


# Examining the Legality of the Guantánamo Bay Detention Center According to International Humanitarian Law and International Human Rights Law

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EXAMINING THE LEGALITY OF THE GUANTÁNAMO BAY  
DETENTION CENTER ACCORDING TO INTERNATIONAL  
HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

by

SYDNEY WINCHESTER

A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in International and Global Studies  
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## ABSTRACT

The purpose of this research paper is to examine how international humanitarian law (IHL) and international human rights law (IHRL) are applied to the Guantánamo Bay detention center. This paper was completed through the research of international treaties, court cases, and secondary sources that thoroughly discussed issues pertaining to Guantánamo and international law.

This paper first examines the differences between the two laws by looking at the particular roles each is meant to play in the subject of international law, as well as how the two have been applied thus far to the situation at Guantánamo. Second, the paper discusses the topic of whether or not IHL and IHRL should be mutually exclusive, or can be interpreted alongside each other. In addition, a discussion of the opposing viewpoints on this topic will be presented including the United States argument of *lex specialis*, and the opposing arguments of the international community. Chapter three will cover the topic of extraterritorial application and how it affects the international treaties and court cases that deal with issues pertinent to Guantánamo. The fourth chapter discusses the effects that Guantánamo has on the reputation of the United States internationally, and how it affects human rights around the world. Chapter five discusses possible recommendations in order to achieve the long-term goal of ending the Guantanamo Bay controversy, and protecting and promoting human rights everywhere.

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

I. DIFFERENCES BETWEEN IHL AND IHRL ..... 4

II. SEPARATION OR COMBINATION OF IHL AND IHRL ..... 6

III. TREATIES AND COURT CASES APPLICABLE TO GUANTÁNAMO ..... 9

IV. EFFECTS OF GUANTÁNAMO ..... 16

V. RECOMMENDATIONS ..... 19

CONCLUSION ..... 24

BIBLIOGRAPHY ..... 26

## INTRODUCTION

I knew the day was significant when my mother came to my elementary school, without warning, and removed my sister and me from classes early. My mother walked us to the car and mentioned something about a tragedy in New York City, a place that then seemed so far away. At the time, my seven-year-old mind didn't understand what was such a big deal. I can tell you exactly where I was sitting when my mind finally understood the gravity of what was happening, as I watched the two towers collapse on live television.

The United States relationship with Guantánamo Bay began when Cuba gained its independence from Spain after the Spanish-American War.<sup>1</sup> After the attacks on September 11, 2001 the United States began military operations in Afghanistan that October.<sup>2</sup> In its beginning, Guantánamo had mostly been used as a standard military base. But shortly after operations began in Afghanistan the detention camp at the Guantánamo Bay Naval Base<sup>3</sup> was opened for the purpose of holding detainees captured in Afghanistan and suspected of terrorism against the United States. Guantánamo is now world renowned for the indefinite detention and use of torture on prisoners. As of October 2016, there were 30 detainees being held without a formal charge or trial.<sup>4</sup> There have been instances such a detainee being strapped to the floor without access to

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<sup>1</sup> *Rasul v. Bush* (03-334) 542 U.S. 466 (2004), (recognizing the event that lead to the United States gaining access to the land that would be the Guantanamo Bay Naval Base).

<sup>2</sup> Richard J. Wilson, "United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole", *Human Rights Brief* (2003): 2, recognizing when the United States began its military operations in Afghanistan.

<sup>3</sup> The detention camp at the Guantánamo Naval Base will be referred to as Guantánamo Bay, and Guantánamo throughout this paper.

<sup>4</sup> "Guantánamo By the Numbers," Human Rights First, October 21, 2016.

bathroom facilities, food, or water, for over 18 hours.<sup>5</sup> Former President Jimmy Carter discussed reports of waterboarding that have been common practice, as well as threats using semiautomatic weapons, in order to obtain confessions.<sup>6</sup> The United States government maintains that its treatment of the detainees is lawful because of a distinction between the laws of international humanitarian law<sup>7</sup> and international human rights law<sup>8</sup>, as well as the reality that Guantánamo is not on United States soil. These claims are refuted by the international community, which argues that the distinction in this scenario is unlawful and that the United States has legal obligations to those not detained on United States soil.

The situation concerning the detainees at Guantánamo is difficult because of the confusion surrounding their detention. The United States government claims that the detainees of Guantánamo are subject to only the protections of international humanitarian law because of its *lex specialis* status, and not to any protections of international human rights law.<sup>9</sup> In addition, the United States government argued that because the detainees were being held in Cuba and not in the United States, the detainees were not subject to United States laws concerning human rights.<sup>10</sup> Both of these concepts will be expanded upon later.

The international community consistently refutes these justifications, claiming that international humanitarian law and international human rights law are not mutually exclusive

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<sup>5</sup> Anthony Lewis, "Guantánamo's Long Shadow," *The New York Times*, July 21, 2005.

<sup>6</sup> Jimmy Carter, "A Cruel and Unusual Record," *The New York Times*, June 24, 2012.

