constitution, originally from the year 1787. The US Constitution very much alive still today, as can be seen from frequent quotes and references to it in the media, among the general public, in the public arena, not to mention the Courts and Judicial system and also in cinema and in television shows etc. The constant quoting of the Constitution reminds the people and the Government of their rights and duties prescribed therein.

The Constitution is built on the so called “checks and balances” where the Executive, Legislative and Judicial powers are clearly separated and work in a system of checks against each other. Based on the ideology of the French Revolution, the Magna Carta of England and trends and ideas during the Enlightenment, the Constitution is a document based on foresight and rights. For as James Madison, one of the “founding fathers” and fourth President of the United States is quoted as having said, in 1788: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (Madison, 1788).

2.1 The Legislative - Congress

Congress has the right, according to the Constitution “to declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water” (Constitution of the United States, 1787a).

“”[R]eprisal” means an action taken in return for some injury. A reprisal could be a seizing of property or guilty persons in retaliation

for an attack and injury. It could include forced used [sic] against the perpetrators for the redress of grievances. A reprisal could even involve killing a terrorist who is threatening further harm and cannot be captured.

"Marque" is related to "marching" and means crossing or marching across a border in order to do a reprisal. So a Letter of Marque and Reprisal would authorize a private person, not in the U.S. armed forces, to conduct reprisal operations outside the borders of the U.S.A." (Foldvary, Senior editor – not dated).

Shortly after the 9/11 attacks, there were moves within the Government to increase the executives power, with regards to the "war on terror", i.e. the Presidents power; such as when Congressman Ron Paul presented the "Marque and Reprisal Act of 2001", legislation designed to give President Bush an additional tool in the fight against terrorism" (Paul, 2001). A letter of marque and reprisal would encourage non-military people, ordinary citizens wherever they may be, to act for the US Administration as it seems and give information on, or even capture people whom they believe to be terrorists. This legislation was thought to be necessary due to the basic fact that when fighting a terrorist organization, one which has in retrospect no legal definition of territory or a nation, a declaration of war is impossible (ibid).

It seems almost medieval, to encourage people from all walks of life, wherever they may be in the world, to "be on the ball" when it comes to terrorism. To be alert, not only towards their own well-being, but to be on alert towards other individuals as well. This is a sure way to fester suspicion among people, - ordinary civilians, even neighbors and friends. People were to be proactive in the process and hence possibly risking their own lives. Not to mention the very possibility that people could be wrong. In an atmosphere of paranoia, suspicion and stress, the possibility increases of wrongful deduction, even more than before. What a dangerous situation emerges, if this act of capturing terrorists by oneself or giving information about others, based on a hunch. What a dangerous situation, both for the civilian and the person whom he begrudges. This is suspiciously reminiscent of the famous witch hunts of medieval times, and is also connected to the leaflets, strewn over

Afghanistan.

Congress has the power to outlaw torture if it would, as is stated in the Constitution: “To make Rules for the Government and Regulations of the land and naval Forces” (US Constitution, 1787b). Congress did in fact enact the anti-torture statute in 1994, which is an international obligation under the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Mukasey, 2007; Garcia, 2004).

However, Jane Mayer of the New Yorker, quoted John Yoo, Assistant Attorney General in a telephone interview, published in 2005. She wrote:

“Yoo ... argued that the Constitution granted the President plenary powers to override the U.N. Convention Against Torture when he is acting in the nation’s defense—a position that has drawn dissent from many scholars. ... Congress doesn’t have the power to “tie the President’s hands in regard to torture as an interrogation technique. ... It’s the core of the Commander-in-Chief function. They can’t prevent the President from ordering torture.” If the President were to abuse his powers as Commander-in-Chief, Yoo said, the constitutional remedy was impeachment” (Mayer, 2005a).

Regarding the issue of Guantánamo Bay, it surely must be a thorn in Congress’s side. Congress should by all accounts oversee the Presidential actions, but seems to have been dormant during the initial process on the “war on terror”. As of 2005, there had been hardly any deliberation or debate on the issue of Guantánamo bay, or enemy combatants for that matter, in Congress. And the issue of what appropriate Presidential power consists of has not been addressed either (Byrd, 2005d, p. 54). Senator Robert C. Byrd wrote: “Congress has decided it would rather just salute the emperor and then stand down” (ibid).

The Bush Administration and the Courts were tangled in legal problems in the “war on terror” meanwhile “Congress has remained on the sidelines” (Washington Post, 2005). This allowed a regime of trial, interrogation and detention to go on, without

comments or guidance from Congress, based on guidelines and rules set by standards of previous wars, - wars that were completely different to the “war on terror”. However, changes are occurring. In 2005, three years after the official “war on terror” began, with hearings of the Senate Judiciary Committee declaring that Congress needed to be more active in decisions regarding the detentions at Guantánamo Bay (ibid).

2.2 The Executive - Presidential power

“The line between legislating and executing is sometimes very thin, and whether that line is breached or broken often depends on the personalities involved. Decisions about war and peace are made [in the White House] ... A major goal is to assure that the presidential power is completely unfettered. ... [T]hat single mission is carried out by hundreds of lawyers throughout the executive office... and in the Justice Department” (Byrd, 2005e, p. 37-38).

That is exactly what happened right after the 9/11 attack. There was a lot of effort put into increasing the President’s power quickly in light of the “war on terror” and hence blurring the lines that so distinctively separate the powers, in the U.S. Constitution. John Yoo, Office of Legal Council, Department of Justice, was one of the persons who wrote the first draft of the power authorization, with the purpose of giving President Bush virtually unlimited power with regards to fighting “war on terror”. Congress passed this new bill, overwhelmingly (Kirk, 2005-1c). The statute “authorized the President to use all necessary and appropriate force against those responsible for the 9/11 attacks” (Foreign Policy, 2006). Yoo said in an interview: “They [the President’s lawyers] wanted the maximum flexibility for the President, to win the war. If you are a prisoner of war, under the Geneva Conventions, then you can only be asked questions and you cannot be treated any differently, based on whether you answer them or not” (Kirk, 2005-2a)

On September 14th 2001 Congress passed a Joint Resolution, acknowledging this new executive power (FAS, 2001). A memo from the Justice Department’s office of

legal counsel, written by John Yoo, stated that “the President enjoys complete discretion in the exercise of his commander-in-chief authority” ... and in a summary of the Yoo memorandum, published on the FAS website states:

“The President has constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations.

The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11” (FAS, 2001).

In that line of thinking, White House Counsel and Judge Alberto Gonzales wrote a memorandum to the President on January 25th 2002, stating that: “... the nature of the war places a high premium on other factors, such as the ability to quickly obtain information” ... “[the war on terror] is a new paradigm ... renders obsolete Geneva's strict limitations on questioning of enemy prisoners” (New York Times, 2005, Transcript; Kirk 2005-2b).

Senator Patrick Leahy expressed concern about the “checks and balances” in the Senate Judiciary Committee Hearing upon on the nomination of Alberto R. Gonzales to be Attorney General, in 2005. There he was primarily concerned with the powers accumulated by the Republican Party, since that political party was in majority control of all three branches of Government. Therefore he expressed concerns that the checks and balances, might be rendered neutral or powerless, since there were few oversights of the authority vested in the executive branch. He was furthermore concerned about Alberto Gonzales’s personal role in the “war on terror”, since several high profile matters had been addressed by Gonzales himself, and there Senator Leahy, felt that Gonzales was a facilitator of the US policy, rather than an independent operator in the official policy making (New York Times, 2005, Transcript).

President Bush said in an interview with Bob Woodward in 2002: "I'm the commander, see? I do not need to explain why I say things. That's the interesting thing about being president. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation" (Polman, 2006). President Bush is not exactly right on that issue. He might have been jesting. He is after all, appointed the President of the United States and therefore he has qualifications and credibility to carry out that role. He does however, need to explain actions he takes and decisions he makes. That's the general idea behind the "checks and balances". The Constitution of the United States supplies the executive branch with the responsibility to guard national security. However, it does not give the President unfettered powers to proscribe whatever he wants, whenever he wants, and sometimes in blatant disregard for legal procedures and treaties. There are limits to military action, and that's where the Supreme Court comes in. The Supreme Court has judicial overview of the executive power.

The President can make decisions on military affairs, such as where and how to proceed with military actions and that seems relatively reasonable. For in the field judgments often need swift action and not a lengthy deliberative process, as would be the case if Congress were to make decisions in the field. "So the Constitution sensibly vests the conduct of military affairs in a single person: the commander in chief" (Margulies, 2006a, p. 51-53). The Constitution however, has countermeasures for the power of the President in war time. That is because the Commander in Chief has broad latitude to conduct military affairs. So the "checks and balances" come into force. If it were not for the "checks and balances" the lines between the three branches might easily be blurred, especially during war. That is, judicial questions would become military matters, and legal issues would become matters of military interest. So the Commander in Chief has the responsibility of providing security to the nation. However, with the Supreme Court overseeing the Presidents' actions, the executive needs to prove the necessity of any action it chooses to take, in wartime (ibid).

Military decisions require financing and hence the President is also dependent on the Senate to provide him the necessary funds for whatever decisions have been made. Here the "checks and balances" are activated again, in the Constitution of the

United States (1787c). In Article 1, section 8 it states: “no Appropriation of Money to that Use shall be for a longer Term than two Years.” This means basically, that the “commander in chief is dependent upon the legislature’s willingness to give him an army to command” (Byrd, 2005f, p. 170). “Yet here in the fall of 2002, ... the Senate was on the threshold of handing over to George Bush – lock, stock and barrel – the sole discretion to unleash the dogs of war” (ibid).

The powers claimed by the Bush Administration were among other things that the individuals captured in the “war on terror” were not entitled to the Prisoner of War status and hence not subject to the Geneva Conventions. The odd thing was that they were neither distinguished as ordinary criminals, nor entitled to a hearing within the American court system (The Economist, 2004a). A whole new phrase was created, i.e. “unlawful (enemy) combatant” relating to the people captured in the “war on terror”. The phrase is used interchanging, i.e. “unlawful combatant” or “enemy combatant” or “unlawful enemy combatant” or “foreign alien” etc. This phrase – unlawful (enemy) combatant - is not found in the Geneva Conventions or other established treaties of humanitarian nature, although some of the phrases or variations of them can be found in legal or scholarly writings. This is a completely new status and as it seems outside the realm of International law or accepted practices.

Vice President Dick Cheney said in an interview with Donaldson on ABC, in 2002, when asked about the detainees in Guantánamo Bay, and why the Geneva Conventions don’t apply to the people in custody:

“...these are not POWs [Prisoners of War] in the conventional sense, they are... unlawful combatants. They don't meet the requirement of the laws of war. They target civilians. That's a violation of the laws of war. They don't wear [sic] uniforms, they don't come in as representatives of the army of a state and satisfy the requirements that are in the Geneva Convention.

Geneva Convention applies specifically to war between states. There are provisions in there that apply to civil wars. But there's a real

question about whether or not the Geneva Convention, ... can be interpreted to apply to the new situation we're faced with, where we've got terrorist attacks on the United States..." (The White House, 2002b).

When asked if the people in US custody have rights, even if they're not categorized as prisoners of war, Cheney answered:

"No, ... the legal question is, there is a category under the Geneva Convention for unlawful combatants, ... they ought to be treated within the Geneva Convention but under that convention deemed unlawful combatants, and therefore ... they don't extend to the rights of a prisoner of war.

The other argument is, the Geneva Convention doesn't apply in the case of terrorism...

These are bad people. I mean, they've already been screened before they get to Guantanamo. They may ... have information about future terrorist attacks against the United States. We need that information, we need to be able to interrogate them and extract from them whatever information they have"(ibid).

So where did they stand, these captured people in US custody? These "bad" people as Cheney and Bush call them? ("The only thing I know for certain is that these are bad people" (CNN, 2003)). No doubt, some of them were or might have been terrorists. But the question still remains; does this apply to all the persons detained in US custody? Are they all "bad"?

The power vested in the current administration seems to pose a threat to civil liberties in general. Civil liberties in the United States have for many years been a fundamental right, within the Constitution of the United States. Now it seems like the military, under the command of President Bush, has the authority to capture and detain thousands of people from all over the Middle East and perhaps other regions too, without disclosing their names and without granting them access to counsel. These captured individuals, at least in the first two years were virtually

incommunicado, and had no rights to judicial process at all. Some if not most, were interrogated and the general feeling is that they too, were subjected to harsh and inhumane treatment. There seems to have been no attempt made as to clear up how long these individuals could be detained. The President claimed this authority, to capture people, detain them and interrogate them, under the Commander in Chief authority, proscribed by his legal aids, in the beginning of the “war on terror”. Apparently incarcerated people in the “war on terror” do not have any rights, primarily because they are foreign nationals, and for the sake of national security. Furthermore, they are, according to the administration, detained outside the sovereign boundaries of the United States, and hence the US Courts don’t have jurisdiction. Because these individuals are categorized as “unlawful (enemy) combatants”, the rules and regulations of the Geneva Conventions and other international humanitarian law, do not apply.

Professor David Cole (2006) is inclined to agree with Senator Byrd’s statement regarding the effort that was put into enhancing the Presidents’ powers, for this new “war on terror”. He writes:

“Since the first few days after the terrorist attacks of September 11, 2001, the Bush administration has taken the view that the President has unilateral, unchecked authority to wage a war, not only against those who attacked us on that day, but against all terrorist organizations of potentially global reach. The administration claims that the President's role as commander in chief of the armed forces grants him exclusive authority to select "the means and methods of engaging the enemy." And it has interpreted that power in turn to permit the President to take actions many consider illegal. ...President Bush has largely gotten away with it, at least at home, for at least three reasons. His party holds a decisive majority in Congress, making effective political checks by that branch highly unlikely. The Democratic Party has shied away from directly challenging the President for fear that it will be viewed as soft on terrorism. And the American public has for the most part offered only muted objections” (Cole, 2006).

2.3 The Judiciary - The Supreme Court

The Supreme Court has been proscribed the task of interpreting the Constitution in cases of doubt. In the US Constitution, the basic protections for persons are detailed and the Supreme Court sets a minimum standard of protection, and no decision of other courts or law may curtail that decision (The Constitution of the United States, 1787d; Gísli Guðjónsson, 2003a).

In the 14th amendment of the US Constitution, due process is described. Due process provides that the Government “shall not deprive any person of life, liberty or property without due process of law” (The Constitution of the United States, 1787e; Gísli Guðjónsson, 2003a). Furthermore, in Article VII of the Fifth Amendment of the Bill of Rights, it is stated:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ... nor be deprived of life, liberty, or property, without due process of law...” (The Constitution of the United States, 1787f).

Hence, no person may be incarcerated without proof - proof which is presented before a neutral tribunal or court. Persons should certainly not be in danger of being killed without cause either! A question arises though, regarding the ultimate power and apparent lack of regard for international law and the Constitution of the United States, when these words of J. Cofer Black, who was the Director of the CIA Counterterrorist operations in 1999-2002, are viewed: “After 9/11, the gloves come off. Nearly 3000 al-Qaeda have been arrested or detained. In Afghanistan the al-Qaeda that refused to surrender have been killed. The hunt is on” (Kirk, 2005-1d; FAS, 2002). This was said during the address to Congress, in the Joint Investigation into September 11th – one year after the attacks.

The Constitution of the United States has provisions to restrain the US President’s

powers during troubled times, because the “war power does not remove constitutional limitations safeguarding essential liberties” (Margulies, 2006b, p. 13, quoted from *Holme Bldg & Loan Assn. v. Blaisdell*, 290 US 398, 426 (1934)). Or as Justice Sandra Day O’Connor writing for the Court in 2004: “state of war is not a blank cheque for the president” (Cole, 2005; *The Economist*, 2004a) However in the “war on terror” there seems to be a change of pace. The administration seems to be able to acquire and harvest all the powers given to the executive during times of war. Does it however accept the restrictions?

