THE PROTECTION OF VICTIMS OF WAR ON TERROR:

A LEGAL PERSPECTIVE

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Submitted by

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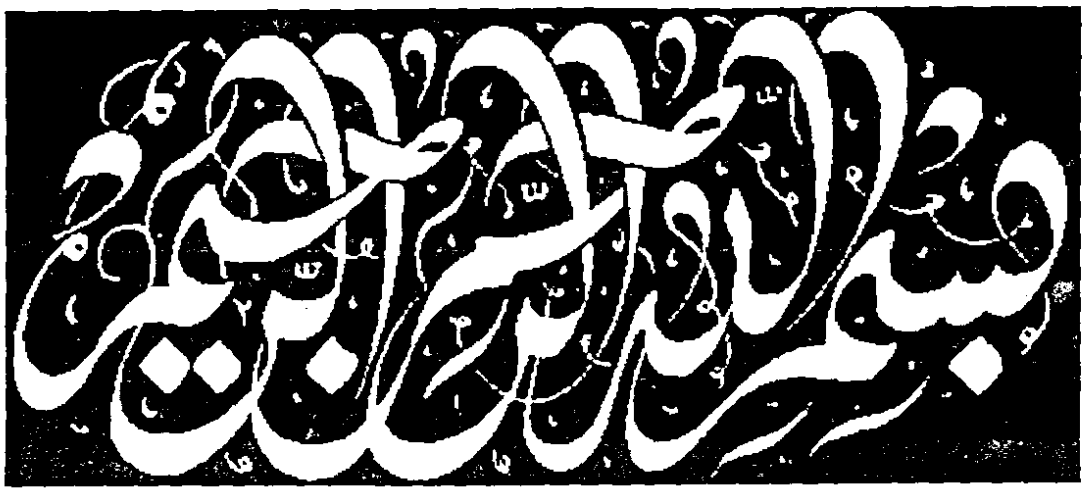

(We commence) with the name of Allah
The most gracious (To begin with)*
The most Merciful (To the end)**

INTERNATIONAL ISLAMIC UNIVERSITY
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It is certified that I have read the dissertation submitted by *Mr. Muhammad* Fayyaz Khan entitled "The Protection of Victims of War on Terror: A Legal Perspective." as a partial fulfillment for the award of degree of LLM (International Law). We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of the degree.

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Written by

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DEDICATION

For my Parents

To whom I owe everything

and

my all brothers and sisters

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ACRONYMS

ANC	African National Congress
AP	Additional Protocol
CPPT	Convention for the prevention and punishment of Terrorism
CBS	Columbia Broadcasting System
CIA	Central investigation agency
CID	Criminal investigation command
FBI	Federal Bureau of Investigation
FOB	Forward Operating Base
FBI	Federal Bureau of Investigation
G A	General Assembly
GC	Geneva Conventions
HRW	Human Rights Watch
POW	Prisoner of war
GPW	Geneva Convention Relative to the Treatment of Prisoners of war
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
MP	Military Police
MI	Military Intelligence
OAU	Organization of African Unity
UN	United Nations
UNSC	United Nation Security Council
UNHCR	United Nation High commissioner on Human Rights

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Muhammad Fayyaz Khan Yousafzai

ABSTRACT

IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies. International humanitarian law recognizes two different categories of armed conflict. International armed conflicts, and non-international (or internal) armed conflicts (usually known as civil wars). When and where the "war on terror" manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law.

War on terror is a new paradigm in armed conflict. The rules of IHL apply equally to all parties to an armed conflict whether it is an aggressor or acting in self defense or is a state or rebel group. Thus the IHL rules also apply to the armed conflict named as "war on terror". Humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implications, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. "War on Terrorism" has been used to justify unilateral preemptive war, perpetual war, human rights abuses, and other violations of international law.

There has been no review of the status of individual detainees by competent tribunals of a kind contemplated by the Third Geneva Convention. Simply they were considered as right less persons. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention; a civilian covered by the Fourth Geneva Convention; or again, a member of the medical personnel of the armed forces who is covered by the First Geneva Convention. There is no 'intermediate status'; nobody in enemy hands can be outside the law

INTRODUCTION

The extraordinary developments the world is witnessing today under the banner of "war against terrorism" has been spurred by the events of September 11, the day when hijacked jetliners crashed into the symbols of the US economic power and military might World trade center and Pentagon. Thus a new era has ushered in international politics. Stunned by attacks, upset and desperate, the US has apparently succeeded in having all and sundry to be on its side against what it terms war against terrorism against those whom it declares "terrorist" or accuses of 'harboring terrorist.'

When can an "armed conflict" be said to obtain? The Geneva Conventions themselves are of no help to us here, since they contain no definition of the term. We must therefore look at state practice, according to which any use of armed force by one state against the territory of another triggers the applicability of the Geneva Conventions between the two states. Problem sometime arise when one of the parties to the conflict denies that International Humanitarian Law is applicable, even though there is fighting. It has happened, for example, that a state declares a territory occupied by it as its territory, thereby laying the applicability of the law of Geneva open to question. IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities and the near or total collapse of some states. Over the past ten years a number of new IHL norms and institutions (courts) have been created, not in Geneva, but in New York, Ottawa, and Hague. In turn, these new institutions have contributed considerably to the development of customary IHL. The question then becomes whether expansion or revision of the Geneva law is desirable and likely. Do new wars call for new laws? Is IHL still one war behind? International humanitarian law recognizes two different categories of armed conflict. Wars between two or more states are considered to be international armed conflicts, and war like clashes occurring on

the territory of a single state are non-international (or internal) armed conflicts (usually known as civil wars). When and where the "war on terror" manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. Whether or not an international or non-international armed conflict is part of the "global war on terror" is not a legal, but a political question. The designation "global war on terror" does not extend the applicability of humanitarian law to all events included in this notion, but only to those that involve armed conflict.

War on Terrorism" and the policies it denotes have been a source of ongoing controversy, as critics argue it has been used to justify unilateral preemptive war, perpetual war, human rights abuses, and other violations of international law. According to the US, neither captured Taliban nor Al Qaeda are entitled to POW Status. The United States and its allied countries in the war on terror assert that the prisoners in this war are not entitled to the status of POWs. What is the logic and reason on which they rest their claims? They have been entitled to the status of Unlawful Combatants. In classifying the detainees as unlawful combatants, the United States, it seems, assert the right to treat the detainees in any way it deems appropriate-unencumbered by international legal obligations. They have been tortured at Guantanamo, Bagram and Abu Ghuraib. The high profile debates that emerged in the wake of 9/11 about the status of a range of people detained by the United States have continued to bedevil courts and diplomats. At one level, the issue seemed to be one of choosing between legal alternatives: should the prisoners be viewed as alleged violators of criminal law or should they be viewed as participants in an armed conflict? In the former case, the detainees would be entitled to the entire apparatus of U.S. criminal procedure; in the later case, their treatment, especially their entitlement to POW status, would have to be examined under the international law of armed conflict. Yet from its inception, the debate did not focus on the alternatives between the two bodies of

law, but rather, on a term put forward by the U.S. government that seemed designed to put many of the detainees beyond the reach of any law at all. The term "Unlawful Combatants" united crime and combat in a manner that short circuited the alternative between two bodies of law. By declaring that some detainees did not merit the protections of criminal law because of their combatant activities, and that they did not merit the protections of *jus in bello* due to the unlawful nature of their combat, the term seemed designed to establish a crude, general dichotomy between law and war, at least certain kinds of war. Indeed, in the way in which it was deployed by the U.S. government, it appeared to create a category of right less persons neither criminal suspects nor prisoners of war, committed to the caprice of un reviewable state power.

The Third Geneva Convention provides that where the prisoner-of-war status of a captured person who has committed a belligerent act is in doubt, their status shall be determined by a competent tribunal. There has been no review of the status individual detainees by competent tribunals of a kind contemplated by the Third Convention. Simply they were considered as right less persons. Geneva Conventions establishes that POW's are entitled to certain basic rights. Far most the right to humane treatment if detained and the right to a fair trial on any criminal charges, including terrorism or some other crimes against humanity. Thousand of individual have been detained abroad in the context of the "war on terror", both during the armed conflict in Afghanistan and Iraq and as a result of transnational law-enforcement operations. With regard to the US, it seems clear that the choice of detaining individuals abroad is part of the "war on terror" is based, at least in part, on their assumption that by keeping them outside national territory, the military or the other agencies will not be restricted by standards of national (and international) legal protection in the same way as if they were held on national territory. They were initially detained in the custody of Coalition forces. Since then, the large majority of them have been handed over to the new Authorities in respective countries. However, some are still held in detention facilities run by Coalition forces and located within Afghanistan, Iraq and

Pakistan. In numerous cases, they have been transferred to Guantanamo bay or to other detention facilities in undisclosed locations-so-called-"black sites"- outside the territory of the United States, and have been termed as Ghost detainees. Some of the detainees were held abroad on the assumption that by keeping them outside national territory, the military or the other agencies will not be restricted by standards of national (and international)legal protection in the same way as if they were held on national territory. Prisoner of war cannot be prosecuted and punished for the mere fact of having taken part in hostilities and they must be given humane treatment form the time they fall into the power of the enemy until their final release and repatriation. Prisoner-of-war status is of utmost importance for a captured person in the hands of a hostile power in terms both of legal status and of treatment. If a person is not given combatant status, he may be tried for having committed a belligerent act. Where this criminal offence may be punished by capital punishment under the domestic jurisdiction, the lack of prisoner-of-war status may be a matter of life or death. The purpose of International Humanitarian Law is to protect and assist victims of armed conflict.

Chapter 1

Introduction

International humanitarian law recognizes two different categories of armed conflict. Wars between two or more states are considered to be international armed conflicts, and war like clashes occurring on the territory of a single state are non-international (or internal) armed conflicts (usually known as civil wars).

When can an "armed conflict" be said to obtain? The Geneva conventions themselves are of no help to us here, since they contain no definition of the term. We must therefore look at state practice, according to which any use of armed force by one state against the territory of another triggers the applicability of the Geneva conventions between the two states.[1]

Problem sometime arise when one of the parties to the conflict denies that international humanitarian law is applicable, even though there is fighting. It has happened, for example, that a state declares a territory occupied by it as its territory, thereby laying the applicability of the law of Geneva open to question.[2] IHL currently faces challenges resulting from the emergence of transnational terrorist networks and criminal organizations, an aspiring hegemony's militarization of its foreign and counter-terrorism policies, the privatization of traditional military activities and the near or total collapse of some states. Over the past ten years a number of new IHL norms and institutions (courts) have been created, not in Geneva, but in New York, Ottawa, and Hague. In turn, these new institutions have contributed considerably to the development of customary IHL. The question then becomes whether expansion or revision of the Geneva law is desirable and likely. Do new wars call for new laws? Is IHL still one war behind?[3]

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[1] Hans-Peter Gasser, *International Humanitarian Law: an Introduction*, (Geneva: ICRC, 1993), 22.
[2] Ibid.
[3] Luc Reydams, A la guerre comme a' la guerre: patterns of armed conflicts, humanitarian law responses and new challenges. *International Review of the Red Cross*, (Geneva: ICRC, 2006) volume 88, Number 864.

1.2 War on terror: a new paradigm in armed conflict.

The same is the situation with the new era armed conflict, better to call it the armed conflict of 21ist century named as "War on terror". Is international humanitarian law applicable to the existing war on terror, and if applicable then to what an extent? How to bring the parties to the conflict to agree that international humanitarian law is applicable to the prevailing global armed conflict know as war on terror.

When and where the "war on terror" manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. Whether or not an international or non-international armed conflict is part of the "global war on terror" is not a legal, but a political question. The designation "global war on terror" does not extend the applicability of humanitarian law to all events included in this notion, but only to those that involve armed conflict.[4]

What is the proper role of international humanitarian law (the law of armed conflict) in the "war on terror"? Humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implication, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. Otherwise, the standard bodies of domestic and international criminal and human rights laws will apply.[5]

The War on Terrorism (also known as the War on Terror) is an umbrella term coined by the Bush administration to refer to the various military, political, and legal actions taken to ostensibly "curb the spread of terrorism" following the September 11, 2001 attacks on the United States. Both the phrase "War on Terrorism" and the policies it denotes have been a source of ongoing controversy,

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[4] www.icrc.org official statement, 21-07-2005. Last accessed on 01/08/2007.
[5] http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-864-729/$File/irrc_864_Reydams.pdf. Last accessed on 01/08/2007.

as critics argue it has been used to justify unilateral preemptive war, perpetual war, human rights abuses, and other violations of international law.[6]

On September 20th, 2001, during an address to a joint session of congress and the American people, President George W. Bush formally declared war on terror when he said, "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." The phrase was also used frequently by U.S. President Ronald Reagan in the 1980s. In fact, many leaders from all over the world utilize this term when dealing with terrorist activity.[7]

1.3 War on Terror: is it an Armed Conflict?

As already mentioned IHL is only applicable in armed conflict. A central element of the notion of armed conflict is the existence of "parties" to the conflict. The parties to an international armed conflict are two or more states (or states and national liberation movements), whereas in non-international armed conflict the parties may be both states and armed groups – for example, rebel forces- or just armed groups. In either case, a party to an armed conflict has a military-like formation with a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL. The rules of IHL apply equally to all parties to an armed conflict. It does not matter whether the party concerned is the aggressor or is acting in self-defense. Also, it does not matter if the party in question is a state or a rebel group. Accordingly, each party to an armed conflict may attack military objectives but is prohibited from direct attacks against civilians. Specific aspects of the so-called "war on terrorism" launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL. The war waged by the US-led coalition in Afghanistan that started in October 2001 is an example. The 1949 Geneva Conventions and the rules of customary international law were fully

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[6] http://en.wikipedia.org/wiki/war_on_terrorism. last accessed on 01/08/2007.
[7] ibid.

Contracting Parties, even if the state of war is not recognized by one of them, or in "any cases of partial or total occupation of the territory of a High Contracting Party." Common Article 3 of the Geneva Conventions applies to internal hostilities serious enough to amount to an armed conflict, although the parties are encouraged to adopt voluntarily the remaining provisions with respect to each other. In the case of sporadic violence involving unorganized groups and uprisings, the law of war is not implicated, although the law of basic human rights continues to apply. The classification of an armed conflict presents few difficulties in the case of a declared war between two states. Such a conflict would clearly qualify as an international armed conflict to which the Geneva Conventions would apply in their entirety. Such conflicts have also become rare. The term "internal armed conflict" generally describes a civil war taking place within the borders of a state, featuring an organized rebel force capable of controlling at least some territory. Internal conflicts may be more difficult to classify as such because states frequently deny that a series of violent acts amounts to an armed conflict. Classifying a conflict in which a foreign state intervenes in an internal armed conflict creates an even more complex puzzle. Some theorists consider an armed conflict to remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency, whereas foreign intervention on behalf of a rebel movement would "internationalize" the armed conflict. Under this view, the war in Afghanistan was an internal conflict between the Taliban and Northern Alliance troops until U.S. forces intervened, at which point the conflict became international. When the Taliban ceded control of the government, the conflict may have reverted to an internal conflict, because U.S. forces then became aligned with the government of the state. Others view virtually any hostilities causing international repercussions to be international for the purposes of the Geneva Conventions. According to the official commentary of the International Committee of the Red Cross (ICRC), the conditions for an international war are satisfied whenever any difference arises leading to the use of armed force between the militaries of two states. Both the United States and Afghanistan are signatories to the four Geneva Conventions of 1949. If the Taliban was, at the onset of the conflict, the government of Afghanistan and its soldiers were the regular armed forces, it would appear that the present conflict meets the Geneva Conventions' definition

of an international armed conflict. However, only three states ever recognized the Taliban as the legitimate government of Afghanistan. While it is not necessary for the governments of states engaging in hostilities to recognize each other, the rules are less clear where virtually no country recognizes a government. The use of force by private persons rather than organs of a state has not traditionally constituted an "act of war," it is arguable that refusing to recognize the Taliban as a *de facto* government of a state would preclude the United States from prosecuting the September 11 terrorist attacks as "war crimes." After all, it has been suggested that international terrorism might be considered to amount to armed conflict for the purposes of the law of war only if a foreign government is involved. The level of state support of terrorism required to incur state responsibility under international law is a matter of debate. Denying that *any* state is involved in the terrorist acts that precipitated the armed conflict could call into question the United States' treatment of those attacks as violations of the law of war. Some observers cite additional policy grounds for treating the armed conflict as international. To treat it as an internal conflict could have implications for U.S. and allied troops. No one would be entitled to POW status or "protected person" status under the third and fourth Geneva Conventions, although Common Article 3 would remain in force for all parties. U.S. and coalition soldiers may be placed at risk of capture in Afghanistan or elsewhere depending on how the conflict proceeds. The President Bush recent decision to apply the Geneva Conventions to the Taliban but deny their application to al Qaeda as a non-party may be an implicit recognition that the armed conflict is an international one.[9]