<sup>7</sup> International humanitarian law will be referred to as humanitarian law, and the abbreviation IHL throughout this paper.

<sup>8</sup> International human rights law will be referred to as human rights law, and the abbreviation IHRL throughout this paper.

<sup>9</sup> U.S. Additional Response of the United States to Request for Precautionary Measures- Detention of Enemy Combatants at Guantánamo Bay, Cuba (July 15, 2002).

<sup>10</sup> Patricia Goedde, "Human Rights of Guantánamo Detainees under International and US Law: Revisiting the US Supreme Court Cases," *Journal of East Asia & International Law* (2014): 17.

entities, but rather that they interact and overlap with one another. Finally, many international organizations have concluded that although the detention center may not be on United States soil, the United States military has full jurisdiction of the area because it has complete authority and control of the naval base and therefore is responsible for the humane treatment of the detainees.<sup>11</sup>

In order to clarify these issues, the relationship between international humanitarian law, and international human rights law and the question of the United States jurisdiction over Guantánamo Bay will be examined. These issues will be addressed individually, with first with arguments from the United States government regarding the respective issue, followed by the counter arguments of the international community. Finally, the effects that Guantánamo has on the world will be explained, and recommendations will be presented in order to find a solution to this issue.

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<sup>11</sup> Wilson, 4.



## I. DIFFERENCES BETWEEN IHL AND IHRL

International humanitarian law (IHL) and international human rights law (IHRL) are two branches of the broad subject of international law, each with its own set of particular rules that apply in particular situations. According to the International Committee of the Red Cross international humanitarian law is a branch of law that aims to reduce the impact of armed conflicts by protecting people that are not participating in hostilities by restricting the available practices of warfare.<sup>12</sup> While the High Commissioner of the United Nations describes international human rights law as the fundamental civil rights spanning political, economic, social, and cultural domains, in which all individuals should benefit by setting forth laws that States are obligated to comply with.<sup>13</sup> One can see from these classifications that there are distinctions between the two branches. The rules of international humanitarian law apply only during instances of armed conflict, while international human rights laws apply at all times, to all of a state's conduct.<sup>14</sup>

On the subject of Guantánamo, the United States has maintained its argument that these branches are distinct and separate entities. On February 7, 2002, nearly a month after the first detainees arrived at Guantánamo Bay, the United States released its first statement regarding the

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<sup>12</sup> “What is International Humanitarian Law,” International Committee of the Red Cross, Advisory Service on International Humanitarian Law: 1.

<sup>13</sup> “International Human Rights Law,” United Nations Human Rights Office of the High Commissioner.

<sup>14</sup> Samantha Pearlman, “Human Rights Violations at Guantánamo Bay: How the United States Has Avoided Enforcement of International Norms,” *Seattle University Law Review* 38 (2015): 1119.

status of these new detainees.<sup>15</sup> The statement emphasized that, while the United States wanted to maintain its commitment to the Geneva Conventions, it also noted that not every one of the men captured and taken to Guantánamo was going to benefit from the protections laid out by the Geneva Conventions. After these statements were made, the Inter-American Commission on Human Rights (IACHR) addressed the statements through precautionary measures regarding the status of the detainees the United States government had presented.<sup>16</sup> In these precautionary measures, the IACHR found that the detainees at Guantánamo were in danger of mistreatment because the United States government was refusing to grant the detainees the status of Prisoners of War until after a military tribunal decided their status.<sup>17</sup> As a result, the Commission came to the decision to release precautionary measures that advocated for a timely resolution to the detainees' status.<sup>18</sup> The United States government responded to the precautionary measures of the IACHR with the argument that the Commission lacked the relevant jurisdiction to implement the Geneva Conventions to the Guantánamo detainee, and that international humanitarian law is the ultimate discipline to apply to the detainees, not international human rights law.<sup>19</sup>

This disagreement between the applicable disciplines of international law is what has led to most of the problems between the United States and the international community, and introduces the important concept of *lex specialis* as applied to international humanitarian law.

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<sup>15</sup> Robert K. Goldman and Brian D. Tittlemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and rights Under International Humanitarian and Human Rights Law," *The American Society of International Law* (2002): 24.

<sup>16</sup> "Precautionary Measures 2002," Inter-American Commission on Human Rights.

<sup>17</sup> "Precautionary Measures 2002," Inter-American Commission on Human Rights.

<sup>18</sup> "Precautionary Measures 2002," Inter-American Commission on Human Rights.

<sup>19</sup> "Response of the United States to Request for Precautionary Measures on behalf of the detainees in Guantánamo Bay, Cuba," Inter-American Commission on Human Rights, April 15, 2002.