“In constitutional-law classes and international forums, activists railed against the unchecked power of the executive branch ... how the precedents established under the Bush administration could harm future generations. Journalists Seymour Hersh and Jonathan Mahler, and legal scholars Ronald Dworkin and Joseph Margulies ... have made important contributions to this country’s awareness by detailing hunger strikes, suicide attempts, and alleged atrocities within the camp [Guantánamo] walls” (Brenner, 2007, p. 172)

Chapter III

International law

3.1.1 Jus ad bellum

The laws of war are split into two categories. Jus ad bellum and Jus in bello. Jus ad bellum, are laws covering a State's right to engage in war; for which there are various theories and practices, international and domestic. Suffice it to say, that there are only two "just war" reasons by today's standards and laws is by means of self-defense, as prescribed by Article 51 of the UN Charter. The other ground for legitimate action is one taken under the UN Security Council itself, i.e. the authorization of Chapter VII in the UN Charter.

In Chapter I, of the UN Charter, entitled "Purposes and Principles" it is stated, in Article 2.4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Charter of the United Nations, 1945, Art. 2.4).

From the UN Charter it is clear that use of force is prohibited, however as with so many treaties there are exceptions. That's where Article 51 comes in to force. In Chapter VII of the UN Charter, it is stated that member states of the United Nations have the right of self-defense either individually or collectively. This is only if an armed attack occurs against any member of the UN. However, the clause for self-defense is only applicable until the Security Council has maintained peace and security, by measures proscribed within their means. Furthermore the Security Council itself has provisions to take legal action, if there is a necessity to do so (Charter of the United Nations, 1945, Chapter VII, Art. 39-41, Art. 51).

Other than that, there is a prohibition to the use of force in interstate relations. If there are not legal and justifiable reasons to wage a war, then States must refrain from resorting to war (Detter, 2000a, p. 156-157). The new “war on terror”, is a questionable war to say the least. However for the purposes of this article, *jus in bello* will be examined closer and *jus ad bellum*, marginally discussed.

After the 9/11 attacks on America, the United Nations and NATO pledged to react to the terrorist attacks. In the immediate aftermath of 9/11, unanimous resolutions were passed by the UN Security Council and the General Assembly (UN SC Res: 1368 (2001) and 1373 (2001) and GA Res: 51/6 (2002)). And NATO pledged to invoke Article 5 of its treaty for the first time in its history (Gray, 2004, p. 159).

The Security Council resolutions 1368 (2001) and 1373 (2001) state:

“Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security” (UN SC 1368; Gray, 2004 p. 159).

Res. 1373 states:

“Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)” (UN SC 1373, Gray, 2004, p. 159).

And as stated above, NATO, offered to activate Article 5 of its treaty, which states:

“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs,

each of them, in exercise of the right of individual or collective self-defence...”

So the possibility of collective self-defense was apparent, a coalition of many states helping the United States in these troubled times. The US administration decided however, not to accept the help of the United Nations. With regards to NATO, the troops were later sent to Afghanistan, in a peace keeping mission, but not in the initial invasion into Afghanistan.

3.1.2 Jus in bello

Jus in bello proscribes the proper conduct of war and what humanitarian laws apply (Detter, 2000a) this means what action is allowed once states find themselves at war. Jus in bello is actually split in two categories as well. The methods and means of warfare, is called the “Hague law” (based on the conventions drafted in Hague; The Netherlands in 1899 and in 1907). The rules and codes of conduct for the proper treatment of people in war, is called “Geneva law”. The Geneva law is based on four conferences, each resulting in a treaty, held in Geneva, Switzerland, where different issues of jus in bello were addressed from 1864 to 1949, which was the most recent ratification of the Geneva Convention treaties (Margulies, 2006a).

In all the legal codes that are available relating to war, there are two main principles in the law of war, which specifically apply to the individuals in US custody in Guantánamo Bay, Abu Ghraib and other detention centers of the US military. These are due process and retreat from torture. It seems that both principles are grossly violated by the current US Administration in the “war on terror”.

3.2.1 Due process

In democratic societies, detainment of any human being is regarded unlawful if the guilt of a person is not established, in a proper and just manner. The evaluation of guilt or innocence and legal incarceration is therefore fundamental in domestic law, as well as international law. Actually, it is the very first thing that should be

reviewed in any case, where liberty is at stake. For how can detainment of an individual be justified, if the individual is in fact innocent? Until such a decision is made on the grounds of careful analysis and review and preferably in fair and just circumstances, then there is a real possibility of unlawful activity with regards to detention.

There is one fundamental question which must be addressed when it comes to incarcerating individuals. Are the captivated people Prisoners of War or criminals? In the case of Prisoners of War, *jus in bello* applies. In criminal cases, the standard procedure of the general justice system handles their case. People may be incarcerated for a certain period of time, such as in cases of temporary arrest, even though guilt as such has not been established. This is perfectly legal. The person must however be suspected of committing a crime in order for these laws to apply, and once incarcerated, the person must be charged with a crime, as soon as a court order has been issued. These are standard proceedings in democratic states.

A lot of public attention has been paid to the legality of the US Administrations decision to incarcerate and detain hundreds, even thousands of people, in various locations around the world. On this point, there “are 300 charges of abuse, and DoD [Department of Defense] has held more than 50,000 detainees worldwide” (Garamone, 2004). Please note, has held more than 50.000 people. That’s not to say that some, even most may have been released, but this is non-the-less a staggering amount of people.

Even more attention and criticism has been directed towards the official position taken by the US Administration regarding the rights these individuals have or as the case may be, do not have. The reasons and justifications for the detainment, treatment and lack of basic internationally approved rights of these individuals seem to center around the policy of the moment. A policy formed in haste and perhaps without going through all the normal channels of Government, in the aftermath of 9/11. Certainly not something established through many years of legal agreements and practice, treaties and norms.

The most pending question is not whether the Government of the United States has

the power to incarcerate a person – any person, for whatever reason – because the answer to that question would invariably be, that it does. The power is there. Having power to do something does not necessarily mean that it's right to use it. The most fundamental question that follows, is whether the incarceration of people from about 40 countries and in numbers that are of a staggering amount, even children and the elderly, is lawful and exercised lawfully, within the international and domestic arena? The answer to that question would have to be “no”.

One of the primary principles and therefore underlying the practice of law is that incarceration of innocent people, and hence deprivation of their liberty, is wrong. The categorization of people is not only the most important thing to establish in times of war but also, whether people are in fact guilty of whatever they are accused of doing. Therefore establishing guilt or innocence is a basic requirement and activity in the process of law. These terms are known in law, as “actus reus” and “mens rea” i.e. establishing guilt and intent. It follows that during such a process of evaluation, the legality of detainment comes into question, known as “habeas corpus”.

“Actus reus, is Latin for “guilty act” ... constitutes intent or recklessness, constitutes a crime.

Mens rea: the crime committed in a certain mental state, with intent.

Habeas corpus, Latin for “you have the body”. A prisoner files a petition for writ of habeas corpus in order to challenge the authority of the prison or jail warden to continue holding him.” Hearings can be ordered after reading the writ, by judges. In the writ a prisoner can argue that the confinement is illegal” (Legal definitions).

Habeas corpus includes the basic right to be heard by a jury, and to question the legality of detention, and according to the Constitution of the United States, “shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” (Brenner, 2007, p. 171).

These basic requirements are not exactly being carried out in a lawful manner; at least it is doubtful, in some of the cases regarding the incarcerated people in US custody. There seem to be some loopholes with regards to the screening process on the scene of capture, i.e. its not all together clear how some of the individuals have been caught, nor why they have been labeled unlawful (enemy) combatants. However, they have been shipped off to foreign locations, for interrogation and information gathering. Only to find later in the process, that some of them were indeed innocent of any crime, participation in terrorist attacks and in some cases, simply innocent bystanders, who found themselves in the wrong place, at the wrong time.

No matter what, the people held in custody during conflict, must be treated fairly, justly and humanely and furthermore have a right to challenge their detention, according to international law. There is no room for doubt with this regard.

3.2.2 How long without due process?

How long can people be detained without due process of law? Indefinitely? The administration has taken the position, that the law of war allows the US to capture and detain members of terrorist groups, indefinitely, without charges (Elsea, 2005, p. 5). Are all these people guilty of being terrorists? Are they guilty of any other crime? Are some of the detained people innocent? In fact, the Taguba report claims that a lot of the people being detained in Abu Ghraib are in fact Iraqi criminals, but not terrorists as can be seen from this paragraph:

“Currently, there are a large number of Iraqi criminals held at Abu Ghraib (BCCF). These are not believed to be international terrorists or members of Al Qaida, Anser Al Islam, Taliban, and other international terrorist organizations. The management of multiple disparate groups of detained people in a single location by members of the same unit invites confusion about handling, processing, and treatment, and typically facilitates the transfer of information between different categories of detainees” (MSNBC. The Taguba Report. 2004).

Joseph Margulies, attorney and law professor wrote about the screening process for detainees being sent to Guantánamo that the official stance was that there was an elaborate screening process in Afghanistan “to separate the wheat from the chaff” (Margulies, 2006c, p. 65). However, as it turned out, hundreds of incarcerated people turned out to be innocent. Major General Michael Dunlavey, supervisor of interrogations, even expressed concerns that too many ““Mickey Mouse” prisoners were being sent to the base” (ibid).

3.3.1 Humanitarian law

Humanitarian law constitutes a considerable part of the international law and is based on a feeling for humanity and protection of the individual in whatever situation an individual may find himself or herself in times of unrest. This combines two basic ideas, i.e. the moral idealism and legal process (Detter, 2000b, p. 160-161).

Human rights, and Humanitarian law, are not exactly the same thing, as Human rights apply to all humans – basic human rights that ought to apply to all human beings. Humanitarian law applies to certain people, categorized groups of people, in certain conditions in conflict or war. These would include prisoners of war, civilians and wounded (to name a few), i.e. Humanitarian law is designed to protect individual rights during times of war and social unrest (Detter, 2000b).

3.3.2 Magna Carta

As early as the year 1215, in the Magna Carta of England, on which the US Constitution is partially founded, there are references and articles about the guaranteed rights of citizens, among which are: freedom from imprisonment; freedom from prosecution or exile, “unless by the lawful judgment of his peers, or by the law of the land” (Magna Carta, 1215, Art. 39). Also to be found in the Magna Carta is a formulation of the right to a fair trial, although a primitive one, by today’s standards. “We will sell to no man, we will not deny to any man, either

justice or right” (Magna Carta. 1215. Art. 40). However, it was during the Civil War and The Peaceful Revolution of the 17th Century that led to what we now know as the Habeas Corpus Acts. These ensure among other things; freedom from unusual and cruel punishments and the right to trial by jury (Robertson and Merills, 2001 p. 4).

3.3.3 Lieber Code

Another “old” code of conduct, which is still very much alive, is the Lieber Code, dating as far back as the American Civil War, in 1863. This code proscribes what is considered inhumane conduct in war. This code addresses issues such as: pillage, rape of civilians and treatment of prisoners. The rules and codes of conduct originated from Professor Francis Lieber, and were applied by the Union army, as proscribed by Abraham Lincoln (Schabas, 2004, p. 1). In “the Code for Armies in the Field”, from that year it is stated that: “unnecessary and revengeful destruction of life is not lawful” (Detter, 2000c, p. 153; Yale Law School, Laws of War, Article 68). The Lieber code was an attempt to codify rules of land warfare and has been very influential in military conduct throughout these almost 150 years of existence. In these codes of conduct one can find strict rules on what is acceptable, in the treatment of prisoners. For instance, in section 1, Article 4, it is stated that: “As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity...” (Yale Law School, Article 4). In Article 16 of the same section, it is clearly stated that: “Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confession” (YLS, Article 16).

There are of course inconveniences, following capture, as is stated in Article 49 of the Lieber Code. That is quite evident or obvious, e.g.: detention during hostilities, being away from their family, friends, work and normal social surroundings or even away from the cause for which one is fighting. All of these are inconveniences. As with any incarceration, no matter where, why or what - there are inconveniences! However, taking Prisoners of War is in some instances a necessary action, if

nothing else, than to take certain people - possibly dangerous people, off the actual battlefield. That is understandable and is common practice in war situations. Other reasons might be apparent for seizing individuals too, such as security issues. That too is understandable, since security must be an issue. A third reason for capturing individuals, is of course the possibility of obtaining viable information or intelligence, from the people in custody, to help the captor's army in their battle. That almost goes without saying.

However, the Lieber Code had something to say about that as well, as can be seen in Article 80, where it is stated that: "modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information" (YLS, Article 80).

If being a prisoner of war includes some inconveniences, it also means that on the grand scale of things, there are some benefits as well (YLS, Art. 49). These include being spared "intentional suffering or indignity" as is proscribed in Article 75 of the Lieber Code (YLS, Art. 75). This from a code of conduct, from 1863! What does that say about the evolution of warfare and where we stand today?

3.3.4 Martens Clause

The Martens Clause (so named after a Professor von Martens, a Russian delegate, at the first Hague Conferences), is another prominent provision, sited in the Hague Conventions and is now a customary rule in international law which is often quoted, although it has different interpretations in accordance with different states, and matters at hand. This clause was included in the Preamble of the 1899 and 1907 Hague Conventions; as well as Protocol I of the Geneva Conventions from 1977 (Detter, 2000d, p. 187; Ticehurst, 1997). The Martens Clause states:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law,

as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience" (Ticehurst, 1997).

This is a clause relating to international law and gives a guideline in cases of doubt, i.e. in cases that are not directly covered by other international agreements. Therefore, it is of great importance in international law, not to be diminished. Especially, and fundamentally, when it comes to the suggestion that States in general can behave as they wish, this clause states the contrary. In other words, states cannot behave as they wish, and if they do, there are (or ought to be) reparations (Detter, 2000d). "It is important to underline the implications of the Martens Clause that it is really the conscience of individuals, or a group of individuals, perhaps a large body of individuals, that, in the last resort, will be relevant since States themselves have no such conscience" (ibid).

The turning point in the development of the law of war in recent years is precisely the hotly disputed question of whether detainees are entitled to Prisoner of War status (Detter, 2000e, p. 198). The question on where the individuals in US custody stand in legal terms has generated controversy around the world, as well as within the United States. The establishment of the official categorization of these people as "unlawful (enemy) combatants" has played and will continue to play a significant role in the proceedings before the US courts, both Federal and the Supreme Court (Gill & Sliedregt, 2005).

Chapter IV

The Geneva Conventions

The Geneva Conventions relate directly to the issues of detainees in US custody. The Geneva Conventions are often called, Geneva I, Geneva II etc., since each convention addresses specific categorizations of protections during war. Geneva III provided a detailed set of rules relating to Prisoners of War, and is hence called the POW convention, and Geneva IV, in the same manner provided protection for civilians and is hence called the Civilian convention (Margulies, 2006a).

The Geneva Conventions and other established humanitarian law are quite clear when it comes to the treatment of individuals incarcerated during conflict. Most captured people acquire a Prisoner of War status, but if not, then they are categorized as civilians. Either way, they are protected according to international law and several international treaties. Whatever the official categorization, people incarcerated in armed conflict are protected from harsh and inappropriate treatment; should receive due process of law i.e. be allowed to challenge their detention. International law is very clear on who may be incarcerated, for how long, what treatment they can be susceptible to and so on. Therefore to establish their status, is of primary importance, i.e. civilian or Prisoner of War. This categorization determines the individuals' rights and the custodians' duty, towards the individuals in custody.

Even in this regard, the US Administration seemed to be in doubt, in the very beginning, as how to handle the captivated individuals in the “war on terror”. John Yoo said in an interview: “We start thinking about – what happens, when we capture other al Qaeda members. What happens? Do we try them? Do we detain them? Where can we detain them?” (Kirk, 2005-1e). And following that statement, Bradford Berenson associate White House counsel at the time, - said on the same

issue: “You can’t kill them. You can’t let him go, because he’s far too dangerous, and potentially far too valuable as a source of intelligence. Can’t try him in an ordinary civilian court system. So what do you do with this person?” (Kirk, 2005-1f).

