

‘Prisoners’ Dilemmas’: The Potemkin Villages of International Law?

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Abstract

The outbreak of the ‘war against terrorism’ has provoked a deluge of images. It is uncommon for lawyers to think of the impact of the media on the production of law, yet a specific set of images has had a considerable impact on how legal issues surrounding the use of violence have been framed. The article seeks to explore this novel area by focusing on international humanitarian law and how it deals with the recurring question of prisoners. Some of the distortions the media community imposes on the law are uncovered, but the law’s inherent malleability to such distortions is also underlined.

Key words

virtuality; international humanitarian law; media; prisoners; war

Outside the beltway, beyond the ken of many journalists, and on the margins of the academy, many of the elusive if not esoteric features of 9.11 bear an uneasy familiarity: the dominance of the image over the word, the displacement of space by pace, the rise of the nodal over the central, the allure of the virtual over the real thing, the power of the watcher over the watched, and the erosion of distinctions between here and there, fact and fiction, peace and war.¹

I. INTRODUCTION

The real and the virtual are held to be two irreducible categories of understanding. What is real cannot be simultaneously virtual and vice versa; 11 September belongs to the most ‘real’ category of events, since it led to thousands of deaths. Death is real. Indeed, death and pain are perhaps the closest thing to what is real in human existence. The response to 11 September is also and inevitably extremely real, since it can draw on all the reality of the actual events that gave rise to it.

The law’s role within the response to 11 September has been to bring back a sense of order where order has been threatened. Law is familiar. It suggests a fair and balanced response to the problem of violence. Law is also real, although for reasons and in ways different from the reality of death or violence. Law is real because

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1. J. Der Derian, ‘9–11: Netwar and Mime-Net (II)’, *INFOinterventions*, 4 Nov. 2001 (www.watsoninstitute.org/infopeace/911/jdd_netwar.html).

it can harness the power of the state to punish the guilty and to wage war on its enemies.

In the aftermath of 11 September, however, law and violence also mingle in a complex interweaving that is sometimes difficult to disentangle. At times, violence seems to infect the law in a way that leads the law to exude a barely repressed sense of vengefulness. Violence itself becomes legalized in new and creative ways.

All of these developments take shape against the background of an ultra-mediatized global society. Mediatization can be summarily described here as the transformation of the signals of the living world into codified bits of information for mass consumption. Both law and violence are permanently processed through the megaphones of the post-industrial apparatus instrumentalized by the mass media.

The law, however, does not think of itself as being represented through the media. To be more precise, lawyers are trained to think of the law and the representation of the law as two distinct things. Only law's representations – in the media, for example – can be virtual. Above all, law does not see itself as a medium.

But what happens when, in the vortex created by cataclysmic violence, the law confronts its image at the speed of light? How is international law's narrative of progress shaped by its image? What link is there between the image of the twin towers falling, the picture of blindfolded prisoners in Guantanamo Bay, and the unfolding of international law, as a secular project of peace and justice?

Surely it is appropriate that an event begun in, and almost tailored to generate, an orgy of images,² whose comprehension has become inseparable from the endless repetition of these images,³ and whose very potential for virtuality was from the start an object of fascination,⁴ should affect the law and the way we think of it. At a time when efforts have been made to enlist Hollywood's imagination in the war effort,⁵ when the creation of an Office of Strategic Influence was seriously contemplated,⁶ or when one interviewed marine's comment upon entering Iraq was that 'it looks very much like in *Three Kings* [a film about the previous Gulf War]', no sector of society – especially not the legal establishment – can avoid reflecting on how the global media are affecting the practices of global regulation.

This article will seek to shed light on the issue of virtuality through an exploration of the media's recent treatment of international humanitarian law, particularly through the treatment of prisoners. 'Virtuality' here is defined as the predominance of signs over meaning through the saturation of public space by the mass media.

2. C. P. Freund, 'Apocalypse by Deed: The Scale of Potential Terror Meets the Scope of Available Media', *Reason*, 11 Sept. 2001. See also <http://web.mit.edu/cms/reconstructions/>, one of the better websites devoted to the exploration of 11 September through its media coverage.
3. P. Farhi, 'The Images that Won't Let Us Go', *Washington Post*, 15 Sept. 2001, C-01. See also M. Semati, 'Imagine the Terror', (2002) 3 *Television & New Media* 213.
4. Perhaps the most emblematic article to emerge in this context, to be circulated widely on the web soon after 9/11, was S. Žizek's 'Welcome to the Desert of the Real', (2002) 2 *The Symptom* (www.lacan.com). See also J. Baudrillard, 'L'esprit du terrorisme', *Le Monde*, 2 Nov. 2001. These articles, in turn, have spawned a whole series of pieces on similar or connected themes. See S. Weber, 'War, Terrorism, and Spectacle, or: On Towers and Caves', (2002) 1 *Grey Room* 14; R. Farmanfarmanian, 'The Media and the War on Terrorism: Where Does the Truth Lie?', (2002) 15 *Cambridge Review of International Affairs* 159.
5. P. Bart, 'Nets, Studios Answer Call to Arms in Fight Against Terrorism', *Variety*, 17 Oct. 2001.
6. J. Dao and E. Schmitt, 'Pentagon Readies Efforts to Sway Sentiment Abroad', *New York Times*, 19 Feb. 2002, 1.

International humanitarian law has come to play a crucial role in the aftermath of 11 September, perhaps all the more so that the traditional constraints on the *jus ad bellum* have been significantly loosened by the succession, in less than a year, of two major conflicts. At the same time, it seems, international humanitarian law has rarely been so vulnerable to manipulation. Because international humanitarian law makes it possible to focus on the human dimension of warfare, it has become particularly dear to the media's need to produce 'narratives' of individual suffering. The relation of international humanitarian lawyers to this attention is complex. On the one hand, the attention is welcome, principally as a means of publicizing violations by the parties to a conflict. On the other hand, the risk is that the media will also contribute substantially to distorting the public's perception of both international humanitarian law and the conflicts at stake.

The relationship of the global media – what was once referred to as the 'CNN factor' – to international law generally, and to international humanitarian law in particular, is only now beginning to be investigated,⁷ let alone understood. What this article wants to do is to begin uncovering how the treatment by the media of international humanitarian law may in fact contribute to complex processes of virtualization of human suffering. Crucially, however, the argument of this article will be that international humanitarian law is not simply the victim of this distortion but is also complicit with it in certain ways.

In order to put this argument, the article will proceed through three 'images' of the state of international law, each of which has as its central feature a given snapshot of 'prisoners'. The prisoner strikes a compelling figure in these times of war and death: part victim, part criminal, he is at the vanishing line of opprobrium and pity, the complex product of the conflicting trajectories of humanitarianism, war, and repression. The article does not propose to offer anything like a comprehensive answer to some of the perennial questions it raises. What to make of these images or of their being presented together will be in part left to the reader. As the ironic use of the plural in the reference to the founding case of contemporary game theory in the title suggests,⁸ it will be interested not in some timeless monolithic truth but in uncovering the plurality of criss-crossing rationalities behind the apparent obviousness of images; that is, in marking out a trail through the lush jungles of the virtual.

2. ON GUANTANAMO

The first image (Fig. 1) is one that was broadcast around the world immediately after it was taken.⁹ It has had a huge impact on the perception of the war against terrorism.

7. On the role of the media in triggering interventions, see P. Robinson, *The CNN Effect: The Myth of News, Foreign Policy and Intervention* (2002). Also, on the role of the media during conflicts, see N. Gowing, 'Media in Conflict: The New Reality Not Yet Understood', *ICRC Forum: War and Accountability*, April 2002; M. S. Parry, 'Pyrrhic Victories and the Collapse of Humanitarian Principles', (2002) *The Journal of Humanitarian Assistance* (<http://www.jha.ac/articles/a094.htm>) (particularly the section on the role of the mass media).