It is nonetheless indisputable that with in the wider context of the "war on terror" two international armed conflicts stricto sensu have taken place, namely the conflicts in Afghanistan and Iraq. To the minds of those who invoke that notion, however, the war on terror" extends far beyond the conflicts in Afghanistan and Iraq to encompass all the anti-terror operations that have taken place since September 2001. When examining the rules of humanitarian law applicable to either situation i.e. international armed conflict or non-international armed

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[9]Jennifer Elsea, *Treatment of "Battlefield detainees "in the war on terrorism,* April 11 2002 , Legislative Attorney American Law Division, CRS Report for Congress. Order code RL 31367. http://www.fas.org/crs/terror/RL31367.pdf, Last accessed on 08/08/2007.

conflict, one is immediately struck by the immense difference in their number. The Geneva Conventions and their additional protocols contain 20 provisions on internal armed conflict against almost 500 on international wars. And yet, it can safely be said that the problems from the humanitarian point of view are the same whether shots were fired over or within the border. [10]

1.5 Armed Conflict or Law Enforcement Operation?

A large number of operations have been carried out with in the territory of the states involved and by agents of those states, several have had transnational character and have seen the involvement of law enforcement agencies and military forces of numerous states. From the perspective of international law, the latter operations are not part of any "war" or of any armed conflict, and are to be considered as law enforcement operations on an international scale against a transnational criminal organization.[11] A necessary distinction has therefore to be drawn between captures and detentions which took place in the context of an armed conflict stricto sensu, i.e., during the conflicts in Afghanistan and Iraq and the subsequent military occupation, and arrest and detention carried out in the context of law enforcement operations. [12]

One could attempt to refuse this problem by categorizing Al-Qaeda" attacks as purely criminal and the response as law enforcement activities that should be closely disciplined by domestic civil liberties law and international human rights law. This categorization would, however, defy the way all parties to the struggle conduct and define it. It would also take one of the key armed conflicts of our time, conducted by military means, out of the jurisdiction of the laws of war. No matter which body of law one chooses, to place this conflict within its sole jurisdiction seems to expand its conceptual framework beyond reasonable bounds. It is the discontinuous quality of the war on terror that makes it akin to the confrontation with Iraq that has persisted for over fourteen years- and that has

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[10]Hans-peter Gasser, *International Humanitarian law: an introduction*, (Geneva: Henry Dunant institute Haupt, 1993)

[11]Silvia Borelli, Casting light on the legal black hole: International law and detention abroad in the "war on terror", *International review of the Red Cross*, (Geneva: ICRC, March 2005), Volume 87 number 857.

[12] Ibid.

continually shifted back and forth between exceptional, war like activities and normalized, ongoing regulation.[13]

1.6 Applicability of Geneva Conventions to WOT

The Third Geneva Convention, with its comprehensive set of rules determining the treatment and material conditions of detention of members of the armed forces taken prisoner, is perhaps the best known and strongest pillar of the international legal system which protects victims of warfare. The POW Convention best serves the interests of armed forces and of their members, officers and men, and has consequently never been a subject of controversy. A weakening of it would be a tragedy for members of armed forces who have to fight in future conflicts. The law which protects them in captivity should not be undermined by any "war against terrorism".[14] A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons. If they are not nationals of the adverse party to the conflict but citizens of third States, they keep the status of foreign nationals. Civilian detainees have to be treated according to the rules set out in the Fourth Geneva Convention. Civilian detainees suspected of having committed a serious crime can and must be put on trial. The Fourth Geneva Convention does not grant them any immunity from prosecution for acts of terrorism, but it does establish the obligation to grant them a fair trial.[15]

The ICRC has said in this connection that it "remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime. International humanitarian law grants the detaining power the right to legally prosecute prisoners of war suspected of having committed war crimes or any other criminal offence prior to

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[13]Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War. *Columbia Journal of Transnational Law*, (2004), 32.
[14]Hans-Peter Gasser, Acts of terror, "terrorism" and international humanitarian law, *International Review of the Red Cross*, (September 2002), vol.84 N 847
[15] Article 5 of the fourth Geneva Convention of 1949.

or during the hostilities."[16] It has been suggested that the four criteria in GPW art. 4A(2) apply to regular armed forces as a matter of customary international law; however, others point out that state practice does not appear to support the conclusion that the armed forces of states have been categorically denied eligibility for POW status on the basis that the army did not comply completely with the law of war. The Bush Administration has also asserted that the Geneva Conventions are obsolete when it comes to dealing with terrorists, but will continue to follow the treaties' principles.

Humanitarian law applies in and to armed conflict. Thus, terrorism, and by necessary implication, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. Otherwise, the standard bodies of domestic and international criminal and human rights laws will apply. There is good reason for this division of legal labor between humanitarian law and other legal regimes. While the purposes of humanitarian law are humanitarian, it is also true that killing, detention without judicial review and trials with reduced menus of rights are permitted, albeit within defined limits, in times and situations of armed conflict. Thus, the determination that a particular situation is subject to the law of armed conflict can have decidedly unhumanitarian consequences. This is especially the case when parties assert the rights of belligerency, but decline to accept the humanitarian obligations imposed by the laws of armed conflict.

Humanitarian law has been accused of being passé, or at least stale and in need of revision—inadequate to deal with the demands of modern day terrorism and the efforts to combat it. This is a red herring. The phrase "war on terror" is a rhetorical device having no legal significance. There is no more logic to automatic application of the laws of armed conflict to the "war on terror" than there is to the "war on drugs," "war on poverty" or "war on cancer". Thus, blanket criticism of the law of armed conflict for its failure to cover terrorism, per se, is akin to assailing the specialized law of corporations for its failure to address all business disputes. Humanitarian law recognizes two categories of armed conflict

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[16] ICRC press release of 9 February 2002. http://www.icrc.org, last accessed on 09/08/2007.

international and non-international. Generally, when a State resorts to force against another State (for example, when the "war on terror" involves such use of force, as in the recent U.S. and allied invasion of Afghanistan) the international law of international armed conflict applies. When the "war on terror" amounts to the use of armed force within a State, between that State and a rebel group, or between rebel groups within the State, the situation *may* amount to non-international armed conflict. a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified. Absent these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable.[17]

Keeping in view the above mention criteria in "war on terror" the territorial bounds of the conflict can neither be defined and identified nor the beginning and end of the conflict can be defined and identified, however the parties to the conflict can be defined and identified, i.e., Al-Qaeda, the US and its allies in the war on terror are the parties to the conflict. As according to Article 4 (2) of the Geneva convention the organized resistance movement has been defined as those being commanded by a person responsible for his subordinates, with a distinctive sign and emblem, carrying arms openly and that of conducting their operations in accordance with the laws and customs of war.

1.7 What is Terrorism?

1.7.1. Etymology:

The term "terrorism" comes from Latin *terrere*, "to frighten" via the French word *terrorisme*, which is often associated with the *regime de la terreur*, the *Reign of Terror* of the revolutionary government in France from 1793 to 1794. A leader in the French revolution, Maximilien Robespierre, proclaimed in 1794 that: "Terror

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[17] http://www.icrc.ort/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument 16/03/2004. Official statement by Gabor Rona. Last accessed on 09/08/2007.

terrorist attacks often are carefully selected for their shock value. Schools, shopping centers, bus and train stations, and restaurants and nightclubs have been targeted both because they attract large crowds and because they are places with which members of the civilian population are familiar and in which they feel at ease. The goal of terrorism generally is to destroy the public's sense of security in the places most familiar to them. Major targets sometimes also include buildings or other locations that are important economic or political symbols, such as embassies or military installations. The hope of the terrorist is that the sense of terror these acts engender will induce the population to pressure political leaders toward a specific political end.

Some definitions treat all acts of terrorism, regardless of their political motivations, as simple criminal activity. For example, in the United States the standard definition used by the *Federal Bureau of Investigation* (FBI) describes terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." The element of criminality, however, is problematic, because it does not distinguish among different political and legal systems and thus cannot account for cases in which violent attacks against a government may be legitimate. A frequently mentioned example is the *African National Congress* (ANC) of South Africa, which committed violent actions against that country's apartheid government but commanded broad sympathy throughout the world. Another example is the Resistance movement against the Nazi occupation of France during World War II. Since the 20th century, ideology and political opportunism have led a number of countries to engage in transnational terrorism, often under the guise of supporting movements of national liberation. (Hence, it became a common saying that "One man's terrorist is another man's freedom fighter.") The distinction between terrorism and other forms of political violence became blurred—particularly as many guerrilla groups often employed terrorist tactics—and issues of jurisdiction and legality were similarly obscured.

These problems have led some social scientists to adopt a definition of terrorism based not on criminality but on the fact that the victims of terrorist violence are

are irregular. On the internal level, both are likely to constitute criminal activities and, in an international conflict, both may amount to war crimes.

In three respects, terrorism and guerrilla warfare differ:

1. Terrorists tend to use force indiscriminately and on an excessive scale. The reason is that whenever their aim is not merely revenge or retaliation, they seek to attain their objective, whatever it may be, by the creation of fear. As it is difficult to anticipate how much fear is likely to produce the desire results, terrorists are likely to overact. Guerrilleros think primarily in military terms. Thus they tend to concentrate on the military and police forces of the political system against which they are fighting. In the typical case, they are short of weapons and ammunition and, therefore, likely to use force economically. Their irregularity is of a different order. It lies in the revolutionary character of their organization and the specific techniques of guerrilla warfare.
2. Terrorist may find it convenient to act as one-man armies and compensate for their numerical weakness by the caliber of their destructive power. In contrast, guerrilla forces, however small, tend to operate in groups.
3. The existence of individual terrorist does not create an armed conflict, internal or international. This requires the involvement of more than negligible groups. While terrorism is compatible with situation of armed conflict, it may also occur in situation of peace and tranquility, domestic or international. In contrast, the existence of substantial guerrilla forces presupposes or creates a situation of internal or international armed conflict. Thus a terrorist is probably best defined by reference to his immediate objective. It is to use force for the purpose of creating fear and, in this way, to attain whatever further aim he may have in mind. As this

essential aspect of the matter is brought out in the very word "terrorist" any definition of the term has an unavoidably circular element.[27]

1.9: UN and other definitions

The question of a definition of terrorism has haunted the debate among states for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the convention drafted in 1937 never came into existence. The UN Member States still have no agreed-upon definition. Terminology consensus would, however, be necessary for a single comprehensive convention on terrorism, which some countries favor in place of the present 12 piecemeal conventions and protocols. The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures. Cynics have often commented that one state's "terrorist" is another state's "freedom fighter". If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A. Schmid suggested in 1992 in a report for the then UN Crime Branch that it might be a good idea to take the existing consensus on what constitutes a "war crime" as a point of departure. If the core of war crimes - deliberate attacks on civilians, hostage taking and the killing of prisoners - is extended to peacetime, we could simply define acts of terrorism as "peacetime equivalents of war crimes".[28]

1.9.1. Proposed Definitions of Terrorism

a. League of Nations Convention or the Draft Convention on Terrorism. (1937):

In 1937, an attempt was made to codify the subject in a convention for the prevention and punishment of terrorism (CPPT). This effort received its impetus

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[27]George Schwarzenberger, *International Law and Order. Terrorists, Guerrilleros, Mercenaries,* (London: Stevens and Sons, 1971).

[28] http://www.unodc.org/unodc/terrorism/_definitions.html last accessed on Monday, 13 August 2007.

from a French proposal, made after the assassination of King Alexander 1 of Yugoslavia in 1934 at Marseilles. The convention was directed against terrorism of an international character. The convention on terrorism still deserves attention for two reasons:

1. The convention contains a definition of terrorism. This is defined as "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public".
2. The aims of the convention were to create mandatory rules of municipal criminal law against terrorism and to make terrorism an extraditable crime. Yet, in spite of an anti-terrorist climate prevailing in the League of Nations era, the Government of India was the only one country which ratified the convention.[29]

b. UN Resolution language (1999):

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whosoever committed;
2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them". (GA Res. 51/210 Measures to eliminate international terrorism)

c. Short legal definition proposed by A. P. Schmid to United Nations Crime Branch (1992):

Act of Terrorism = Peacetime Equivalent of War Crime

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[29] George Schwarzenberger,*International Law and Order. Terrorists, Guerrilleros, Mercenaries*, (London: Stevens and Sons, 1971).

d. Academic Consensus Definition:

The UN's "Academic consensus definition," written by terrorism expert Alex P. Schmid and widely used by social scientists, runs:

> Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought (Schmid, 1988).[30]

One man's terrorist is another man's freedom fighter" was a common refrain prior to 11 September 2001. There was little consensus on how to define terrorism. The attacks in New York and Washington, D.C. are forcing a new worldview on terrorism. A precise definition is one of the priorities in the current discussions on a Comprehensive Convention against Terrorism. However, other vexing questions remain, such as: should acts of the armed forces of Member States also fall under the conventions, e.g. the one against Nuclear Terrorism? The United Nations has wrestled with the definition question since the 1972 attack at the Munich Olympic Games. Two camps emerged: those who thought that the United Nations should primarily concentrate on dealing with the causes of terrorism and those who wanted to outlaw specific acts like hostage taking or the theft of nuclear materials, no matter what caused them. Thirty years later there are 12 international conventions relating to terrorism but an explicit definition is still missing, as is a strong supervisory board to monitor the implementation of treaty obligations. An Additional Protocol could fill this void. Security Council Resolution 1373 gives more teeth to the convention for the Suppression of the Financing of International Terrorism because it falls under Chapter VII of the United Nations Charter, making many of its provisions mandatory for all United

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[30] http://www.unodc.org/unodc/terrorism/_definitions.html last accessed on Monday, 13 August 2007.

Nations Member States. The Security Council has also established a Counter Terrorism Committee to monitor the implementation of the Resolution.[31]

Terrorism has been on the agenda of the United Nations for decades. Thirteen international conventions have been elaborated within the framework of the United Nations system relating to specific terrorist activities. Member States through the General Assembly have been increasingly coordinating their counter-terrorism efforts and continuing their legal norm setting work. The Security Council has also been active in countering terrorism through resolutions and by establishing several subsidiary bodies. At the same time a number of programmes, offices and agencies of the United Nations system have been engaged in specific operational actions against terrorism further assisting Member States in their efforts. To consolidate and enhance these activities Member States opened a new phase in their counter-terrorism efforts by agreeing on a global strategy to counter terrorism. The strategy, adopted on 8 September 2006 and formally launched on 19 September 2006 marks the first time that countries around the world agree to a common strategic approach to fight terrorism. The strategy forms a basis for a concrete plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism. The strategy builds on the unique consensus achieved by world leaders at their 2005 September Summit to condemn terrorism in all its forms and manifestations.[32]

e. United Nations

While the United Nations has not yet accepted a definition of terrorism, Terrorism expert Alex P Schmid has propounded a short legal definition which runs as:

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[31] http://www.unodc.org/unodc/newsletter_2001-12-01_1_page006.html last accessed on Monday, August 13, 2007

[32] http://www.un.org/terrorism/ last accessed on Monday 13 August 2007

- An act of terrorism is the "peacetime equivalent of a war crime."

- On March 17, 2005, a UN panel described terrorism as any act "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act."

- The General Assembly resolution 49/60, adopted on December 9, 1994, contains a provision describing terrorism: Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[33]

f. European Union

The European Union (EU) employs a definition of terrorism for legal/official purposes which is set out in Art. 1 of the *Framework Decision on Combating Terrorism* (2002). This provides that terrorist offences are certain criminal offences set out in a list comprised largely of serious offences against persons and property which, "given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization."[34]

g. United States

The United States has defined terrorism under the Federal Criminal Code. Chapter 113B of Part I of Title 18 of the United States Code defines terrorism

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[33] http://www.un.org/terrorism/ last accessed on Monday 13 August 2007

[34] ibid

and lists the crimes associated with terrorism. In Section 2331 of Chapter 113b, terrorism is defined as:

> activities that involve violent... or life-threatening acts... that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and... (C) Occur primarily within the territorial jurisdiction of the United States... [Or]... (C) Occur primarily outside the territorial jurisdiction of the United States.[35]

h. United Kingdom

The United Kingdom defined acts of terrorism in the Terrorism Act 2000 as the use of threat of action where:

a) the action falls within subsection (2),

b) the use or threat is designed to influence the government or to intimidate the public or a section of the public and

c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it

a) involves serious violence against a person,

b) involves serious damage to property ,

c) endangers a person's life, other than that of the person committing the action,

d) creates a serious risk to the health or safety of the public or a section of the public or

e) is designed seriously to interfere with or seriously to disrupt an electronic system.36

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[35] ibid
[36] ibid

standpoint, or to act according to certain principles; or(ii) disrupt any public service, the delivery of any essential service to the public or to create a public *emergency; or(iii) create general* insurrection in a State.(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii).[38]

k) *UN Resolutions against terrorism*

Just after 9/11, the United Nations Security Council (UNSC) gave a quick response by passing resolution 1368 (2001) of 12 September 2001. Another resolution 1373 was passed on 28 September 2001 stating as follow,

Reaffirming its unequivocal condemnation of the terrorist acts that took place in New York, Washington, D.C., and Pennsylvania on 11 September, the Security Council this evening unanimously adopted a wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism.