4.1.1 Reasons for categorization

The distinction and categorization of people is important, especially during war or times of unrest. Distinction of people is fundamental in humanitarian law. Someone of authority and accountability has to determine as soon as possible and preferably at the scene of capture, whether captivated people are in fact civilians or military personnel, i.e. non-combatants or combatants. This categorization is important because as soon as a person is determined to be associated with military activity, that person is automatically entitled to the Prisoner of War status. The Prisoner of War status entails a lot of rights to the person in question.

There are two important features behind the combatant status. One is to establish whether the person in question, has authorization for participating in hostilities. If a person is a lawful combatant, the person has authorization to perform belligerent acts, including such acts as wounding an enemy or even killing the enemy. Normally, without the combatant status, those acts are considered criminal acts. However, when carried out in an armed conflict of an international nature, then the acts are legal, as far as belligerent acts go. Hence a legal combatant or a person who is authorized to participate in armed conflict has in fact, a “license to kill”, and can furthermore participate in organized violent acts (Gill and Slidregt, 2005, p.4).

Non combatants on the other hand, do not have any rights under humanitarian law, to engage in hostilities. They do however have the right to defend themselves against criminal actions and assault (ibid).

The second feature, worth mentioning, is that during hostilities, every precaution must be made to keep fighting solely between combatants and/or against military objectives. This is so the immunity of civilians can better be preserved, as well as

other non-combatant individuals. These people, i.e. non combatants and civilians ought to be protected from harm, as much as is possible in armed conflict (ibid).

Behind the Prisoner of War status (POW status), - also known as the belligerent privilege, is the idea that once a person has been captured, that person is protected and his or her rights are to be respected. The person should not be subject to prosecution simply for having participated in hostilities as a member of the opposing party's armed forces. It is however generally considered a criminal act if non-authorized participation in conflict is carried out by a person of non-combatant status, except in self defense. This is so, because it undermines the Principle of Distinction, which is one of the cornerstones of international law. The protection of civilians and other protected persons is founded on this principle (Gill and Slidregt, 2005, p.4-6).

There is no explicit mention of "unlawful combatant" in international treaties, although it can be found in reference in various theoretical literatures. Participating directly in hostilities is unlawful if one is not a lawful combatant, hence perhaps one can see why somebody would be called an "unlawful combatant". If a person is considered a legal combatant, then he or she is entitled to the POW status, it's as simple as that. If however, they are not, then they are considered civilians, regardless of the actions they might have taken during hostilities, again – it's as simple as that. Whatever the categorization it does not entitle the captor any rights to treat people differently, with cruelty or inhumanely, than is proscribed in international treaties (ibid).

As by the International Committee of the Red Cross, - when all the principles of the Geneva Conventions are taken together, the following is relative:

"Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' There is no ' intermediate status; nobody in enemy hands can be outside the law. We feel that that is a

satisfactory solution -- not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view” (ICRC, Geneva IV).

4.1.2 Why is this important?

In the beginning of captivity:

“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. If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

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 any unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand” (UN, Geneva III-a).

4.2.1 Prisoners of War

The Geneva Conventions grant the captives’ opposing State the power to incarcerate people, considered to be Prisoners of War. Combatants can be detained for the duration of hostilities according to the Conventions. Which poses the question in the case of individuals in US custody, how long the official hostilities will be ongoing? How long will the “war on terror” go on? Is there ever an end to

“war on terror”? This war is certainly not a “normal” theatre of war in any sense of the word. Regardless of that, the Geneva Conventions proscribe that: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities” (UN, Geneva III-b; ICRC, Geneva III, Art. 118 (1)). And furthermore in Article 119 of Geneva III, it is stated, that POW’s may be detained, if criminal proceedings are pending and for the duration of those proceedings. If a POW is charged with crimes of any sort, they may be detained for the duration or completion of punishment. However, parties of the conflict should disclose the names of any person in their custody, which is categorized as a POW. Commissions should be set up, which have the purpose of searching for dispersed persons, specifically POW’s, and make an effort to send them back to their country of origin as soon as possible (UN, Geneva III-c; ICRC, Geneva III, Art. 119 (5)).

Putting aside questions of duration, which could be indefinitely at this point in time there are several other things to think about. According to these articles quoted from the Geneva Conventions, and which are considered to be guidelines in international law; countries are allowed to detain combatants for the duration of hostilities. They must however disclose the names of the captive individuals to the opposing party. This was not done in the beginning of the “war on terror”; instead the US administration claimed that for national security, the names of detained individuals would be withheld. This can be seen e.g. from an article of the New York Times from October 21st 2007, written by Tim Golden, where he writes: “Pentagon officials said that they were withholding the prisoners’ names for their own safety. But keeping the names secret made it harder for volunteer lawyers to file petitions on the prisoners’ behalf and for critics to dispute official claims that virtually all the men were terrorists” (Golden, 2007). Thankfully, not all US military personnel are oblivious to the wrongdoings of the current US Administration, as Matthew Diaz, lieutenant Commander of Guantánamo Bay, Cuba proved, when he disclosed all the names of the detainees, secretly in 2005 (ibid).

Since the duration of hostilities in this case is unknown, then questions of the role of the judicial system emerge. In some cases, countries can even hold POW outside the civilian judicial system. This seems to have been what happened regarding judicial issues of the detained individuals in Guantánamo Bay and other detention

sites of the US administration. However, regardless of duration, disclosing names and information on detainees, jurisdictional matters and matters for the judicial system; that is not to say that countries have no obligations towards people held in captivity. The military cannot mistreat individuals in their custody. This is clear in international law, humanitarian treaties, the Constitution of the United States and so on. This is a fundamental rule of international law and is unmistakably clear in the Geneva Conventions. It should be said and clarified, that even though being a soldier is not a crime as such, and being a POW should not be considered a punishment per se, it does not give countries a “carte blanche” (i.e. unconditional authority) to conclude that prisoners have no rights and treat people as they see fit at any given moment.

Common Article 3, of the Geneva Conventions, so called because it is the same in all Geneva documents states:

“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 provisions:

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” (UN, Geneva III-d).

As can be seen from common Article 3, there are certain humanitarian rules that must be respected and one would suspect and hope, that there are affects to violations of these acts. All people detained during armed conflict are protected by common Article 3 of the Geneva Conventions. The reports on violations of the Article coming from various sources are disturbing, if nothing else. Especially since, The United States has long been known for honoring the Geneva Conventions during conflict or war. At least that has been the official projection of values and norms, coming from this powerful nation. That has been the pristine image of the United States throughout many years of conflict and war.

In Article 4 of Geneva III, goes on to categorize the POW's, who have been captured as:

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, 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.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power..." (UN, Geneva III-e).

Should there be any doubt, regarding what category a captured person falls into then Article 5 proscribes that in cases of doubt, a person is protected. The protection is valid, until their status has been decided upon, i.e. determined by a competent tribunal (UN, Geneva III-f).

4.2.2 Unlawful (enemy) combatants

Secretary of Defense, Donald Rumsfeld said so eloquently:

"We need to keep in mind that the people in US custody are not there because they stole a car or robbed a bank. They are enemy combatants and terrorists who are being detained for acts of war against our country and that is why different rules have to apply" (BBC, 2004; Kozaryn, 2004).

Is there in international law, such a thing as an "unlawful (enemy) combatant" as the US administration claims the status of the detainees to be? And if there is an "unlawful (enemy) combatant" status, does it entail that the persons so categorized, are outside the realm of the law, - outside the realm of the Geneva Conventions? What happens to a person if that individual is not a prisoner of war? According to international law captive people have rights, no matter how their status is categorized. So international law states that if a person in captivity is not a POW, that person shall enjoy rights as a civilian in captivity.

The law of war generally declares enemy combatants as members of the opposing party, who are authorized to participate in battle (e.g. not military surgeons or medics). These individuals, may be targeted, captured and detained in wartime. The Government established rules, relating to the Combatant Status Review Tribunals (CSRT) for the “war on terror”, where the term “enemy combatant” was clarified (Elsea, 2005).

“[T]he term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces” (Elsea, 2005, p. 2-3).

According to this definition, the “enemy combatant” status is not limited to prisoners who have committed belligerent acts, and not limited to Afghanistan. Who supports al Qaeda and or the Taliban? Is that direct support, or also support of an involuntary nature? Some people claim to have been captured by the Taliban and forced to work for them in one way or another – are they too supporters of the Taliban? This is important, because in *Hamdi v. Rumsfeld*, Justice O’Connor, said: “... the enemy combatant ... is an individual who ... was part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and who engaged in armed conflict against the United States *there*” (Kalman and Schroeder, 2006, emphasis mine).

Secretary of Defense, Donald Rumsfeld, said in a News Briefing, accompanied by General Myers, on January 11th 2002, regarding the individuals in US custody:

“They will be handled not as prisoners of wars [sic], because they're not, but as unlawful combatants. ... [A]s I understand it, technically unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly

what we have been doing.

What we've said from the beginning is that these are unlawful combatants in our view, and we're detaining them. We call them detainees, not prisoners of war. ... We have said that, ... being the kind of a country we are, it's our intention to recognize that there are certain standards that are generally appropriate for treating people who ... are prisoners [of] war, which these people are not ... in our view -- but ... to the extent that it's reasonable, we will end up using roughly that standard. And that's what we're doing. I ... wouldn't want to say that I know in any instance where we would deviate from that or where we might exceed it. But I'm sure we'll probably be on both sides of it modestly” (DoD, 2002c).

This statement is “double-talk”, as far the meaning of its context can be interpreted. The statement reflects an attempt by the US administration to bypass international law and customs regarding POW’s or even civilians caught in conflict or war and their treatment.

Under the Freedom of Information Act, a memorandum was made public, entitled: “Memorandum for the Vice President [and others], regarding the Humane Treatment of Al Qaeda and Taliban Detainees” from February 7th 2002. The summary of that memorandum states, that President Bush, accepted the conclusion of the Justice Department, regarding the treatment of POW’s. He acknowledged that the Geneva Conventions do not apply to members of al Qaeda, wherever they were captured. The memorandum concluded that the Geneva Conventions apply only in cases involving “High Contracting Parties”, i.e. only applied to States. Therefore individuals belonging to the Taliban regime or the Taliban forces could not be treated as POW’s, since they were indeed “unlawful combatants”. This conclusion was brought about, by the logic that Common Article 3, of the Geneva Conventions, only applies in “armed conflict not of an international character” (Global Security, 2004).

“...the president said, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent

appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva"" (ibid).

However, further proclamations coming from the US Administration would reveal that there was little regard for the Geneva Conventions, as John Yoo, of the Justice Department stated in an interview quoted by Alessandra Stanley in 2007:

“At the Justice Department we did not think the Geneva Conventions applied in the war against Al Qaeda because they did not sign the Geneva Conventions, and they don’t follow any of the rules of warfare... “Al Qaeda, if you look at what happened on 9/11, has no interest in following any of those rules. ... They don’t take prisoners, as far as we can tell. Instead they try to kidnap people and execute them on the Web or on television”” (Stanley, 2007).

Despite this extra-ordinary comment, Article 4, of Geneva IV, states: “Persons protected by the Convention are 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” (UN, Geneva IV-a).

In Geneva III, i.e. relating to Prisoners of War, it could be suggested that the drafters of the provisions provided, might have had in mind non-state combatants, as can be seen from this quote in Article 4(3) of the POW convention: “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power” (UN, Geneva III-g; ICRC, Geneva III, ICRC Geneva II). In other words, people of a regular armed forces, - are entitled to the POW status, even though the detaining power does not categorize them as such. As seen above (page 22), Yoo and Delahunty, considered members of al Qaeda non-state actors and therefore not parties to international agreements relating to war (Yoo and Delahunty, 2002).

In a Pentagon Briefing from February 8th 2002, Donald Rumsfeld said:

“The president has, as you know, now determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status” (Global Security, 2002a; Kirk 2005-2c).

4.3 Grave breaches

The Geneva Conventions and the Additional Protocols of Geneva treaties, define “Grave breaches” (UN, Geneva III, Art. 129-130):

“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 Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention” (UN, Geneva III, Art. 130)

And in Geneva IV, a similar text is found relating to civilians. In this conference, it is considered unlawful to deport a person or transfer them, as well as confining a protected person. Furthermore it is not lawful to deprive a person, covered by Geneva IV of his or her rights to a fair and just trial (UN, Geneva IV, Art. 147).

Furthermore, in the Additional Protocol 1, Article 11, for Protection of persons, Grave breaches are described. When a person in custody is in danger of being hurt, either physically or mentally, or when a persons integrity is violated, these are Grave breaches of Protocol 1 (ICRC, Geneva IV-a, AP 1, Art. 11).

Additional Protocol 1, Article 85, regarding the Repression of breaches of this Protocol, it is stated as a grave breach: “(e) depriving a person protected by the

Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial“ (ICRC, Geneva IV-b, AP, 1 Art. 85, 4(e)).

The question then arises, who if anyone, is determining whether the people in US custody are in fact terrorists? What “competent tribunal” has been established to determine the status of captivated people? As can be seen from the Due process chapter of this article, some of the captivated people in Abu Ghraib were in fact “ordinary” criminals, with no connection to any terrorist organization, upon capture. Could the same not hold true for Guantánamo?

Why are the “Grave breaches” important at all? The general rule is that if the Geneva Conventions are not followed then charges of war crimes can be brought against individuals and states. There seems to have been some fear of this, from US officials, such as John Yoo and Alberto Gonzales. For instance, as seen from Yoo and Delahunty’s quote above, that they were concerned about the War Crimes Act, but claimed that this act, as well as the Geneva Conventions did not regulate the detention of terrorist detainees, captured during the conflict in Afghanistan (Yoo and Delahunty, 2002). So the top legal aids for the US administration were in fact thinking of “Grave breaches” and War Crimes Acts, or at least had knowledge of them during the whole process since 9/11 2001.

The Bush administration was showing concern that troops and perhaps even military officials could possibly be accused of and prosecuted for, war crimes at any given future date, due to their handling of detainees in US custody (Smith, 2006). According to the same article, Attorney General Alberto R. Gonzales wanted protections against possible prosecution for violations of the War Crimes Act of 1996, since the Supreme Court had declared that the Presidential order of 2002 was in fact illegal. Furthermore there were moves within the administration, to protect US personnel, from possible lawsuits from the detained individuals in US custody, based on the Geneva Conventions and violations thereof. However, as so often is the case, the US might interpret the conventions according to the United States standpoint, rather than the foreign standpoint. The Supreme Court is the deciding factor and might see things differently, and might therefore comply with the internationally understood meaning of international law and treaties (ibid).

The American Civil Liberties Union, wrote a letter to all senators on the 25th of September 2006, when the Military Commissions Act of 2006, was about to go to vote. There they urged the senators among other things, to assure that “government officials who authorized or ordered illegal acts of torture and abuse will not receive retroactive immunity” (Fredrickson and Anders, 2006). So clearly The Military Commissions Act of 2006 was an attempt to prevent future prosecutions of US personnel.

Chapter V

Guantánamo Bay

Since Guantánamo Bay Naval Base, has been most prominent in the media, this place of detainment will be of primary focus. Abu Ghraib in Iraq will also receive some attention, since that was the beginning of the official verification of prisoners' abuse, i.e. with pictures emerging from that detention center causing a world wide shock and upset regarding the prisoners in captivity. Not only are people concerned about the treatment of prisoners in US custody, but also what precedence this sets for the treatment of other individuals in custody of their opponents, now and in future. The whole situation is so bizarre regarding the detention of individuals in US custody, and therefore, the starting point of this chapter is the question of why Guantánamo Bay was chosen as the best place to keep these people, caught in the "war on terror"?

On December 27th 2001, Secretary of Defense, Donald Rumsfeld declared that captured individuals in the "war on terror" would be brought to Guantánamo Bay for detention (ABC 2007; CNN, 2001c). Furthermore the Bush administration decided that Military tribunals would be the best forum for trial of the individuals in US custody. The American court system could, according to the administration, be a hindrance rather than a help with regard to intelligence gathering (CBC news, 2006). The very first question is therefore; why Cuba?