8. A. Rapoport and A. M. Chammah, *Prisoner's Dilemma* (1965).

9. 'In Pictures: Camp X-ray Prisoners', *BBC News*, 20 Jan. 2002.



Fig. 1.

It is that of prisoners taken in the Afghan conflict, freshly arrived in Guantanamo, handcuffed in orange prisoner suits. The picture was met with considerable shock worldwide.

There are many interesting things that can be said about the picture, which has been described as ‘a voyeur’s delight’.¹⁰ The fact, for example, that it is ‘weirdly erotic in that perverse way that hardcore male-on-male sado-masochistic porn often is’ and that the sight of ‘Osama surrogates’ was meant as the ‘revenge of the raving castrati after the pain and phallic humiliation of 9.11’,¹¹ or that ‘Stripped of cultural representations, dressed in vibrant neon orange, these men both live out and symbolise the loss of state protection, a spiral into the virtuality of the global political vortex’;¹² or that the picture was not taken by some paparazzo but actually released by the US Defense Department as a picture very much ‘meant to be seen’: perhaps it was a tragic public relations blunder by a leadership removed from public opinion, or perhaps a carefully calculated ploy designed to divert attention from ‘something else’ that we were not meant to see.

But here we want to focus on the impact of images on the law. Lawyers, international lawyers perhaps even more so, are not particularly interested in

10. S. Block, ‘The Great Pretzel Swallower’s Guantánamo S/M Porn PR Disaster’, *Counterpunch*, 29 Jan. 2002.

11. *Ibid.*

12. S. Diamond, ‘Intimate Technologies and the War Zone’, in S. Mann, M. Bohlen, and S. Diamond, *Decontamination, Surveillance and Ready Made Martial Law* (2002) <http://wearcam.org/iseao2/mann1716.pdf>.

understanding the social conditions under which legal questions are reproduced. A fortiori, lawyers do not typically think of 'images' as having an impact on the law. Perhaps because of their overwhelming perception of the law as a *verbal* activity, lawyers tend to think of their endeavours as being insulated from the media society, essentially driven by the dominantly professional agenda of their caste: order, justice, a taste for the formal splendour of the *beau raisonnement*, tinged, perhaps only marginally, by interest, strategy, and the pursuit and fructification of symbolic capital.

In fact, however, the case could be made that this particular picture at least has had very much of an impact on the way in which lawyers made sense of their role in the aftermath of 11 September. Legal problematiques do not hover in the void – not even in the rarefied world of legal academia – but are the product of dense fields of competing interests waiting to be electrified by a sudden bolt of media attention. Where the global production of images meets the law is where one can begin to make sense of the rise of legal controversies in the media age. The release of the Guantanamo picture intervened at a time when the media had been direly starved of images, and where the war had become even more virtualized than the Gulf War or the NATO bombings of Yugoslavia. Hence the image was one of the first glimpses of 'real reality' that we had ('so *this* is what an Al-Qaida terrorist looks like'). While releasing a tingle of guilt-ridden sadism, it seemed to symbolize much of what *could* go wrong with the 'war against terrorism'.

The point here is not to write one more piece about the question of whether the conditions were legal or not, or whether, in Donald Rumsfeld's words, they were 'appropriate and humane'. In all likelihood, the treatment was outside the *spirit* of the law, although probably not by far. Rather, the point is that the image very much *defined* the legal debate, in that it delimited the legal terrain upon which it unfolded.

This is so in the trivial sense that the picture *revealed* an aspect of the war against terror and that the chronology of comments, reactions, and op-eds correlates quite strikingly with the release of the picture. It is also true in the more complex sense that the picture *constructed* a debate that simply did not exist beforehand. Of course, there would not have been a debate had the picture not crystallized already existing anxieties. Clearly the image managed to tap the huge hidden reservoir of Western, particularly western European, guilt. The pictures did, however, manage to shape the way in which the problem was perceived. They did so, for example, by focusing attention on the conditions of transfer of the prisoners (the disturbing vision of the shackles, the 'sensory deprivation' devices), rather than, or at the expense of, the issue of why they were detained in the first place, or how long they should be so detained. They brought all the weight of global attention to bear on the prisoners in Guantanamo rather than any other prisoners.

This is so regardless of the fact that, as it soon turned out, the pictures were rather unrepresentative and that, as reported since, the treatment of the prisoners was relatively up to required standards, so that one Russian mother, after hearing from her son that 'there is not even a health resort in Russia on the level of this

place', pleaded with him to stay there at all costs rather than risk deportation to Russia;¹³ or that the measures paled in comparison to treatment in penitentiaries throughout the United States and Europe; or that the treatment of Cuban and Haitian refugees in Guantanamo a few years earlier had been indescribably worse, while not eliciting even a fraction of the media attention;¹⁴ or that US troops had engaged in similar types of measures in the past;¹⁵ or that detention conditions in Afghanistan were infinitely more dire;¹⁶ or that for many, being held in Guantanamo was a blessing compared with being bombed, gassed or drowned in the basements of Mazar el Sharif, or being stampeded to death in containers at the hands of the Northern Alliance; or that having been shackled or blindfolded or made to kneel down would soon turn out to be the least concern of prisoners facing indefinite detention or being returned to the authorities of their home country.

There may even have been something weird, almost obscene, about the detailed legalism involved in some of the – notably European – reactions to the episode, combined with the general nonchalance when it came to the 'larger details' of the 'war against terrorism'. It was as if all the indignation had less to do with any objective assessment of degrees of suffering than with the specific representation of that suffering for all to see under the global media's gaze; as if the driving force behind the indignation was not the realization that such things could happen, but that they could happen so close to the tidy shores of a liberal democracy (illustrated so vividly by the highly ambiguous 'not in my name' slogan that was such a big success with anti-war demonstrators); as if, finally, the importance of the incident had more to do with how it shed light on each actor's claim to legitimacy than any genuine empathy with the fate of prisoners, of all prisoners. Those who had supported the 'war against terrorism' down to some of its most devastating and dangerous aspects, such as the UK government, suddenly found themselves ready to slam the door on the coalition over the fact that prisoners' cells were open to the elements. One is reminded of that convoluted instruction issued to the 9/11 terrorists that, as they were headed towards mass-murder, they should keep a sharp knife so as not to 'cause discomfort

13. 'Russian Mother Pleads for Son to Stay in Guantanamo', Reuters, 8 Aug. 2003.

14. See, for example, the following description by Michael Ratner:

The conditions under which they are living, if you can call it that, are out of Dante's inferno – the ninth circle of Hell. For 14 months they have used portable toilets that are rarely cleaned, that are filled with feces and urine. The camp is bleak – no grass, hardscrabble ground and temporary wooden barracks on concrete slabs. Within those 'homes' 15 to 20 Haitians are huddled with only sheets hanging from the rafters. Rain, vermin and rats are the other occupants.

Statement of M. Ratner (Feb. 9, 1993) (describing the camp and the condition of the Haitians on a hunger strike) (on file with the *Harvard Human Rights Journal*). See also M. Ratner, 'Guantanamo Bay: When Will The Suffering End?', in J. Ridgeway (ed.), *The Haiti Files* (1994), 199.

15. J. Borger, M. Engel, D. Campbell, and R. Norton-Taylor, 'US Accused over Prisoners', *Daily Mail and Guardian*, 28 Jan. 2002.