By resolution 1373 (2001) the Council also established a Committee of the Council to monitor the resolution's implementation and called on all States to report on actions they had taken to that end no later than 90 days from today. Under terms of the text, the Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay. The Council also decided that States should prohibit their nationals or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. States should also *refrain from providing any form of support to entities or persons involved in*

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[38] http://untreaty.un.org/english/terrorism/oau_e.pdf last accessed on Wednesday, August 15, 2007

terrorist acts; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well.

By other terms, the Council decided that all States should prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other countries and their citizens. By further terms, the Council decided that States should afford one another the greatest measure of assistance for criminal investigations or criminal proceedings relating to the financing or support of terrorist acts. States should also prevent the movement of terrorists or their groups by effective border controls as well.[39]

1.10 The impact of terrorism and counter terrorism on Human Rights

Every act of terrorism is incompatible with international humanitarian law applicable in armed conflict. Like any other violation of the 1949 Geneva Conventions, of another humanitarian law treaty or of international customary law, such acts call for action by States party to those treaties to redress the situation. They not only have a legitimate interest in stopping criminal behavior and thereby protecting their own citizens, they are also legally obliged to monitor compliance with the law, to prosecute and punish offenders and to prevent any further act contrary to humanitarian law.[40]

Acts of terrorism are grave breaches of international humanitarian law. Moreover, the Geneva Conventions do not exclude action by third States with a view to responding to grave breaches or preventing further violations, especially if the State concerned does not take appropriate action itself. Whether such third-party involvement includes the right to use force is not a question for international humanitarian law but for the law of the UN Charter.[41] A few states claim very

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[39] http://www.un.org/news/press/docs/2001/sc7158.doc.htm last accessed on Wednesday 15 August 2007

[40] Article 1 common to the four 1949 Geneva Conventions recalls this basic truth with the following words:
"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

wide rights of self-defence to protect nationals, anticipate attacks, and to respond to terrorist and other past attacks. As long as they pay-lip-service to the need to act in self-defence, and as long as they report to the Security Council invoking the magical reference to Article 51, somehow their action requires a veneer of legality and their argument will be treated seriously by commentators. A few of these commentators seem prepared to treat any US action as a precedent creating new legal justification for the use of force. Thus they use the US actions in Tripoli, Panama, the Iran/Iraq conflict, Iraq, Afghanistan, and Sudan as shifting the Charter Paradigm and extending the right of self defence [to counter Terrorism].[42]

Under the shock of the events of 11 September 2001, a number of States have taken steps to prevent terrorist acts from being committed on their territory. These steps include *inter alia*:

- tightening police surveillance, particularly of foreign residents;
- adopting more "vigorous" interrogation procedures, which may amount to inhumane treatment or even to torture;
- curtailing the right of alleged terrorists to a fair trial by e.g. establishing limits to access to witnesses and to the exercise of other rights of the defendant, measures which may sometimes be equivalent to abolishing the presumption of the defendant's innocence;
- toughening attitudes vis-à-vis asylum-seekers, refugees and migrants e.g., by ignoring the prohibition on returning such persons against their will to a country where they have to fear for their lives *(principle of non-refoulement).*

While not necessarily illegal as such, these measures may amount to clear violations of a government's commitment to respect international human rights and humanitarian law obligations. Adam Roberts has the following to say about

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[42] Christine Gray, *International Law and the Use of Force,* (New York: Oxford University Press, 2000), 119.

the difficulties international humanitarian law has to face in counter-terrorist operations:

> In military operations with the purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subjected to mistreatment or torture. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it. External states supporting the government have sometimes contributed to such excesses. Applying pressure on a government or army to change its approach to anti terrorism, to bring it more into line with the laws of war and human-rights law, can be a difficult task.[43]

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[43] Adam Roberts, "Counter-terrorism, armed force and the laws of war", *Survival*, (Spring 2002) Vol. 44. p. 13.

Conclusion

"Terrorism" is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted "fight against terrorism" rather than a "war on terrorism" it is however indisputable that with in the wider context of the "war on terror" two international armed conflicts stricto sensu have taken place, namely the conflict in Afghanistan and Iraq.

The type of armed conflict depends upon the status of the parties to the conflict and the nature of the hostilities. The status and rights of individuals depend, in turn, on the relationship of those individuals to the parties to the conflict.

The Geneva Conventions apply in full to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them, or in "any cases of partial or total occupation of the territory of a High Contracting Party.

War on terror is a new paradigm in armed conflict. The rules of IHL apply equally to all parties to an armed conflict whether it is an aggressor or acting in self defense or is a state or rebel group. Thus the IHL rules also apply to the armed conflict named as "war on terror".

Chapter 2

The Status, Protection and Treatment of the Victims of the War on Terror

2.1 Introduction

In this chapter we are going to discuss the status, protection and treatment of the victims of global war on terror. The United States and its allied countries in the war on terror assert that the prisoners in this war are not entitled to the status of POWs. What is the logic and reason on which they rest their claims? Are they not entitled to POWs status? Previously we explained that whether the war on terror itself is an armed conflict or not and can it be categorized as international armed conflict or it is just an internal uprising. It has been suggested that international terrorism might be considered to amount to armed conflict for the purposes of the law of war only if a foreign government is involved.

In classifying the detainees as unlawful combatants, the United States , it seems, asserts the right to treat the detainees in any way it deems appropriate-unencumbered by international legal obligation. The United States argues that neither group (Al Qaeda and Taliban) of captured fighters satisfies the express requirement of the POW convention, and that POW protections would impede the investigation and prosecution of suspected terrorists.

The abuses of Iraqi prisoners by US soldiers at Abu Ghuraib that came to light in the spring of 2004 have brought the issue of torture to lime light. Numerous documents shows that the technique and practices revealed in Abu Ghuraib had migrated from Guantanamo and Afghanistan and that they were authorized or justified at various points by high ranking officials in Pentagon and White House.

2.2 Status of the detainees of war on terror:

According to the US, neither captured Taliban nor Al Qaeda are entitled to POW Status. While the Third Geneva Convention applies to the former, as the US recognizes that there was an armed conflict involving two parties: it and Afghanistan, they have forfeited their protection by violating humanitarian law and associating themselves with Al Qaeda, and further, through their failure to

comply with the conditions of combatancy set out in Article 4 of the Third Convention. They are thus 'unlawful combatants'. The Third Geneva Convention does not apply to Al Qaeda, who are also considered 'unlawful combatants'. This executive decision to consider all detainees as unlawful combatants, with no legal rights but who will be treated humanely, is supposed to settle the matter. There has been no review of the status of individual detainees by competent tribunals of a kind contemplated by the Third Convention.[44]

Conventional wisdom maintains that denial of POW status to combatants has drastic protective and policy consequences. Contrary to this conventional wisdom Derek Jinks argues in his article titled "The declining significance of POW status":

> That denial of POW status carries few protective or policy consequences, and that the gap in protection for those classified as POWs and those not so classified (e.g., those designated "unlawful combatants") is closing. He further says that " the only gaps that persists are (1) that POWs are "assimilated into the legal regime governing the armed forces of the detaining state; and (2) that POWs enjoy "combatant immunity. [45]

The conventional view, however, requires substantial qualification, with out question, the Geneva conventions; guarantee POWs several important rights and privileges. It is a mistake, however to infer from this proposition that the denial of POW status carries significant detrimental consequences for the scope and content of detainee rights. In fact careful analysis of the text, structure, and history of the Geneva Conventions demonstrate that the conventions provide a robust rights regime for all war detainees, indeed the rights extended to all detainees include those rights that the U.S government suggests may undermine the war on terrorism.[46]

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[44] Avril McDonald, "Defining the war on terror and the status of detainees: Comments on the presentation of Judge George Aldrich," http://www.icrc.org/web/Eng/siteeng0.nsf/htmlall/5P8AVK/$file/Avril%20McDonald-final.pdf. Last visited 18/12/07

[45] Derek Jinks, "The declining significance of POW status," *Harvard international law journal* / vol. 45, Number 2, summer 2004, 368.

[46] Ibid

The controversy concerning the legal status of captured Taliban and Al Qaeda fighters reflects this conventional wisdom. The United States has expressly advanced the conventional view in this context, and has determined that these detainees do not qualify for POW status. This view deprives them of protection under humanitarian law. In classifying the detainees as unlawful combatants, the United States , it seems, asserts the right to treat the detainees in any way it deems appropriate- unencumbered by international legal obligation. Predictably, the POW controversy has persisted and intensified. Indeed, the controversy has reached such proportions that it threatens to compromise the "war on terrorism".

The heart of this controversy is whether the detainees – enemy combatants captured in Afghanistan – are entitled to POW status as defined in the POW convention. The official U.S government position is that neither Taliban nor Al Qaeda fighters qualify as POWs because they fail to satisfy international standards defining lawful combatants. Specifically, the United States argues that neither group of captured fighters satisfies the express requirement of the POW convention, and that POW protections would impede the investigation and prosecution of suspected terrorists. Of particular concern on the policy front are (1) restrictions on the interrogation of POWs, (2) the criminal procedure rights of POWs (which might preclude trial by special "Military commission" and (3) the rights of POWs to release and repatriation following the cessation of hostilities. In short, the United States has concluded that the detainees are "unlawful combatants" (or "unprivileged belligerents") and thus not protected by the Geneva Conventions.[47]

Critics of the U.S policy, on the other hand, argue that (1) the U.S determination that the detainees are not POWs is flawed because it relies on a misreading of POWs convention; and that (2) the U.S must irrespective of the merits of their classification, treat the detainees as POWs until a "competent tribunal" has determined that they don't qualify for POW status. The first criticism question the U.S interpretation of Article 4 of the POW convention – relating to the identification of persons entitled to POW status (the Article 4 issue"). The second

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[47] Ibid P 371-72

criticism, on the other hand, question the U.S interpretation of Article 5 of the treaty, which establishes presumptive POWs status in all cases of doubt and prescribes the procedure for determining the legal status of captured fighters ("the Article 5 issue").[48]

After earlier criticism from human rights organizations and many foreign governments regarding the determination that the Geneva Conventions of 1949 do not apply to the detainees held in Cuba, President Bush shifted position with an announcement that Taliban fighters are covered by the 1949 Geneva Conventions, while al Qaeda fighters are not. Taliban fighters are not to be treated as prisoners of war (POW), however, because they reportedly fail to meet international standards as lawful combatants. The President has determined that al Qaeda remains outside the Geneva Conventions because it is not a state and not a party to the treaty.

Some allied countries and human rights organizations are criticizing the President's decision as relying on an inaccurate interpretation of the Geneva Convention for the Treatment of Prisoners of War (GPW). The U.N. High Commissioner on Human Rights (UNHCR) and some human rights organizations argue that all combatants captured on the battlefield are entitled to be treated as POWs until an independent tribunal has determined otherwise. The European Parliament also called for a tribunal to determine the status of detainees. Great Britain has reportedly asked that its citizens detained in Cuba be returned for trial. The Organization of American States' Inter-American Commission has issued a preliminary order to the United States, urging it to take "urgent measures" to establish hearings to determine the legal status of the detainees.[49]

The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict. Members of a regular armed force and certain others, including militias and volunteer corps serving as part of the armed forces, are entitled to specific privileges as POWs. Members of volunteer

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[48] Ibid p 372-73

[49] http://www.icrc.ort/web/eng/siteeng0.nsf/htmlall/5xcmnj?opendocument 16/03/2004. Official statement by Gabor Rona. Last accessed on 09/08/2007.

corps, militias, and organized resistance forces that are not part of the armed services of a party to the conflict are entitled to POW status if the organization (a) is commanded by a person responsible for his subordinates, (b) uses a fixed distinctive sign recognizable at a distance, (c) carries arms openly, and (d) conducts its operations in accordance with the laws of war. Groups that do not meet the standards are not entitled to POW status, and their members who commit belligerent acts may be treated as civilians under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC). These "unprivileged" or "unlawful combatants" may be punished for acts of violence for which legitimate combatants could not be punished. Some have argued that there is implied in the Geneva Conventions a third category comprised of combatants from militias that do not qualify for POW status but also fall outside of the protection for civilians. These combatants may be lawful in the sense that they do not incur criminal liability for engaging in otherwise lawful combat, but they would not be entitled to privileges as POWs or protected civilians.[50]

The status of the detainees may affect their treatment in several ways. The U.S. Administration has argued that granting the detainees POW status will interfere with efforts to interrogate them, which would in turn hamper its efforts to thwart further attacks. Denying POW status may allow the Army to retain more stringent security measures, including close confinement of detainees in prison-like cells. The U.S. Administration also argues that the detainees, if granted POW status, would have to be repatriated when hostilities cease, freeing them to commit more terrorist acts. Finally, POWs accused of crimes are entitled to trial by court-martial or regular civil court. Denying POW status would appear to leave open the possibility that the detainees may be tried by military commissions for violations of the law of war.

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[50] Jennifer K. Elsea, *"Treatment of "Battlefield detainees "in the war on terrorism,"* April 11 2002. Legislative Attorney American Law Division, CRS Report for Congress. Order code RL 31367.. http://www.fas.org/crs/terror/RL31367.pdf, Last accessed on 08/08/2007.

Indeed, U.S. practice has been to accord POW status generously to irregulars, to support such status for irregular forces at times, and to raise objections whenever an adversary has sought to deny U.S. personnel POW status based on a general accusation that the U.S. forces were not in compliance with some aspect of the law of war. The Bush Administration has also asserted that the Geneva Conventions are obsolete when it comes to dealing with terrorists, but will continue to follow the treaties' principles.[51]

2.3 The status of Al-Qaeda detainees

With respect to al Qaeda fighters, the U.S. Administration has stated it is not applying the Geneva Conventions because al Qaeda is not a state party to the Geneva Conventions. Opponents of that position argue that the Geneva Conventions do not apply solely to the armed forces of state parties to the Conventions; that the treaties also cover non-state belligerents, who have not been allowed to become parties to the Conventions. Partisan and other irregular groups can qualify for POW status if they otherwise meet the criteria in GPW Art. 4. Non-states as well as states that are not parties to the Conventions remain bound by the provisions that have attained *opinio jurist* status, and may also accept the obligations of the Conventions in return for more favorable treatment. Common Article 3 of the Geneva Conventions provides minimum protection during non-international conflicts for all captives.