## II. SEPARATION OR COMBINATION OF IHL AND IHRL

Human rights laws entered the realm of international law when they were introduced into the Charter of the United Nations.<sup>20</sup> At this time, it was originally interpreted that IHL and IHRL should be understood as separate parts of international law, and should only be interpreted without consultation of the other branch.<sup>21</sup> The thought was, that during times of peace, human rights law would apply, but during times of conflict humanitarian law would apply in order to allow states to make necessary derogations during the conflicts.<sup>22</sup> But this method of reasoning has been losing ground in recent decades as institutions such as the International Court of Justice<sup>23</sup> as well as the European Court of Human Rights and the Inter-American Commission and Court on Human Rights begin to include IHRL during conflicts.<sup>24</sup>

It is recognized through much of the international community that the commitments of states in reference to international human rights apply at all times; in both situations of peace and armed conflict, to all individuals under the state's authority at the time.<sup>25</sup> It is the concept of *lex specialis* that prioritizes international humanitarian law over international human rights law in times of conflict.<sup>26</sup> The International Court of Justice has its own opinion on the matter in its advising of the *Legality of the Threat of Nuclear Weapons* case, in which it stated that the

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<sup>20</sup> Nancie Prud'homme, "Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship," *The Hebrew University of Jerusalem International Law Forum* 40 (2007): 356

<sup>21</sup> Prud'homme, 357.

<sup>22</sup> Goldman and Tittmore, 40.

<sup>23</sup> Prud'homme, 370.

<sup>24</sup> Casla, Koldo. "Interactions Between International Humanitarian Law and International Human Rights Law for the Protection of Economic, Social and Cultural Rights." *Electronic Journal of International Studies*, no. 23 (June 2012): 3.

<sup>25</sup> "Customary IHL, Chapter 32, Introduction to Fundamental Guarantees," International Committee of the Red Cross.

<sup>26</sup> Prud'homme, 367

protections outlined by the ICCPR do not halt in times of war unless proper derogations have been filed during instances of national emergency.<sup>27</sup> It is also the opinion of the Inter-American Commission on Human Rights that during times of armed conflict both IHRL and IHL apply concurrently.<sup>28</sup> The IACHR then goes on to explain that while international humanitarian law is the *lex specialis* for determining states' obligations in cases of conflict, humanitarian law may not provide complete coverage for the affected persons, and that human rights law was created with the goals of protecting those that needed more coverage.<sup>29</sup> In addition, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), which the United States ratified on 21 October 1994<sup>30</sup>, also makes it clear that it is applicable even during times of armed conflict.<sup>31</sup>

Since the 1960s, this idea of separate disciplines has begun to wane, and the incoming wave of thought is beginning to stress the complementary relationship between international humanitarian law and international human rights law.<sup>32</sup> Many legal minds argue for the *theory of complementarity*, which emphasizes that human rights law and international humanitarian law

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<sup>27</sup> International Court of Justice, *Nuclear Weapons case*, Advisory Opinion, 25. It is well documented that no such derogation request was ever even submitted under its duties to the ICCPR, But even if the United States had submitted a request for derogation, the prohibition of torture and/or cruel and degrading treatment is a right given to all persons that cannot be derogated from under any circumstances according to Pearlman, 1123.

<sup>28</sup> Admissibility Djamal Ameziane, Petition No. 900-08, Inter-Am. Comm'n H.R., Report No. 17/12, OEA/SER.L./V/II.144,doc 21

<sup>29</sup> "10 Years After the Detentions in Guantánamo Began, the IACHR Repeats its Call to Close the Detention Center," Organization of American States, January 11, 2012.

<sup>30</sup> "Ratification Status for United States of America," United Nations Human Rights Office of the High Commissioner.

<sup>31</sup> David J.R. Frakt, "Applying International Fair Trial Standards to the Military Commissions of Guantanamo," *Southern Illinois University Law Journal* 37: 556.

<sup>32</sup> Prud'homme, 357.

are not separate bodies of law, rather that they overlap but keep a distinction from one another.<sup>33</sup> This theory is beneficial for maintaining the important aspects that remain unique to each branch, but also brings them together for interaction when it is important. Another proposal has been made and put into reasonable practice in Kuwait and Iraq in which a cumulative application of both branches of international law were maintained in the occupation and reconstruction of the affected areas.<sup>34</sup>

In addition, the concept of *lex specialis* is not an infallible topic. *Lex specialis* has a convincing counter argument contained in the Martens Clause. The clause was initially created to provide additional humanitarian rules in order to protect the people living in occupied areas.<sup>35</sup> The Martens Clause is a feature of customary international law, which in modern law interpretation, has been understood to play a role in providing human rights coverage to everyone under international humanitarian law.<sup>36</sup> The Martens Clause is important to this subject because it argues that the laws relevant to armed conflicts should not be seen as the ultimate rule when it comes to protecting human beings, and that these laws can be supplemented with laws that specifically protect human rights.<sup>37</sup> Therefore, this point is significant because it reinforces the argument that international human rights law is an applicable discipline to the situation at Guantánamo Bay.

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<sup>33</sup> Hans- Joachim Heintze, “On the relationship between human rights law protection and international humanitarian law,” *International Review of the Red Cross* 86 (2004): 794.

<sup>34</sup> Heintze, 794.

<sup>35</sup> Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience”, *The American Journal of International Law* 94 (Jan 2000), 79.

<sup>36</sup> Meron, 80.

<sup>37</sup> Heintze, 797.