The United States Naval Station at Guantánamo Bay in Cuba has been on lease from 1903. It has had relatively little activity, serving as a foreign outpost in a country where there is no amicability between nations (Hiromi, NYT; The Economist, 2004b). Castro's Cuba has been a thorn in the side of the American officials for many years. American troops have not left since the lease was signed and in 1934, the Cuban and American officials negotiated a legally binding

perpetual lease that could only be terminated by mutual agreement (DePalma, 2002). Based on that agreement, Guantánamo Bay is under US control, still today.

In recent years, the base was revived and given a new mission. A mission, which would end up spurring a lot of criticism as time went by and be the focal point of worldwide attention. When Guantánamo Bay Naval base was chosen to be the central prison for terrorist suspects, it caused even more of a stir in the international arena. However, since that time and still today one of the principal holding places for suspected terrorists in US custody. Guantánamo Bay is a strange choice for a detention centre or prison if you will, because Cuba is on Washington's list of states that sponsor terrorism. It furthermore must be regarded as an odd choice, when one considers that it is surrounded on three sides, by an island governed by the anti-American communist, Fidel Castro (now Raul Castro) and his regime.

5.1.1 Security issues

Secretary of Defense, Donald Rumsfeld said that one of the reasons for Guantánamo Bay, as a detention center, was that the administration wanted to secure the safety of the detainees quickly. Guantánamo Bay was controlled by the United States, yet not on domestic soil, hence an ideal place (PBS, 2002-2005). So security was an issue. Security of the detainees and security for the citizens of the United States, that's understandable. Cuba is close to the United States mainland, but still far enough to protect American civilians from potential threats stemming from foreign detainees, who might possibly escape. Thoughts about threats, such as possible escapes or even more probable, a reaction from terrorist blocks must have weighed in the initial decision for the detention site.

It is quite apparent that the US wanted to protect itself from further attacks, and therefore did not want suspected terrorist on their own domestic soil. Who could blame them? In the aftermath of 9/11, there was still a major concern that other attacks were pending, anger and fear were real emotions running high and therefore this reasoning can be viewed as logical. However, if security of the detainees, US troops and perhaps the US civilians in general, then why was Abu Ghraib chosen as

a place of detention in Iraq? That prison is right in the middle of the combat zone and is regularly shot at and bombarded. Clearly the same reasons of security did not apply in that regard. International law is clear on the issue of safety for detained individuals; the custodian must make all efforts to secure their safety during hostility. This can be seen in Article 19 of the POW Convention, where it is stated that evacuation of POW is essential, to ensure their safety, away from the battle field, and hence out of imminent danger. The Geneva Conventions proscribe that POW's should not be unnecessarily exposed to danger, while waiting to be transferred from the area of conflict (UN, Geneva III-i).

And in Article 23 of the POW Convention it is clearly stated:

“No prisoner of war may at any time be sent to or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations“ (UN, Geneva III-j).

Security being an issue is however, understandable. Security for the United States and security for the individuals and guards at Guantánamo (but not Abu Ghraib), that is a reasonable requirement. Surely there were other benefits though taken into account.

5.1.2 Maximum security prisons in the US

The United States is notorious for its maximum security prisons in several states. By all accounts, there is no chance of flight from them, or at least that takes a special skill. Guarded heavily and with all the facilities and equipment needed to operate such an institution, these prisons can hold virtually anybody the administration so desires to hold. They are vaults. President Bush's own home state, Texas, is in today's world primarily known for its prisons, some of which are the most notorious in the United States. Why not send the detainees there? Surely shackled people cannot be a flight risk, let alone hooded and shackled people! There must have been other considerations, when Guantánamo Bay was chosen. What other benefits could the US administration find for Guantánamo Bay? The

sheer cost of building and maintaining proper facilities in Guantánamo Bay, must at some point have come into question. Or one would at least suspect as much. Building and running a prison is by no means cheap.

Could it be that Cuba was chosen as the prime location for a detention centre, simply because the US administration considered the detainees out of reach of the federal courts in the United States? Could it be that the detainees were furthermore considered outside the jurisdiction of international courts? Outside the realm of the Supreme Court of the United States? Outside the realm of reach for the international community? After careful consideration of these thoughts, and countless reading material, the conclusion reached is that this is the case. Perhaps Guantánamo was the chosen place of detainment, because it was originally intended to serve as the site where Military tribunals would eventually be held, since the prisoners would perhaps be charged with war crimes. This conclusion can be reached, since the official stance original detainees were considered terrorists and hence war criminals. If the US courts did not have jurisdiction, then they could not interfere with the management of the prison, and therefore not take up due process challenges from their detainees.

In fact, Bradford Berenson, associate White House counsel at the time, said in a published interview: “We thought the fact that Guantanamo was outside the territory of the United States would eliminate an important legal ambiguity. As it turns out, we were wrong” (PBS, 2002- 2005).

5.1.3 Jurisdiction

One of the most important questions with regards to the detention of individuals in US custody is that of jurisdiction. Since the people detained in the “war on terror” are being held in various locations around the world, then the question of jurisdiction is very important.

The US administration claimed in the beginning of the “war on terror”, that there was no jurisdiction for US Courts in Guantánamo, Cuba. The official justification

for the detainment and lack of legal process for the individuals incarcerated and detained at Guantánamo Bay, i.e. in US custody is jurisdiction. This is the limitation of the habeas corpus writ, the question of jurisdiction. For if a Court does not have jurisdiction, the Government cannot be held accountable for detention.

On December 28th 2001, one of the earliest memos from the Bush legal counsels was drafted regarding jurisdiction. Patrick F. Philbin and John Yoo, both with the office of Legal Counsel at the time wrote:

“This memorandum addresses the question whether federal district court would properly have jurisdiction to entertain a petition for writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantanamo Bay, Cuba (GBC) ... If a federal court were to take jurisdiction over a habeas petition, it would review the constitutionality of the detention and the use of military commission, the application of certain treaty provisions, and perhaps even the legal status of al Qaeda and Taliban members.

While we believe that ...federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States, there remains some litigation risk that a district court might reach the opposite result.

If an alien detainee is both outside the United States’ sovereign territory and outside the territorial jurisdiction of a federal court, then it is clear that no habeas jurisdiction exists.

...potential legal exposure if a detainee successfully convinces a federal district court to exercise habeas jurisdiction. There is little doubt that such a result would interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens” (Philbin and Yoo, 2001).

So early on in this “war on terror”, there was a question, - a question of jurisdiction.

This must have been one of the major deciding factors, when Guantánamo Bay was chosen as a detention site. Then claims of Cuba not being a part of the United States sovereign territory could be voiced and hence no accessibility by United States Courts. If there is no jurisdiction, then there is less cause to be concerned about litigations from the detainees themselves. It goes without saying, there is no jurisdiction; there is no forum for litigation. Therefore there is no need to fulfill the detainees' rights of habeas corpus. In retrospect, this means that the US had complete control of the inmates, without any interference from the outside world, let alone international treaties and bilateral agreements.

5.1.4 Information and intelligence - Interrogation site

The final argument for the choice of Guantánamo Bay was that this site could serve as an interrogation site or chamber if you will. What better way to gather information, about possible future attacks; about the terrorist organizations; about members of terrorist groups; the training; the financing; the regrouping etc..., than to have a majority of the individuals suspected of terrorist acts, in one place. This site; the location; the environment - a militarily controlled environment, with secrecy being the optimum goal; outside the jurisdiction of courts; away from prying eyes and uncomfortable questions; individuals totally under the control of their interrogators; incommunicado, in isolation from the rest of the world? The whole set-up of this place, - the design; the organization; the site; the place, all of this amount to the "perfect" place for interrogation.

Interrogation is a highly stressful experience, as one can imagine. Need not be in a military situation, - as the negative impact can surely be felt in civilian cases as well. However, it seems that this interrogation chamber created at Guantánamo Bay was intended to use the detainees' disorientation for the military's advantage, by further confusing the captivated individuals, and shaming, embarrassing or exhausting the prisoners. This place of detention was chosen for the purpose of stress and discomfort, ending up keeping the detained persons, in unbelievable conditions and hence, traumatizing the individuals.

5.1.5 Reasons for Guantánamo

So the reasons for choosing Guantánamo Bay as a detainee centre (as with Abu Ghraib), were therefore for one thing, that the facilities were there. The facilities were already available, but would serve a new purpose in the “war on terror”. Regarding Guantánamo Bay, the Americans had the base already, and the contract signed, claiming they had a right to be there. Regarding Abu Ghraib, courtesy of Saddam Hussein, the facility was also there, i.e. available and ready to use.

The second reason was safety. Safety for the detainees, safety for the US public and safety for the US guards, as mentioned above.

The third reason was the jurisdiction of courts and secrecy. Keeping Guantánamo Bay away from the prying eyes of the public, the courts and perhaps other alternative motives, such as keeping the operations secret; not under the watchful eye of Human Rights organizations, the Red Cross or the international arena for that matter. This way, the US administration could, if the need arose, hold Military tribunals over the suspects (or not), hence maintaining complete control from capture to release (or death) of the inmates. This of course based on the assumption that all the people detained, were actually guilty of the acts they were caught and incarcerated for.

The final reasoning for Guantánamo Bay, but by no means the least, was that it could be a massive interrogation site. A site, where possibly some viable information or intelligence, could be acquired and perhaps used to prevent further and future attacks. The logic being, that the detainees are all of foreign descent, highly dangerous terrorists and therefore could not, should not and would not be brought before American courts (or any other court). Guantánamo Bay is under US control, and therefore highly secretive activity goes on there, outside of the “normal” transparency of military conduct. Should claims of jurisdiction or legal process arise, then the reasoning of Cuba owning the land and being a sovereign state could be used. Hence outside of the reach of the United States Courts or judicial system. However, it is clear, that the United States has a dominant status

over this piece of land where the detention centre is; a site where they have a contract for the lease and therefore this kind of reasoning is questionable. To quote Noam Chomsky: “Evidently, the Bush administration selected Guantánamo because legalistic chicanery could portray it as exempt from domestic or international law” (Chomsky, 2006, p. 43).

5.2.1 The first arrivals at Guantánamo

So it was, in January 2002, the first detainees were transferred to Guantánamo Bay Naval Base in Cuba (Amnesty International, 2006, Timeline).

“Inmates were dressed in Day-Glo orange jump suits and shackled whenever they were moved, their eyes covered by blacked-out goggles or hoods. Fearing that the terrorists among them might somehow seek revenge, officials instructed military police guards to cover their name badges and avoid any mention of their families, hometowns or outside jobs” (Golden et al, 2004).

Once there, the facilities were not quite up to par, during the first few months of detention i.e. from January 2002 – April 2002. The first cells were open chicken wire cells, 8x8 feet, with a concrete floor and a roof of sorts. This camp was called Camp X-Ray. The orders to then commanding officer at the Naval Station in Guantánamo Bay, Brigadier General Michael Lehnert, from Donald Rumsfeld, were to make the camp humane but not comfortable. So in these cells, there was a bucket to relieve oneself, a mat to sleep on, two towels (one to be used as a prayer mat) but no blanket. Furthermore, the guards were on patrol constantly outside these cages (note, there were no walls on the initial cells), and lights which were placed overhead were on all night. To add insult to injury, the inmates were not allowed outside their cells, except for 15 minute breaks, twice a week for “exercise”. The very color of the prison outfits, caused stress to some inmates, since this is a sign in many confinement centers of the Arab world, that this person has been sentenced to death (Margulies, 2006c, p. 64-65). Not to forget, that insects and

snakes frequent the island of Cuba, along with rats and other creatures, that can easily find their way into “open” spaces, such as chicken-wire fences.

Brigadier General, Rick Baccus was in charge with the military police and was put in charge of the camp at Guantánamo Bay in March 2002. Baccus seems to have been, by all accounts a fair individual and concerned with complying with international law (Alden et al, 2004), but was relieved of his position after a while, and General Miller was assigned the post. However, Baccus said in an interview, regarding Camp X-Ray:

“The area wasn't the best of situations. Camp X-Ray didn't have any internal facilities at all -- no bathrooms, no source of water. So any of the detainees kept at X-Ray had to be given everything to them. And if they wanted to do the smallest thing like go to the bathroom, the MPs were required to go in, shackle them, and then move them to a Port-A-John to have them go to the bathroom and take them back again. So it was a very manpower-intensive situation” (Kirk, 2005-2d).

When questioned on the facilities, Donald Rumsfeld was quoted as saying: “Just for the sake of the listening world, Guantánamo Bay’s climate is different than Afghanistan. To be in an 8-by-8 cell in beautiful, sunny Guantánamo Bay, Cuba, is not inhumane treatment” (Seelye, 2002; Kirk 2005-2e). Despite this arrogant remark, these conditions were in complete violation of the Geneva law, which states in Article 22 of the POW Convention, that POW’s must be guaranteed hygienic and healthy surroundings. If however, for whatever reason it is necessary to imprison a person in an unhealthy area, or where the climate could be injurious to the person, the prisoners should be removed as soon as possible to a different location, where the requirements of hygiene and health are more favorable (UN, Geneva III-k).

And Article 25 of the same Convention proscribes that the living conditions and penitentiary, should be of the same quality as those of the custodian, if they are in the same area. Other factors must also be taken into account, such as customs and habits of the prisoners, and there should be no prejudice on behalf of the Detaining power, regarding their habits or towards their health. One of the requirements is that

the areas of detention are not damp, too cold or too hot. The dormitories should be adequately provided with customary installations, blankets and bedding, and so on. In other words, the basic comforts a human being needs in order to sustain life and health (UN Geneva III-1).

In April of 2002, Camp X-Ray was replaced by a new facility, Camp Delta. This new facility, is modeled after a maximum security prison within the United States - which begs the question again, why not use the prisons already available? Since the cost of building a new prison is approximately USD 30 million, and then there is the added cost of running the facility (Zagorin and Corliss, 2006).

The person who took over the camp at Guantánamo Bay was Major General Geoffrey Miller. He is by almost certainly responsible for the increased pressure on interrogators to get information, and get it fast.

“There is strong evidence that Major General Geoffrey Miller - the man who ran the Guantanamo Bay detention facility and was then sent to Iraq to improve intelligence gathering at Abu Ghraib - encouraged harsher interrogation methods. But those practices - putting detainees in "stress positions", giving them only basic food rations, reducing heat in winter and air conditioning in summer - come nowhere near the extreme beatings, intimidation and sexual humiliation shown in photographs from Abu Ghraib. ... The link to Maj Gen Miller is crucial. Through him, a direct line can be drawn to the highest levels of the Pentagon and, in turn, the White House. But he has vehemently denied that his recommendations condoned illegal behaviour and senior military officials have rallied around him... One fact remains undisputed: less than two months after his departure from Iraq, the first of the shocking photographs were taken. Whether one event helped cause the other is the question that could decide the fate of an administration” (Alden et al, 2004).

5.2.2 “The least worst place”

Defense Secretary, Donald Rumsfeld, said Guantánamo was the “least worst place” [sic] to send detainees (DePalma, 2002, BBC, 2001). He furthermore said: “it's not going to be a country club” (Elliott, 2002) “but it is going to be humane” (BBC, 2002). This certainly is the “worst” place to send detainees and it's highly questionable if it's the “least worst” place. Donald Rumsfeld also said:

“The fact is that the first people we brought down were in fact the hardest of the hard core, because we wanted to get them out of the Kandahar and Bagram facilities. Now we have brought down a large portion of the people, and now it is [a] mix, and they vary. ... It seems to me ... that some may be transferred to other countries, some may be released, some may be held for the duration, some may be tried in one or more of the various mechanisms that are available -- the United States criminal justice system, military commissions, or the Uniform Code of Military Justice” (Global Security, 2002b).