Another consideration may be that al Qaeda members would retain their status as citizens of their states of nationality. The status and treatment of prisoners of war generally does not depend on their nationality. However, civilians would not ordinarily derive their status under the Conventions from membership in a private organization. Under this view, the relevant issue would be whether they are citizens of states that are parties to the Conventions and whether those states have normal diplomatic relations with the United States. The President Bush decision regarding al Qaeda's status suggests that he may consider al Qaeda to have sufficient "international personality" to be a valid party to the conflict and subject

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[51] http://www.asil.org/pdfs/CRSReportforCongress.pdf Last visited on Thursday, August 16, 2007

to the law of war, but the White House has not to date issued a statement clarifying its position.[52]

According to Judge Aldrich, detained Al Qaeda members are clearly not entitled to POW status. They are illegal combatants and may therefore be prosecuted for their participation in any armed conflict and for any crime they committed in the process. It may be the case that member of Al Qaeda are not entitled to POW status. However, the almost meaningless status of 'illegal combatant' should not be applied across the board to detainees who are members of Al Qaeda, if indeed it should be applied to any detainees. Instead, it is necessary to distinguish between members of Al Qaeda depending on the context in which they are captured. Members of Al Qaeda who have been captured in Afghanistan and who were engaged in combat against US and allied forces may indeed be considered as 'unlawful combatants', or better, as civilians illegally engaged in an armed conflict. Theoretically, some of them could be considered as belonging to the armed forces. It is also possible that members of Al Qaeda were members of militias or volunteer forces, and providing that they could prove that they had satisfied the four conditions of combatancy, in principle, could be entitled to POW status. On the other hand, there might be members of Al Qaeda captured in Afghanistan who did not participate in the armed conflict and who were captured because of their membership of an illegal organization. These persons should not be considered as unlawful combatants but should be regarded as terrorist suspects. If they have committed a common or an international crime, they may be prosecuted, but they cannot be held in definitively without charge. [53]

Many prisoners are being held in Guantanamo. The issue of application of the Geneva Convention has arisen sharp criticism by human rights groups about the treatment of the captives. [54]

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[52] Ibid

[53] Avril McDonald, "Defining the war on terror and the status of detainees": Comments on the presentation of Judge George Aldrich, http://www.icrc.org/web/Eng/siteeng0.nsf/htmlall/5P8AVK/$file/Avril%20McDonald-final.pdf. Last visited 18/12/07

[54] www.rediff.com/us/2002/jan/28ny.htm last accessed on Thursday, August 16, 2007

2.4 Status of Taliban Detainees

On September 11, 2001, a small number of men who belonged to a fanatical group known as "al Qaeda" carried out a suicidal armed attack upon the United States that resulted in very substantial material damage and the loss of life by some three thousand persons, the great majority of whom were civilians. In response, the United States and a number of allies have taken action to find, capture or kill as many members of that al Qaeda organization as possible and deprive it of funds, support and sanctuary. As the leaders of al Qaeda and a large part of its membership and facilities were located within the territory of Afghanistan, the Taliban, who controlled all but a small part of Afghanistan and were, consequently, the effective government of Afghanistan was requested to assist in this effort. The Taliban refused to do so and made clear that they would continue to give sanctuary to al Qaeda. As a result, the United States and its allies attacked the armed forces of the Taliban, as well as those of al Qaeda, in the process killing and capturing a considerable number of soldiers belonging to both entities. As these persons were captured in the course of an international armed conflict, questions immediately arose as to their legal status and as to the protections to which they might be entitled pursuant to international humanitarian law, particularly as it was clear that at least some of them were clearly bound to face criminal proceedings for terrorist acts and other crimes. President Bush determined the position of the United States concerning at least some of these questions. In essence, as announced by the White House Press Secretary on February 7, 2002, he decided that:

(1) The 1949 Geneva Convention concerning the treatment of prisoners of war, to which both Afghanistan and the United States are Parties, applies to the armed conflict in Afghanistan between the Taliban and the United States;

(2) That same Convention does not apply to the armed conflict in Afghanistan and elsewhere between al Qaeda and the United States;

(3) Neither captured Taliban personnel nor captured al Qaeda personnel are entitled to be POWs under that Convention; and

(4) Nevertheless, all captured Taliban and al Qaeda personnel are to be treated humanely, consistent with the general principles of the Convention and delegates of the International Committee of the Red Cross may visit privately each detainee.[55]

The decision to consider that there are two separate armed conflicts is correct. One is the conflict with al Qaeda that is not limited to the territory of Afghanistan. Al Qaeda is evidently a clandestine organization with elements in many countries and composed apparently of people of various nationalities, which has the purpose of advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations. As such, al Qaeda is not in any respect like a State and lacks international legal personality. It is not a Party to the Geneva Conventions, and it could not be a Party to them or to any international agreement. Its methods brand it as a criminal organization under national laws and as an international outlaw. Its members are properly subject to trial and punishment under national criminal laws for any crimes that they commit.

The armed attack against the Taliban in Afghanistan analytically is a separate armed attack that was rendered necessary because the Taliban, as the effective government of Afghanistan, refused all requests to expel al Qaeda and instead gave sanctuary to it. While the United States, like almost all other countries, refused to extend diplomatic recognition to the Taliban, both Afghanistan and the United States are Parties to the Geneva Conventions of 1949, and the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan clearly constitute an international armed conflict to which those Conventions, as well as customary international humanitarian law, apply. This analysis must recognize that practical problems are likely to arise in some circumstances, for example, when al Qaeda personnel are captured while accompanying Taliban armed forces; but, once the al Qaeda personnel are identified, they clearly would not be entitled to POW status. As persons who have

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[55] Editorial comments, *The American Journal of International Law*, Vol. 96:89,2002, p 891-92,

been combatants in hostilities and are not entitled to POW status, they are entitled, under customary international law to humane treatment of the same nature as that prescribed by Article 3 common to the four Geneva Conventions of 1949 and, in more detail, by Article 75 of Geneva Protocol I of 1977; but they may lawfully be prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed. They have been illegal combatants, or, as the late Professor and Judge Richard Baxter once described such persons, they are "unprivileged belligerents", that is, belligerent persons who lack the privilege enjoyed by the armed forces of a State to engage in warfare with immunity from any liability under national law or under international law, except as prescribed by the international laws of war. This vulnerability to prosecution for simply taking part in an armed conflict and for injuries that may have been caused in that connection is the sanction prescribed by the law to deter illegal combatants.

President Bush's decision that all Taliban soldiers lack entitlement to POW status is quiet difficult to understand. The White House Press Secretary gave the following, cryptic explanation of that decision:

> Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.[56]

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[56] George H. Aldrich, "The Taliban, al Qaeda, and the determination of illegal combatants. Extract from "Humanitäres Völkerrecht", No 4/2002, a review published by the German Red Cross (www.drk.de) and The "Institute for International Law of Peace and Armed Conflict" in Bochum. http//: www.ifhv.de. Last accessed on 19 September 2007.

the Convention would be eroded if it were accepted that they need not be accorded to the armed forces of a government in effective control of the territory of a State by another State that declines to recognize the legitimacy of that government.

Another possible argument might be that the conditions specified for POW status by Article 4A (2) for militias and volunteer corps that are not part of the armed forces are somehow also applicable to all armed forces. While contrary to textual logic, the assertion has occasionally been made that those four requirements are inherent in the nature of armed forces of States. I consider that to be a dangerous argument, however, one that States should be reluctant to put forward, because the fourth condition – that the militia or corps conducts its operations in accordance with the laws of war – can easily be abused, as it was by North Korea and by North Vietnam, to deny POW treatment to all members of a State's armed forces on the ground that some of its members allegedly committed war crimes. Even in a conflict where substantial war crimes were committed by the armed forces of a State, this would be a bad idea. Those who commit war crimes should be punished, but their crimes should not be used as an excuse to deprive others of the protections due to POWs.

It seems that it would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan should, upon capture, be treated as POWs. That causes me to suspect that there may have been some unexplained reason behind the decision. I am forced to ask why the United States would wish to deprive all Taliban soldiers of POW status when they have been defending the government whose armed forces they are? Does it intend to prosecute them simply for participating in the conflict? I must doubt that. Does it intend to prosecute them for crimes under United States law? For crimes under some Afghan law? If a few of them are guilty of war crimes or crimes against humanity, they could be prosecuted while remaining POWs.

Article 5 of the Convention states the following cautionary rule:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[58]

Given that provision, either the United States must maintain that no doubt could arise with respect to any Taliban prisoner, or it must preserve the option of a determination by a tribunal in the event that any doubt does arise concerning a group or an individual prisoner.

Also relevant to prisoners facing criminal prosecution is paragraph 2 of Article 45 of Protocol I which establishes a separate right of any person who has fallen into the power of an adverse Party and is to be tried by that Party for an offense arising out of the hostilities to have his entitlement to POW status determined by a judicial tribunal. When that text was negotiated, the United States Government was painfully aware of the experiences in Korea and Vietnam where many American military personnel were mistreated by their captors and were denied POW status by mere allegations that they were all criminals. Time evidently dulls memory.

This conclusion flows from the fact – that there are two armed conflicts involved in Afghanistan – one with Taliban, to which the Geneva Conventions and, for Parties to it, Protocol No. I, apply, and another with al Qaeda, to which those treaties do not apply. Al Qaeda and its personnel do not belong to any Party to the Geneva Conventions and Al Qaeda is not itself capable of being a Party to a conflict to which those Conventions and Protocol No. 1 apply. Members of al Qaeda are not entitled to be combatants under international law and are subject to trial and punishment under national laws for their crimes. [59]

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[58] Article 5, *Geneva Convention relative to the treatment of prisoners of War of August 12, 1949*, (Geneva: ICRC, 2007).

[59] George H. Aldrich, "The Taliban, al Qaeda, and the determination of illegal combatants. Extract from "Humanitäres Völkerrecht", No 4/2002, a review published by the German Red Cross (www.drk.de) and The "Institute for International Law of Peace and Armed Conflict" in Bochum. http//: www.ifhv.de. Last accessed on 19 September 2007.

2.5 The character of the 'conflicts' involving the Taliban and Al Qaeda

Judge Aldrich raises two legal questions of considerable interest: the status of detainees held by the US in connection with its 'war on terror', and the characterization of the conflict. He agrees with the White House that there are two separate armed conflicts:

One, between the US and its allies against the Taliban, the *de facto* government of Afghanistan, which took place on the territory of Afghanistan. This is an international armed conflict.

Two, between the US and its allies against Al Qaeda, which is not confined to the territory of Afghanistan. Its status as 'international' or 'non-international' is not defined.

2.5.1 The conflict against Afghanistan

There is no doubt that there has been an armed conflict between the US and its allies against Afghanistan as understood by the 1949 Geneva Conventions and their 1977 Additional Protocols. Since it involves at least two States, clearly it is an international armed conflict, within the meaning of common Article 2 of the Geneva Conventions. Although the use of force in apparent self-defense by the US was a response to a terrorist attack on the United States by Al Qaeda, rather than to any act attributable to Afghanistan or for which Afghanistan was considered responsible, Afghanistan was attacked because it was considered to be harboring and assisting Al Qaeda members and for its refusal to hand them over.

The international armed conflict began with the American strikes against Afghanistan. Even if, as the US President said, the attacks by Al Qaeda were a 'declaration of war', it seems to have been rhetorical rather than actual. One could accept that an international armed conflict began at that point only if one could show that Al Qaeda were acting on behalf of a State, which they were not

generally considered to be, even if they were being supported by certain States. The US War Crimes Ambassador Pierre Prosper said that:

> These aggressors initiated a war that under international law they have no legal right to wage." He added, "And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes". As a non-State, Al Qaeda is not legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict. Since their crimes in attacking the world trade centre and pentagon were not committed in the context of an armed conflict, they are not war crimes within the meaning of the Geneva Conventions. In fact, the acts can be legally characterized in several ways, as crimes against humanity, or as breaches of conventional law concerning terrorism. They could also be considered as acts of piracy. Clearly, the attacks cannot be considered as committed in the context of an internal armed conflict. Whatever the attacks on the US on 11 September 2001 initiated, until the US used force against Afghanistan, it was neither an international nor an internal armed conflict. If it was a declaration of war, it is not a war contemplated by humanitarian law.[60]

2.5.2 The conflict against Al Qaeda/the War on Terror

The 'conflict' between the US and Al Qaeda units in countries other than Afghanistan, that is, the so-called 'war on terror' is not *per se* an armed conflict within the meaning of the Geneva Conventions and their Additional Protocols. Most fundamentally, it is not a conflict between two or more States. On the one side there is the US and its allies and on the other side there is Al Qaeda, which Aldrich describes as "a clandestine organization with elements in many countries and composed apparently of people of various nationalities". Given that Al Qaeda seems to have no international legal status, and is simply composed of terrorists, criminals *hosti humanis*, who could be prosecuted by any State, but certainly by a State with a personal interest in the matter, such as the US; that for the most part they are not combatants, but simply civilian criminals; that they are mainly based in countries where there is no armed conflict, including the US itself; that they are not parties to the Geneva Conventions and Protocols, nor are

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[60] Avril McDonald, "Defining the war on terror and the status of detainees": Comments on the presentation of Judge George Aldrich, http://www.icrc.org/web/Eng/siteeng0.nsf/htmlall/5P8AVK/$file/Avril%20McDonald-final.pdf. Last accessed on 18/12/07.

they capable of becoming a party, it is impossible that any 'conflict' between that organization, acting on its own behalf, and a State or coalition of States could be considered as an international armed conflict within the meaning of common Article 2 of the Geneva Conventions. It is theoretically possible that some members of Al Qaeda could be considered as fighting for Afghanistan or as agents of the Taliban, and should then be considered as affiliated to Afghanistan's armed forces and as involved in an international armed conflict, although Aldrich states that no evidence of such involvement has been shown. More facts need to be made available regarding the relationship between the Taliban and Al Qaeda and whether Al Qaeda could be considered to be working as agents of the Taliban. Did they receive financial aid from the Taliban? To what extent were their operations known to and directed by Kabul, etc.? Did the Taliban have overall or effective control of Al Qaeda operations? Nor can the campaign against Al Qaeda *per se* be considered as an internal armed conflict, within the meaning of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. There might however be cases where the US and its allies become involved in what might be an internal armed conflict on the territory of another State, where, by invitation, it helps States fight armed rebels with suspected links to Al Qaeda. In fact, the 'war on terror' is clearly not an armed conflict at all. It consists of a multi-faceted counter-terrorism campaign, some aspects of which involve the use of military force, most of it carried out in States where there is no armed conflict, although aspects of the counter-terrorism campaign assume the characteristics of armed conflict where the US attacks a State considered to be harboring or assisting Al Qaeda, as it did in Afghanistan. In this case, it would be an international armed conflict against the attacked State, rather than Al Qaeda, since Al Qaeda is not a State. Otherwise, the so-called 'war on terror' which the US is waging against Al Qaeda does not satisfy the conditions of the Geneva Conventions to be considered as an armed conflict. It is thus not clear on what legal basis either the White House or Judge Aldrich can claim that there is an armed conflict involving Al Qaeda.[61]

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[61] Ibid.

Party to the conflict" and fulfill the additional cumulative criteria set forth in Article 4 A Para. (2) GC III.[62]

In Iraq, the resistance was clearly composed of various armed groups. There is no reason to exclude the possibility of several organized resistance movements fighting an occupying power which are not necessarily under a unified command or coordinated. However, only members of those groups who fulfill all the cumulative criteria laid down in Art. 4 A Para. (2) GC III must be granted the status of prisoner of war in case of capture. It seems that most armed groups operating during the occupation of Iraq shared the common goal of ousting the occupying powers. The fact that the hostilities amounted to a concerted armed struggle against this occupation is an important factor differentiating such military operations governed by IHL from mere acts of civil unrest.

At the start of the conflict in Iraq, the "High Contracting Parties"[63] to the Geneva Conventions, parties to the international armed conflict, were the coalition States on the one hand and the State of Iraq on the other. Bearing in mind that a State is normally represented by its government, the question arises whether, following the collapse of the former regime of *Saddam Hussein,* it is possible to envisage that armed resistance movements fighting "against the occupation" and "for Iraq" belong to a party to the conflict in terms of common Article 2 to the four GCs. In other words, how can the required link between armed resistance movements and a High Contracting Party be established when the government of this party no longer exists?

The situations of organized resistance that the drafters of the Geneva Conventions had in mind usually refer to occupations where a force has lost effective control over territory but remains, to some degree, a viable entity, either by continuing organized resistance from the unoccupied parts of its territory or by establishing an exile presence and expressly or tacitly supporting armed resistance movements. The occupation of Iraq presented a case distinct from these cases of

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[62] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

[63] Article 2 Para. 1, Common to the four Geneva conventions.

occupation, in the sense that there remained no representative of the former regime in Iraq or in exile. Therefore, even tacit agreement of the former regime could not be expected and a restrictive interpretation of Article 4 a Para. 2 GC III precludes the granting of prisoner of war status to captured members of resistance movements. This restrictive interpretation is in line with the jurisprudence of the ICTY, (International Criminal Tribunal for the former Yugoslavia) which requires that a government is held accountable for the operations of armed groups. It is also in accordance with the rationale of the other provisions of Article 4 A GC III dealing with similar cases, in particular Para, 3 and 6, which both require a link with a government. Indeed, these provisions implicitly demand that armed forces of a government or authority not recognized by the detaining power fight under the orders of a government or authority recognized by third States or that the population which resists the invading forces acts in the name of the authority commanding the inhabitants who have taken up arms, or the authority to which they profess allegiance. Under a broader interpretation of the term "belonging to a party to the conflict" it could be considered that, following the ousting and disappearance of a former regime, an organized resistance movement could act as *de facto* agent of the State and that such agent engages the responsibility of the State. Indeed, in the absence of a government, the question remains whether it would be advisable to recognize the possibility for a sufficiently organized and structured movement with a responsible command enabling the respect of international humanitarian law to fight in the name of the liberation of an occupied State. Moreover, no longer linking the fight against an occupant with the defense of a government but rather of an occupied State is not in contradiction with Article 9 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[64]

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[64] Draft Articles on Responsibility of States for Internationally Wrongful Acts, United Nations

Thus, in the absence of a government, the criteria of 'belonging to a Party to the conflict' could be met through a sufficiently clear *de facto* link between the group on one hand and the State and the population on the other hand, suggesting that the group effectively represents the State or exercises the *de facto* authority of a State party to a conflict. Despite the weakness of this broad interpretation which seems to contradict the jurisprudence of the ICTY and the denial of *ius insurrectionis* for the inhabitants of an occupied territory, it is nevertheless the only way to provide, on occasion, the protection of the Third Geneva Convention to members of organized resistance movements when the former regime no longer exists. This solution also benefits members of the armed forces of the coalition in case they were to fall into the hands of resistance movements, as they would be in the power of *de facto* representatives of a party to the conflict and should therefore be granted the status of prisoners of war themselves.[65]

i. Additional Requirements of Article 4 A Para. 2 GC III

Furthermore, in view of the use of methods like suicide bombing and the deliberate policy of targeting civilians, armed resistance movements would almost certainly have failed to meet at least one of the cumulative requirements of Article 4 A Para. 2 lit. b (having a recognizable distinctive sign), lit. c (carrying their arms openly) and lit. d (respect for IHL).