### III. TREATIES AND COURT CASES APPLICABLE TO GUANTÁNAMO

It has been emphasized by parties such as the IACHR<sup>38</sup>, and the United Nations that the Cuban government has no control over Guantánamo Bay, so Guantánamo falls under the control of the United States. As a result, it is the responsibility of the United States government to protect the human rights of those detained at Guantánamo Bay.<sup>39</sup> A responsibility that is widely known the United States has failed to preserve.

One of the primary reasons Guantánamo Bay was chosen as the location to hold the detainees is because of its location outside of United States territory, and is therefore not recognized by the United States as being under U.S. sovereignty.<sup>40</sup> The United States government has used the Supreme Court case *Johnson v. Eisentrager*, to justify its position that aliens detained outside the sovereignty of the United States do not have access to constitutional privileges, and subsequent *habeas corpus* review.<sup>41</sup> *Johnson v. Eisentrager* was a court case that concerned the ability for German nationals to file a writ of *habeas corpus* in order to contest the legality of their detention by the United States after World War II.<sup>42</sup> The case found that the German nationals who were detained for military activity against the United States in China had no right to the writ of *habeas corpus*, and therefore could not test the legality of their detention.<sup>43</sup> The Bush administration maintained that, although the United States has control over Guantánamo Bay, this control is contingent upon a lease with the government of Cuba, and

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<sup>38</sup> Cindy Galway Buys, “The Role of International Law and Institutions in U.S. Detention Policy and Practices,” *Southern Illinois University Law Journal* 37(2013): 522.

<sup>39</sup> Pearlman, 1123.

<sup>40</sup> Pearlman, 1122.

<sup>41</sup> Fiona de Londras, “Guantánamo Bay: Towards Legality,” *The Modern Law Review* (2008): 40.

<sup>42</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>43</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

therefore Guantánamo is still under the sovereignty of the Republic of Cuba. Therefore, the reasoning of the administration follows that, like in the *Johnson* case, the detainees have no right to writ of habeas corpus because they are detained outside the United States sovereign territory.

Since the United States signed a lease agreement with the newly independent Cuba in 1903 the Guantánamo Bay Naval Base has been under the exclusive control of the United States of America.<sup>44</sup> The details of the lease agreement specify in Article III that the United States recognizes that the Republic of Cuba retains ultimate sovereignty over Guantánamo Bay, but that during the duration of the lease, the United States has total jurisdiction and control over Guantánamo Bay<sup>45</sup>. Because of the language of the lease agreement, the U.S. government argues that, because Cuba retains sovereignty over Guantánamo laws and treaties- normally subject to other U.S. territories- do not have extraterritorial application in Guantánamo. This method of reasoning by the United States government is consistent with the ideas of sovereignty created by the Westphalian system, in which sovereignty over a territory creates a barrier of legal jurisdiction that is contingent upon the borders of said sovereign territory.<sup>46</sup> While the Westphalian system has played a significant role in shaping the modern international realm, it is a system with its own flaws, which has never truly been enforced to how the language says it should be. <sup>47</sup> For example, in most scenarios Embassies are treated as being entities that are within the jurisdiction of the nation using the Embassy, even though they exist within the

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<sup>44</sup> Kal Raustiala, "The Geography of Justice," *Fordham Law Review* 73 (2005): 2501, (recognizing the year in which the United States officially gained control over the land that would be the Guantanamo Bay Naval Base).

<sup>45</sup> "Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations: February 23, 1903," Yale Law School.

<sup>46</sup> Raustiala, 2509.

<sup>47</sup>Raustiala, 2510.

sovereign territory of another nation.<sup>48</sup> Therefore, while the idea of the Westphalian system is important, one should not consider its enforcement to be the quintessential element of a relationship between states.

This notion of jurisdiction used by the Bush administration does have precedent in earlier court cases. For example, in *United States v. Spelar*, the Supreme Court decided that the definition of “foreign country” would constitute “territory subject to the sovereignty of another nation”<sup>49</sup>. Should one evaluate the language of the lease between the Republic of Cuba and the United States, one would acknowledge that the lease states under Article III that the United States recognizes the ultimate sovereignty of Cuba over the land, but the U.S. shall have absolute jurisdiction over the land in question.<sup>50</sup>

One question that arises from this statement is: what is the difference, if any, between sovereignty and jurisdiction, when referencing a territory? In the case *Cuban American Bar Ass’n v. Christopher*, the Eleventh Circuit determined that jurisdiction and control are not equivalent to sovereignty, and as a result, American military bases on the territory of another state remain under the sovereignty of that host state.<sup>51</sup>

The United Nations Human Rights Committee has commented on the issue of extraterritorial reach and the resulting validity of the International Covenant on Civil and Political Rights (ICCPR), its opinion on the matter was that it would be ridiculous to think that crimes which a state could not commit on its own soil, should be allowed to happen on the soil of

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<sup>48</sup> Raustiala, 2510.

<sup>49</sup> *United States v. Spelar*, 338 U.S. 217 (1949).

<sup>50</sup> “Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations: February 23, 1903,” Yale Law School.