In other words: “the hardest of the hard core” may find whatever fate the current US Administration sees fit.

By detaining dangerous enemy combatants, the US is able to prevent their return to fight, as well as providing intelligence, which helps prevent further terrorist attacks. The people in detention at Guantánamo Bay, according to Rumsfeld, include high ranking al Qaeda and Taliban operatives, as well as lower ranking soldiers. Because these men are dangerous, their detention is “security necessity” (Kozaryn, 2004). Ms. Kozaryn goes on to quote Rumsfeld: “They've provided information on al Qaeda 'front' companies and bank accounts, on surface-to-air missiles, improvised explosive devices and tactics used by terrorist elements. And they have confirmed other reports regarding the roles and intentions of al Qaeda and other terrorists organizations” (ibid).

5.3.1 Are they all dangerous terrorist?

These people, the “hardest of the hardcore” included some of the following - senile old men and children. Of course some of the people incarcerated and detained at Guantánamo Bay may indeed be terrorists. Some may even be responsible for the 9/11 attacks. However arbitrary detention of any human being is unlawful, in international law, and the presumption of innocence is a vital foundation of international, as well as domestic law in democratic societies. In the “war on terror” it seems to have been a major weakness in the decision-making process, regarding who would be confined at Guantánamo. Old people – children ... is there no end to the reach of the US administration in the “war on terror” regarding whom they were eventually to capture and detain, without access to counsel, without due process, without hearings?

The Bush administration repeatedly exaggerated the danger of the detainees in custody, as well as the actual intelligence these individuals provided (Golden et al (2004). The journalists interviewed many high-level intelligence, law enforcement and military officials, and concluded from those interviews, that the detainees at Guantánamo Bay were not high ranking or senior members of al Qaeda. Only a few detainees were actually members of al Qaeda or other known terrorist groups. Some of the people sent to Guantánamo Bay were quite obviously not high ranking or even active terrorists. According to the reporters, the CIA made an analysis of Guantánamo Bay. The CIA’s conclusion was that there were quite a few low-level military personnel in captivity in Guantánamo. Others were innocent or were there on ideological grounds, i.e. had attempted to defend the Taliban for religious reasons (Golden et al, 2004).

Christopher Cooper, reporting for the Wall Street Journal, said:

“About 80 to 85 men brought to Guantanamo turned out to have serious mental problems, American officers say, and several other prisoners were deathly ill. One psychotic Afghan prisoner, nicknamed “Wild Bill” by his captors, spoke four languages but spent most of his time shouting nonsense in English. Another man soldiers dubbed

"Half-Dead Bob" arrived weighing 78 pounds and suffering from pneumonia, tuberculosis, frostbite and dysentery. Neither man offered much in the way of intelligence; they were treated and then returned to Afghanistan, American officials say" (Cooper, 2005).

Joanne Mariner, a Human Rights attorney, quotes the New York Times description of Faiz Muhammed, one of the four people released from Guantánamo Bay in 2002:

"Babbling at times like a child, the partially deaf, shriveled old man was unable to answer simple questions. He struggled to complete sentences and strained to hear words that were shouted at him. His faded mind kept failing him" (Mariner, 2002a).

5.3.2 Even children?

United States law, as well as international law, requires Governments to provide juveniles caught up in hostilities, with special considerations. This is based on the fact that children and juveniles are particularly vulnerable individuals. Most importantly, children ought to be allowed separate facilities or housing; contact with families and provided with education, not to mention the very important fact, that children should be allowed legal assistance (Sullivan, 2008).

The UN Convention on the Rights of the Child from 1989, states among other things, that a child is any person under the age of 18 years. Children should be protected against torture, and other incidence, such as inhuman or degrading treatment. These individuals, when caught up in a war like situation, are by no means to be sentenced to life imprisonment or capital punishment for any act they may have committed, while under the age of 18 years. Furthermore, arbitrary imprisonment or unlawful imprisonment, is prohibited, but if necessary for some reason, then the detention should be as short as possible and only used as a last resort. It goes without saying, that legal access should be provided to the child and the right to challenge the legality of detention (UN Convention on the Rights of the Child, 1989, Art. 37-38).

The US has admitted holding eight teenagers at Guantánamo, some have been given a juvenile status, and others have not (Sullivan, 2008). According to Professor Margulies, the Pentagon released three children in January of 2004. They were according to accounts, ten years old, twelve years old and thirteen years old, at the time of their capture. The US commander at Guantánamo at the time said they were forced to join the Taliban. However, upon noticing that there were children among the captured individuals, they were moved to Camp Iguana, which was a special facility (Margulies, 2006c). No such luck for Omar Khadr though (his story to follow). Margulies goes on to note, that “not all juveniles at the base are held at Iguana. In January 2004, the military acknowledged “a small number” of children remain in custody” - how many remains unknown (ibid).

In an address to the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights, at the American University Washington College of Law, on September 7th 2006, Professor Richard J. Wilson said among other things, that he had served as co-counsel for Omar Khadr. His story has recently hit the headlines in the media. Omar Khadr was 15 years old upon capture in Afghanistan. He is a Canadian citizen. Omar has spent most of his adolescence in Guantánamo bay, without being able to file for writ of habeas corpus (Wilson, 2006).

“We have visited with Omar on many occasions. We have watched him grow physically, though in our view, as well as that of more than one trained psychologist, he is emotionally, educationally and psychologically suspended in time with the mind and heart of a child” (Wilson, 2006).

The story goes on, in the most horrific way, sending chills up and down the readers’ spine:

“Omar Khadr’s torture began almost as soon as he was taken to Bagram Air Force Base in Afghanistan after his capture, in July of 2002. Although badly wounded during his capture, Omar’s interrogation began even as he lay in recovery, days after his arrival at the hospital with nearly mortal wounds. He was carried on a cot to an interrogation room and denied pain medication until he cooperated ...

and was hung from the door sill by wrist shackles for hours as a disciplinary measure for talking in his cell” (ibid).

Just for the reader, this will not be pursued further, but refer the reader to the statement of Professor Richard J. Wilson on that matter (<http://ejp.icj.org/IMG/MrWilsonStatement.pdf>), because the story is very upsetting, to say the least.

Another report, in a more upbeat manner, comes from James Astill, reporter for the Guardian, in his article where he talks about Asadullah, a 14 year old boy, detained at Guantánamo for 14 months, before his release. Astill reports that Asadullah had been returned to Afghanistan, but he was 12 years old, when arrested. He was according to the journalist, happy with the conditions, the food, the teaching, and considered American people to be good and friendly people (Astill, 2004). Nice to know, that the US Military did comply with general provisions, with regards to juveniles, in some cases. The question still remains, what were the children doing in Guantánamo Bay in the first place?

Chapter VI

6.1 Interrogations

The main purpose of interrogation, logically, is to gather from suspects, valid information and factual accounts. The main problem with that is that the prisoner may want to withhold information, or not know anything about what he is being interrogated for. The most probable way to gather such information, i.e. information that can be of use to the interrogator, is to carry out the interrogation in an ethical and legal manner. However, this is not often the case, as can be seen from Professor Gísli Guðjónsson's quote of Patrick McDonald's book, from 1983: Make 'em talk':

“If you have suspects under your total physical control, you can wear them down and make them easier to exploit and more compliant. One of the simplest methods to debilitate people physically is to severely limit their food intake or intermittently refuse them food altogether”
(Gísli Guðjónsson, 2003b, p.8).

The very nature of interrogation opens up the possibility of abuse. It goes without saying, when “any means necessary” apply, it gives open range to use coercion or torture in an attempt to gather viable information or intelligence. That's why there are so many laws, regulating the process of interrogation and information gathering.

According to Guðjónsson; in some cases the persons detained, and in instances of “incommunicado” detention, the people are often physically exhausted, emotionally distraught and mentally confused. There is a high level of anxiety and nervousness. Stress caused by the environment the individual finds him or herself in; the unfamiliarity; the confinement; the isolations; and more, can cause trauma to the individual, and a feeling of uncertainty and lack of control. Agitation and increased physiological arousal is caused when a person is restrained, cannot be in contact

with friends or relatives, receive visits or use bathroom facilities without permission etc... All of this is invasion of personal space. Add to this a number of uncertainties relating to the confinement, and you have serious physiological strain; such as questions of fulfillment of basic needs, not knowing the length of detainment, not knowing what's going to happen to the individual, timing and duration of each interrogation and confinement and social isolation (Gísli Guðjónsson, 2003c, p. 24-27).

There is evidence to suggest, that social isolation, sensory deprivation, fatigue, hunger, lack of sleep, physical and emotional pain, threats etc... affect decision making and the reliability of statements. Individuals under such duress, have impaired judgment, suffer from mental confusion and disorientation and are subject to increased suggestibility (Gísli Guðjónsson, 2003d, p. 31). Under these conditions, confessions or information gathered can be - and probably is - false and ought to be inadmissible in a Court. This should be of major concern to those who seek information or viable intelligence. In the "perfect" world, false confessions would be inadmissible in Court, but that is not necessarily the case with the individuals in US custody.

There are at least 4 different ways in which miscarriage of justice can be identified:

1. Defendant did not receive fair trial. Regardless whether the person has committed the act he/she is accused of. Unfair means and violation of due legal process, being the main cause for conviction.
2. Defendant marginally connected with the case, but charged with greater involvement or a more serious charge.
3. Wrong person in detention or being charged
4. The alleged act, the person is being charged with, was never committed (Actus reus), (Guðjónsson, 2003e, p. 158).

Apparently false confessions were quite common during Stalin's "show" trials and among American military people in Chinese custody during the Korean War. So there is nothing new here with this regard. People will confess to (almost) anything, if coerced, tortured or forced to do so. Cultural factors and differences in legal systems are also a part of the equation (Guðjónsson, 2003, p. 174). American

military interrogators at Guantánamo Bay and Abu Ghraib, along with other prisons, seem to be using the same tactics as the Russians in the Stalin era. Some of his “favorite” methods were: subjecting individuals to interrogations at night, sleep deprivation, deprivation of social contact, combining them with beatings, causing physical discomfort, threatening and intimidating the individuals, and perhaps even torturing them (Guðjónsson, 2003, p. 174). Sounds eerily similar to some of the accounts regarding the treatment of foreign nationals in US custody, in the “war on terror”.

6.2.1 Torture?

“After Bush has been securely ensconced in office for another four years comes evidence of a policy of torture, sanctioned by the administration in official memos, and in use in Guantanamo and heaven only knows where else in the world. We are quietly bending back thumbs in the pursuit of perpetrators of evil. How do we look in the eyes of the world? ... No one can make me believe that these atrocities are mere aberrations by young troops run amok. No. There was a climate – a tacit understanding that this was what Washington wanted done.” (Byrd, 2005g, p. 234).

One of the most fundamental principles of international law is that torture is prohibited. Prohibited, not only on moral grounds, but also, if for no other reason than this kind of behavior tends to snowball out of control. If one side of the party involved in armed conflict, will resort to using torture, the other side might go ahead and do the same as acts of revenge, or simply because “the other side started it”. Needless to say, the barbarity will escalate and soon international rules and codes of conduct no longer apply. One of the main reasons behind prohibition of torture is therefore concern for ones own soldiers or citizens and the treatment of any native individual in foreign custody. When interviewed by Wolf Blitzer of CNN, Ken Roth, the executive director of the Human Rights Watch said: “The prohibition on torture is one of the basic, absolute prohibitions that exists in international law. It exists in time of peace as well as in time of war. It exists

regardless of the severity of a security threat” (Blitzer, 2003).

The U.S. Army Field Manual from 1992, named: FM 34-52, Intelligence Interrogation, says among other things:

“Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces, while undermining support of the war effort. It also may place US and allied personnel in enemy hands at greater risk of abuse by their captors” (US AFM, 1992, p. 14).

6.2.2 The law can be tricky business

One of the reasons for a “new” definition on torture, and other matters of dubious nature, can be found in answers given by Ingrid Detter, among other legal writers in the international arena. In international law, deviation from rules is sometimes allowed, under very specific circumstances. International laws are often fragmented by various national systems, but also susceptible to different interpretations. This is because they are complex, highly technical, embodied in a complicated inter-woven network of conventions as well as entrenched in general international law (Detter, 2000a, p. 156). Therefore derogation from general rules is often allowed in various treaties. For instance the American Convention on Human Rights from 1969, states that derogation of the main principles is only allowed in wartime, in cases which are deemed to put the public in direct danger or in cases of emergency, for instance where the independence or security of the State is at stake. However this is limited to urgency and has a time limit, i.e. only for the most necessary situations and only for a certain period of time. However, the acts which cause the deviation from the general rules must be consistent with other international law and obligations thereof (American Convention on Human Rights, 1969, Art. 27 (1)).

However, even though there are provisions in several treaties, concerning derogation of the main principles of the law, there are still rules that may not be broken under any circumstances (Detter, 2000b, p. 161 – 162). In the agreements for the American Convention on Human Rights, there are provisions against the use of torture and inhuman and degrading treatment, such as Article 5:

- “1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal” (American Convention on Human Rights, 1969, Art. 5).

This law, and many others state in plain words, that persons in custody, for whatever reason they may be in custody, are by no means to be maltreated, dishonored or punished. However, there is an overall problem with the effectiveness of international law relating to different legal orders within States. These problems arise from the difference between what is perceived as international affairs, and what is perceived as internal affairs. The two come from different sources. International law has in many cases been implemented into domestic law. If they had not affected internal or domestic law, it:

“[W]ould be impossible to explain why individuals are bound by obligations in the field of human rights and humanitarian law and, conversely, why they enjoy rights in these two fields. It would be even more difficult to determine how international society can proceed to try, convict and punish “war criminals” ..., [military staff] may even have scrupulously followed and obeyed national legislation” (Detter, 2000f, p. 193-194).

Generally lawyers of a State, tend to interpret international law in a way that does not comply with internal matters, unless the Constitution of the country in question allows for such international law to apply. This is common practice. However, rules of international law and treaties are usually automatically incorporated in internal law of a State, and if not, they are transformed or converted to apply. Most theorists on international law claim that individuals as such are not directly bound by rules of the system. Law of War is however, aimed at individuals because they provide guidelines for the people involved directly in war, codes of conduct if you will, and proscribe treatment of Prisoners of War. The most probable reason for reluctance of internal lawyers to apply international law within their States is precisely in the field of treatment of individuals in their custody. States generally wish to treat incarcerated people as they wish (Detter, 2000f).

This certainly seems to be the case with regards to the current US administration and the “war on terror”. This view, certainly explains a lot of what has been going on, with regard to justification for various actions and claims of the current US Administration.

President Bush said when increasing pressure for answers to questions of prisoners’ abuse came from every source, i.e. the media, from within the US Government and the international community:

“There's been a lot of talk in the newspapers and on TV about a program that I put in motion to detain and question terrorists and extremists. I have put this program in place for a reason, and that is to better protect the American people. And when we find somebody who may have information regarding an -- a potential attack on America, you bet we're going to detain them, and you bet we're going to question them -- because the American people expect us to find out information -- actionable intelligence so we can help protect them. That's our job.

Secondly, this government does not torture people. You know, we stick to U.S. law and our international obligations.

Thirdly, there are highly trained professionals questioning these extremists and terrorists. In other words, we got professionals who are trained in this kind of work to get information that will protect the American people. And by the way, we have gotten information from these high-value detainees that have helped protect you” (The White house, 2007).

This statement was contradicted by CBS’s interview with Israel Rivera, a young reserve soldier, who was among others, ordered to “break the detainees” in Iraq. He told The Fifth Estate’s Gillian Findlay: "I mean, prior to being an [intelligence] analyst I worked at Kentucky Fried Chicken, so it was quite a big jump from being a 19-year-old wage worker to, you know, people coming toward you and saying well, what do you think" (CBC, The Fifth Estate series. *A Few Bad Apples*). Other journalists have reported in a similar manner: “One Army intelligence reservist had previously been managing a Dunkin' Donuts. Many younger Army interrogators had never questioned a real prisoner before. As in Afghanistan, interrogators at Guantánamo asked the same basic questions again and again, many former detainees recalled” (Golden et al, 2004).

