

Human Rights and Humanitarian Law in Occupied Iraq: Current Problems and Future Prospects

Date: 25 May 2004

Speakers: Professor Christopher Greenwood QC, Professor Françoise Hampson, Professor Philippe Sands QC, Professor Ruth Wedgwood

Chair: Professor Conor Gearty

Conor Gearty

Thank you very much, Chris.

Our next speaker is Professor Françoise Hampson, who is a person of many roles, an independent expert member of the UN sub commission on the promotion and protection of human rights and consultant on humanitarian law to the International Committee of the Red Cross, Co-Director of the Centre for Children and Armed Conflict Monitoring at Essex and Governor of the British Institute of Human Rights.

So Françoise this is a special welcome to somebody from Essex Centre to the Centre for the Study of Human Rights, the floor is yours.

[APPLAUSE]

Françoise Hampson

Thank you. I'd like to thank the warm up act – I'll hire him again. I don't disagree with anything he said, it doesn't necessarily mean I agree with everything, a subtle distinction there.

There's one exception and the exception is when he said that this might be useful to students revising for exams, those students here from the University of Essex disregard that
[LAUGHTER]

I will consider the applicability of the law of armed conflicts, which is my preferred term, and human rights law in Afghanistan and Iraq and I will consider the application as opposed to the applicability of both regimes with regard to three specific issues: changing the political or economic structure of an occupied territory, the status of detainees and status determination and what to do next about the problem of ill treatment.

I want to raise initially though a problem with the abstract and I appreciate many of you will not have seen that. The abstract about this session gave the impression it's a choice of

humanitarian law or human rights law. I agree with Professor Greenwood that that is not the case, simply because the law of armed conflict applies does not necessarily mean in and of itself that human rights law is not applicable.

So when is the law of armed conflicts applicable? In particular I think there's a problem with regard to the current situation in Afghanistan. When the operation was embarked upon it was an armed conflict between two states, or more than two states, between the coalition and the Taliban who governed most of Afghanistan. The issue of recognition was not relevant. It was clearly an armed conflict between two or more states, therefore it was an international armed conflict. That bit's easy.

But what about the situation after the change of government and the installation of a new government? I'm not dealing with the issue of <ESA> I'm dealing with the question of the US forces working in the area on the borders between Afghanistan and Pakistan. Is that subject, that fighting to international humanitarian law, or the law of armed conflict, and if so of what type and in what order do you ask the questions? I think the first question is there an armed conflict going on? It would appear from the degree of organisation of the fighters, the nature of the fighting and the scale of the fighting that that can appropriately be called an armed conflict. But is it international or non-international?

The US forces are certainly not acting on behalf of the Afghan government, in that sense they're not as it were Afghan style armed forces. So it's not a classic internal armed conflict, but equally if an international armed conflict has to be between two or more states, which is the other state that the United States is fighting? It might be tempting to say Pakistan but I think that would be misleading. So I'm not clear what the status is of the current fighting in Eastern Afghanistan and I'd be very interested in hearing the views of the ICRC.

As far as Iraq is concerned it was clearly an international armed conflict followed by belligerent occupation during the course of which there have been occasional outbreaks of fighting of such intensity and nature that they maybe appropriately called little armed conflicts, e.g. Fallujah. What about human rights law? There I agree essentially with what Professor Greenwood said. The key question is not actually does it matter that it's outside national territory is in what circumstances does a victim of... or alleged victim of a human rights violation come within the jurisdiction of the state when it's acting outside national territory. The case law of the European Court of Human Rights and the Human Rights Committee's general comment make it very clear that human rights obligations apply in occupied territory. In addition they apply where an individual is under the effective control of a state acting outside national borders, a classic example would be the detention of <??>. So what about the situation in Iraq?

Iraq is and has been since approximately the first of May last year, occupied territory. Therefore it would appear, but I suspect this is going to be subject of judicial challenge, it would appear that generally speaking the powers running Iraq effectively – I don't mean they're running it effectively, I mean they're effectively running Iraq [LAUGHTER] those powers are bound by their

human rights obligations and since they have not taken the trouble to derogate they're bound apparently by them in their entirety, because the Cyprus/Turkey decision of the European Commission of Human Rights makes it clear, if you don't derogate you are bound by the treaty in its entirety and in that case under the European Convention on Human Rights you can't detain POWs, interestingly, you can if you derogate.

In addition, whether or not it is applicable human rights law in occupied territory where you are dealing with detainees it is also applicable because of the extent of the control you are exercising over the particular individuals.