16. UN Office for the Coordination of Humanitarian Affairs, Afghanistan, 'Deplorable Conditions at Shebarghan Prison', 29 Jan. 2002 (<http://www.irinnews.org/report.asp?ReportID=20194>). See also J. Lobe, 'Afghanistan's "Quiet Atrocity"', *Asia Times Online*, Jan. 30, 2002, www.atimes.com/c-asia/DA30Ago2.html; B. Murphy, 'Detainees Held in Afghan Prisons Complain of Inhumane Conditions', Associated Press, 30 Jan. 2002.

to those [they would be] killing'.¹⁷ Perhaps an intriguing case of global 'mimetism' (*MIME*-tism?) after all.¹⁸

It also seems to matter little that in insisting that all prisoners be labelled as prisoners of war, even though many of them may blatantly not qualify, one risks weakening that attribution to those worthy of it; or that, in labelling them prisoners of war, one might legitimize the idea that there is such a thing as a 'war against terrorism', hence reinscribing violence within the violence that is. Any suggestion that the whole episode might be a diversion from the bigger picture, or that it might have more to do with the discreet positioning of its participants¹⁹ is dismissed with derision.²⁰

What we do seem to have for certain, however, is a combination of factors that seem specific to the 'spectacle society'.²¹ First is a *saturation* of the mainstream public debate, and for many weeks. Guantanamo becomes the 'issue of the day', to the point that other issues linked to the war in Afghanistan become relegated to almost 'secondary' status. There is a clear 'crowding out' or 'noising out' effect, in a public space that is already generally unreceptive to general debate.

The second factor is a *virtualization* of the war. Guantanamo offers a kind of redux of the 9. 11 aftermath, an appropriately convoluted and perhaps very American legal epilogue to what started in an orgy of violence. As one author put it, in a perhaps unwittingly characteristic statement, 'As the US war on terrorism meanders on, legal questions surrounding alleged terrorists and their associates have taken on all the complexity of the war itself.'²² The war against terrorism, a war waged by means of stealth and largely invisible to the eye, becomes as if encapsulated, absorbed by the Guantanamo incident and the visual loops it generates. The hundreds of collateral casualties, the suspected terrorists brought to distant airfields at dawn only to be flown to countries willing to torture them, are simply no match for the kneeling down of a few dozen prisoners on a Caribbean island when it comes to news impact.

Third, as a by-product of virtualization, comes a *trivialization* of the war. That trivialization is in a sense no different from and a product of the general tendency of the media to focus on 'the story', or the 'killer detail'. Within the ambit of Guantanamo, it seems, issues can be reduced to manageable proportions, far from the paradigm-shattering complexity of recent world events. By suggesting with the full suggestive force of images that 'the worst that can be said about the war is its treatment of

17. G. Niebuhr, 'The Letter; Injunctions to Pray and Orders to Kill', *New York Times*, 29 Sept. 2001, 3.

18. On René Girard's theory of 'rivalité mimétique à l'échelle planétaire', see Henri Tincq's interview of Girard in 'Ce qui se joue aujourd'hui est une rivalité mimétique à l'échelle planétaire', *Le Monde*, 5 Nov. 2001. On the Military Industrial Media Entertainment (MIME) Network, see Der Derian, *supra* note 1.

19. See F. Mégret, 'Guantanamo Is Not the Problem', (2002) 3 *German Law Journal* (www.germanlawjournal.com) (arguing that the intensity reached by the polemic can only be explained by its being caught in the crossfire of a European-US legitimacy rivalry).

20. M. Meltsner, 'A Response to Frédéric Mégret: Guantanamo Is Not the Problem', (2002) 3 *German Law Journal* (www.germanlawjournal.com).

21. To use Guy Debord's expression in *La société du spectacle* (1967).

22. E. Helmore, 'War on Civil Liberties', *Guardian*, 7 May 2002. See also US Department of State, 'Guantanamo Detainees, "More Controversial than Military Campaign?"' usinfo.state.gov/admin/005/www/h2j18.html.

prisoners',²³ one implicitly denies that quality of gravity to other episodes of the war against terrorism. By symbolizing all that is wrong with the war against terrorism, Guantanamo becomes a powerful image of the front line against that war, just as it risks claiming an excessive part of scarce and short-lived global indignation.

Against that background, one would be confronted with the incontrovertible evidence that winning battles at home concerning the treatment of prisoners is one of the ways to fight the extremism of the war against terrorism. In a sense, this suggested linkage is the redeeming factor of the media society: that the attention brought to some aspects of social life is not necessarily *completely* lost on other aspects. And indeed, it may be true to an extent that '[t]o require due process for, and to uphold civilised treatment of, prisoners,' becomes 'just one more way of fighting the polarized thinking and black–white narrative that allows more and more reliance on the use of force to the relative exclusion of other means'.²⁴

What follows is presented as, in many ways, a story of at least partial liberal success. Long after their effect has worn out, the images do provide the initial impetus for further legal action. Of course, the initiative launched against the administration by a 'coalition of clergy, lawyers and professors' is a failure that nearly ends up as a farce: the recognition by an appeal court of the administration's reasoning that, *inter alia*, Guantanamo is under Cuban sovereignty so that the US Constitution cannot possibly be applicable.²⁵ But the legal action is a pretext and its initiators probably suspected that it was doomed. What matters is not its content as much, coupled with the indignation and criticism of international NGOs, as its political and media impact. Lawyers here appear as consummate politicians, who have fathomed the publicity value that a trial can bring. The coalition of reasoned opinion does eventually force the Bush administration first to suspend the transfer of prisoners, and then partially to change its position by deciding to apply the Geneva Conventions – although not classifying the Taliban as prisoners of war. The essentials seem to have been secured.

Consider, however, a slightly different story, one of many no doubt, but one that may be more plausible and that sheds some light on the diversity of interests lying behind the indignation over the prisoners' fate. There is clearly a deep, ingrained assumption about the profoundly unitary character of the rule of law as a concept, not least for well-known epistemological reasons, so that, overall, the domestic and international rule of law should be seen as essentially reinforcing each other. More often than not, both will converge substantively so that, for example, the Geneva Conventions require due process for the Guantanamo detainees *qua* war prisoners, while the US Constitution requires it to the extent that they are on US territory. Both texts have accordingly been invoked in the Guantanamo detainee case, and there seems to be a measure of common interest (or objective collusion) between international human rights NGOs and traditional US civil libertarians.

23. Mégret, *supra* note 17.

24. Meltzer, *supra* note 18.

25. See United States Court of Appeals for the District of Columbia Circuit, No. 02–5251, Consolidated with No. 02–5284 and No. 02–5288, decided 11 March 2003.

That both international law and the constitution should be invoked by those taking up the cause of the Guantanamo detainees, however, probably reflects less a commitment to the direct applicability of international law in the United States than an adjustment to the complex problem of legal geography created by the transfer of the prisoners to Guantanamo, of all places. Guantanamo, as the ultimate frontier of non-territory, has emerged over the years in US practice, thanks to the peculiar terms of a lease agreement signed with Cuba in 1903, as a kind of constitution-free offshore haven, the closest thing to a legal no man's land.

It is not the least of ironies that the distant product of the emergence of the United States as an imperial power at the turn of the previous century, a portion of the much reviled last Cold War Castroist remnant, the occasional graveyard ('safe haven') of Cuban aspirations to emigrate,²⁶ should serve as the testing ground for cutting out constitutional guarantees. But, were it not for their chance encounter in Guantanamo, one might think that the visions of human rights implicit in the constitutional and internationalist project were very much talking past each other. In fact, as is well known, the US Constitution and others alongside it in recent history are as much a reason to reject international human rights standards (generally because it is argued that human rights are sufficiently well protected domestically) as they are a reason to subscribe to them,²⁷ so that invoking constitutional guarantees may precisely be a way of keeping international law from the Guantanos of the world.