6.2.3 “The Torture Memo”

In August of 2002, Jay Bybee and John Yoo, both of them Assistant Attorney Generals to the White House wrote the so-called “Bybee memo”, which has also received the dubious name of “the torture memo”. In this memorandum which is written to Alberto R. Gonzales, counsel to the President, regarding standards of interrogation. This memo was written in response to Mr. Gonzales’s request to view the standards of conduct under the 1982 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Codes. In this astonishing memorandum, Bybee and Yoo write:

“We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain

amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration e.g. lasting months or even years (Bybee and Yoo, 2002).

They went on to say that the statute of 2340-2340A was clear in that it only prohibited extreme acts. Criminal proceedings and penalties could only be carried out, for torture in itself, but not other treatment such as “cruel, inhuman or degrading treatment or punishment” (ibid). The final point was, that even though or even if, torture did occur, that “necessity” or “self-defense” are instances where interrogation methods might be justified, even though they are in violation of Section 2340A (ibid).

According to this explanation and completely new definition on torture, the act of torture can only be described as acts leading to injury, organ failure, bodily impairment or death. Putting people in stress positions for up to 8 hours, shackling people, subjecting people to ice cold conditions, beating people, humiliating people etc., is not torture. Further more significant psychological harm is something that has a lasting effect of months, even years. Anything else, like feeding on a person fear of dogs for instance, is not torture. Needless to say, when this memo was released and people realized what it entailed, there was a general outcry from organizations concerned with Human rights, from retired military personnel within the United States, from current members of the Administration and so on, and the media too.

The question that immediately arises when reading this memo is what is the purpose of redefining the actual term, torture, which falls short of actual death? Why? Is there a need to redefine a term that has been agreed upon and acknowledged throughout various international treaties and agreements? What is the purpose of that? Is it because these practices were already the “norm” within the US military? Is it because the administration wanted to free itself and its people from possible prosecution by shielding itself behind this new definition? Whatever the reasons, the US administration, felt compelled later to devise a new definition on torture.

How could they not? The former definition had spurred a lot of criticism, internationally and domestically. In 2004, the Justice Department revised and expanded the definition on torture, as Bybee and Yoo had previously described it. The head of the Office of Legal Counsel had in fact declared that: "torture is abhorrent both to American law and values and international norms" (Smith and Eggen, 2004) and furthermore rejected the previous statement that only "organ failure, impairment of bodily function, or even death" constitute torture punishable by law (ibid).

The "torture memo" assured the Bush administration of at least three things in all. First, that pain could be caused without crossing the line of torture. Second, even though the US had outlawed torture through various treaties and international law, the interrogators could in fact practice it, if they had authorization from the President. Third, even if, in a possible future, the interrogators were in fact prosecuted for these acts, the legal defenses had been put in motion in order to avoid accountability (Clark and Mertus, 2004).

Setting aside the moral and legal grounds for detention another point to ponder is whether the "war on terror", can be won with coercion or torture? Can reliable information be gathered through coercive methods, torture and degrading treatment? And now, years after the initial individuals were brought to the detention centers, how much information they can be expected to give? What knowledge do they have of current events or plans?

6.3.1 New techniques

Donald Rumsfeld approved several interrogation methods for the people at Guantánamo Bay, Cuba, in December 2002 and again in April 2003. These methods, included stress positions for as long as four hours, hooding the individuals, subjecting them to very long interrogations - up to 20 hours, use of dogs to intimidate, humiliation and non-injurious physical contact (Bravin and Jaffe, 2004). Rumsfeld wrote onto a now unclassified memorandum addressed to the Secretary of Defense, from William J. Haynes II, General Counsel on November 27th 2002, a personal note, regarding the comment of "stress positions"

for as long as four hours: “However, I stand for 8-10 hours a day. Why is standing limed to 4 hours?” (Rumsfeld, 2002).

Among the 24 methods sanctioned by Secretary of Defense, Donald Rumsfeld, for interrogation in Guantánamo Bay, in April 2003, there were the “normal” procedures of questioning and “mild” instructions of instilling fear and pretending to know more than the interrogator knows or knew at the time. These are usually standard means of obtaining information. Then as the list progresses, these instructions are given (Rumsfeld, 2003):

“U. Environmental Manipulation. Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell.) Conditions would not be such that they would injure the detainee. ... [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. ...]

V. Sleep Adjustment: Adjusting the sleep times of the detainee (e.g. reversing sleep cycles from night to day). This technique is NOT sleep deprivation.

X. Isolation. Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: ... This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation, Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique]” (Rumsfeld, 2003).

Actually any technique can be used in combination with another. The possibility of multiple methods used on any one individual is apparent, with unknown consequences to that individual. Of course all these techniques allowed by Rumsfeld, assume that the US military has the right people in custody. It does not allow any possibility that there might in fact be innocent people that are being subject to any one, or a combination of, these techniques.

6.3.2 Detainee 063, Mohammed al-Qahtani (Kahtani)

The prisoner, now known to the media and interested parties as Detainee 063, is in fact Mohammed al-Qahtani, also known as “the 20th hijacker”. Time Magazine acquired an 84-page secret interrogation log on al-Qahtani’s case at Guantánamo Bay, which they published on their website, and which describes in detail the ordeal that al-Qahtani went through. In 2004, a senior FBI counterterrorism official, complained to the Pentagon about the treatment of individuals in Guantánamo Bay. Regarding al-Qahtani, they stated, that he had been “subjected to intense isolation for over three months” and “was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours on end) (Zarogin and Duffy, 2005). Furthermore, “the detainee’s physical condition is frequently checked by medical corpsmen—sometimes as often as three times a day—which indicates either spectacular concern about al-Qahtani’s health or persistent worry about just how much stress he can take” (ibid).

Why? Because according to the Time Magazine article, which is based on the log, al-Qahtani was subject to various methods, like being awoken at 4 in the morning, every morning and then questioning him until midnight; forced to stand or sit; not allowed a bathroom break when needed; stress positions; isolation; no clothing; shaving of facial hair; playing of loud music, etc. For all this treatment, al-Qahtani commenced a hunger strike and refused food or water, only to be forcibly administering fluids into his veins for his attempts (ibid). The log in itself is an interesting reading, and exhibits the lengths to which the interrogators went in an effort to extract information from al-Qahtani.

The reasons for these actions, are most probably political, i.e. an attempt to overcome opposition; achieving confessions to justify the arrests and detention; and reassurance to the general public, that said persons are indeed guilty of what they are accused of (Gísli Guðjónsson, 2003f).

6.3.3 The case of Sean Baker

There are not only foreign nationals who have been subject to harsh treatment by US military personnel at Guantánamo. The case of Sean Baker an Air Force veteran and member of the Kentucky National Guard comes to mind. He told the Kentucky Television Station how his maltreatment came about. When asked to pretend to be a prisoner of Guantánamo, in full “disguise” i.e. in the orange jump suit etc., he agreed to do so. His instructions were to refuse to comply with orders of leaving his cell, and then wait for the Immediate Reaction Force to arrive. This was so the officers at Guantánamo Bay could observe how the IRF reacted to unruly inmates. He said in the interview:

“They grabbed my arms, my legs, twisted me up and unfortunately one of the individuals got up on my back from behind and put pressure down on me while I was face down. Then he – the same individual – reached around and began to choke me and press my head down against the steel floor. After several seconds, 20 to 30 seconds, it seemed like an eternity because I couldn’t breathe. When I couldn’t breathe, I began to panic and I gave the code word I was supposed to give to stop the exercise, which was ‘red.’ . . . That individual slammed my head against the floor and continued to choke me. Somehow I got enough air. I muttered out: ‘I’m a U.S. soldier. I’m a U.S. soldier’” (Kristof, 2004; CBS, 2004).

He ended up being sent to the Walter Reed Army Medical Center, upon realizing that he was in fact a member of staff at Guantánamo and not a detainee. There he received treatment for brain injury. Forty eight days later, he was transferred to light duty, and then finally, after severe seizures, he was given medical discharge (ibid).

“Meanwhile, a military investigation concluded that there had been no misconduct involved in Mr. Baker's injury. Hmm. The military also says it can't find a videotape that is believed to have been made of the incident” (Kristof, 2004).

6.3.4 Daniel Levin, acting head of the Justice Department's Office of Legal Counsel in 2004

Daniel Levin, the acting head of the Justice Department's Office of Legal Counsel in 2004, wanted to experience waterboarding, after the infamous “torture memo” became public. He was concerned about the definition of torture, and therefore decided to experience the method first hand. Waterboarding is a technique that consists of strapping a person to an inclined board, with the head of the individual lower than the body, and then water is poured over the individual. All this, to simulate drowning (Esposito, 2007).

Keith Olbermann said in his Countdown on MSNBC:

... he wrote that even though he knew those doing it meant him no harm, and he knew they would rescue him at the instant of the slightest distress, and he knew he would not die — still, with all that reassurance, he could not stop the terror screaming from inside of him, could not quell the horror, ... he could not convince his being that he wasn't drowning” (Olbermann, 2007).

6.4 Extraordinary Rendition

““Rendition” is the CIA's name for the mission of a Gulf-stream V turbojet with permission to land at U.S. military airports worldwide. The passengers who board this luxury aircraft will not be seen traveling in ordinary attire. Oh no. These passengers are hooded and handcuffed because they are suspected terrorists flown by the United States from country to country for torture and interrogation” (Byrd, 2005g)

In October 1994, the UN Convention against torture took effect:

“The United Nations Convention Against Torture ... bans the transfer of a prisoner to another country where there are "substantial grounds" that he may face torture. The U.S. Congress, in ratifying the treaty, orders that "substantial grounds" are defined as "more likely than not" that the prisoner will be tortured. The convention potentially makes renditions to other countries a crime under U.S. law” (PBS, Rendition Timeline).

It is a known fact that there are several “black sites” where people are held that have been captured in the “war on terror”. When President Bush was asked if the administration had different standards for interrogating suspected terrorist, outside the United States, the President said: "Torture is never acceptable, nor do we hand over people to countries that do torture" (Bumiller et al, 2005). Vice President Dick Cheney also said in an interview with Scott Hennen, for WDAY at Radio day, when asked if dunking people in water was OK, to save lives:

“It's a no-brainer for me, but for a while there, I was criticized as being the Vice President "for torture." We don't torture. That's not what we're involved in. We live up to our obligations in international treaties that we're party to and so forth. But the fact is, you can have a fairly robust interrogation program without torture, and we need to be able to do that. And thanks to the leadership of the President now, and the action of the Congress, we have that authority, and we are able to continue to program” (The White House, 2006a).

However there are several stories that have been published that contradict that claim. Investigative reporter Stephen Gray interviewed a man named Abu Omar, who claims to have been kidnapped on February 17th 2003, and then he “disappeared from history”. Abu Omar claims that he was snatched of the streets and sent to Egypt. There he claims to have been subject to very harsh treatment indeed, and said that his torture had lasted for a long time, 14 months in all (Gray S., 2007).

Needless to say, no charges were ever officially brought against Abu Omar (ibid). That sadly has been the case for many individuals who have been captured and brought into US custody. That remains the legacy of the US Administration, i.e. individuals brought either in Guantánamo, Abu Ghraib or other known detention centers (or unknown detention centers for that matter), that have not been charged with any crime.

The New Yorker's journalist Jane Mayer also wrote a similar story. In her article she tells the story of Maher Arar, a Syrian born individual, who had become a Canadian citizen and worked as an engineer. Captured in New York, after a vacation, and suspected of being a terrorist, he was sent to Syria, where he was tortured severely. Later he was released without charges, after the Canadian Government got involved in his case (Mayer, 2005a). In the same article Mayer goes on to quote Scott Horton, an expert on international law, stating that he estimates that 150 individuals have been "rendered" since 2001.

In yet another article Mayer writes that great lengths have been taken to keep secret how individuals are treated by the CIA (Mayer, 2007).

"The program has been extraordinarily "compartmentalized," in the nomenclature of the intelligence world. By design, there has been virtually no access for outsiders to the C.I.A.'s prisoners. The utter isolation of these detainees has been described as essential to America's national security. ... [Majid Khan] had to be prohibited from access to a lawyer specifically because he might describe the "alternative interrogation methods" that the agency had used when questioning him. These methods amounted to a state secret ... and disclosure of them could "reasonably be expected to cause extremely grave damage"" (Mayer, 2007).

The Council of Europe investigated allegation of secret CIA detention centers in Europe. Swiss Senator Dick Marty investigated the matter and found that it was almost certain, that secret detention facilities for High Value Detainees were to be found in Poland and in Romania (The Council of Europe website, 2007). Investigative reporter Stephen Gray quoted Senator Dick Marty, as saying:

“Methods of interrogation were ‘enhanced’, which is a euphemism. It’s totally unacceptable. There was waterboarding, when you pretend to drown someone, and you only stop when he’s unable to breathe. Sleep deprivation, bright lights, loud noise. These are all methods of torture” (Gray, S., 2007).

Senator Marty also said: “I think all Europeans agree with Americans that we must fight terrorism.... but this fight has to be fought by legal means... Wrongdoing only gives ammunition to both the terrorists and their sympathisers” (BBC, 2005).

Not only are there “black sites” in Europe, but: “Reports have suggested that C.I.A. prisons are being operated in Thailand, Qatar, and Afghanistan, among other countries” (Mayer, 2005a). From this one can assume, that not only is there some merit to allegation of misconduct in Guantánamo Bay and Abu Ghraib, but people are also being forcibly flown to unknown destinations, where torture is certainly applied. How can the US Administration do this and get away with this kind of conduct? That remains a conundrum, which is not so easy to decipher.

6.5 Ibn al-Shaykh al-Libi

The consequences of information gathered under duress or torture, can be seen for instance from Ibn al-Shaykh al-Libi’s case, where he provided “information” about Iraq’s weapons of mass destruction, among other things to his captors, which he later recanted. We all know what that led to, i.e. the invasion into Iraq. US Secretary of State, Colin Powell presented information obtained from Ibn al-Shaykh al-Libi, to the United Nations, as evidence of Iraq’s nuclear program, in February 2003 (Drum, 2005). And Vice President Dick Cheney had also used information obtained by al-Libi to justify the attack on Iraq (see page 19 above). Ibn al-Shaykh al-Libi was a deciding factor in the invasion into Iraq, but later recanted his claims of knowledge about weapons of mass destruction, and said he had confessed to a whole manner of things, under duress and torture (Isikoff and Hosenball, 2008).

“al-Libi was one of the first test cases for Dick Cheney's campaign to introduce torture as a standard interrogation technique overseas, replacing the FBI's more mainstream methods:

... "They duct-taped his mouth, cinched him up and sent him to Cairo" for more-fearsome Egyptian interrogations..." (Drum, 2005).

Soon, it became apparent that al-Libi had indeed made up a lot of his claims, in order to relieve his situation:

"... [A]n intelligence report from February 2002, said it was probable that the prisoner, Ibn al-Shaykh al-Libi, "was intentionally misleading the debriefers" in making claims about Iraqi support for Al Qaeda's work with illicit weapons (Jehl, 2005).

6.6.1 American Nationals in the Courts

A vast majority of people captured and imprisoned by the current US administration, have by all accounts been foreign nationals. Few have been charged with any crime, and most have not received access to counsel. Certainly it is also questionable whether the Geneva protections have applied in some of these cases. However, there have been American nationals' caught up in the sweeps that have taken place in various locations. These people were immediately upon recognition that they were in fact US nationals, given a completely different treatment, than other detainees. They eventually received hearings before the Courts, were given access to legal counsel (after some time) and were moved to prisons within the United States. At least three that the public know of have been caught in the "war on terror" and one at least was transported to Guantánamo Bay. These three, are Yaser Esam Hamdi, José Padilla and John Walker Lindh.