The three issues I wanted to touch on. Professor Greenwood mentioned the question of whether or not you have to apply the previously applicable law and gave the example, the non-application of offensive domestic law. My problem isn't that, my problem is attempting to change the political and economic order of Iraq by privatising national assets that is prohibited under the Fourth Geneva Convention. It is absolutely clear that there is no way in which can be justified, those decisions are for the people of Iraq to make and not for occupying powers to make on their behalf.

The question of the status of detainees whether in Afghanistan or in Iraq. Here I disagree with the American position. To me it seems clear that under international law including customary law in so far as the relevant provisions and the protocol of customary law, there are two animals, there are combatants and there are civilians, there is no such legal animal as an unlawful combatant. There are civilians who unlawfully take part in hostilities. When they unlawfully take part in hostilities they can be targeted. They can also be tried for taking part in hostilities unlike a member of the armed forces who can't be tried simply for fighting. But there is no animal known as an unlawful combatant. Why might states be tempted to create such an animal? If you have an unlawful combatant it means you can fire at him any day... any hour of the day, any day of the week whatever he is doing, because that's true in relation to armed forces and it means he can't fire back. Unfortunately the law of armed conflict is based on the very sensible notion of reciprocity, not in the sense of each side has to formally commit itself but it's based on the equality of belligerence. If you start saying we have the right to fire at you and you don't have the right to fire on us, then the chances of respect for the rules is going to be undermined.

When it comes to the detainees actually being detained and the question arises of what their status is, in particular whether they're prisoners of war or not, there is a provision set out in the Third Geneva Convention on how you decide these issues. You don't decide by executive fiat. You decide by if there is any doubt going along to a tribunal and letting the tribunal reach a decision. There is a doubt if a guy says he's a civilian and you think he's a combatant. There is a doubt if you think he's a civilian and he claims to be a combatant. You can't say "I'm certain that I know what he is therefore he is that and there is no doubt" so there is a need for some form of independent mechanism for determining status.

The third issue that I wanted to touch on very briefly is the question of the ill treatment of the detainees. Whether they are prisoners of war or ordinary criminals or civilians who unlawfully took part in the conflict doesn't matter. Torture inhuman degrading treatment is prohibited under both human rights law and under the law of armed conflict and the Geneva Conventions Three and Four.

But I don't want to go over that ground again I want to look at what happens next and the question of causation. If you are looking at why did the problem arise don't fall into the trap of assuming, "Oh well, that's what happens when the American military go in", because that is simply untrue. Since Vietnam the American military have gone out of their way to institutionalise ways of giving effect to the rules. Admittedly it's their interpretation of the rules, but they do take the rules very seriously. What has happened is an aberration, it is not the norm for US forces. Having said that it is not a matter of the conduct simply of individuals, you don't get all that equipment and you don't happen to stumble by accident on traditional ways of softening people up for interrogation. I think the causes and I'm not speaking of strict causation in a legal sense here, I'd identify two important causes; one, the complete failure to plan for what would happen after the armed conflict in which case people find themselves doing all sorts of unexpected things and there was no planning in place. That is not the fault of the military, either the British or American military, they wanted to plan, they were told they weren't to engage in any such planning. The other cause in this broad sense of cause is the way in which since 9/11 the US gives the impression of having torn up international law, most notably the Geneva Conventions and human rights law. They keep saying it doesn't apply. In fact the position is that in various respects the US is currently acting in violation of rules. It's not the rules are uncertain, the particular rules I'm referring to are clear. There are some rules the scope of which is uncertain but that is not true with regard to the issue of status determination, nor is it that there's any lack of clarity on the question of who is combatant and the fact that if you're not a combatant you're a civilian and you may be fighting unlawfully. Those dilemmas or those concepts are clear.

In asserting since 9/11 that the war on terror is outside every kind of previously known construct the US in effect has torn the rules that apply to those sorts of things. If you tear up some rules it's not surprising then that you're armed forces don't know whether it's okay if they humiliate people, don't know whether it's okay if you use dogs or not. So I think the causation is linked to that problem. There is no doubt that it's unlawful and I'd like to issue a sort of challenge to Ruth as my final comment, I think there's only one way in which the US can show "never again" with regard to the ill treatment of detainees. The investigations are good but they won't achieve "never again". If the US means it, if they mean this should never happen again they will ratify the Inter-American Convention on Human Rights which contains the right of individual petition or they will ratify the optional protocol to the covenant on civil and political rights and give detainees the right to petition the Human Rights Committee. Ruth can hardly object she sits on it! Thank you.

[APPLAUSE]