In truth, the civil libertarians' concerns as expressed in the context of 11 September may be very different from the internationalists' habitual fear that 'We are in effect writing new precedents that other governments are going to rely on – and that is not in the interest of global human rights.'²⁸ What seems to be the decisive factor here is that the Guantanamo precedent might lead to the kind of police state *within* the United States that civil libertarians abhor. Immediately after saying that it is simply wrong or illegal to detain prisoners in a legal void, it is the 'this could also happen to us' argument that acts as a rallying cry. As one author put it, for example:

The treatment of the Guantanamo prisoners could... provide a wedge for our own government to erode the civil liberties of citizens, permanent resident aliens, or visa holders – claiming that the Constitution applies in fewer and fewer circumstances, and to fewer and fewer persons.²⁹

The important point here is that it is attempts to curtail rights *domestically* that clash head-on with important societal interests in maintaining a free and open society. That the point is made by requiring the protection of foreigners caught in a

26. In that sense, there is nothing new about the current debate. See, for example, J. Wachs, 'The Need to Define the International Legal Status of Cubans Detained at Guantanamo', (1996) 11 *Am. U.J. Int'l L. & Pol'y*, 79.

27. This is the 'kind of learned insularity' that Dorothy Q. Thomas speaks of. See D. Q. Thomas, 'We Are Not the World: US Activism and Human Rights in the Twenty-First Century', (2000) 25 *Signs, J. Women Culture & Soc'y*, at 1121–3. Constitutional provisions regarding due process, for example, are considered by constitutional fundamentalists as one of the most important reasons why the United States should *not* join the International Criminal Court.

28. Michael Posner, executive director of the lawyer's Committee for Human Rights, quoted by W. Richey, 'How Long Can Guantanamo Prisoners Be Held?', *Christian Science Monitor*, 9 April 2002, at 4.

29. A. Chander, 'Guantanamo and the Rule of law: Why We Should Not Use Guantanamo Bay to Avoid the Constitution', *Findlaw's Writ*, 7 March 2002 (<http://writ.news.findlaw.com/>).

foreign land and, what is more, some of the worst enemies of liberal democracy, is to the credit of liberal democracies' inclusive capacity, but it is hardly a point *about* international law, the need to respect international human rights, or international humanitarian law globally.

Clearly the maintenance of a free and thriving democracy in the world's superpower is an important issue in its own right, not only for US citizens but for foreigners residing in the United States, and quite possibly for the rest of the world as well. There is even a very legitimate case for saying that the domestic polity, as the cradle of human rights conceptions, should be the privileged platform for human rights enforcement, along liberal-communitarian lines. But it hardly needs to be said that there is no obvious – even less automatic – link between commitments to the rule of law domestically and internationally.

One need look no further than the United States during most of the Cold War, to see a society that had successfully fought off its own home-grown attempt to impose ideological dictatorship (McCarthyism), but that was committed to suppressing many democratic regimes, covertly or not, elsewhere. It was the same country that desegregated its schools under the helmsmanship of Chief Justice Warren and was preparing itself to support the suppression of dissent in the name of fighting communism throughout large parts of the Third World.

Indeed, if one is ready to go a step further, one might think that the stampeding of human rights abroad was often seen as *precisely* the price of maintaining the kind of open, consumer-based society contemplated by the United States at home. Remarkably, that argument has even begun to enter the fray of political correctness. As one author put it, announcing in supremely ambiguous terms what may one day be seen as a prescient intuition:

a fundamental reason for supporting the making of war outside the United States is to prevent the erosion of our domestic arrangements and civil liberties by instead destroying those abroad who would bring war to this society, for it is better to make war on our enemies abroad and to destroy them and their threat than to create a long-term police and surveillance state at home.³⁰

So that one of the more likely scenarios in the years to come is probably not the downward spiralling of the US polity into authoritarianism (although that remains for all practical purposes a salutary working proposition for civil rights groups). Rather, what one will probably witness is an opportune salvaging of civil liberties in the West (if only because the objective alliance between liberals and conservative libertarians spans a large section of the political spectrum), but the consequent dumping and outsourcing of 'terrorist' repression to its periphery, in Russia, Pakistan, the Philippines, Colombia, and so on.

In this light, efforts to bring legal protection to the detainees in Guantanamo by US civil liberties advocates should probably be seen less as the first in a series of concentric circles designed to contain violence than as the locus of an increasingly

30. K. Anderson, 'What To Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defence of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base', (2002) 25 *Harv. J.L. & Pub. Pol'y*, at 593.

radical disjunction between standards applied at home and abroad. At the very least, the suggestion that constitutional and international safeguards naturally go hand in hand should be received with guarded scepticism. In fact, there may be little reason to see anything more behind that belief than a liberal sacred cow – itself perhaps some sort of larger-than-life projection of the Protestant ethos on to the global plane – that by behaving decently at home, one will somehow improve the odds globally of an international rule of law.

What teasing out some of the ramifications of a single picture hopes to have achieved is the demonstration of a double ambiguity. First, an ambiguity of representation by the media itself: the image of shackled prisoners in Guantanamo attracted attention to a minute part of a global problem, helping to publicize some of the violence involved in the war against terrorism but at the same time potentially contributing to the desensitization of the public to other issues. Second, however, this is an ambiguity that does not stop with media representation but also seems to taint various legal courses purportedly undertaken in the name of humanitarianism, as if even the reality of law were not sufficient to offset the virtuality of the media; as if, perhaps, both were not so much separated by incommensurable dimensions as part of a larger continuum.

3. POWS, AL-JAZEERA, AND THE PITFALLS OF 'SHOWING'

The second image takes us to quite a different war, although one that is in many ways logically connected to the previous one. Three days into the invasion of Iraq by US and UK forces the stray part of a maintenance regiment fell into an Iraqi ambush. Several were killed, soon to provide the first gruesome images of allied casualties and a painful reminder, we were told, of the reality of the war. Others were made prisoners of war. On 23 March al-Jazeera, the Qatar-based news network, aired the pictures of five of the captured, apparently exhausted and dazed. A similar incident involved British troops. In both cases, it was a few hours before US and British authorities reacted. But when they did so it was by lashing out at the Iraqis for what was described by the British Defence Secretary, in particular, as being 'in direct violation of Iraq's obligations under the Convention'.³¹ The images, because of their haunting, symbolic character, have become symbols of sorts of the low regard held by the Iraqi regime for international humanitarian law.

Again, there are a number of details that are worth noting, behind the obviousness of the images. There is the fact that it is not clear whether the look of bewilderment on the prisoners' faces betrays harsh conditions, the sheer surprise at having been caught, fear of their jailers, or puzzlement at the intrusive presence of a video camera. The slight incongruity that, amongst images of US military might and muscle, those caught look strangely meek and inexperienced, almost 'civilian', and include, for example, an African-American single mother (otherwise the dreaded *bête noire* of neo-conservatives being sent to fight a neo-conservative's war?) serving as a chef.

31. 'Transcript of British Ministry of Defence Secretary Geoff Hoon', <http://www.number-10.gov.uk/>.

But here we want to concentrate on the reaction to the images and how they shed light on the role of lawyers and the media in framing the 'legitimate' debate. The temptation is to make this the incident exactly symmetrical to Guantanamo, thereby suggesting that there is some causal relation between disregard for international humanitarian law by the United States in its treatment of prisoners in Guantanamo and Iraqi behaviour. For NGOs seeking above all to make the case for upholding international humanitarian law (much more, often, than establishing a violation in a particular case) this is a powerful rhetorical trope which portrays the United States as getting a taste of its own medicine.³² It also confirms the principal pragmatic argument of many NGOs, namely that in renegeing on the application of the Geneva Conventions the United States was forfeiting its authority to have them applied by others.

It is indeed true that, if one conceives the treatment of prisoners less as a list of minute requirements and more as a more general duty to treat prisoners 'humanely', one might be inclined to agree with Michael Ratner, who has criticized what he calls the United States' 'amazing hypocrisy'.³³ Under the guise of serving international humanitarian law, US indignation seems to amount to a strikingly selective assertion of its supremacy.