<sup>51</sup> *Cuban American Bar Ass’n v. Christopher*, 43 F.3d 1412 (1995).



another state.<sup>52</sup> Courts within the United States have agreed with this position. In the case *Gherebi v. Bush*, the Ninth Circuit court argued that the only conclusion they could reasonably reach was that the United States employed all of the fundamental characteristics that accompany complete sovereignty.<sup>53</sup> It is from these arguments that one can conclude the United States has *de jure* sovereignty over Guantánamo Bay; *de jure* meaning that sovereignty has been relinquished from one group and given to another.<sup>54</sup> Therefore, the United States fully sovereign in the *de facto* sense; *de facto* is the term used to describe a government that is actually in control of a territory although it may not be legally recognized<sup>55</sup>. The Republic of Cuba will maintain this reversionary sovereignty until the lease with the United States is ended.<sup>56</sup> Reversionary sovereignty is the situation in which, in the case of Guantánamo, Cuba's sovereignty over the land is based upon the decision of the United States. Sovereignty can only revert back to Cuba in the case that the United States renounces control over the area.<sup>57</sup> This situation is similar to that of the United States military base in Okinawa, Japan. The court held in *U.S. v. Ushi Shiroma* that the sovereignty given to the United States, which gave the U.S. its power over the military base, was to be referred to as *de facto* sovereignty.<sup>58</sup> It is because the control the United States has over Guantánamo is so extensive and thorough, that the ICCPR and CAT have extraterritorial application in this scenario. That would imply that the United States government is bound to the

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<sup>52</sup> Buys, 529.

<sup>53</sup> *Gherebi v. Bush*, 352 F. 3d 1278- Court of Appeals, 9<sup>th</sup> Circuit 2003, 3. Conduct of the Parties Subsequent to the Lease and Continuing Theory.

<sup>54</sup> Herbert W. Briggs, "De Facto and De Jure Recognition: The Arantzazu Mendi," *American Journal of International Law* 33 (1939): 689.

<sup>55</sup> Briggs, 689.

<sup>56</sup> Michael Strauss, "The Leasing of Guantánamo Bay" (Westport: Praeger Security International, 2009): 92.

<sup>57</sup> Strauss, 92.

<sup>58</sup> *U.S. v. Ushi Shiroma*, 123 F. Supp. 145 (D. Haw. 1954).

limitations of the ICCPR and CAT, even though Guantánamo is technically under Cuban sovereignty.

Since one can see that international human rights law still has a significant position in the conversation, it is important to analyze the treaties and covenants that the United States is required to abide by. One such covenant is the ICCPR, which the United States ratified on 8 June 1992.<sup>59</sup> The ICCPR bans torture and it applies to any and all government conduct, not just conduct during international conflict.<sup>60</sup> Therefore ICCPR would be applicable to the actions of the U.S. government under the War on Terror title.

Another international body applicable to the conflict is CAT. CAT's protection applies to everyone; because contrary to the Geneva Conventions, CAT does not rely on the common agreement between states or whatever associations the individual in question has.<sup>61</sup> Should the United States government maintain its position that international humanitarian law is the standard for the conflict, it must concede that these other treaties do have a place in the conversation as well.

Additionally, Guantánamo is not like other military bases. Unlike the locations of other military bases, the Republic of Cuba has never had control over Guantánamo Bay<sup>62</sup>. The lease between Cuba and the United States came directly from U.S. sovereignty over Guantánamo

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<sup>59</sup> "Ratification Status for United States of America," United Nations Human Rights Office of the High Commissioner.

<sup>60</sup> John T. Parry, "Just for Fun: Understanding Torture and Understanding Abu Ghraib," *Lewis and Clark Law School, Journal of National Security Law and Policy* 1 (2005): 265.

<sup>61</sup> Richard D. Rosen, "America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror," *Georgetown Journal of Law and Public Policy* 5:113 (2007): 134.

<sup>62</sup> Raustiala, 2536.

when the U.S. captured Cuba during the Spanish-American War.<sup>63</sup> As a result, the relationship between the United States and Guantánamo is not the same as the relationship examined in the case *Johnson v. Eisentrager*.<sup>64</sup> It was explained in *Eisentrager*, that for a military commission to take place and try the *Johnson* petitioners, permission first had to be acquired from the Chinese Government.<sup>65</sup> But in the case of Guantánamo, the United States has not had any restrictions from the Cuban government on what is and is not acceptable action by the U.S. government while occupying Guantánamo.<sup>66</sup> This illustrates that the United States relationship with Guantánamo Bay is not a comparable relationship to other military bases and that *Johnson v. Eisentrager* is not necessarily the best case to use as precedent for decisions concerning Guantánamo Bay.

In addition, sovereignty today is not the same as it was when the Westphalian system was first conceived. The heavily inter-connected world of today has made sovereignty a more fluid entity. It is the opinion of Raustiala that sovereignty is not an infallible entity and therefore whatever kind of sovereignty Cuba has over the land does not automatically take away from whatever sovereignty the U.S. also has.<sup>67</sup>

The United States government cannot use *Johnson v. Eisentrager* as support for its claims without also using another court case, *Haitian Centers Council Inc. v. Sale*, in its reasoning process. In 1993, Guantánamo was an interesting topic in the news because after a successful military coup in Haiti many Haitian refugees who had been trying to illegally travel to the United

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<sup>63</sup> Raustiala, 2536.