None of these US citizens were initially allowed access to legal counsel. Deputy Director of the Americas division of Human Rights Watch, Jane Mariner, wrote:

"Not only is the Bush administration currently holding several hundred people as alleged "enemy combatants" in indefinite detention without charges, it is also denying them access to counsel. Even Jose Padilla

and Yaser Hamdi, the two American citizens held on U.S. territory, have no access to a lawyer (Mariner, 2002b).

Why do even Americans, not have access to counsel? According to Mariner, the Government claimed that by allowing detainees access to legal advice, would in fact interference of efforts by the US military, to gather and process information obtained by these individuals, as well as being threat to national security. "Access to counsel would, in this view, "disrupt" the interrogation environment, which has to be tightly controlled "to create dependency and trust by the detainee with his interrogator"" (ibid).

If captivated individuals are not allowed to have legal counsel, how can their cases proceed in a fair and just manner? It seems like the Bush administrations policy on detention, is one of prolonged incarcerations, without legal counsel. People are held in secret locations and of the locations that are known, the peoples names are not necessarily disclosed, hence their captivity remains secret as well. This gives the custodians complete control over the individuals in custody, whether innocent or not.

However, on an upbeat note, the Supreme Court might actually make a positive impact. The Federal Appeals Court in Manhattan denied the President's claim that he had, in the name of his authorization as Commander in chief, the authority to declare American citizens, as "enemy combatants". By designating the individuals as "enemy combatants" he could hold them indefinitely (Byrd, 2005d).

"The court found that a president has no constitutional authority to detain as enemy combatants American citizens seized on American soil, away from any zone of combat" (Byrd, 2005d).

6.6.2 Yaser Esam Hamdi

Hamdi was caught in Afghanistan in 2001, and later transferred to Guantánamo Bay. Upon discovering that he was in fact a US citizen, he was transferred to the Navy camp in Virginia. From there he was transferred to Charleston, in 2003. He was denied access to counsel for two years and kept in solitary confinement for a

very prolonged period (Hirschhorn and Robertson 2004). According to the Hamdi et al. v. Rumsfeld, Secretary of Defense, et al, case no: 03-6696: “Petitioner Hamdi, an American citizen whom the Government has classified as an “enemy combatant” for allegedly taking up arms with the Taliban during the conflict, was captured in Afghanistan and presently is detained at a naval brig in Charleston, S. C” (Hamdi v. Rumsfeld. Case no: 03-6696). Hamdi’s lawyer, Mr. Dunham, challenged his clients’ detention and brought the case before the Supreme Court. The Government had claimed that the detainment of Hamdi was absolutely necessary, in order to obtain as much intelligence as possible, during wartime (Hirschhorn and Robertson, 2004). When filing a Habeas corpus petition, Mr. Dunham was told that the administration had the “unreviewable prerogative” to keep him in custody, without trial and without access to counsel, for national security, based on the Presidents’ authority as Commander in Chief (Elsea, 2005, p. 7). However, Mr. Dunham stated that Hamdi was indeed innocent of the charges against him, and had not been involved in armed conflict.

The Fourth Circuit Court agreed with the administrations’ position and dismissed the case, but the Supreme Court affirmed the President’s authority to declare him an “enemy combatant”, however stated that Hamdi had non-the-less a legal right to challenge his detention (Elsea, 2005, p. 7). The end result was, to release Hamdi, if he renounced his US citizenship, to which Hamdi’s attorney said: "When you've been in solitary confinement for three years and somebody puts a piece of paper in front of you that says you can get out of jail free if you sign it, you don't really worry too much about the rest of the fine print” (Hirschhorn and Robertson, 2004).

“[T]he Supreme Court also ruled in Hamdi v. Rumsfeld that a U.S. citizen captured in Afghanistan and labeled an “enemy combatant” could not be held indefinitely at a U.S. military prison without the assistance of a lawyer, and without an opportunity to contest the allegations against him before a neutral arbiter” (Human Rights First, In the Courts, Jose Padilla, U.S. Citizen ...).

It is interesting to see the reach the Supreme Court of the United States allows itself, for instance, by conditioning Hamdi “never to travel to Afghanistan, Iraq,

Israel, Pakistan, Syria, the West Bank, the Gaza Strip ... and not to travel to the United States for ten years, and “after that time to receive express permission from the Secretary of Defense” ... prior to initiating travel to the United States” ... and for 15 years, to report to the United States Embassy any intent or plans to travel outside the Kingdom of Saudi Arabia” (Yaser Esam Hamdi v. Donald Rumsfeld, 2004, Paragraphs 10 and 11, of The settlement agreement). It certainly seems that the US courts allow themselves to interfere in domestic affairs of Saudi Arabia in this case, by even suggesting such a clause, as if they have any control over Saudi citizens.

It is also interesting to see that the Federal Appeals Court in New York declares that the President cannot designate US nationals as “enemy combatants”, but then the Supreme Court says he can. This adds to the confusion of all the cases pending, regarding captivated individuals in US custody.

6.6.3 José Padilla / Abdullah al Mujahir

Regarding José Padilla, a Brooklyn-born citizen of the United States, the case is a little different. Padilla was arrested on American soil, i.e. at O'Hare airport, in 2002. He was suspected of being a material witness in a terrorist investigation. He was shortly thereafter, declared by President Bush, to be an “enemy combatant” and was in custody for 32 months, as of March 2005 (Smith, 2005). He claimed to have subject to inhumane treatment while in US Custody (Cassel, 2007). He was initially deprived of access to a lawyer, on the grounds that he had not been charged with a crime. There was a lot of confusion regarding the Padilla case. A federal judge ruled that Padilla did have the right to challenge his detention, but no sooner was that ruling passed; then the administration asked for reconsideration. The claim was that for national security, Padilla should not have the right of habeas corpus. That argument was rejected, and Padilla was eventually granted access to legal advice. The Second Circuit Court of Appeals said that President Bush did not have authority to declare Padilla an enemy combatant and that Congress had not authorized him to do so. Therefore there was no authorization to place Padilla under Military jurisdiction (Elsea, 2005, p. 5-6; Human Rights First, In the Courts, Jose

Padilla, U.S. Citizen).

The treatment Padilla endured, was similar to what has been heard before, i.e. he was subject to stress positions, extreme temperatures, sleep deprivation and was held in solitary confinement (Martinez, 2007).

However, Padilla was not released as proscribed by the Court of Appeals. The case went onto the Supreme Court and then back to federal court. The end result was, that Padilla indicted him for charges of murder, injuring people abroad and kidnapping, but no charges on terrorism were to be heard, and sentenced to 17 year and four months in prison (Human Rights First, In the Courts, Jose Padilla, U.S. Citizen).

6.6.4 John Walker Lindh

John Walker Lindh was captured in Afghanistan, in sweep by the US military, where he was found in the basement of a prison there. He was later to be charged with treason and the death of CIA agent Johnny “Mike” Spann (Ballard, 2002). He is known as the “American Taliban” because he joined a radical Islamic group and received military training in Pakistan at a very young age. He was therefore upon capture, considered an enemy of the state, yet only 21 years old at the time. He was eventually sentenced to 20 years in prison, whereas he pleaded guilty to supplying services to the Taliban. As part of his agreement, the Government did not pursue allegations of conspiracy to kill US nationals (Zahn, *The case of the Taliban American*). It seems to be an extraordinary harsh sentence to sentence a person that has derailed in life, to twenty years in prison. Under the media frenzy that occurred upon his capture, perhaps the Courts were influenced by the public opinion and pressure from the State.

Chapter VII

Supreme Court rulings relating to foreign Nationals

As early as 2004, the Supreme Court was preparing to rule on the legal status of the almost 600 men [in 2004] thought to be detained at Guantánamo Bay, Cuba (Golden et al, 2004). The main point of interest though, is that in 2004, the Supreme Court was not contemplating guilt or innocence or any other legal issue for that matter, except whether the United States Supreme Court had jurisdiction over the detained individuals in Guantánamo Bay, i.e. whether the individual had in fact access to the United States court system (The Economist, 2004b).

7. 1 Salim Hamdan

In the case of Salim Hamdan, who was a citizen of Yemen, the Supreme Court had a vital impact. Hamdan has been held at Guantánamo Bay since 2002, and is one of the 14 men, that have been or will be allowed a day in Court, leaving the fate of the other 400 or so [in 2006] undetermined (Cole, 2006). When Hamdan was caught, in a bounty-hunter seize, he was: “chained to the ground and eventually shipped off to Guantánamo, where he was kept in solitary confinement for more than 10 months and lost 50 pounds, and showed signs of deterioration” (Brenner, 2007, p. 178). He was charged on conspiracy charges, based on the fact that he was Osama bin Ladens’ driver and bodyguard. Being in that position, he attended al-Qaeda training camps. Basically the charges were war crimes. As Justice Paul Stevens wrote, in conclusion: “[T]he Executive is bound to comply with the Rule of Law that prevails in this jurisdiction. The notion that government must abide is hardly radical. Its implications for the “war on terror” are radical, however, precisely because the Bush doctrine has so fundamentally challenged that very idea” (Cole, 2006).

In accordance with the Executive order on Military tribunals issued in November

2001, (further discussed in the chapter on Military tribunals / commissions below), Hamdan was to be tried. However, the trials permit evidence, that neither the defendant nor his lawyer has been allowed to see, let alone challenge. Hearsay evidence is allowed, and no cross-examination is permitted. Some of the information presented in a Court, may have been obtained by coercive methods or even torture. In these military tribunals, the defendant is often not even allowed to be present in all the stages of the trial. The military tribunals are furthermore only supposed to be held for foreign nationals, not US citizens, caught up and detained in the “war on terror” (Cole, 2006).

In this case however, the District Court ruled that Military tribunals of the sort mentioned in the above paragraph, were in fact in violation of the Geneva Conventions. After a lot of actions, backwards and forwards, the case finally reached the Supreme Court. The Court ruled that the Military tribunals were not in co-ordinance with the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions (Cole, 2006). Hamdan’s ordeal was not over with that ruling, Congress no sooner learned of the Supreme Courts ruling, then they passed a law, that made the Supreme Courts ruling null and void, since they did not have jurisdiction in the “no-man’s land” of Guantánamo, so the attorneys for Hamdan, had to make new plans to appear before the Appellate Court. Shortly thereafter, President Bush signed the Military Commissions Act of 2006. In this Act, a new system was devised, where interrogation and prosecution of suspected terrorist were proscribed, and effectively denying the individuals in question, the right to habeas corpus (Brenner, 2007 p. 171). Salim Hamdan has not yet been released, as pre-trial hearings were still scheduled as late as April 2008 (Human Rights First, The case of Salim Ahmed Hamdan).

7.2 Shafiq Rasul and others v. George W. Bush

Joseph Margulies and others filed a lawsuit for Shafiq Rasul and others in Federal District Court on February 19th 2002. These persons were also known as, “The Tipton Three” in the media, and were all British nationals (Margulies, 2006c). “The issue in the litigation was not whether the president had a right to detain prisoners

who committed a belligerent act against the United States or its coalition partners during the war in Afghanistan. Instead the issue was whether they could be held without legal process” (Margulies, 2006d, p. 71). With no foreseeable end to the “war on terror”; with no rights under the Geneva Conventions, therefore the question was not “whether the president had the power to detain, but whether his power would be restrained by the rule of law” (ibid).

In *Rasul v. Bush*, the Court held that the individuals held at Guantánamo Bay, had access to Federal Courts and hence had the right to challenge their detention (Elsa, 2005 p. 4). The Supreme Court commented that since “They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control” (*Rasul v. Bush* Supreme Court ruling no. 03-334, 2004). Justice Paul Stevens said because the United States exercised “complete jurisdiction and control” over the base, the fact that ultimate sovereignty remained with Cuba was irrelevant. Further, Stevens wrote that the right to habeas corpus is not dependent on citizenship status. The detainees were therefore free to bring suit challenging their detention as unconstitutional” (U.S. Supreme Court Media, Abstract, 2004). They were all released in 2004.

Chapter VIII

8.1 Military tribunals / Military commissions

On November 13th 2001, President Bush issued the first Military order. This was an order on the detention, treatment and trial of non-civilians in the war against terrorism (The White House, 2001f). In paragraph 1e, it is stated: “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals” (ibid). The Military Order goes on to state, that exclusive jurisdiction is awarded to the Military tribunals, and individuals shall not be able to seek any remedy, or commence a proceeding, neither indirectly or directly, in any Court of the United States (ibid).

So no jurisdiction was awarded to the US Court system, no claims would be heard by detainees, except through Military tribunals. In fact, this states that there would be no judicial process at all. The Military commissions were designed specifically for non-US citizens (Gilmore, 2002). Hence an attempt to exclude the judicial system from the normal due process in any given case, deny legal access to the detainees and to pass judgment on the legality of detention.

The US Supreme Court ruled in June 2006, that these Commissions are unlawful. The Commissions violate the Uniform Code of Military Justice, and the Geneva Conventions. Furthermore, President Bush had not sought Congressional authority to establish them in the first place. However, in 2006, a new Military Commissions Act was passed by Congress, authorizing a new system of military commissions. Six years after the first detainees were brought to Guantánamo Bay, Cuba, and six years after the establishment of the tribunals was announced, no one had been brought to trial, except the Australian David Hicks, which ended up pleading guilty to one account, in relation to terrorism, i.e. providing material to terrorist

organizations, and was allowed to serve his 9 month sentence in Australia. However some had been released and others had filed a petition to challenge their detention (Human Rights Watch, Special Focus; Guantanamo).

8.2 The Military Commissions Act of 2006

On the 17th of October 2006, President Bush signed into law, the Military Commissions Act of 2006. With this act, he claimed that the administration would be provided the tools necessary to save American lives. The Commissions Act would allow the CIA to continue the program already established, to question key terrorist individuals. President Bush claimed that this program had been a very successful intelligence effort, and one of the most successful in American history. The main jest of the Military Commissions Act was however, that it would allow the US to prosecute captured individuals for war crimes, and that the tribunals themselves would be full and fair trials. Furthermore, the Military Commissions Act would provide protection for US Military personnel, for whatever role they might play in the “war on terror” (The White House, 2006b). As expected, this particular part of the Military Commissions Act would end up spurring the greatest controversy. Charles Swift (one of the lawyers on the *Hamdan v. Rumsfeld* case), expressed the sentiments relating to the new law: “It keeps striking me, all the phrases they are using – “The trials will be full and fair” ... it was, like *huh?* They will be “full and fair” but different” (Brenner, 2007, p. 179).

The Military Commissions have been subject to numerous legal challenges and criticism. The most prominent claim is that they are not fair or just and are directly subject to executive pressure. Furthermore that the cases are not brought to trial until after a substantial delay, even many years, and then only to be rushed through the legal system as quickly as possible. The final point of criticism has been that the tribunals accept hearsay evidence and / or evidenced obtained through coercive or even torturous methods (Human Rights Watch, Special Focus: Guantanamo).

Some of the criticism has come from The New York Times, editorial:

“One of the many problems with the new law is that it will only make it harder than it already is to separate the real terrorists from the far larger group of inmates at Guantánamo Bay who were bit players in the Taliban or innocent bystanders. ... [S]upporters of this dreadful legislation seem to have forgotten that American justice does not merely deliver swift punishment to the guilty. It also protects the innocent” (NYT, 2006).

Amnesty International has also expressed serious doubts as to the legality of these Military Commissions, where they point out that the Military Commissions Act proscribes that US courts will not have jurisdiction to hear habeas corpus cases, where the detainees would or could challenge the detention or their conditions as “enemy combatant” and the people held at Guantánamo Bay, had up until the year 2006, not been given a hearing or been charged with any crimes. That means, that none of the captivated people had any rights to claim remedy for unlawful incarceration or human rights violations. This however only applied to people of a foreign nationality (Amnesty International, 2006).

Amnesty expressed concerns that the Military Tribunals would provide substandard justice for the individuals in US custody, and thereby be discriminatory in the process. Furthermore they conclude that Military Tribunals could not and would not be impartial, independent and competent since the President himself has such an overreaching role, as the executive power within the United States, among other things he can decide who, if anyone, would actually be brought before such a tribunal. He can also, proscribe the actual procedures and appoint the judges and officers of the Commissions (ibid).