Members of resistance movements in occupied territories will rarely meet all the conditions required for entitlement of prisoner of war status, as in order to accomplish their mission they will wear no uniforms or distinctive signs, hide their weapons and withhold their identity prior to their strike.[66] Various commentators have pointed out how difficult, if not impossible, it is for resistance movements to comply with the requirements of Article 4 A Para. 2 GC

General Assembly Res. 56/83 of 28 January 2002. http://www.un.org/ga/ Last accessed on 29 September 2007.

[65] Knut Dormann and Laurent Colassis, International Humanitarian Law in the Iraq conflict. http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

[66] Albert J. Esgain and Waldemar A. Solf, "The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Its Principles, Innovations, and Deficiencies," *North Carolina Law Review*, vol. 41, 1963, 550.

III without departing form the guerrilla warfare to which they usually resort. This reality was considered during the negotiations of Additional Protocol I. As a consequence, Article 44 AP I, in particular Para. 3, was negotiated which modifies to a certain extent the conditions of Article 4 A Para. 2 GC III for States parties to Additional Protocol I.[67]

ii. Persons Protected by the Fourth Geneva Convention

All persons deprived of liberty who do not meet the criteria for prisoners of war are protected by the Fourth Geneva Convention as detainees or internees, with the exception of nationals of coalition countries held by the coalition (for example, United States or British citizens in the hands of the United States or the United Kingdom). The latter, however, benefit from the rules of existing customary international law as reflected in Article 3 common to the four GCs and Article 75 AP I, which lay down minimum guarantees. During the occupation of Iraq, Iraqi citizens and nationals of States which were neutral within the meaning of international humanitarian law, that is, States not participating directly in the war in Iraq were protected persons covered by the Fourth Geneva Convention. To sum up, it can therefore be said that every person deprived of liberty during the occupation of Iraq was either a prisoner of war protected by the Third Geneva Convention or a detainee or internee protected by the Fourth Geneva Convention, with the rare exception of nationals of coalition States held by the coalition forces.[68]

2.6.2 Status of Persons in the Power of the Enemy – After 28 June 2004

The legal situation in Iraq has changed since the handover of power from the Coalition Provisional Authority to the interim Iraqi Government on 28 June 2004. Therefore, the current hostilities between armed fighters, on the one hand, opposing the Multinational Forces and/or the Iraqi authorities, on the other, are

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[67] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf . Last accessed on 29 September 2007

[68] Ibid.

persons in connection with a non-international armed conflict. As the Third and Fourth Geneva Conventions no longer provide a legal basis for continuing to hold them, these persons should be placed within another legal framework that regulates their current internment or detention. Despite the provisions of Articles 5 Para. 1 GC III and 6 Para. 4 GC IV, a more appropriate approach would be to consider that these persons are now protected by common Article 3 to the four GCs, customary rules applicable to non-international armed conflicts, relevant rules of human rights law and Iraqi law, as their deprivation of liberty is no longer linked to the former international armed conflict but rather to one of the current non-international ones. The situation is the same as if these persons would have been released after the end of the international armed conflict and simultaneously re-arrested by the Multinational Forces, even if this sequence is more virtual than real, the detainees not recovering their liberty at any stage of this process.[73]

ii Persons Held by the Iraqi Authorities

Some of those captured by the coalition forces before 28 June 2004 have now been handed over to Iraqi authorities. This handover must not be perceived as a transfer in the sense of Articles 12 para. 2 GC III and 45 para. 3 GC IV, as these Articles deal with the transfer of a protected person from a detaining power to another State party to the GC and do not address the 'repatriation' of such a person to his State of origin. Once handed over to the Iraqi authorities, they are no longer protected by the Third or Fourth Geneva Convention. If the ensuing deprivation of liberty by Iraqi authorities is in connection with a non-international armed conflict, they are protected by common Article 3 of the four GCs, customary rules applicable to non-international armed conflicts, human rights treaties and relevant Iraqi law. If their deprivation of liberty by Iraqi authorities is unrelated to the continuing non-international armed conflicts, they are no longer protected by IHL but benefit nevertheless from the protection of Iraqi and human

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[73] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

rights law. This handover can legally be interpreted as a release by the Multinational Forces followed by a "repatriation" (Articles 118 GC III and 133 GC IV) and a simultaneous re-arrest by the Iraqi authorities, once again even if this sequence is more virtual than real.[74]

b Persons Captured or Arrested after 28 June 2004

Persons captured or arrested after 28 June 2004 and held by Iraqi authorities or by the Multinational Forces in connection with one of the ongoing non international armed conflicts underway since then are protected by common Article 3 of the four GCs, customary rules applicable to non-international armed conflicts, relevant rules of human rights law and Iraqi law. Only those whose detention is not connected to an armed conflict are not protected by IHL. UN Security Council Resolution 1546 grants the Multinational Forces a mandate to "take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution [...]."While UN Security Council Resolution 1546 can be interpreted as giving the Multinational Forces the authority to intern persons, it neither clarifies which provisions of the Geneva Conventions apply nor stipulates which body of law applies to interned persons. The rules on internment laid down in the Fourth Geneva Convention are a minimum to be respected in times of international armed conflict. However, given that IHL treaties do not regulate internment or detention in non-international armed conflicts in detail, recourse must be had to customary IHL as well as to international human rights law to clarify the uncertainties or insufficiencies of conventional IHL. Therefore, it is not sufficient to only refer to the Fourth Geneva Convention in order to grant the entire range of protection owed to persons deprived of their liberty in connection with a non-international armed conflict in Iraq. 'Detaining Powers' should afford better safeguards by resorting to customary IHL, human rights law and domestic law to supplement the insufficiencies of conventional IHL.[75]

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[74] Ibid.
[75] Ibid.

2.7 Protection of detainees under international human rights law.

Some prisoners in the "war on terror", however, fall outside the protection of the Geneva System. The first and most numerous category is that of persons captured in the context of law enforcement operations carried out by the US and its allies throughout the world after 11 September 2001. Those operations can not be characterized as being part of an "armed conflict" within the meaning that international law attributes to that term. In this respect, the US assertion that "none of the provisions of Geneva apply to our conflict with al Qaeda, whilst being undeniably correct, is irrelevant: the Geneva convention do not apply for the very simple reason that the "war on terror" is not an armed conflict. But quite apart from the question of the applicability of the rules of IHL, the fundamental rights of every individual detained in the context of the "war on terror", including those detained as a result of law enforcement operations outside the context of an armed conflict, are protected by international human rights law. In relation to the International human rights law, the United States has in the past consistently denied the extraterritorial application of human rights obligations. It has also denied that human rights apply in time of armed conflict, and has recently reiterated both of these positions with regard to the detainees at Guantanamo Bay.[76]

Alleged use of torture and ill treatment by security forces and arrest powers and Practices of security forces.

The convention against torture and other cruel, inhuman or degrading treatment or punishment adopted by the U N general assembly on 10 December 1984 has defined torture as:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third

[76] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror". *International Review of the Red Cross*, March 2005, Volume 87 Number 857.

> person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. [77]

Prisoners of war must at all times be humanely treated. They are entitled to respect for their person, both physical and moral. The following acts, for example, are contrary to respect for the physical person: any unlawful act or omission causing death or seriously endangering the health of a prisoner of war, not to mention physical mutilations, medical or scientific experiments which are not justified by the patient's treatment, acts of violence on the part of civilians or military persons; prolonged questioning, whether or not accompanied by acts of brutality, with the aim of extracting information; continual harassment; omission of medical care to the wounded and sick; prolonged deprivation of sanitary facilities or of physical, intellectual and recreational pursuits; inadequate conditions of food, quarters and clothing extended over any lengthy of time. Respect for prisoners means respect for their person and honour and protection against public curiosity. Humiliating and degrading treatment is therefore banned.[78]

The abuses of Iraqi prisoners by the US soldiers at Abu Ghuraib that came to light in the spring of 2004 have brought the issue of torture-particularly in the context of armed conflict or in the fight against terrorism-again to the center of the international agenda. Despite the fact that torture is a crime under the UN convention against torture, adopted by the General Assembly in 1984, and other relevant international frameworks, and is similarly defined in the national legal codes of many of the UN's member states, it is a practice that is widespread throughout the world. The essential phenomenon of torture, however, is that it is not an ordinary crime, but a crime of obedience: a crime that takes place, not in opposition to the authorities, but under explicit instructions from the authorities

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[77] Article 1 of the Convention against torture, www.unhchr.ch/html/menu3/b/h-cat39.htm. Last accessed on 05 October, 2007.

[78] Claude Pilloud, *Protection of the victims of armed conflicts: Prisoners of war, International Dimensions of Humanitarian law,* (Henry Dunant Institute, UNESCO: Martinus Nijhoff Publishers, 1988), 169 - 170.

to engage in acts of torture, or in an environment in which such acts are implicitly sponsored, expected or at least tolerated by the authorities. Lee Hamilton and Herbert C. Kelman have defined a crime of obedience as:

> An act performed in response to orders from authority that is considered illegal or immoral by the larger community. Torture is clearly considered illegal and immoral by the international community; it is prohibited by international declarations and conventions that have been unanimously adopted by member states of the United Nations, yet it is the authorities of these very states that order, encourage or tolerate systematic policies or sporadic acts of torture. [79]

2.8.1 The use of torture as an instrument of policy

Torture has been practiced by non-state entities or agents, such as guerrilla groups or liberation movements, but it is primarily a phenomenon linked to the state. The emergence or reemergence of torture as an instrument of policy in the twentieth century is directly related to the nature of the modern state. In particular, as Edward Peters argues in his historical study: torture arises from the combination of two features of the modern state: its vast power and its enormous vulnerability to state enemies, internal and external. The power of the modern states rest in the extent to which it affects all aspects of the life of its citizens and the resources that it can mobilize to control its population. The vulnerability of the modern state stems from the high degree of interdependence of the political, economic, and social institutions required to run a modern society and the resulting ease with which social order can disintegrate and the political authorities can lose control when their legitimacy declines in the eyes of their population, or when they confront terrorism and insurgency.

The condition conducive to the rise of torture as an instrument of state policy are the authorities' perception of an active threat to the security of the state from internal and external sources; the availability of a security apparatus, which enables the authorities to use the vast power at their disposal to counter that threat

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[79] Herbert C. Kelman, "The policy context of torture: A social-psychological analysis," *International Review of the Red Cross*, Volume 87 Number 857 March 2005.

by repressive means and the presence within the society of groups defined as enemies of or potential threats to the state.[80]

2.8.2 *Torture at Abu Ghuraib.*

What happened at Abu Ghuraib? Why did it take place? Who are to blame? These are the questions that have been widely discussed since the broadcasting of photos by CBS TV in 2004 showing Iraqi detainees being tortured and sadistically humiliated by American soldiers. The questions have not been answered fully as the secrets as well as most of the photos in the possession of the Pentagon are yet to be revealed. It is possible, however, to make certain conclusions based on available information. The biggest collection of photos, accompanied by comprehensive analyses based on US Army documents, is available at Salon. The 279 photos and 19 videos alongside the documentation provided by Salon "tells the story, in more graphic detail than ever before, of the rampant abuse of prisoners there," in the words of Joan Walsh, the editor of the publication, including "new details about the role of the CIA, military intelligence and the CID [Army's Criminal Investigation Command] itself in abuse captured by cameras in the fall of 2003."[81] Walsh presents nine aspects of torture at Abu Ghuraib, which will be briefly discussed as an introduction to the analysis of the torture at Abu Ghuraib.[82]

These scenes, caught in shocking candor by someone's digital camera, played over and over in the world's newspapers and magazines and across the airwaves. Jarring new examples emerged: A female soldier, holding a leash wrapped around the neck of a naked prisoner cringing at her feet. Even when the shots were pixilated or cropped for modesty, nothing could hide the raw cruelty of U.S

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[80] Ibid.

[81] Arsalan Jumaniyazov, *Imperial Roots of Abu Ghuraib Prison abuse*, a thesis submitted to the faculty of American studies in candidacy for the degree of Bachelor of Arts, Department of American Studies, Bishkek, Kyrgyzstan, April 2007.

[82] The following analysis of nine aspects of torture at Abu Ghuraib and the quotations are from. "The Abu Ghuraib Files," Salon, 14 March 2006, <http://www.salon.com/news/abu_Ghuraib/2006/03/14/introduction/>. (Accessed: 1 April 2007).

soldiers ridiculing the manhood of Iraqi captives. The accounts of these misdeeds would be sickening in the best of times. But with each new revelation of abuses inflicted by U.S. troops in Iraq, it seems evident that the damages go far beyond the appalling acts of few miscreants. [83]

a) Standard Operating Procedure.

The interrogation techniques employed at Abu Ghuraib— hooding, forced nudity, sleep deprivation, stress positions, among others—were similar to those approved by the former Secretary of Defense Donald Rumsfeld in a memo written in 2 December 2002 for interrogating detainees at Guantánamo Bay, Cuba. General Geoffrey Miller, under whose supervision the new harsh interrogation techniques were employed at Guantánamo, arrived in Iraq in September 2003 reportedly to"Gitmo-ize"—to use interrogation techniques designed for Guantánamo at—Abu Ghuraib. Accordingly, the US soldiers and the intelligence personnel at Abu Ghuraib accepted new techniques as SOP [standard operating procedure], according to the report by Maj. Gen. George R. Fay. "It is clear that pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum resulted in stronger interrogation techniques," former Defense Secretary James Schlesinger similarly concluded in his report about the conduct of the U.S. military personnel at Abu Ghuraib.

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[83] *Time Magazine*, Special Report, May 17, 2004. Vol. 163, No, 19.

b) Dehumanization.

According to the report by Maj. Gen. George R. Fay, the systematic use of forced nudity to humiliate detainees "likely contributed to an escalating 'de-humanization' of the detainees and set the stage for additional and more severe abuses to occur." Thus, the Army investigators concluded, some military police (MP) and military intelligence (MI) decided on their own to punish and humiliate detainees by using techniques that were not authorized by any policy

c) Sexual exploitation.

In addition to the sexual humiliation of male detainees shown in the photographs, the Army investigations found incidents of abusive treatment of female detainees not shown in the photographs. Fay report, for instance, mentions an incident where three military intelligence soldiers assaulted a female detainee. The detainee was forcibly kissed by one solder while her hands were held behind her back by another soldier. She was later forced to kneel and raise her arms while her shirt was removed. Her shirt was returned after she began crying, but was warned that the soldiers would return each night unless she decided to cooperate in providing information

d) Electrical wires.

Photos show electrical wire being used against detainees at Abu Ghuraib. "One of the most iconic images of abuse to emerge from Abu Ghuraib showed a detainee perched on top of a cardboard box, with a hood on his head, a blanket

around his shoulders and electrical wires extending from his hands" who was known to the soldiers at Abu Ghuraib as "Gilligan," observe Michael Scherer and Mark Benjamin, contributors to Salon collection. Military police was ordered to soften up the detainee by making his life "a living hell" by an agent from the Army's CID—the same agency, it should be emphasized, that would later investigate abuse at Abu Ghuraib.

e) Dog Pile.