<sup>64</sup> Raustiala, 2537.

<sup>65</sup> Raustiala, 2537.

<sup>66</sup> Raustiala, 2537.

<sup>67</sup> Raustiala, 2544.

States were being held there indefinitely.<sup>68</sup> As with the current case of Guantánamo, the United States government argued that the people being held at the facility were not subject to U.S. laws of due process for asylum seekers because Guantánamo was not a sovereign territory of the United States and thus not subject to American laws.<sup>69</sup> But in *Haitian Centers Council Inc. v. Sale*, it was determined that Guantánamo was subject to U.S. legal jurisdiction at that time, as a result, the refugees being held at Guantánamo were granted proper review of their asylum petitions<sup>70</sup>. Therefore, it should be considered that the detainees present at Guantánamo are then subject to the right of due process, even though they are not U.S. citizens, and are being held outside the United States.<sup>71</sup> Likewise, the Panama Canal Zone, the Trust Territory of the Pacific Islands, and (during its time) the American Sector of Berlin, are all locations that the United States had control, not sovereignty, over and were still granted constitutional rights.<sup>72</sup> Therefore the constitutional protections the Guantánamo detainees are eligible for should be given further consideration, since there are significant precedents that are present to support its claims.

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<sup>68</sup> Harold Hongju Koh and Michael J. Wishnie, “The Story of *Sale v. Haitian Centers Council: Guantánamo and Refoulement*”, *Human Rights Advocacy Stories* (2009): 386.

<sup>69</sup> Chad Lennon, “Detainees in the Global War on Terrorism Aboard Guantánamo Bay,” *Touro Law Review* 31 (2015): 1015.

<sup>70</sup> *Haitian Centers Council Inc. v. Sale*, 823 F. Supp. 1028 (1993).

<sup>71</sup> Koh and Wishnie, 415.

<sup>72</sup> Gerald L. Neuman, “Closing the Guantánamo Loophole”, *Loyola Law Review* 50 (2004): 15.

#### IV. EFFECTS OF GUANTÁNAMO

The effects of Guantánamo Bay extend much farther than the boundaries of the prison camp. Guantánamo presents significant hurdles to the already disadvantaged subject of international human rights.

Because the United States has been getting away with human rights abuses at Guantánamo, other governments have taken notice of the irregular enforcement and ambiguous nature of international human rights.<sup>73</sup> These governments then use the ambiguous enforcements displayed by the Guantánamo events to continue or increase their own practices that violate basic human rights.<sup>74</sup> For example, the Russian Federation was able to avoid reprimand for its human rights abuses in Chechnya, using the precedent set by the United States operations in Afghanistan.<sup>75</sup>

In addition, Guantánamo Bay may be decreasing the effectiveness of the United States as a world power, and the effectiveness of its War on Terror campaign. For example, the European Court of Justice found in *Kadi v. Council of the European Union* that the United Nations program to freeze assets of individuals suspected of terrorism was a violation of basic human rights.<sup>76</sup> Because of this ruling, the program had two directions it could take. Either (1) the program had to be altered to meet basic requirements or (2) countries party to the European Convention on Human Rights and Fundamental Freedoms would not be allowed to assist the

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<sup>73</sup> Joan Fitzpatrick, “Speaking Law to Power: The War Against Terrorism and Human Rights,” *European Journal of International Law* 14 (2003): 243.

<sup>74</sup> Fitzpatrick, 242.

<sup>75</sup> “Chechnya – human rights under attack,” Amnesty International, February 19, 2008.

<sup>76</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461.

United States in the detention and interrogation of the suspected terrorists.<sup>77</sup> This kind of ruling is a result of the United States treatment of the Guantánamo detainees and subsequently limits the options available to the United States when it comes to obtaining assistance with the detainees. One example of this would be if the U.S. were to move the detainees out of Guantánamo Bay. The United States would either have to see the conditions of the detainees changed, should they be moved to a European country, or find somewhere else to put them. Another problem the United States faces is that many European countries are refusing to extradite criminals to Guantánamo Bay because it is believed that the United States government may be in violation of European Convention standards.<sup>78</sup> Such was the issue in *Soering v. United Kingdom*, a court case that dealt with a young German national, whose extradition to the United States for capital murder would've been in violation of Article 3 of the European Convention on Human Rights (ECHR).<sup>79</sup> The opinions concerning the extradition of individuals facing the death penalty are mounting, and sooner rather than later, the United States will not have its extradition treaties upheld by other countries unless changes are made to how the United States operates its justice system.<sup>80</sup> As a result of these limitations, the United States may very well find itself alone in its activities in the Middle East, as countries decide not to be associated with practices that violate their commitments to international organizations.<sup>81</sup> Had the United States treated the detainees by the proper standards from the beginning, these kinds of issues would probably not have arisen.