But there are also differences worth noting. In the case of the Guantanamo pictures, these revealed what was said to be particularly harsh treatment, but there were few protests about the existence of the pictures themselves or the fact that they were taken at all. In fact, if anything, the pictures made it possible to have a debate on the prisoners' treatment that would not have been possible otherwise. In the case of the pictures of US prisoners of war (POWs) taken by Iraq, on the other hand, it is the portrayal itself that is considered potentially to be a violation of international humanitarian law, whereas the treatment seems fairly neutral (we do not know of course what is happening off-screen). The violations in the case of Guantanamo were 'real' enough. While the images of US POWs were clearly intended to make them identifiable, it would have taken great skill to figure out who was being portrayed in the Guantanamo pictures (it may well be that the fact that their identities were not apparent had more to do with security concerns than with the need to protect their rights, but the effect is the same). It is indeed true and to the credit of the United States and the United Kingdom that they avoid showing clearly recognizable images of POWs.

Rather than the incidents themselves and their similarity, what seems to stand out is the particularly violent reaction of Allied officials to the incident. Geoff Hoon, for example, spoke of 'the appalling, barbaric behaviour of Iraqi forces dealing with ... American prisoners'.³⁴ There are several things, in fact, that make the characterization of the showing of the images as 'barbarous' somewhat excessive. First, failing to protect POWs from intimidation or public curiosity may well be a

32. Amnesty International, International Secretariat, 'International Standards for All'.

33. A. Liptak, 'Public Opinion Effort Leans On Rules Of War', *New York Times*, 26 March 2003.

34. Quoted by A. Dworkin, 'The Geneva Conventions and Prisoners of War', *Crimes of War Project*, 24 March 2003, at <http://www.crimesofwar.org>.

breach of the Geneva Conventions (they say so) but it is likely that it is by itself one of the milder forms of breach. Clearly, out of the whole list of potential mistreatment (including torture), intimidation or exposure to public curiosity is the one of the least unpleasant things that can happen to a POW. So that almost at once, if one gives it any thought and without even inquiring into whether filming does indeed constitute a failure of protection against public curiosity, there seems to be something considerably over-inflated about the rhetoric used to describe the incident.

Indeed, there is a constant paradox about the images. In the weeks preceding the war, the Allied rhetoric on the criminality of Saddam Hussein had reached such peaks that one might have been forgiven for thinking that any US soldier unfortunate enough to be caught by Saddam's thugs would be immediately and summarily executed. But of course Iraq had repeatedly announced its intention to abide by the Geneva Conventions, and, at least in its most clear and formalistic parts, has probably not fallen far from doing so. Nor is this necessarily surprising: the Iraqi regime knew that the war it was fighting was being fought at least as much on the legitimacy as on the military front; whatever dubious 'advantage' might have been secured by mistreating POWs would have been more than offset by the attendant bad publicity.

In fact, coming from a dictator who is accused of bombing his own people with chemical gas, the treatment of POWs apparent in their filming seems remarkably benign, so that, probably, if the only thing that could be held against the regime was the depiction of the prisoners, then that would in fact show it in a relatively good light. At most the parading of the prisoners looks like an opportunistic use of scarce propaganda advantages: distasteful, ugly, most likely illegal, but hardly evidence by itself of wanton violations of international humanitarian law. In this context, the Allies' efforts to dispel any thought that the regime might adhere to international standards seem unwittingly to reinforce the perception that the regime's behaviour is in fact broadly within international standards.

But there was another more worrying aspect about the level of indignation displayed by the Allies. As has been amply noted, the day before the images of the US POWs were broadcast, images had been displayed of Iraqi prisoners surrendering. In fact, come to think of it, images of prisoners have never been far from our screens at least since Vietnam, if not before. Such displays had elicited little protest in the past. And while there may be some doubt as to what adverse consequences might be suffered by US POWs as a result of being filmed (certainly not a reprisal visit by the FBI to their families the next day), there is little doubt what kind of danger Iraqi prisoners might be facing in similar circumstances.

Several commentators have argued that there was a crucial difference between these kinds of pictures. Geoff Hoon has spoken of the 'enormous difference' between 'the factual photographs very often of the backs of prisoners surrendering' and the pictures of US POWs.³⁵ That sounds a little specious: it may be that there

35. Continued prosecution of the military campaign until the Iraqi regime has been defeated, 'Transcript of Briefing given by the Secretary of State for Defence, Geoff Hoon, The Foreign Press Association', 24 March 2003 (<http://www.ukun.org/>).

was a little more pathos in the Iraqi images of US prisoners of war, but what is a 'factual' photograph is very much in the eyes of the beholder. At any rate, if identification is what is at stake then clearly several of the Iraqi soldiers surrendering were identifiable.

Another argument suggests that there is a difference between pictures of soldiers in the process of surrendering and those of actual POWs already in custody.³⁶ In the first case, the soldiers are not actually POWs yet and therefore not technically protected by the Geneva Conventions as such. Again, that seems a bit strained. The better interpretation of the Geneva Conventions is that one becomes a prisoner from the moment and *as* one surrenders, not simply by the time one has been put under lock and key. By the time the pictures were aired, moreover, it must have been clear that those filmed were actually in custody, so that the Geneva Conventions obligations had been triggered.

A more serious argument is that one has to distinguish between Iraqi government propaganda and independent journalists doing their work, the idea being that only governments (including Iraq and the United States) are parties to the Geneva conventions so that only they are constrained in that matter.³⁷ There is a risk, however, that this will sound like casuistry. First, the line is a fine one to draw: on the one hand, the images may have been produced by Iraqi government but they were aired by a private company (Al-Jazeera); on the other hand, the images of Iraqi POWs may have been produced by private journalists, but these were 'embedded' with US regiments and their release was submitted to military control. The idea that simply because a media is state-owned it should refrain from showing certain images at the risk of committing a crime, while it is perfectly legal for a private company to do so, sounds artificial. The distinction has been further confused by the fact that it was clear from the US reaction that the independent media were expected at least to exercise restraint.

So the argument moves one step up the scale of sophistication:

it is not the fact that the images were shown, or who showed them, *but with what intentions*. What makes the difference between lawfully showing their images – as the Western news media have done – and unlawfully showing their images – as Iraq has done – *is who does the filming, when the filming takes place, and what motivates it*.³⁸

One cannot help thinking that this is true and specious at the same time, true because strictly speaking there would seem to be a difference worth keeping between blatant propaganda and press freedom, even though that has clearly asymmetrical consequences depending on who is waging combat. Specious, because the least one can say is one has moved a long way away from the 'barbarous' violation which was originally alleged towards something which, on a balance of probabilities and after a detailed evaluation of context, intention, and timing, probably looks more like a violation than a non-violation. Not to mention that the Geneva Conventions envisaged a fairly intrinsic concept of violation so that by the point at which one

36. A. Cohen, 'Courtwatch: POWs and the law', *CBS News*, 23 March 2003.

37. C. Dyer, 'Film of PoWs within Geneva rules', *Guardian*, 28 March 2003.

38. Cohen, *supra* note 34 (emphasis added).

has introduced 'intention' as the litmus test of what constitutes a war crime, it is difficult to see how the neutrality of international humanitarian law might emerge unscathed.

So why the indignation and why on such a scale? Why now rather than earlier? These should be interesting questions for international lawyers, because lawyers do not inhabit an abstract world where legal issues just 'spring up', but one where such issues are specifically put to them by the turn of events, and the particular twist that the media society puts on them. In the same way that it seems legitimate to ask who filmed what, when, and how, it seems legitimate to ask why this issue of all potential legal issues was hyped to such proportions.

The answer to that question can only lie in an exploration of the complex ramifications of waging war in Iraq and the impact of the media on the administration of the global humanitarian regime. There is of course concern for the prisoners themselves, but it seems unlikely that this concern was the only motivation, since clearly the indignation was out of proportion to the kind of harm apparently suffered as a result of merely being filmed. The seizing upon the picture most likely had to do with much more than just the fact that 'the law had been violated'. Rather, three dimensions seem worth bearing in mind.