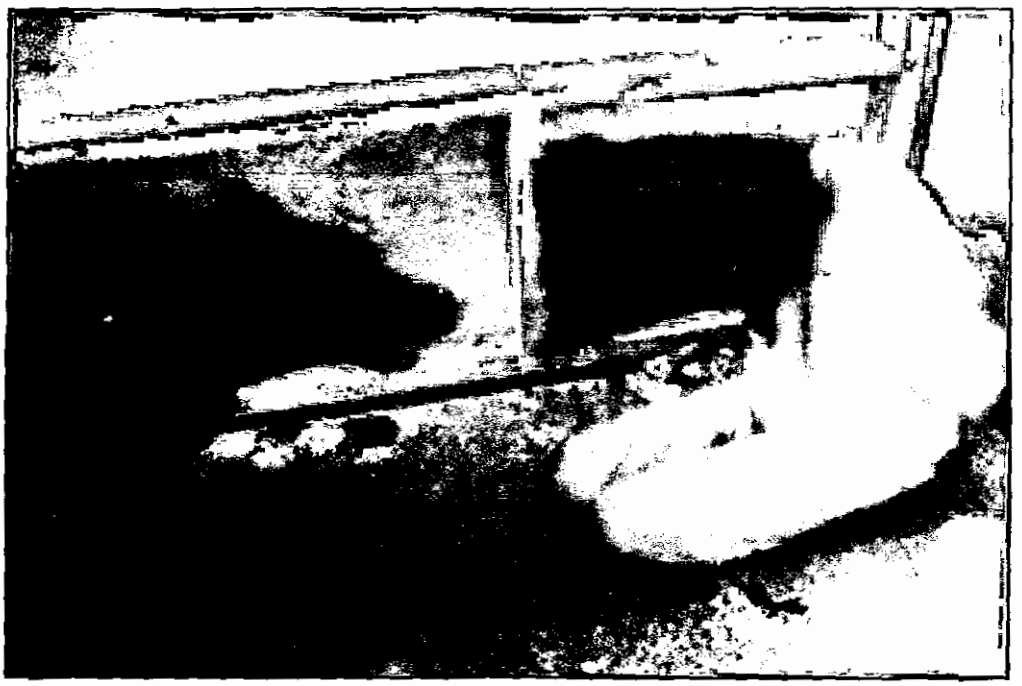
On 7 November 2003, seven detainees were accused of inciting a riot and "were subjected to some of the worst documented abuse at Abu Ghuraib," Scherer and Benjamin sum up. "They were verbally abused, stripped, slapped, punched, jumped on, forced into a human pyramid, forced to simulate masturbation, and forced to simulate oral sex, several Army reports concluded."

Lynndie England, who was photographed smiling and pointing at naked detainees, testified that the "prisoners were brought in handcuffs and bags on the heads and wearing civilian clothes.... Everyone was downstairs pushing the prisoners into each other and the wall. Until they all ended up in a dog pile." Two detainees later testified to the Army's criminal investigation. "They forced us to walk like dogs on our hands and knees," one detainee said. "And we had to bark like a dog and if we didn't do that, they start hitting us hard on our face and chest with no mercy." Another detainee described how he was forced to masturbate, and to the question "How did you feel when the guards were treating you this way?" he answered: "I was trying to kill myself but I didn't have any way of doing it."

f) Lacerations.

"In addition to humiliation and abuse, the military police at Abu Ghuraib photographed and documented detainee injuries," Scherer and Benjamin point out. The photographs were taken partly as a boast and partly for official records, according to military police testimony. Photographs show two detainees with significant cuts on their faces and arm, and one hooded and naked detainee is shown with smiley faces drawn on his nipples.

g) Working dogs.



Maj. Gen. Geoffrey Miller, the former commander of the detention facility at Guantanamo Bay, had recommended the use of dogs as part of his plan to use more effective interrogation methods at Abu Ghuraib, and dogs arrived at Abu Ghuraib on 20 November 2003, according to the Schlesinger report. Miller reportedly told Col. Thomas M. Pappas, who became commander of military intelligence at Abu Ghuraib in November 2003 that the use of dogs was effective in "setting the atmosphere for interrogations," according to a report by Maj. Gen. George R. Fay. The use of dogs was also approved by Lt. Gen. Ricardo Sanchez, the commander of U.S. forces in Iraq. "The use of dogs in interrogations to 'fear up' detainees was generally unquestioned and stems in part from the interrogation

techniques and counter-resistance policy," according to the Fay report. The exploitation of Arab fear of dogs was referenced in memos reviewed by Donald Rumsfeld for drawing up harsh interrogation techniques for Guantanamo prison.

h) Mentally Deranged.

The military police at Abu Ghuraib managed some mentally disturbed inmates who apparently had no links to any national security concerns. One of the inmates, shown in the photographs and videos, was referred to by U.S. prison personnel as "Shitboy." The detainee was photographed in many humiliating and degrading manners. Soldiers simply chose to take his photos and videos instead of stopping him when he was apparently harming himself.

This brief description of prisoner mistreatment and torture that took place at Abu Ghuraib shows a glimpse of what happened from 17 October to 2 December 2003. "The documentation does not include many details about the detainees who were abused and tortured at Abu Ghuraib," points out Joan Walsh and "much remains unknown about the detainees abused in the 'hard site' where the Army housed violent and dangerous detainees and where much of the abuse took place":

> Finally, it's critical to recognize that this set of images from Abu Ghuraib is only one snapshot of systematic tactics the United States has used in four-plus years of the global war on terror. There have been many allegations of abuse, torture and other practices that violate international law, from holding prisoners without charging them at Guantanamo Bay and other secretive U.S. military bases and prison facilities around the world to the practice of "rendition," or the transporting of detainees to foreign countries whose regimes use torture, to ongoing human rights violations inside detention facilities in Iraq. Abu Ghuraib Fin fall 2003 may have been its own particular hell, but the variations of individual abuse perpetrated appear to be exceptional in only one way: They were photographed and filmed.[84]

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[84] Joan Walsh, "The Abu Ghuraib Files." As Walsh points out, the DOD sponsored investigations had practical and structural flaws. They were narrowly circumscribed in scope and did not investigate the accountability of OAG, civilian contractors, and above all, high military commanders. None of the ten official military investigations of the military conduct at Abu Ghuraib observed Seymour Hersh "has challenged the official Bush Administration line that there was no high-level policy of condoning of overlooking such abuse."—Seymour Hersh, Chain of Command. (London: Penguin Books, 2005), p. 369. For a detailed analysis, see "Getting to

In its ongoing investigation Salon obtained a DVD containing materials from the CID investigation report written by Special Agent James E. Seigmund, dated 6 June 2004. The materials include:

> A total of 1,325 images of suspected detainee abuse, 93 video files of suspected detainee abuse, 660 images of adult pornography, 546 images of suspected dead Iraqi detainees, 29 images of soldiers in simulated sexual acts, 20 images of a soldier with a Swastika drawn between his eyes, 37 images of Military Working dogs being used in abuse of detainees and 125 images of questionable acts.[85]

Up to this day, the U.S. officials publicly state "we do not torture" despite the overwhelming evidence showing the contrary. President Bush as well as officials from the Department of Defense, Department of Justice, and the White House prepared legal grounds for torturing prisoners during the interrogations as part of the "war on terror."[86] One of the official justifications for torturing detainees was derived from the official referral to prisoners at Guantanamo as "unlawful combatants," implying that the Geneva Conventions on the treatment of POWs (prisoners of war) do not apply to them.[87] "As I understand it," stated Donald Rumsfeld, "technically unlawful combatants do not have any rights under the Geneva Conventions."[88] President Bush issued Military Order #1 in November

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Ground Truth: Investigating U.S. Abuses in the 'War on Terror'," Human Rights First, September 2004.<http://action.humanrightsfirst.org/ct/Wp11111107J0/>. (Accessed: 1 April 2007)

[85] Mark Benjamin, "Salon Exclusive: Abu Ghuraib Files," Salon, 16 February 2006.<http://www.salon.com/news/feature/2006/02/16/abu_Ghuraib/>. (Accessed: 1 April 2007).

[86] Arsalan Jumaniyazov, *Imperial Roots of Abu Ghuraib Prison abuse*, a thesis submitted to the faculty of American studies in candidacy for the degree of Bachelor of Arts, Department of American Studies, Bishkek, Kyrgyzstan, April 2007.

[87] This practice is not new in American experience. In Vietnam, the U.S. officials disqualified the Vietnamese civilians detained by the U.S. forces under the Phoenix Program from the status of POW. Guenter Lewy, in his celebrated military history American In Vietnam, argued, after his seven-page long apologia for the Phoenix Program, that the "South Vietnamese civilians captured or detained by U.S. forces were . . . not covered by the fourth Geneva Conventions." Lewy's conclusion was based on the provision of the Convention stating that the Convention applies to those persons who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Lewy, of course, does not dwell on the obvious fact that South Vietnam *was* under occupation and that the United States *was* an Occupying Power. Guenter Lewy, *America in Vietnam*, (New York: Oxford University Press: 1978), p. 286

[88] Monica Whitlock, "Legal Limbo of Guantánamo's Prisoners," BBC Online, 16 May 2003. <http://news.bbc.co.uk/2/hi/americas/3034697.stm>. (Accessed: 1 April 2007). And "Regarding the Torture of Others," The New York Times Magazine, 23 May 2004.<http://www.nytimes.com/2004/05/23/magazine/23PRISONS.html?ex=1400644800&en=a2cb6ea6bd297c8f&ei=5007 &partner=USERLAND>. (Accessed: 1 April 2007).

2001 in which he granted himself the authority to detain indefinitely any non-U.S. citizen in any part of the world.[89] Given this authorization for the new harsh interrogation techniques, there is little surprise that Abu Ghuraib took place. Yet there is little surprise that the mistreatment of prisoners had started in Afghanistan.

Among the human rights violations in Afghanistan by the Coalition Forces documented by Human Rights Watch (HRW) are: indiscriminate and excessive force used during arrests, arbitrary or mistaken arrests and indefinite detention, mistreatment at Bagram airbase as well as other detention centers. There were incidents in which detainees were tortured to death. The mistreatment was so horrible and degrading that prisoner refused to talk about them. "We were treated absolutely terribly there. They did terrible things to us, things we'll never forget," one detainee said to HRW interviewer, "It was absolutely awful what they did. . . We cannot talk about it."[90] The detainees, according to the report, were blindfolded, hooded, and shackled after the arrests, and once at Baghram, stripped and photographed. Hundreds of detainees were taken to Guantánamo. Three months later, HRW released another report which stated that the abuse in Afghanistan was "systematic":

The U.S. military maintains some twenty detention facilities throughout Afghanistan. The main U.S. detention facility in Afghanistan is at the Bagram airbase, north of the capital Kabul. Other detention facilities in the country include bases in Kandahar, Jalalabad, and Asadabad. The U.S. Central Intelligence Agency (CIA) is also holding an unknown number of detainees, both at Bagram airbase and at other locations in Afghanistan, including Kabul.[91] Torture techniques were exported to Iraq not only from Guantanamo but also from Bagram. The abuse and torture became so routine that in response to the

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[89]Isabel Hilton, "The 800Lb. Gorilla in American Foreign Policy," The Guardian 28 July 2004.<http://www.guardian.co.uk/Columnists/Column/0, 5673,1270541,00.html>. (Accessed:1 April 2007).

[90] "Enduring Freedom: Abuses by U.S. Forces in Afghanistan," Human Rights Watch, March 2004, Vol. 16, No. 3(C). <http://www.hrw.org/>. (Accessed: 01 April 2007).

[91] The road to Abu Ghuraib, *Human Rights Watch*, june 2004, http://hrw.org/reports/2004/usa0604/, Last accessed on 01 April, 2007.

Red Cross documentation of psychological torture of detainees in U.S. detention centers, the military intelligence responded that the techniques were "part of the process"[92] The accounts of soldiers from the U.S. 82nd Airborne Division published by HRW show that Iraqis were tortured not only for extracting information, but also "stress relief" for the soldiers. "Alleged abuses," the report stated, "have taken place in locations all over Iraq, in both FOBs [Forward Operating Base] and centralized facilities, and have involved CIA agents, military interrogators, MP guards, and ordinary combat soldiers."[93] Another report by HRW published a year later based on firsthand accounts by military personnel did not leave any doubts that the abuse and torture of detainees by the U.S. forces have been systematic throughout Iraq before and after Abu Ghuraib prison scandal.[94]

Included in the documents are some new accounts of abuse related to the detainees' religious beliefs: Investigators wrapped a detainee's head in duct tape "because he would not stop quoting the Koran;" another agent said an interrogator bragged about making a detainee listen to "satanic black metal music for hours and hours." According to the same report, the interrogator later "dressed as a Catholic Priest and baptized the detainee in order to save him." In another incident observed by an FBI agent, a Marine captain squatted over the Koran during an interrogation of a Muslim prisoner, which the prisoner found extremely offensive.[95]

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[92] Mark Danner, "Torture and Truth," New York Review of Books, 10 June 2004.http://www.nybooks.com/articles/article-preview?article_id=17150. Last accessed on 01 April 2007.

[93] Leadership Failure, "Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division," Human Rights Watch, September 2005, Vol. 17, No.3(G).http://www.hrw.org/. Last accessed on 01 April,2007.

[94]No Blood No Foul, Human Rights Watch, July 2006, Vol 18, No.3(G), http://www.hrw.org/. Last accessed on 01 April, 2007.

[95] "FBI Inquiry Details Abuses Reported by Agents at Guantánamo," ACLU 3 January 2007. <http://www.aclu.org/safefree/torture/27816prs20070103.html>. (Accessed: 1 April 2007).

Conclusion

The Geneva conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict. The United States, it seems asserts the right to treat the detainees in any way it deems appropriate and unencumbered by international legal obligations. The United States has argued that granting the detainees POW status will interfere with effort to interrogate them and POW convention would impede the investigation and prosecution of suspected terrorist. They are of the view that Taliban fighters are not to be treated as POWs, however because they reportedly fail to meet international standards as lawful combatants and Al Qaeda remains outside the Geneva convention because it is not a state and not a party to the treaty. Al Qaeda is not in any respect like a state and lacks international legal personality. But UNHCR stance is that all combatants captured on the battlefield are entitled to be treated as POW, until an independent tribunal has determined otherwise. It seems an appropriate midway that those who commits war crimes should be punished but there crimes should not be used as an excuse to deprive others of the protection due POWs. It seems from the above discussion that POWs Controversy has persisted and intensified. A central assumption in the contemporary practice of torture is that the victims are guilty. The torture apparatus operates on the assumption that those who are brought in for torture are guerrillas, insurgents or terrorists who have committed and/or are about to commit dangerous crimes against states.

Chapter 3

The unlawful combatants

3.1 Introduction

International law has continued to grant the combatants' privilege to most participants even if one side is a state engaged in pure aggression and the other is engaged in self-defense. The equality of belligerents in the eyes of jus in bello, regardless of their relative merits on jus ad bellum grounds, remains a cardinal principle of the law of war. Without this form of the combatants' privilege, war would look very different to those who plan it, recruit for it, and participate in it.

The high profile debates that emerged in the wake of 9/11 about the status of a range of people detained by the United States have continued to bedevil courts and diplomats. At one level, the issue seemed to be one of choosing between legal alternatives: should the prisoners be viewed as alleged violators of criminal law or should they be viewed as participants in an armed conflict? In the former case, the detainees would be entitled to the entire apparatus of U.S. criminal procedure; in the later case, their treatment, especially their entitlement to POW status, would have to be examined under the international law of armed conflict. Yet from its inception, the debate did not focus on the alternatives between the two bodies of law, but rather, on a term put forward by the U.S. government that seemed designed to put many of the detainees beyond the reach of any law at all. The term "Unlawful combatants" united crime and combat in a manner that short-circuited the alternative between two bodies of law. By declaring that some detainees did not merit the protections of criminal law because of their combatant activities, and that they did not merit the protections of jus in bello due to the unlawful nature of their combat, the term seemed designed to establish a crude, general dichotomy between law and war, at least certain kinds of war. Indeed, in the way in which it was deployed by the U.S. government, it appeared to create a

category of right less persons- neither criminal suspects nor prisoners of war, committed to the caprice of un review able state power.[96]

3.2 Who are unlawful combatants?

In international armed conflicts, the term' combatants' denotes the right to participate directly in hostilities. As the Inter-American Commission has stated, "the combatant's privilege [...] is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives."[97] Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behavior would constitute a serious crime in peacetime. They can be prosecuted only for violations of IHL, in particular for war crimes. Once captured, combatants are entitled to prisoner of war status and benefits from the protection of the Third Geneva Convention. Combatants are lawful military targets. Generally speaking, members of the armed forces (other than medical personnel and chaplains) are combatants. The conditions for combatant prisoner of war status can be derived from Article 4 GC III and from Articles 43 and 44 AP I, which developed the said Article 4 for States parties to the Additional Protocol I.[98]

Generally speaking, it is illegal for ordinary people to kill other ordinary people. But the laws of war recognize that during an armed conflict, combatants on one side are supposed to try to kill combatants on the other side. If they are later captured, the opposing forces can detain them until the end of hostilities but can't try them for murder. They have "combatant immunity": If they killed opposing combatants, they were just doing their job.