Other issues of importance, such as the right to a trial within a reasonable time of capture; the right to choose ones one counsel; the presumption of innocence until proven guilty; the right to challenge evidence against a captivated individual; the right to have evidence extracted or obtained with coercive methods or torture, to be excluded; and the right to have a fair and just judicial proceeding in order to evaluate the proper punishment; will be absent and not addressed in a legal and just manner, within the current Military commissions system.

8.3 Combatant Status Review Tribunal

The problem of a “competent tribunal” as proscribed in Geneva III, Article 5, was not sorted out, or any attempt made to rectify the situation, until the Supreme Court of the United States said, in the case of Hamdi versus Rumsfeld, that: “the president cannot simply lock up anyone – even a foreign citizen – without giving him a real chance to challenge his detention before a “neutral decision maker”” (NYT, editorial, 2006).

One of the most fundamental provisions of the Geneva Conventions is, that people caught up in war, ought to be screened by a “competent tribunal” upon capture, in order to determine, if there is any doubt as to what their role is in the hostilities in question. However, since this was not done, many people were captured and sent to various detention sites around the world, without a screening by a “competent tribunal” and hence, there is no way of knowing if they are in fact legal or illegal combatants.

“... Mr. Bush created Combatant Status Review Tribunals, which gave the most cursory possible reviews of the Gitmo detainees. These reviews took place years after the prisoners were captured. They permitted the use of hearsay evidence, evidence obtained through coercion and even torture, and evidence that was kept secret from the prisoner. The normal burden of proof was reversed: the tribunals presumed prisoners were justifiably detained and the prisoners had the burden of disproving government evidence — presuming they knew what it was in the first place” (NYT, editorial, 2006).

Actually, these reviews were announced only 9 days after the Supreme Court ruled that prisoners, could rely on habeas corpus, and asked that the case be determined on the merits of allegations. So the Combatant Status Review Tribunals were set in motion, in order to establish whether the individuals in Guantánamo Bay, were in fact enemy combatants. All rights (if they had any at all) would be determined by the Combatant Status Review Tribunals (Margulies, 2006e, p. 159).

“... The Military Commissions Act not only did away with habeas corpus for non-citizens but also expanded the definition of “enemy combatant” in what, for many, was an unconscionable overreach of presidential authority” (Brenner, 2007, p. 171).

The US Government had “previously determined” the status of the people at Guantánamo, as being “enemy combatants”, i.e. before the actual Combatant Status Review Tribunal hearings. So the allegations against each person, was in fact “proof” of the enemy combatant status. And therefore, it is up to each individual, - each case – to prove otherwise, which seems quite contrary to conventional judicial proceedings (Denbeaux & Denbeaux, 2006, p. 6).

8.4 War Crimes

“[P]ersons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations ... the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law” (UN SC #1315, 2000).

This was written in a press release from the United Nations regarding Sierra Leone, but could just as well apply to the United States, with regards to the detention and treatment of individuals in US custody.

“Jus cogens” is a Latin term for the principles of international law, so fundamental that nations cannot ignore them, nor make attempts to exclude these principles, or abolish them through treaties (Legal Definitions). Jus cogens thus deals with the legal status that international crimes can reach. However, another term often accompanying jus cogens is “obligation erga omnes”. This is relative to the legal implications, due to certain crimes, categorized as jus cogens (Bassiouni, 1996).

Recognizing that international crimes, are jus cogens crimes, means that the State that does so, (i.e. acknowledge those crimes) has the duty to prosecute or even extradite individuals known to have committed jus cogens crimes, according to

scholarly view. Regardless, of whether that person is a Head of State, a high ranking official or whatever status the person may hold; if the criminal act was committed during war or peace; and finally whatever the categorization of the supposed victim is. Statute of limitation and Universality of jurisdiction do not apply either. The State simply has a duty to extradite or prosecute, regardless of other issues that might arise (Bassiouni, 1996, p. 3). However, States have often made allowances for impunity for jus cogens crimes, and the Principle of Universality is not universally recognized and hence not applied, and the duty to prosecute and extradite is not quite fully established. That is the reality, and that is the gap between scholarly view and legal reality (Bassiouni, 1996, p. 4).

The following international crimes are jus cogens; aggression, genocide, crimes against humanity, war crimes, piracy, slavery and torture. The list is devised from recognition that the crimes are part of customary law and can be seen in countless treaties of international law, preambles and provisions. So jus cogens crimes are ones that come from a State policy or conduct, which threaten the peace and security of mankind, and have consequences from conduct, which will shock the conscience of humanity (Bassiouni, 1996, p. 5-7). These two elements work together, because without one or the other, then there is a question on whether the act in question would actually be characterized as jus cogens.

In 1994, there was work in progress by the United Nations General Assembly, to establish an International Criminal Court. This Court would, be allowed jurisdiction (The “Trigger Mechanism” i.e. to start prosecution) over matters of war crimes, crimes against humanity and genocide, and would be able to exercise jurisdiction if National Courts could not or were unwilling to proceed with prosecution of these crimes. In July 2002, the Statute for the ICC officially entered into force; however, the Court cannot prosecute crimes committed prior to that date (Schabas, 2004, p. 13-20).

“Even prior to entry into force, it became increasingly clear that a showdown was looming between the United States and the Court. One of the final acts of the Clinton administration was to sign the Statute, literally at the eleventh hour, on the evening of 31 December 2000” (Schabas, 2004, p. 21).

The Bush administration, however, “unsigned” the treaty, which was quite unprecedented. The statement to the United Nations Secretary-General, said: “This is to inform you, in connection with the Rome Statute of the International Criminal Court ... that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000” (Schabas, 2004, p. 21).

Furthermore the US applied pressure to several states, to sign bilateral agreements, which would protect US nationals from the Court. Agreements of this sort state that the International Criminal Court cannot commence proceedings, since prosecution would be in breach of international treaties, such as ones requesting the surrender of an accused individual. This in fact gives immunity to military members. However, some states refused to sign such agreements, such as Mexico, Canada and those of Western Europe. Then the US showed its trump-card, by threatening to veto all Security Council resolutions, regarding peacekeeping and collective security, until the jurisdiction of the International Criminal Court would exclude their members. So they got their way. Following that, President Bush signed a new law, The American Service Members’ Protection Act (which is a whole chapter in itself), and as Schabas states, the court has weathered any squalls without mishap (Schabas, 2004, p. 22-23).

However, despite the efforts to shield US Military personnel from possible prosecutions, there might still, be charges brought against the highest ranking members of the US administration. That remains to be seen.

Professor David Cole, of the Georgetown University, claims that President Bush has:

“...*already*” committed a war crime, simply by establishing the military tribunals and subjecting detainees to them. ... [T]he Court found that the tribunals violate Common Article 3, and under the War Crimes Act, any violation of Common Article 3 is a war crime. Military defense lawyers responded to the *Hamdan* decision by requesting a stay of all tribunal proceedings, on the ground that their own continuing participation in those proceedings might constitute a

war crime. But according to the logic of the Supreme Court, the President has already committed a war crime. He won't be prosecuted, of course, and probably should not be, since his interpretation of the Conventions was at least arguable. But now that his interpretation has been conclusively rejected, if he or Congress seeks to go forward with tribunals or interrogation rules that fail Article 3's test, they, too, would be war criminals" (Cole, 2006, emphasis original).

As far as Donald Rumsfeld is concerned; for the acts of instruction, regarding the treatment of detained individuals in US custody, and perhaps other incidence, he too could face a charge for war crimes, as the Human Rights Watch proclaims on their website in an article called: "Getting away with torture". There they call for an investigation into Mr. Rumsfeld's part in the torture by US troops in Afghanistan, Iraq and Guantánamo Bay. The reason for investigation would be under the "command responsibility" clause, with regards to war crimes. The Human Rights Watch claims that Rumsfeld's role in the conditions and treatment that individuals in custody were subjected to came about because he approved interrogation techniques that were in direct violation of the Geneva accords and the Convention Against Torture (Human Rights Watch, 2005).

"From the earliest days of the war in Afghanistan, Secretary Rumsfeld was on notice through briefings, ICRC reports, human rights reports, and press accounts that U.S. troops were committing war crimes, including acts of torture. However, there is no evidence that he ever exerted his authority and warned that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces could have been avoided" (ibid).

Major General Antonio Taguba, the one who was in charge of the investigation into the scandal, following the release of the pictures from Abu Ghraib, has accused President Bush of War Crimes. He wrote: "The Commander-in-Chief and those under him authorized a systematic regime of torture, of detainees." His report follows another, by the Physicians for Human Rights, who found that detainees in Guantánamo Bay and Abu Ghraib in Iraq were subject to torture and sexual abuse, by the hands of US personnel, as well as long term isolation and severe humiliation

(CNN, 2008). However, President Bush is immune while he is in office, except in the instance, that an international tribunal would be established, one which could commence a case against top US officials. There are however, no indications of such a tribunal being carried out, at the present moment.

Conclusion

After the attacks on US soil on September the 11th 2001, a whole lot of things in the international arena were about to change. Although there was shock and sorrow over the events and many nations and organizations showed support and sympathy; there signs right from the start, that the reaction of the United States administration would be somewhat different than “normal”. Different from other attacks of a similar nature. Different from other incidence with regard to the United States. The immediate reaction was to retaliate. And the hunt for terrorists was on.

This would be a new kind of war - a global “war on terror”. However, the war was to be fought largely on ideological grounds, - at least in the beginning and during President Bush’s term in office. Starkly reminiscent of the “glory” days of cowboy times, with declarations of winning the war, on the simple grounds that it was right to do so. Justice would be done, and good would prevail over evil. Common claims from the Bush Administration that terrorists would be hunted down, wherever they were to be found. Proclamations of ideological conquest were frequent, such as quoting of the posters, again, reminiscent of the old cowboy days, were quite common: “Wanted dead or Alive” and referring to Osama bin Laden “If he’s alive, we’ll get him. If he’s not alive – we already got him”. Just like in the old cowboy movies, the “good guy” can be distinguished from the “bad guy” by their headwear. The Bush administration has by all accounts the authority to seize people, from anywhere in the world and hold them in captivity, without disclosing their names and without due process of law, and perhaps indefinitely in the “war on terror”. The US Courts were initially not to have any specific role in the “war on terror” as there were direct attempts to exclude their participation right from the start of the war, on the grounds of jurisdiction.

Any country found to host terrorist activity or harbor terrorists was automatically the enemy of the United States. In that regard, this certainly was to be a new kind of war, a global war on terrorism. If the idea is pushed to the limits, any country in the world might, at some point, be considered an enemy of the United States, due to the possibility that terrorists live or work there. That's certainly a new idea. In an attempt to capture the actual culprits of the 9/11 attacks, and again, reminiscent of the posters mentioned above and very ideological indeed, leaflets were scattered all over Afghanistan, with huge promises of awards to anyone that surrendered a "terrorist" to the US authorities or military.

It's highly questionable how the "war on terror" can actually be fought and won, because terrorist organizations are not specific nations, rather groups of people from various walks of life, in various locations and with various missions in mind. The list of possible "enemies" could in fact be endless, with new recruits joining the cause on a regular basis and the logic of the activities being passed on from one generation to another. Non-the-less, Afghanistan was invaded in order to uproot the terrorist cells and later Iraq too. However terrorist groups can be found in almost every country in the world, in one shape or form, and therefore to claim that there could be a "war on terror", which is in fact fought with terror itself, is a dubious claim.

This "new type of war" was organized and orchestrated by a group of legal advisors, those closest to the top ranking officials of the US Administration and the plan they devised was to be carried out by US Military personnel. The primary focus, from the very beginning, was to give President Bush new powers and more flexibility to deal with people thought to be involved with terrorism. Certain actions were taken to side-step conventional legal codes, such as the Geneva Conventions and other established International Humanitarian Law, thereby giving the Bush administration a full range to conduct the "war on terror" as they saw fit, at any given moment since the hostilities began. The all powerful concept "war on terror" gives the US administration free range and freedom of action; the power to make policy as it goes about its business; changing rules, bending rules, ignoring rules and reinterpreting rules. Shrouded in secrecy, based on supposed national security "this new type of war" isolates the US administration internationally, perhaps frees

it from formal obligations or one would at least suspect that was the intention, and gives complete control over the people within its custody. The “new type of war” furthermore gives the US administration complete control over its own internal checks and balances, i.e. the separation of powers, as established in the US Constitution, that of executive, jurisdictional and legislative.

One of the most amazing aspect of this “war on terror” is the fact that captured individuals were not / are not, according to the highest ranking members of the US administration, entitled to the Prisoner of War status, i.e. Geneva III, nor were they protected under the Civilian Convention either, i.e. Geneva IV. Not only is international law “out”, but also well established internal law within the United States, with regards to humanitarian law, whether it was the Army Field Manual, the War Crimes Act or treaties, such as the American Convention for Human Rights. These captured individuals, were / are completely outside the realm of any legal protection, completely under the control of the US Military and often held incommunicado, in awful substandard conditions, denied due process of law; the right to challenge their detention under the habeas corpus statute and often maltreated during their incarceration, and subject to severe interrogations. Why? Because they are “unlawful enemy combatants”. So these individuals were shipped off to Cuba and other locations – some secret, some known – for the purpose of information gathering. These detention centers have the sole purpose of being interrogation chambers, and the people held in custody are not being treated by all accounts, in accordance with international law, domestic law, humanitarian law, or moral conscience.

A new system of interrogation and information gathering was established and devised, - or at least this new system became publicly known during this period – within a new type of legal framework and justifications thereof. However, the legal arguments and framework for intelligence, would soon spiral out of control and emerge into a system of ungoverned approaches and tactics not officially condoned (except perhaps behind the scenes), and carried out (in some cases) by untrained people, usually from the Military Police or Military Intelligence, in a war, that would soon blow out of proportion and become unmanageable. None of this was however public knowledge until the release, or rather leak of the photographs from

the Abu Ghraib prison were circulated publicly. All military and legal activity up to that point had been covert and highly protected and concealed from the public. These pictures show a nonchalant approach to torture or mistreatment of people in US custody, as well as a cool and collected approach to international treaties and law. Meaning, it was in order to disregard well established international law, as well as the law of the land, i.e. the Constitution of the United States, in this “war on terror”.

Children, the elderly, the mentally unstable, ordinary criminals, - there is no distinction. All these people were rounded up in various places, and ended up in Guantánamo Bay and other facilities, without the normal “screening process” of war. Some for a short period of time, others have been in captivity since the beginning of the hostilities, and might remain in US Custody, indefinitely. Who knows? The uncertainty in many circumstances and in individual cases is the main factor to the whole situation. Nobody knows, what’s next. Not the inmates, not their captors, not the lawyers, and not the international arena. It’s a puzzle, which remains to be solved, and perhaps a new President to the United States will be able to solve some of the problem. Certainly the Courts have been active in denouncing the actions by the administration and have declared some of their actions illegal, i.e. once they were allowed to review some of the cases of detainees in US custody.

The US administration has taken the stance that bending the rules is OK in time of war; bending the international, domestic, moral and humanitarian law and general practice. The policy of the moment gives the administrations free range to reinterpret aspects of well established norms and codes of conduct. However, this policy and stance on the “global war on terror”, has caused gross violations of international and domestic law and have been sanctioned at the highest level of Government, whether it is for reasons of due process, jurisdiction or treatment of individuals in US custody. These practices are being violently opposed and criticized within the US administration and in the international arena.

For the actions and proclamations in the “war on terror” and for the treatment of various individuals, the current members of the highest ranks in the US Administration, might face the charges of war crimes in future. The Geneva Conventions certainly have provisions and repercussions if the treaty laws are

blatantly broken, such as the grave breaches, and already various Humanitarian organizations and private individuals are calling on the international community to take action and prosecute those in charge of the abuses.

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