A first element had to do with the nature of images and the perception of Allied suffering. In filming the prisoners, Iraqi authorities may have sought to humiliate them and, through them, the United States. From a pure propaganda point of view, however, they may have done themselves a great disservice. By giving a face to the prisoners' plight, they contributed to the hyper-individualization of these particular victims' suffering. They may thus have unwittingly fed into the global media loop, a loop keen to maximize the average bored spectator's sense of identification. Compared with the mass anonymity and silence of crushed hospitals or the media's undifferentiated treatment of the Arab masses (to which the images of Ali, the mutilated Iraqi child, provided a unique and redeeming counterpoint), each instance of Western captivity or death tends to be elevated into a unique tale of unwavering professional commitment, patriotic destiny, and grieving parents and children left behind, rich, perhaps, with a visit to the suburban cradle of the deceased and interviews with high school friends. As the unlikely making into a war hero of a CIA agent interrogating prisoners in the midst of the biggest blood-shedding incident in the Afghan war had prefigured, the fewer US casualties the more any casualty is raised to almost mythically exemplary status.

Second, what was clearly apparent from the Iraqi images is that these were propaganda images, one of the few distinct and early advantages that Iraqi troops had secured. The image was of essentially the same kind as the Apache 'caught' by villagers, the display of meagre prizes of war in an overwhelmingly unequal struggle. Whatever other consequences the images may have had were probably incidental and dwarfed by the need to put that message across, and it is unlikely that the prime goal of the images was to violate the rights of prisoners. Without underestimating the Iraqi regime's capacity for sheer evil, it is even conceivable that, in this particular case, the Iraqis were more guilty of benign neglect than a conscious decision to break

the law. This certainly does not make it less of a violation, but it is worth keeping in mind in the overall order of things.

The re-framing of the images as evidencing above all a violation of prisoners' rights, in this context, was a deft manoeuvre by the US Secretary of Defense, using the language of international humanitarian law to deflect attention from an early Iraqi propaganda victory (however minor). The move also presumably deflected attention early on from emerging questions surrounding the Coalition's own behaviour. Compared with what was presented as a visible and flagrant instance of mistreatment, all that could be alleged when it came to the United States were random acts of trigger-happiness and the slow but decentralized mounting of civilian casualties. That the latter might affect the lives of thousands while the former probably only marginally affected the lives of half a dozen is almost irrelevant when it comes to the media's appetite for the visible.

There may be a third reason why so much was made of these images. In a war purportedly fought on moral grounds and with shaky legal foundations, alleging violations of basic canons of humanity has become a powerful legitimizing device. In fact, with the pretext of weapons of mass destruction fast receding, the need to allege massive and flagrant wrongdoing by the Iraqi regime has become ever more pressing. Violations of the *jus in bello* by the defending party, in this context, are a cunning way of legitimating violations of the *jus ad bellum* by the aggressive party, the idea somehow being that the war provides retrospective confirmation of the nefarious nature of the enemy regime and thus of the need to fight it in the first place. There is of course a profound circuitousness to the reasoning: Iraq would not have committed those violations of international humanitarian law that it did commit (quite wrongly, of course) had it not been attacked in the first place. But the message seems to be that the regime's abominations in combat provide yet another justification for ousting it. Violations of the laws of war against the invading party are presented as only one side of a coin that on its other side has, notably, violations of the human rights of Iraqis in peacetime.³⁹

In a context so fraught with politics and where international humanitarian law itself has become an object of political propaganda, what space is there left for the disinterested exercise of humanitarian interposition that Henry Dunant had dreamed up? The traditional defence of international humanitarian law clearly anticipated that there would emerge political arguments *against* respecting international humanitarian law (military necessity, etc.); it had anticipated to a lesser extent, however, that international humanitarian law would become such a staple of legitimacy that arguments over who has or has not respected it would themselves become so mired in the political.

The role of the lawyer in that context can only be ambiguous. Little attention has been paid to the way in which incessant solicitations by the media are shaping the production of law, particularly in matters of war and violence. There is reason to

39. See, for example, Shadow Foreign Secretary Michael Ancram's comment that 'Just as they have no compunction about murdering their own people in their tens of thousands, their depravity knows no bounds in their treatment of prisoners of war.' "'POWs and dead" film condemned', *BBC News*, 27 March 2003.

think, however, that this relentless pressure is profoundly structuring legal debates and opinions.

The lawyer's media time and the attention given to international humanitarian law, to begin with, will be determined by the openings and instant polemics created by images. Rather than the 'international humanitarian lawyer' being allowed to comment on the general situation of international humanitarian law with critical distance, she will be asked to react to such-and-such a specific incident which will have been conveniently highlighted for her as the 'key incidents' for the purposes of international humanitarian law. It is increasingly the media that set the humanitarian agenda, not the other way round. In the case of the pictures at stake, the International Committee of the Red Cross (ICRC) implicitly acknowledged that the reason why they had not issued a statement earlier on when images of Iraqi POWs had been shown was simply that these had not aroused the right amount of media decibels.⁴⁰

A very distorted image of a particular conflict may emerge: one where a few striking images dominate the public's larger understanding at the expense of overall assessments and critical knowledge. This is worrying in the case of Iraq because displaying images of POWs is probably the least worrying or representative aspect of that conflict, despite being one of the most visible. It is simply not the case that modern-day violations of international humanitarian law involve anything so straightforward as to be easily captured on film. As was already apparent during the bombing of Yugoslavia by NATO, the main problem is no longer with anything as obvious as the direct targeting of civilians, the execution of prisoners surrendering, or the use of illegal weapons.

In fact, despite persistent tendencies to portray international humanitarian law as weak, it is remarkable to what extent international humanitarian law has by and large shaped modern international conflicts in its image. The price for doing so, however, is that, in the kind of asymmetric fight that Iraq epitomizes, potential violations have been pushed towards the law's unruly limits to the point of becoming almost entirely concentrated on two twin dangers: on the 'defending' side, a tendency to seek the protection of civilian targets by mixing troops with the civilian population (an implicit acknowledgement, incidentally, that the other side does consider this a major constraint on its warfare); on the 'attacking' side, a tendency to stretch the meaning of collateral damage, by blaming civilian casualties on the defender's wrongdoing.

These are the true scourges of contemporary warfare, both because they affect the greatest number of people in the gravest manner and because they are testing the limits of international humanitarian law. Indeed the problem of collateral damage confronts international humanitarian law with its old nemesis, military necessity, and shows it to be incapable of providing clear answers to problems

40. Seeking to counter the 'somewhat misleading impression that the ICRC had a lot to say about one case and not so much about the other', ICRC delegate Westphal implicitly acknowledged as much when he noted that 'After the images of the American PoWs were shown on al-Jazeera, we were flooded with phone calls from the media ... whereas on Saturday, when the images were shown of the Iraqi PoWs, we hardly received any calls.' 'ICRC says PoW images breach Geneva Convention', *Swissinfo*, 14 April 2003.

that, basically, raise in a nutshell the entire question that it was supposed to bring an answer to (i.e., on what basis weighing between military expediency and concerns for humanity should be made). At the very least, the media's focusing on the issue of displaying prisoners of war can lead to a trivialization and a distortion of the nature of humanitarian problems in contemporary warfare.

Asked to give her expert opinion in isolation, moreover, the international humanitarian lawyer will be compelled to make some general statement typically 'urging all parties' to respect 'all provisions of international humanitarian law' as part of an ongoing conflict. As a result, she will permanently give a sense of the rough equivalence of the behaviour of all those involved, when what would be necessary would be to draw starker lines between various types of misconduct by various types of combatant at different times.

Asked to pronounce herself as an 'expert' (and not wanting to disappoint, at the risk of not being invited back), finally, the international humanitarian lawyer will be made to make her position more clear and matter-of-course than would be wise or necessary. It is well known that the media has little taste or patience for juridical angst and expects, on the basis of the average viewer's attention span and expectations, that law be presented as a clear set of black-and-white rules. This was clear with the issue of prisoners, which was presented very much in the dominant mainstream 'either/or' equation. This will in turn accredit the idea that the law is unambiguous, as if lawyers themselves did not constantly bicker about these things.