What, then, is an "unlawful enemy combatant"? The Bush administration has

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[96] Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War. *Columbia Journal of Transnational Law* 2004, p 13

[97] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116 Doc, http://www.cidh.oas.org/. Last accessed on 29 September 2007.

[98] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

long been fond of tossing around the phrase, but until the 2006 military commissions law, it had zero legal meaning. The phrase arises out of the inappropriate conflation of two very different law-of-war concepts.

The first relates to the circumstances under which combatants can lose their combatant immunity. If a combatant kills an innocent civilian, for instance, it's a war crime, for which he can be tried. Loosely speaking, the phrase "unlawful enemy combatants" could refer to combatants who lose immunity by committing such crimes. But the administration conflated this with a different law-of-war concept, that of unprivileged belligerency. Under the Geneva Convention, combatants who fail to follow certain rules -- such as those requiring the wearing of uniforms -- are not entitled to be treated as prisoners of war if captured, a point the Bush administration has used to justify its decision not to grant POW status to detainees. But not wearing a uniform isn't necessarily a crime under the laws of war -- if it were many members of the U.S. Special Forces, who often operate out of uniform, would technically be war criminals, along with civilians who take up arms against an invading army.[99]

Whereas the terms 'combatant,' 'prisoner of war' and 'civilian' are generally used and defined in the treaties of IHL, the terms *'unlawful combatant'* and 'unprivileged combatant/belligerent' do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear. The terms 'unlawful combatant' and 'unprivileged belligerent' describe all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war when falling into the power of the enemy. This seems to be the most commonly shared understanding. It would include, for example, civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps – including those of organized resistance movements – not integrated in the regular armed forces but belonging

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[99] Rosa Brooks, At Gitmo, it all hinges on a word. Main news, Editorial Pages Desk, *Los Angeles Times*, June 8, 2007 Friday. Home Edition, Pg. 29. http://articles.latimes.com/2007/jun/08/opinion/oe-brooks8, Last accessed on 29 September, 2007.

to a party to the conflict, provided that they do not comply with the conditions of Article 4 A Para. 2 of GC III. Taking into account the wording of Article 4 GC IV, which refers to all persons not covered by the Geneva Conventions I to III, they would be protected persons covered by the Fourth Geneva Convention whenever they are in the hands of the enemy. That protection is supplemented by the fundamental guarantees contained in Article 75 AP I, which essentially reflect existing customary international law. Those persons who do not fulfill the nationality criteria of Article 4 would be protected by the fundamental guarantees contained in Article 75 AP I. Thus, any interpretation that 'unlawful combatants' or 'unprivileged belligerents' are outside the protection of IHL is unfounded. The fact that a person has unlawfully participated in hostilities is neither a criterion for excluding the application of the Fourth Geneva Convention – though it may be a reason for derogating from certain rights in accordance with Article 5 thereof –, nor for excluding the fundamental guarantees contained in Article 75 AP I.[100]

Misinterpretation of Article 4 of Geneva Convention relating to the POWs

According to the US, neither captured Taliban nor Al Qaeda are entitled to POW Status. While the Third Geneva Convention applies to the former, as the US recognizes that there was an armed conflict involving two parties: it and Afghanistan, they have forfeited their protection by violating humanitarian law and associating themselves with Al Qaeda, and further, through their failure to comply with the conditions of combatancy set out in Article 4 of the Third Convention. They are thus 'unlawful combatants'. The Third Geneva Convention does not apply to Al Qaeda, who are not state party to the Geneva Convention, and are also considered 'unlawful combatants'. This executive decision to consider all detainees as unlawful combatants, with no legal rights but who will be treated humanely, is supposed to settle the matter.[101]

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[100] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

[101] Avril McDonald, Defining the war on terror and the status of detainees: Comments on the presentation of Judge George Aldrich,

The members of the Taliban army captured during the war in Afghanistan indisputably belonged to the category outlined in Article 4A (3), in that they were "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power". The position of the US seems, on the contrary, to be based on the assumption that combatants under Article 4A (3) of the Third Geneva Convention must fulfill the conditions set forth in Article 4A (2) in order to enjoy POW status. Even conceding, for the sake of argument, that the conditions relating to what could be termed "voluntary militias" in Article 4A (2) apply to other categories of combatants, it is clear from the text of Article 4 that in any case, in order to deprive a prisoner of his POW status, it is necessary to prove that the individual personally has failed to respect the laws of war. The general determination that no Taliban prisoner is entitled to POW status because of the Taliban's "alliance" with a terrorist organization is thus based on a misinterpretation of Article 4. As for members of Al Qaeda captured in Afghanistan, they were not "members of the armed forces" of one of the belligerents. They could arguably fall into the second category outlined in Article 4A, in that they constituted a "voluntary militia", but as such they, unlike the Taliban, would have had to fulfill the conditions set out in Article 4A (2) in order to be considered prisoners of war.[102]

Article 4(A) also provides POW status to "organized resistance movements" in paragraph 2. The definition of these groups is also informed by the statist bias of the convention as a whole, though it further relaxes its governmental bias. Such forces must "*belong to*" a "party" to an "international armed conflict" as defined in Article 2. In other words, it "must be fighting on behalf" of a state. The difference between the phrases "armed forces of a party" (Para. 1) and armed groups "*belonging to a party*" (para.2) lies in the nature of the tie between the state and the armed groups. Paragraph 2 refers to "partisan" or independent forces" whose relationship to the state may consist merely of "affiliation" or a "*de facto* relationship." Yet the strength of the statist bias of the convention is

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http://www.icrc.org/web/Eng/siteeng0.nsf/htmlall/5P8AVK/$file/Avril%20McDonald-final.pdf. Last accessed 18/12/07.

[102] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross*, Volume 87 Number 857 March 2005.

such that a relationship to a state must indeed exist, even if to a state other than the national state of a resister. While paragraph 2 loosens the mandatory link to the state for "organized resistance movements," it also requires that such movements meet four criteria in order to be eligible fro POW status: (1) the existence of a command structure; (2) the wearing of a distinctive sign; (3) the open bearing of arms; and (4) compliance by the group with *jus in bello.* These criteria are not mentioned in relation to the provisions in paragraph 1 and 3 for "armed forces of" governments. Indeed, given the great importance of the term "armed forces" in the Article, it is striking that it nowhere provides a definition of such forces. While providing a strict set of defining criteria for groups who "belong to" a state in a "de facto" sense, it is silent on the definition of forces which are formally under the command of the government of a state.[103]

The debate in the wake of the U.S attack on Afghanistan in the fall of 2001 over entitlement to POW status of the Taliban centered on the question of whether four criteria required of "resistance movements" under paragraph 2 were nonetheless also applicable to "armed forces of" governments under paragraphs 1 and 3. Taliban's forces were clearly the "armed forces of" the government of Afghanistan, even though that government was not widely recognized, and thus came under paragraph 3. The U.S. government maintained that the Taliban failed to comply with the four criteria and, therefore, that none of its members were entitled to POW status. The critics of this position maintained that the criteria were not applicable to the "armed forces of" a government under paragraphs 1 and 3, but only to the kinds of groups described in paragraph 2. The critics position was based on the fact that paragraph 1 and 3 do not mention the four criteria. The critics argued that the silence of these provision about the four criteria demonstrate the treaty's intent not to require such compliance by the "armed forces of" a government. This position is espoused by most international lawyers and finds some support in the *travaux preparatoires.* [104]

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[103] Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 2004, p 43 44
[104] Ibid

The United States misinterprets GCP Article 4 by adhering to just the second provision of the same article. Are the Taliban soldiers not members of the armed forces of a Party to the conflict? Or, at least, are they not members of militias or volunteer corps forming part of those armed forces? It is only with respect to the second category of POWs that we come to the four conditions mentioned in Article 4 A (2) of GCP. It is theoretically possible that some members of Al Qaeda could be considered as fighting for Afghanistan or as agents of the Taliban, and should then be considered as affiliated to Afghanistan's armed forces and as involved in an international armed conflict, The Al Qaeda members who fought along side Taliban should also be considered as POWs as they have been arrested from the ongoing armed conflict between Afghanistan and United States and treating them as militias or volunteer corps forming part of such armed forces as mention in Article 4 A (1) of GCP.

Assuming the conflict is international, both the United States and Afghanistan, as signatories to the four Geneva Conventions of 1949, are bound to grant POW status to enemy combatants who qualify under GPW article 4. Members of the armed forces, including militias and volunteer corps serving as part of the armed forces, who are captured, are entitled to be treated as POWs. Members of other volunteer corps, militias, and organized resistance forces belonging to a party to the conflict are entitled to POW status only if the organization meets the four criteria in GPW article 4A(2). The regular armed forces of a state, even if it is a government or "authority" not recognized by the opposing party, need not necessarily satisfy the four criteria in order for their members to be entitled to POW status under the GPW art. 4A (2). However, members of regular armed forces may be denied POW rights if they are caught as spies or saboteurs behind enemy lines. Under this view, Taliban soldiers captured on the battlefield in Afghanistan are at least presumptively lawful combatants entitled to POW status.[105]

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[105] Jennifer Elsea, "*Treatment of "battlefield detainees" in the war on terrorism*," CRS Report for congress, Order Code RL 31367. Congressional Research Service, The Library of Congress, http://www.fas.org/crs/terror/RL31367.pdf, Last accessed on 08/08/2007.

3.3.1 *Legal Tests for Prisoner of War Status*

With respect to prisoner of war status, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) sets forth separate categories of persons who are entitled to prisoner of war status. The 1949 Convention's list of six separate categories involved a clear change of certain prior interpretations of coverage under the 1929 Convention. Under express terms of the treaty, only one category out of six contains criteria limiting prisoner of war status to those belonging to a group that carries arms openly, wears a fixed distinctive sign recognizable at a distance, and conducts operations generally in accordance with the law of war. Under GPW Article 4(A)(2), these limiting criteria expressly apply only to certain "militias or volunteer corps" or "organized resistance movements." They expressly do not apply to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" covered under 4(A)(1) or to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" covered under 4(A)(3).7 With respect to the armed forces of a party to the armed conflict in Afghanistan (such as those of the Taliban and the United States), the determinative criterion for prisoner of war status is membership. Thus, members of the armed forces of each party qualify as prisoners of war under GPW Article 4(A)(1), if not 4(A)(3), and the authoritative ICRC has expressly recognized combatant and POW status for all members of the armed forces of the Taliban. Moreover, POW status does not inhibit the ability to detain enemy POWs for the duration of an armed conflict, whether or not particular POWs can also be prosecuted for war crimes or other violations of international law. Indeed, prisoners of war subject to prosecution do not thereby lose their status as a prisoner of war. There is no need to change the laws of war in that regard.[106]

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[106] Jordan J. Paust, "There is no need to revise the laws of war in light of September 11th," *The American society of International Law*, Task force on Terrorism, November 2002.

***Distinction* Between the legal status of Criminals and Prisoners of War**

The key to this distinction is the sharp difference between the respective criteria for the justification and length of detention of the two kinds of prisoners. Criminals are sentenced to prison as a consequence of actions that they have individually committed in violation of criminal law. Domestic or international; the length of their imprisonment will depend on the theory of punishment or rehabilitation to which the sentencer subscribes. POW's by contrast, are detained until the "cessation of active hostilities."[107] Assuming the POW's have not committed any war crimes in violation of *jus in bello,* neither their detention nor its length depends on their individual acts or on their violations of any law. A prisoner of war need never have personally fired a gun at an adversary. Nor would the length of detention of a prisoner who had killed massive numbers of the adversary in battle. The purpose of the detention is to disable enemy combatants from participation in combat, not to punish or rehabilitate them.[108]

3.5 Determination of status by a competent tribunal.

When the prisoner-of-war status of a captured person is in doubt, the question of how to resolve the determination of status takes on a crucial significance, a realization not lost on the delegates at the Diplomatic Conference of Geneva in 1949 when negotiating the Third Geneva Convention. Accordingly, this Convention provides that where the prisoner- of-war status of a captured person who has committed a belligerent act is in doubt, their status shall be determined by a competent tribunal. The Convention does not, however, lay down the composition of the tribunal, or specify the due process rights of a person facing status determination procedures. The open-ended wording of the Third Geneva Convention's Article 5(2) begs the question of what exactly a competent tribunal consists of, and what judicial guarantees must be accorded to those who come

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[107] GPW, Article 118.
[108] Nathaniel Berman,"Privileging Combat? Contemporary Conflict and the Legal Construction of war," *Columbia Journal of Transnational Law* 2004, p 10.

before one. It also raises the question as to how doubt over prisoner-of-war status arises.[109]

Article 5 of the Convention states the following cautionary rule:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[110]

Given that provision, either the United States must maintain that no doubt could arise with respect to any Taliban prisoner, or it must preserve the option of a determination by a tribunal in the event that any doubt does arise concerning a group or an individual prisoner. In this connection, George H. Aldrich notes that the United States Army Field Manual on the Law of Land Warfare makes the following interpretation of Article 5 of the Convention:

> The foregoing provision applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or who has engaged in tile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.[111]

This interpretation clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts a right to be a POW. That is a point that U.S. was careful to state in Article 45, paragraph 1 of Protocol No. I when it was negotiated in the seventies and, it is now part of customary international law. In that connection, when the armed forces of countries that are Parties to the Geneva Protocol capture Taliban soldiers, they will obviously be

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[109] Yasmin Naqvi, "Doubtful prisoner of war status," *International Review of the Red Cross,* September,2002,Vol.84,N847, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf. Last accessed on 10th October, 2007.

110 Article 5, *Geneva Convention relative to the treatment of prisoners of War of August 12, 1949, (Geneva: ICRC, 2007*

[111] George H. Aldrich, "The Taliban, al Qaeda, and the determination of illegal combatants," Extract from "Humanitäres Völkerrecht", No 4/2002, a review published by the *German Red Cross* (www.drk.de) and the *,Institute for International Law of Peace and Armed Conflict*, in Bochum (www.ifhv.de). Last accessed on 19 September 2007.

required by Article 45, paragraph 1 to give them POW status unless and until a tribunal decides otherwise. This obligation might also prevent transfer of such *prisoners to the United States.*[112]

To be recognized as having prisoner-of-war status, a captured person has to fit within one of the six categories in Article 4 of GC III. Despite the careful wording of Article 4, in the confusion of battle the distinction between combatants and civilians may not always be apparent. This rule would seem to make clear that where there is doubt as to the prisoner-of-war status of a captured person, States Parties are required to have individual status determined by a formal mechanism. In the meantime, the captured person must be treated as if he or she is a prisoner of war.[113]

Under Article 5 of the third Geneva Convention, if "any doubt arise[s]" as to whether enemy combatants meet the criteria for POW status, the detaining power must grant detainees "the protection of the present convention until such time as their status has been determined by a competent tribunal." Moreover, Article 5 requires not only that the status of a combatant who falls into the hands of the enemy be determined by a competent tribunal, but also that it be assessed on a case-by- case basis. Generalized determination relating to the status of a group of detainees or of a whole category of enemy combatants therefore do not comply with the requirements of Article 5, in particular when such a determination is made by executive. Therefore, al Qaeda members captured in the theatre of military operations while fighting along side the armed forces of a belligerent in the conflict should have been considered POWs until their status had been determined by a competent tribunal. But even if a determination were made that a

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[112] Ibid.

[113] Yasmin Naqvi, "Doubtful prisoner of war status," *International Review of the Red Cross*, September,2002,Vol.84,N847, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf. Last accessed on 10th October, 2007

particular individual is not entitled to POW status, he or she would still enjoy some degree of protection under the Geneva system.[114]

While Article 5(2) of GC III was an important development in 1949 for the protection of people taking part in hostilities, the rule remained "rather imprecise and at an embryonic stage"[115]. The problems of legal recognition of combatants of guerrilla warfare highlighted the insufficiency of Article 5(2). Article 45 of Protocol I was designed to remedy this insufficiency. The objective was to establish procedures which were more likely to guarantee that prisoner-of-war status would be granted. In effect, the provision lists the cases in which doubt regarding the status of a combatant must give way to a presumption of prisoner-of-war status: (1) if he claims that status; (2) if he appears to be entitled to such status; and (3) if the Party on which he depends claims such status. Where doubt remains notwithstanding the said presumption, the question then goes to the competent tribunal. The series of presumptions in Protocol I are a development of Article 5(2) of GC III, but in contrast to the latter provision the burden of proof clearly lies with the captor. By implementing a system of presumptions, Protocol I reverses the burden of proof so that it is the competent tribunal which must provide evidence to the contrary every time the presumption exists and is contested.[116]

3.6 Persons captured abroad and outside the conflict (Afghanistan and Iraq)

Members of Al Qaeda, who have been captured outside the territory of Afghanistan, and with no connection to that armed conflict, should not be considered as 'unlawful combatants'. Since they are not involved in armed conflict, as that is normally understood, they cannot be considered as combatants,

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[114] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross*, Volume 87 Number 857 March 2005.