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<sup>77</sup> Buys, 531.

<sup>78</sup> Buys, 531.

<sup>79</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H. R. (ser. A)(1989).

<sup>80</sup> Elizabeth Burleson, "Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence," *Albany Law Review* 68 (2005): 910.

<sup>81</sup> Buys, 531.

Guantánamo Bay also limits the United States effectiveness against terrorism because it reduces its reputation abroad. Congress has attempted on multiple occasions to dodge the U.S.'s military commission trials from being classified as flawed by the court-martial.<sup>82</sup> This is a very precarious situation the United States has put itself in, because Congress's actions suggest the United States accepts trials to continue even if the trial is not meeting minimum standards. This is an idea that one would assume the United States would want to avoid, should the day ever come that one of their own service members be subject to a military commission trial.<sup>83</sup> These attempts to circumvent these provisions suggest that the United States wants to be held to different legal standards than the rest of the world, and will use its global hegemony in order to achieve such feats.<sup>84</sup> One can see by terrorist propaganda that this kind of behavior only increases the desire for terrorists to do the United States harm. The terrorists use the arguments that the United States is an unstoppable evil, bent on using its power to control and disrupt the way of life for millions, and can only be stopped through violence.<sup>85</sup>

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<sup>82</sup> Trahan, 814.

<sup>83</sup> Trahan, 815, It is not unreasonable to presume that the United States would be against one of their service members being subject to an unfair trial, therefore the fact that the United States is maintaining a status quo of irregular trials is thoughtless.

<sup>84</sup> Trahan, 815.

<sup>85</sup> Samir Amin, "U.S. Hegemony and the Response to Terror," *Monthly Review* 53 (2001).

## V. RECOMMENDATIONS

As we have discussed, the issues raised by Guantánamo Bay have significant impact on human rights around the world. In order for a solution to be found, there are several suggestions that can be taken into account, not just by the United States government, but also by regional and international organizations.

First, changing the language of international law to create synergy between international humanitarian law and international human rights law, and having more interaction between law institutions and human rights organizations would lead to a more cohesive and comprehensive idea of international human rights. Both international humanitarian law and international human rights law have a significant part to play in the international relations realm, and the idea of the two being mutually exclusive is what has led to the unsustainable problems like we see in Guantánamo. The use of the two as complementary ideas has been rising for decades, and the language of international law should reflect and reinforce this complex but important relationship so that the branches of IHL and IHRL can fill in the gaps that the other creates. This is important because it will prevent stakeholders from being able to claim that individuals exist in “legal black holes” like it has been said about those held in Guantánamo. This kind of change could be initiated from legislation in the form of an Additional Protocol on the behalf of the United Nations. Past Additional Protocols, such as the Protection of Victims of International Armed Conflicts in 1977, were able to successfully add important additions to existing laws of the United Nations. An additional protocol that addressed the interaction of international law could contain general provisions such as: a declaration from states recognizing that IHL is a specific subsection of IHRL, or, if that is not possible, at least a guarantee that individuals in armed



conflicts will fall either under protections afforded by IHL or IHRL at minimum. Both of these general provisions could eliminate the argument that certain individuals exist in the legal black holes as mentioned earlier, thereby maintaining an assurance that everyone is afforded the same minimum human rights.

The International Court of Justice is the institution at the head of this motion, as they have been one of the main advocates for more comprehensive language about the overlap of IHL and IHRL.<sup>86</sup> But we are talking about the “international community”, and for laws in the international community to become consequential more stakeholders need to get involved. Human rights organizations have not been expressive with their expectations on how the allowed derogation of international humanitarian should be interpreted<sup>87</sup>; and this leads to fission between those that have a desire to protect human rights and those that have the means to protect human rights. In order for human rights protection to become comprehensive, a consistent and meaningful discussion of what is necessary and what is possible needs to occur between stakeholders to work out a plan to improve the legal language. For example, institutions devoted to promoting and protecting human rights, such as Amnesty International, and Human Rights First, need to have more communication with legal and legislative bodies that actually implement and enforce laws, such as the IACHR, European Court of Justice, and United Nations. Thereby closing the gap between what the laws should include and what they do include and creating more significant and effective human rights laws.

Second, international law needs to be updated in order to reflect the realities of the world we live in and avoid confusion due to ambiguous laws. Customary international law is still

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<sup>86</sup> Prud'homme, 370.

<sup>87</sup> Prud'homme, 364.

largely based off of the 1949 Geneva Conventions. Since then, methods of warfare and technologies have changed dramatically but the laws used to determine their use are still the same. For example, the 1949 Geneva Convention assumes that armed forces of a party will identify themselves with military uniforms that distinctly mark them from civilians and their enemy.<sup>88</sup> In modern times this is no longer reality. Conflicts are fluid occurrences, with multiple State and non-State actors, and multiple agendas.<sup>89</sup> Possibilities include adding universal easily achievable standards, or clarify the legal language of the laws, in order to avoid confusions that have contributed to the situation at Guantánamo. For example, the Third Geneva Conventions Relative to the Treatment of POWs only uses the term Prisoner of War.<sup>90</sup> It would make the laws more clear if the conventions were to address the different labels applied that have been applied to combat participants like unlawful combatant, and enemy combatant. At the present time it is left up to interpretation to know if these terms are synonymous with the term POW. By addressing their validity as proper terms and what stipulations are included with their application, miscommunications like what have occurred at Guantánamo can be avoided.