It looks at times as if international lawyers are so entranced by the fact that international humanitarian law should be mentioned at all by any party waging the war, that they will oblige enthusiastically by endorsing whatever interpretation seems to err most on the protective side. In the particular incident with which we are concerned, there was a rush by 'international lawyers' interviewed in the wake of the 'US POWs incident' to confirm the Allied interpretation that displaying images of POWs was a violation of international humanitarian law.

There is obviously some truth to that statement, but it would also seem that tone and nuance are of the essence here if one is not to stumble into the first trap opened up by the media. To suggest that displaying the prisoners was a 'flagrant' violation of the Geneva Conventions, in particular, does violence to both the complexity and the novelty of the problem. This is, in fact, precisely the kind of issue that would require some careful thinking through. Clearly, for example, the problem of the global media is not one that had been anticipated in either the 1949 Geneva Conventions or its Protocols. After the Second World War, what the drafters had in mind were some of the reported instances of Allied POWs being paraded in village squares and exposed to an angry mob. At the very least, the Geneva Conventions have to be reinterpreted intelligently in the light of changing circumstances.

Starting with the general requirement that all POWs 'are entitled in all circumstances to respect for their persons and their honour',⁴¹ it is not clear that there is

41. Art. 14.

something particularly dishonourable about being caught in an ambush and made prisoner, so that it is not obvious that the mere airing of images that portray prisoners as prisoners is inconsiderate of these prisoner's honour.

Applied to the circumstances of the present world, intimidation is also a characteristically ambiguous concept. There may be cases when showing images risks the lives of those who may then be accused by their government of having surrendered too quickly. There will be other cases when footage of POWs will be the only proof that they are alive, providing comfort and hope to their relatives.⁴² At any rate, it should be clear that the least way in which the prisoners are likely to be intimidated after being caught in violent combat in a foreign land is by the presence of cameras, a presence whose purpose they are unlikely to know or to pay much attention to. It may be that the cameras even have a protective effect so that, whilst they are around, the prisoners do not risk suffering harsher treatment.

The protection against 'public curiosity' seems more to the point, but here again there are ambiguities. The prisoners are not actually made to suffer from public curiosity, at least not then and now and in the same way they would if they were exposed to it directly. The public curiosity of which they are the object is presumably one that they do not know of (it is unlikely that they have access to Al-Jazeera in their cells), and even if they did it is probably one that would not feature highly on their list of worries. Nor is there something particularly unseemly about that curiosity, and their fate is more likely to elicit reactions of sympathy back home, than scorn for being caught.

If anything, what seems to lie behind the Western indignation is something more subtly cultural: a concern for the right to privacy in difficult circumstances, a distinctly Western concept of the private sphere, the right to one's image. It is the brutality of the images, the type of crude representation that has long ceased to be a feature of US and European television but is still the daily bread of many television services in the rest of the world, that sends a shiver through the spine of Western public opinion.

Whatever one thinks of the legality of the behaviour under the Geneva Conventions, moreover, this is clearly a case where the concerns of international humanitarian law have to be balanced against various other interests, including the freedom of the press and the public's right to know what is going on. It may be, for example, that the images of a few prisoners of war, while not doing much harm to them, will do more to raise awareness of the consequences of the war than any number of casualties, merely by virtue of the publicity they have received, thus contributing to a humanization of the war.

The point of these developments is not to determine once and for all whether airing the images of US POWs was legal or not. Rather it is to show that things are often likely to be immensely more complex than the black-and-white distinctions

42. Something explicitly acknowledged by those concerned in the past. As one RAF pilot captured by Iraqis during the first Gulf War put it, 'My family drew strange comfort from the fact that, even though I was in Iraqi hands, they knew I had survived the missile attack on my Tornado'. 'When are Pictures of POWs Propaganda?', *BBC News*, 26 March 2003.

affected by lawyers, so that what is necessary is less to come down heavily one side or the other as soon as one is prompted to, than to display a certain nimbleness in the face of that complexity. In their urge to compete for the most definitive legal statement, lawyers risk reducing the law to a set of categorical rules that it is not, creating expectations that it cannot honour, while neglecting the extent to which adherence to international humanitarian law has to be evaluated in the context of an overarching commitment to an ethics of restraint.

As things are, by making the issue seem more of a matter of course than it was, international humanitarian lawyers probably missed an opportunity to think through the political context within which they operate, at the risk of unwittingly reinforcing one side's propaganda and, most importantly, of blurring the distinction between the 'truly important' and the marginal. Apart from the ICRC's special position in retaining a strict neutrality in order to ensure access to victims, neutrality is hardly sustainable as soon as one begins to speak, as most leading human rights and humanitarian NGOs do, in terms of specific instances of violations.

In a war that is being fought as much on the screens as it is on the battlefield, there can be no purely 'neutral' standpoint if one interprets neutrality as the mechanical voicing of 'what the law is' whenever asked. This is so not only because 'what the law is' is inseparable from a discursive process about what the law should be, but more importantly because, in an ultra-mediatised conflict, there are no innocent questions. Humanitarian lawyers, therefore, should seek constantly to stretch the framework of questions more or less arbitrarily put to them. Neutrality in the spectacle society must be understood as a proactive effort permanently to offset the combined incursions of the media and parties to a conflict by a creative politics of law.

4. THE BUDDHAS AND THE PRISONERS

The third image is in fact a story, and one that can perhaps provide the missing link in our exploration of the complex relationship of law, politics, and the media. It is a story told by the Agence France-Presse (AFP) on 6 February 2002, and it takes recounting in full to be made sense of.⁴³

We now move back in time slightly, away from the shores of Guantanamo and the Iraqi desert. Long before the 'war against terrorism', the Buddhas of Bamiyan had become something of a media symbol in their own right. The rashness of their destruction, and the fact that it was captured on tape, had at the time probably done more to portray the Taliban regime as one of despicable barbarity than some of its less conspicuous killings and plundering. Somehow, there seemed to be something about the gratuitous destruction of a twelfth-century relic – a blindness to beauty, a totalitarian aspiration to the *tabula rasa* – that signalled a point of no return in a way that not even the systematic oppression of women had.

43. See D. Pasmantier, 'Visite guidée chez les prisonniers talibans de Bamiyan', Agence France-Presse, 6 Feb. 2002. All quotes that follow are extracts from the article, translations by the authors.

After the war, the Buddhas quite naturally found their way on to many a journalist's route map. The story is told by a veteran AFP journalist in the relatively bland tone characteristic of that agency's reporting, although the sad irony of its content was not missed and filters past every word. Only the most important extracts are presented here.

The topic of the story is a visit to the prison of Bamiyan, a prison that is conveniently located at the feet of the Buddhas, as if to underline the change of regime, and expose some of the guilty next to the scene of their crime. The visit is an official, guided one, designed 'to demonstrate in what good conditions the prisoners are held'. But from the outset something seems awkward:

The cell smells, the blankets are rotten, the ground is frozen and filthy. The five unshaven prisoners, locked up in less than 10 square metres of semi-darkness, stare wide-eyed with a gaze that is distraught . . . It is impossible to escape the unbearable smell. A hole 30 cm square allows light and cold to enter the cell, which has no stove, and where the temperature goes down to minus 15 degrees. The prisoners are barefoot on rotting mats, a simple sweater or a short jacket over their dirty tunics. In the morning, they eat bread and tea, for lunch and supper rice and chickpeas. Questioned for a few minutes without the presence of guards, one of them claims to have been beaten and shows a small scar.⁴⁴

Even their guards, whom the journalist describes as 'not looking mean', seem to think, in a kind of disarming moment of honesty, that the treatment meted to the prisoners is 'horrible'.

At this stage, however, the *quid pro quo* suddenly becomes obvious. The prisoners, in fact, are *ordinary* detainees and suspected Taliban 'seized without arms on the front line'. The journalist has simply been shown the wrong cell: 'the soldier supervising the visit realized that it is the other prison, the model one, which he was supposed to show, the one where 27 prisoners are regularly visited by the International Committee of the Red Cross'.

In that prison, the contrast could not be greater since the prisoners are

protected by Article 3 of the Geneva Conventions, according to which those detained in an internal conflict should be treated in humane fashion. This time, the cell, which has several windows, is equipped with carpets, lamps, and even cigarettes. The prisoners in addition have the right each day to sugar, apricots, and even meat, when thousands of refugees in the area have not eaten any in the past three months. They seem well treated, have received warm clothing and new blankets, can send messages to their family and speak without witness to members of the ICRC, thanks to whom they obtained this treatment.⁴⁵

The article ends without so much as a concluding word, and we are left quite unaware of what becomes of the prisoners, or what the outcome of the visit might

44. *Ibid.*

45. *Ibid.*

be, except that the whole situation seems to be frozen in time. No doubt, the metaphor could be spun out almost indefinitely: for each prisoner of war, an unlawful combatant; for each refugee, an internally displaced person; for each beneficiary of special treatment, the masses of the legally undifferentiated. Behind every 'victim' as defined *by* the law, a victim *of* the law as defined by its exclusion from it.

There are, again, many things that could be said about the story. How it is reminiscent, if dimly, of many other staged prison visits organized for the international press or humanitarian alibis; or how the transplantation of the laws of war to the war against terrorism reflects on the fate of a regime invented at the twilight of the nineteenth century to protect from excesses in war, perhaps with the Solferinian image of a roughly homogeneous world confined to European powers; or the bizarre fact that it is only because prisoners of war fit into some previously ordained plan about what is the 'right kind of wrong violence' born from attempts at minimizing the damage caused by the troublesome offspring of Westphalia, that their condition becomes a matter of concern to the international community; or the vertiginous paradox that, under some latitudes and thanks to the incorporation of international humanitarian law in various public relations strategies, it may be infinitely better to be caught as a member of a fundamentalist militia in the course of fighting than as a simple thief.⁴⁶

But what seems particularly striking is what the story reveals about the way in which international humanitarian law is ordinarily called, unwittingly or not, to lend its narrative of progress to the writing of a 'story' about the war. The problem here is not, as in the classic case of the Theresienstadt 'model' concentration camp, that the ICRC might be shown a travesty of reality, or might not get access to where the real suffering lay (although that might also be a problem). Here, respect for international humanitarian law is not being staged. Rather, the problem is precisely that respect for international humanitarian law is, in a limited but significant way, *part of the staging of reality itself*.

The prisoners in the first cell were the ones we were not supposed to see under any circumstances. Had it not been for that most unlikely mistake, the 'ordinary' prisoners would have been as good as invisible to their jailers and the outside world. We would have been left with the impression of order restored, a haven of decency in an ocean of violence; our sense of justice and of our contributing to it would have been vindicated.

Perhaps it is right that protecting 'prisoners of war' should be more fundamental to the goals of an 'international community' than taking on the burden of all of the world's woes. Perhaps some higher interest is thus protected, so that, seeing the whole of world history in retrospect, one might think that this had been the right thing to do. Humanitarianism's lesson, however, seems thoroughly lost, as if international law were subverted beyond recognition. As if, in fact, international law,

46. This is of course not to neglect or disparage the ICRC's own keen efforts at integrating a more general mandate of prison visits on purely humanitarian grounds. It probably remains true, nonetheless, that institutions such as the ICRC are predominantly concerned with those who come close to the core of their mandate.

far from being merely misrepresented, were itself a representation, a mediatization of violence.

5. CONCLUSION

In August 1971 Philip Zimbardo, an American psychology professor, launched what was to become a cult experiment in the field.⁴⁷ Twenty-four male volunteers were made to enter a prison in Palo Alto, California. The men were divided into two groups—twelve prisoners and twelve guards—and were told to live as (virtual) captors and captives for 14 days. At the outset, the volunteers were expressly instructed as to their respective roles and, crucially, on the fact that it was only a 'role' they were asked to 'play'. The 'prisoners' were asked to obey the rules set forth by the 'guards', and the 'guards' were instructed to do whatever necessary to 'maintain law and order'.

Within three days, however, the guards started using sadistic means to keep the prisoners in check. Fire extinguishers were used to keep prisoners at bay, and many prisoners were relegated to solitary confinement in small, dark chambers. The guards started using methods of what they called 'riot control' that clearly amounted to torture. By the account of one of the 'guardian' students,

Less than 36 hours within the experiment, prisoner #8612 began suffering from acute emotional disturbance, disorganized thinking, uncontrollable crying, and rage. In spite of all this, we had already come to think so much like prison authorities that we thought he was trying to 'con' us – to fool us into releasing him.⁴⁸

The experiment – scheduled to last ten days – was abruptly cancelled when it became clear that most of the participants had become excessively confused about where 'roles end and personal identities begin'.

The experience may seem a far cry from the work of international lawyers, not to mention international humanitarian lawyers. Yet it may have something to say about the hypnotic effect of violence, the inertia of 'reality', and the suggestive power of roles.

Surely lawyers too are asked to play roles in something of an experiment. Law depends – not only for its enforcement but also for its formulation – on the creation of symbolic roles. Sometimes the role and the lawyer become dislocated from one another. Sometimes the role becomes all there is to being the lawyer. The spectacle society ensures that this is so by penalizing failure to conform stereotypically to those roles. As the roles become engraved in the lawyers' way of constructing the legal debate, the risk is that legal discourse becomes less and less concerned with the real world, and more and more with pure legal artefact. The law is mired in a conversation with itself. This is typical of the artifice of a self-referential spectacle society, where argument-bites ultimately determine whether the violence perpetrated on the prisoners was 'just' or 'legal', or 'up to standard'.

47. Details on the experiment and a summary of its findings are available online at www.prisonexp.org.

48. *Ibid.*

If put in a position to argue for the legality of various aspects of imprisonment, international lawyers will be expected to become the guardians of such prisons. They may use various interpretative ‘tricks’ to justify and validate actions threatened against the prisoners. As long as the sacrosanct edicts of procedural standards have been respected, filling prisons up is seen as something that invariably proves that the rule of law is a real and functional concept. The role of guardian of the prison may carry with it the potential for abuse of power and authority, but the law will still manage to portray itself as a moderating force.

But when law becomes a mere representation of itself, it only gives a fleeting, if persistent, *illusion* of being itself. It may end up justifying and apologizing for any action that is taken in its name. The tensions between the virtual and the real, between fact and figment, will only increase as the power invested in certain legal performances is taken at face value and accepted just because it produces an interplay that creates the *impression* of justice.

This article has sought to show glimpses of how the application of humanitarian standards is being profoundly reshaped by the media society; it has suggested that if lawyers are not careful, the media will occupy the terrain left vacant by humanitarianism’s failure to stand up to violence, recycling it into a perpetual representation of itself that is one of the surest impediments to lasting and real social change in the international order. The virtual, the accumulation of images that claim to encompass reality but do not mean anything outside themselves, are the surest allies of the trivial.

But this article has also hinted at how international humanitarian law is not always what it seems; how the best of intentions can be perverted into meaninglessness; how humanitarianism may lend itself particularly well to manipulation because it shares a deeper structural affinity with the concept of the media; how humanitarianism is and always was a particular mode of representing violence as essentially redeemable, civilized, even honourable. Either because it is being manipulated or because it lends a helping hand, humanitarianism is always at risk of degenerating into a tepid reformism that is as much part of the show as the stealth bombers, the bearded *Djihadi*, and the fleeing civilians.

The end of law may not be in sight, but its relentless spectacularization contains the seeds of its terminal virtualization.