Third, in order to rectify the situation of Guantánamo, the United States needs to quickly end the indefinite detention of its prisoners. The United States government has put itself into a predicament with the trials of many detainees because of where they were captured. The United States government wants to try the detainees through the use of military commissions trials, however that is not applicable in every detainees' case. Military commissions are only

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<sup>88</sup> Michael Cowling and Shannon Bosch, "Combatant status at Guantánamo Bay- international humanitarian law detained incommunicado," *The Comparative and International Law Journal of Southern Africa* (2009): 8.

<sup>89</sup> Prud'homme, 365

<sup>90</sup> Cowling and Bosch, 7.

appropriate for detainees that were captured during the hostilities of conventional armed conflict or on the battlefield itself, while other detainees should be subject to a trial under federal anti-terrorism laws.”<sup>91</sup> It is clear that this situation is not a traditional armed conflict that is described in customary international law<sup>92</sup>, which takes most of its interpretation from the post World War II ideas of conflicts. Many of the detainees were captured far from the battlefields of Afghanistan, where the United States began its military actions. Several were captured in Bosnia, another from Egypt, one from Zambia, and elsewhere.<sup>93</sup> These detainees should be tried under the procedures of federal courts and federal anti-terrorism laws. Or when applicable, a military commission trial that strictly follows the rules of the Uniform Code of Military Justice.<sup>94</sup> By doing so, the United States will be able to finish the situation at Guantánamo in a way that preserves its integrity as a nation that respects and values law and order, and human rights.

Fourth, the final step would be to close Guantánamo Bay for its current purposes. This step is the reason that the proper military trials, and federal anti-terrorism trials are so important.

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<sup>91</sup> Trahan, 834.

<sup>92</sup> This conflict lacks the traditional characteristics of armed conflict because it has no defined parameters of who exactly is the enemy, where the enemy is, and many of the terrorists in question are from non-state actors.

<sup>93</sup> Wilson, 2.

<sup>94</sup> Trahan, 781. The Uniform Code of Military Justice’s applicability to trials in Guantánamo was rendered null by the Military Commissions Act of 2006 even though it was customary military law in the United States. The version of the code that was altered in 2006, first went into effect in 1951 (UCMJ.US). One could argue that like the Geneva Conventions, the UCMJ was in need of an update, and the National Defense Authorization Acts of 2006 and 2007 did just that. In response I would add that it is my opinion laws are to be updated in order to address possible problems in the future and provide structure and decisiveness for problems that have come up in the past. Laws, in my opinion, are not supposed to be passed in order to serve the agendas of problems that are currently in development. Laws should not simply be manipulated when the current problem cannot go past the power and restraint that has been given to them.

With this chapter in the past, the United States government can finally move onto a new era of the War on Terror that is not blemished by its own errors.

## CONCLUSION

The concepts of international humanitarian law and international human rights law have their significant differences, but they are not mutually exclusive. Customary international law allows for coordination between the two laws because of the commitment to human rights at all times. Even though *lex specialis* may prioritize IHL in times of conflict, IHRL was created in order to fill in the gaps when it became necessary. More recent legal thought emphasizes the *theory of complementarity* and the relevance of the Martens clause. These two entities make for a cogent counter argument to those who claim the Guantánamo detainees are not under any human rights protection because they contend the issue of extraterritorial application of the ICCPR and CAT.

The ways to remedy the situation are not simple, nor are they going to be effective immediately, but they are necessary. An emphasis on the overlap between IHL and IHRL can create an atmosphere in the international realm that stresses the importance of human rights for all because human rights will be promoted to the forefront of more situation of conflict. In order to do so, the laws governing situations of conflict need to be updated in order to provide more clarification of who can benefit from POW status. With updating the laws will be clearer and therefore give more comprehensive human rights. In addition, the United States needs to give fair and proper trials to the detainees left at Guantánamo and end the practice of extended detention of criminals, in order to end the situation and bring some justice to those that have been affected.

With contentious issues like that of Guantánamo, it is important to maintain a level head when evaluating the situation. I am advocating for the justice of people that may have committed

heinous crimes against the United States and also to others abroad. There is no doubt that these individuals should face the consequences of their actions, but at the same time it is incredibly important that governments everywhere hold human rights as a top priority. My encouragement for the fair treatment of prisoners does not negate my desire to see these individuals locked away for their crimes. However, if we fail to protect human rights and dignity, even to those that have wronged us, it is safe to say that we are no better than they are. Through consistent, and clear understandings of human rights, there is hope that in the future our civilizations can achieve a new level of respect for other human beings and situation like Guantánamo can become a thing of the past.

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