[115] Ibid

[116] Ibid

unlawful or otherwise, and international humanitarian law does not apply. They are persons suspected of crimes under national and international law. Members of Al Qaeda captured outside of Afghanistan and with no connection to that conflict cannot therefore be charged with a war crime by a Military Commission or any court, since, as indicated, their campaign against the US and the West cannot be characterized as an armed conflict, and neither can America's 'war on terror'.[117]

3.7 Can we grant the protected persons status to the unlawful combatants?

Persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves, in a case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. Nationals of a state which is not bound by the convention are not protected by it. Nationals of a neutral state, who finds themselves in the territory of a belligerent state, and nationals of a co-belligerent state, shall not be regarded as protected persons while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are.[118]

So can we grant the Al-Qaeda personnel the status of protected persons following their arrest in a conflict zone of which they are not nationals? At least those arrested on suspicion bases can be granted the protected persons status as most of them are the nationals of the state who are parties to the Geneva Conventions of 1949.

Article 33 of the GPW 4 says that "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

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[117] Avril McDonald, "Defining the war on terror and the status of detainees," Comments on the presentation of Judge George Aldrich, http://www.icrc.org/web/Eng/siteeng0.nsf/htmlall/5P8AVK/$file/Avril%20McDonald-final.pdf. Last accessed 18/12/07

[118] Article 4 Para 1 and 2, Geneva Convention Relative to the Protection of civilian persons in time of war of August 12, 1949.

Hans Peter Gasser writes:

> A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons. If they are not nationals of the adverse party to the conflict but citizens of third States, they keep the status of foreign nationals. Civilian detainees have to be treated according to the rules set out in the Fourth Geneva Convention. Civilian detainees suspected of having committed a serious crime can and must be put on trial. The Fourth Geneva Convention does not grant them any immunity from prosecution for acts of terrorism, but it does establish the obligation to grant them a fair trial.[119]

Civilians in occupied territory or the territory of a belligerent may be interned during war if necessary for reasons of security. The Fourth Geneva Convention (GC) protects civilians who fall into the hands of the enemy, providing protections similar to those afforded POWs under the GPW. Enemy civilians, that is, those civilians with the nationality of the opposing belligerent state, have the status of "protected person" under the GC, as long as that state is a party to the GC. Nationals of a neutral or co-belligerent states who fall into the hands of a belligerent state are not entitled to the status of "protected persons" as long as the state of which they are nationals has normal diplomatic representation with the state in whose hands they are. Presumably, these civilians would be protected through the diplomatic efforts of their home country and would not be exposed to the same vulnerabilities as are the citizens of the belligerent states themselves. However, Common Article 3 provides a set of minimum standards for all persons, whether or not they are "protected persons." Furthermore, part II of the GC applies universally without regard to the nationality of the civilians affected.

Civilians who participate in combat, unlike combatants, are not acting on behalf of a higher authority with whom peace can be negotiated; therefore, they are not immune from punishment for belligerent acts. Their conduct is dealt with according to the law of the criminal jurisdiction in which it occurred, which could mean a civil trial or trial by a military tribunal convened by an occupying power. The GC does not state that civilians who engage in combat thereby lose their protection under the Convention. They lose their protection as civilians in the

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[119] Hans Peter Gasser, "Acts of Terror, "Terrorism" and international humanitarian law," *International Review of the Red Cross*, (September 2002 VOL. 84, N 847), P 568.

sense that they may become lawful targets for the duration of their participation in combat, but their status as civilians does not change according to the Convention. Traditionally, such a person would be regarded as an "unlawful combatant."[120]

The official commentary to the Geneva conventions posits that there is a "general principle which is embodied in all four Geneva Conventions of 1949", namely that during an armed conflict or a military occupation:

"Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the third Convention, a civilian covered by the fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no 'intermediate status'; nobody in enemy hands can be outside the law."[121]

3.8 Relevant Case Law

In separate decisions on June 4th (2007), two military judges ruled that the special military commissions set up under a 2006 act had the power to try only "unlawful enemy combatants". The two defendants, Omar Khadr, a Canadian accused of killing an American soldier, and Salim Hamdan, Osama bin Laden's Yemeni-born former driver, had--like most other Guantánamo detainees--been categorized simply as "enemy combatants".

Under the Geneva Conventions, a combatant is deemed lawful and therefore entitled to prisoner-of-war status and protections if he is a member of either a regular government force or an organized militia, wearing a distinctive sign, carrying arms openly, and abiding by the rules of war. As such, he may refuse to give his captors any information save his name, rank and serial number, and, if charged, would be entitled to a trial by a normal court-martial.[122] Salim Ahmed

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[120] Jennifer Elsea, "*Treatment of "Battlefield Detainees" in the war on Terrorism*," CRS Report for Congress. Order Code RL31367. April 11 2002. http://www.fas.org/crs/terror/RL31367.pdf, Last accessed on 08/08/2007.

[121] O.Uhler and H. Coursier, *Geneva Convention relative to the protection of Civilian Persons in Time of War*, Commentary to Art.4, (Geneva: ICRC, 1950), 51.

[122] Another fine mess; Guantanamo Bay. *The Economist*, June 9, 2007 U.S. Edition

Hamadan, an Al-Qaeda suspect held at the facility for terrorist combatants at the U.S. military base in Guantanamo Bay, Cuba, challenged the government's right to try him by the military commissions established by president George W. Bush's November 13, 2001, order governing the detention, treatment, and trial of non-citizens in the war against terrorism. The Supreme Court ruled in Hamadan's favor on June 29, 2006, declaring that the commissions have to be explicitly authorized by Congress.[123]

In June 2006 the Supreme Court of the United States delivered its decision in Hamdan v. Rumsfeld.[124] Hamdan was captured by militia forces and turned over to the US military, and was later transported to Guantánamo Bay. Over a year later, the US president deemed him eligible for trial by military commission for then unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy to commit offences triable by military commission. Hamdan then proceeded to challenge before a US federal court the validity of the military commissions set out to try him. After winning before the district court and losing before the DC Circuit Court of Appeals, Hamadan's case finally came before the Supreme Court of the United States. The Court held that the military commissions as set up by the president violate common Article 3 of the four Geneva Conventions of 1949, to which the United States is a party and whose requirements are incorporated into US statutes, since these commissions do not provide to those accused before them the minimal judicial guarantees recognized as indispensable by civilized peoples. A plurality of the Court also held that conspiracy, with which Hamdan could have been lawfully charged, is not an offence against the law of war.[125]

In another same case the U.S. military judges for the Guantanamo war crimes tribunals has refused to reinstate the charges against a Canadian prisoner accused

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[123] James Jay Carafano, "The detention and trial of unlawful combatants," *The Heritage lectures*, No. 954, (Heritage Foundation reports: July 21, 2006).
[124] HamadanV.Rumsfeld,126S.Ct.2749(2006), http://www.law.harvard.edu/students/orgs/jzlpp/Vol30_No3_Dealyonline.pdf Last accessed on 25 December, 2007.
[125] Marko Milanovik, "Lessons for human rights and humanitarian law in the war on terror," Comparing Hamadan and Israeli targeted killings case, *International Review of the Red Cross*, Volume 89 Number 866 June 2007.

of killing a US soldier and wounding another in Afghanistan. Earlier the US Supreme Court said it would hear a challenge of the law that established the war crimes tribunals and stripped Guantanamo prisoners of their right to court review of their indefinite confinement.

Khadr, 21,[126] is accused of killing one soldier with a grenade and wounding another during a firefight at a suspected Al Qaeda compound in Afghanistan in 2002. A tribunal judge, Army Col. Peter Brownback, dismissed the murder and conspiracy charges against Khadr on June 4. He said he lacked jurisdiction to try him because Khadr had not been designated an "unlawful enemy combatant," as required under the 2006 law that authorized military tribunals for foreign terrorist suspects. [127]

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[126] United States of America V. Omar Ahmad Khadr, U.S. Supreme Court (Case No. 06-1196), http://www.jlc.org/files/briefs/OK%20BRIEF.Jan.18.FINAL.pdf. Last accessed 09 February, 2008.
[127] Daily Dawn, 01 July 2007.

Conclusion

The terms 'unlawful combatant' and 'unprivileged belligerent' describe all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war when falling into the power of the enemy. The laws of war recognize that during an armed conflict, combatants on one side are supposed to try to kill combatants on the other side. If they are later captured, the opposing forces can detain them until the end of hostilities but can't try them for murder. They have "combatant immunity": If they killed opposing combatants, they were just doing their job. The phrase "unlawful enemy combatants" arises out of the inappropriate conflation of two very different law-of-war concepts.

The first relates to the circumstances under which combatants can lose their combatant immunity. If a combatant kills an innocent civilian, for instance, it's a war crime, for which he can be tried. Loosely speaking, the phrase "unlawful enemy combatants" could refer to combatants who lose immunity by committing such crimes.

This has been conflated this with a different law-of-war concept, that of unprivileged belligerency. Under the Geneva Convention, combatants who fail to follow certain rules -- such as those requiring the wearing of uniforms -- are not entitled to be treated as prisoners of war if captured, a point the Bush administration has used to justify it's decision not to grant POW status to detainees. But not wearing a uniform isn't necessarily a crime under the laws of war -- if it were many members of the U.S. Special Forces, who often operate out of uniform, would technically be war criminals, along with civilians who take up arms against an invading army.[128]

Combatants cannot be prosecuted for lawful acts of war in the course of military

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[128] Rosa Brooks, "At Gitmo, it hinges on a word," *Los Angeles Times,* June 8, 2007 Friday, Home Edition. http://articles.latimes.com/2007/jun/08/opinion/oe-brooks8, Last accessed on 29 September,2007.

operations even if their behavior would constitute a serious crime in peacetime. They can be prosecuted only for violations of IHL, in particular for war crimes. Once captured, combatants are entitled to prisoner of war status and benefits from the protection of the Third Geneva Convention.

Whenever a question arises regarding the status of the prisoner of war, a tribunal is required to determine the status of that captive. This point has been clearly stated by GCP 111, Article 5 Para 2 and Additional Protocol 1, Article 45. So where there is doubt as to the prisoner-of-war status of a captured person, States Parties are required to have individual status determined by a formal mechanism. In the meantime, the captured person must be treated as if he or she is a prisoner of war. Hans Peter Gasser says that "A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons.

CHAPTER 4

Legal Perspectives or Legal black holes

4.1 Introduction

Thousands of individuals have been detained abroad in the context of the "war on terror", both during the armed conflict in Afghanistan and Iraq and as a result of transnational law-enforcement operations. The "global war on terror" waged by the United States and its allies after September 11 attacks transcends national borders. When the prisoner-of-war status of a captured person is in doubt, the question of how to resolve the determination of status takes on a crucial significance. The Third Geneva Convention provides that where the prisoner-of-war status of a captured person who has committed a belligerent act is in doubt, their status shall be determined by a competent tribunal.

Since the beginning of hostilities in Afghanistan and Iraq, thousands of individuals were taken prisoner by Coalition forces during the conflict in Afghanistan and Iraq. They were initially detained in the custody of Coalition forces or on US navy vessels in the region. Since then, the large majority of them have been handed over to the new Authorities in respective countries. However, some are still held in detention facilities run by Coalition forces and located within Afghanistan, Iraq and Pakistan. In numerous cases, they have been transferred to Guantanamo bay or to other detention facilities in undisclosed locations- so-called- "black sites"- outside the territory of the United States, and have been termed as Ghost detainees.

4.2 Doubtful prisoner of war status

The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention or GC III), generally regarded as part of the customary law of armed conflict, sets out, *inter alia*, two cardinal principles. The first is that a prisoner of war cannot be prosecuted and punished for the mere fact of having taken part in hostilities. The second is that prisoners of war must be given humane treatment from the time they fall into the power of the enemy

until their final release and repatriation. Prisoner-of-war status is therefore of utmost importance for a captured person in the hands of a hostile power in terms both of legal status and of treatment. If a person is not given combatant status, he may be tried for having committed a belligerent act. Where this criminal offence may be punished by capital punishment under the domestic jurisdiction, the lack of prisoner-of-war status may be a matter of life or death[129]

As Article 5(2) states, the doubt must be with regard to whether a captured person belongs to any of the six categories listed in Article 4 of GC III. But what does it mean to have a doubt and who should be having it? "Reasonable doubt" may be defined judicially as such doubt as would cause a reasonable person to hesitate before acting in a matter of importance. The *Commentary to GC III* is fairly unhelpful in explaining how "any doubt arises". It mentions only two examples of those to whom Article 5(2) would apply: deserters, and persons who accompany the armed forces and have lost their identity card. It does, however, make the point that "[t]he clarification contained in Article 4 should, of course, reduce the number of doubtful cases in any future conflict. It therefore seems to us that this provision should not be interpreted too restrictively". Given the instruction in the *Commentary* to interpret Article 4 of GC III broadly, it should be easy to raise a doubt that captured persons are *not* entitled to prisoner-of-war status. Conversely, it should be difficult to raise a doubt that a captured person is a prisoner of war. This means that States should not be able to unilaterally decide that no doubt has arisen for an entire group of captured persons who have taken part in hostilities. In fact, GC III has been interpreted by some commentators as creating a presumption that individuals apprehended in the war zone are prisoners of war. This quasi-presumption of prisoner-of-war status for those participating in hostilities has been adopted in some military manuals. For example, the 1992 Interim Law of Armed Conflict Manual of New Zealand states that "[a]s a

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[129]Yasmin Naqvi, "Doubtful prisoner of war status," *International Review of the Red Cross,*, September2002,Vol.84,N847, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf. Last accessed on 10th October, 2007.

practical matter, unless combatants as defined in Article 43 [of Protocol I] are actually captured while their arms are concealed, they will be entitled to prisoner-of-war status. In any event, status will be determined by a tribunal." Similarly, the Australian Defense Force Manual 1994 notes that "[i]n most cases, captured combatants are entitled to claim PW [prisoner- of-war] status."[130]

The interpretation of "a doubt arises" as occurring when a claim of prisoner-of-war status is made has also been adopted in some military manuals, notably the United States (US) 1997 Army Regulation dealing with prisoners of war, which requires the convening of a competent tribunal to determine the status "of any person not appearing to be entitled to prisoner of- war status" but who "asserts that he or she is entitled to treatment as a prisoner of war". Significantly, this interpretation is also consistent with the presumption of prisoner-of-war status in Article 45(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 1977 when a captured person "claims the status of prisoner of war" or if "the Party on which he depends claims such status on his behalf."[131]

4.3 Extra territorial detention in the war on terror.

"Detention abroad" may be very broadly defined as any deprivation of liberty of an individual against his or her will by agents acting outside the sovereign territory of the state on behalf of which they act. It also covers the exceptional situation where an individual is held by a third state at the request of, and under the effective control of, the agents of another state. Since 9/11, certain states have adopted a policy of detaining individuals abroad, while at the same time denying the applicability of the legal guarantees which, under both domestic and international law, are generally accepted as protecting persons deprived of their liberty. The position that, by keeping individuals detained during the "war on terror" outside the national territory of the state, State authorities can bypass

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[130] Yasmin Naqvi, "Doubtful prisoner of war status," International Review of the Red Cross, September,2002Vol.84,N847, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf. Last accessed on 10th October, 2007.

[131] Ibid

some or all of the guarantees and limits on state action enshrined in international humanitarian law (IHL) and / or in international human rights law is not justified.[132]

The number of people in detention abroad as part of the "war on terror", however, is not limited to those who have been taken prisoner during US – led military operations in Afghanistan and during the war in Iraq and subsequent military occupation by coalition forces. Since 11 September 2001, others have been arrested and detained in law enforcement operations carried out worldwide by the states engaged in the fight against international terrorism. Those captured by the US have in some cases been handed over to the competent authorities of the territorial state concerned; in numerous cases, however, they have been transferred to Guantanamo Bay or to other detention facilities in undisclosed locations outside the territory of the United States.[133]

With regard to the US, it seems clear that the choice of detaining individuals abroad is part of the "war on terror" is based, at least in part, on the assumption that by keeping them outside national territory, the military or the other agencies will not be restricted by standards of national (and international) legal protection in the same way as if they were held on national territory. This much is evident from a number of internal memoranda providing legal advice to the Bush Administration, which has consistently attempted to argue either that the United States is not bound by certain obligations, or that certain international obligations are simply not applicable to the new paradigm of the "war on terror", or that the obligations in questions are not applicable to the agents of the United States when acting abroad.[134]

George Bush chose the American naval base in Cuba as the detention centre for those picked up in his war on terror because officials believed--falsely as it turned out--Guantánamo was beyond the reach of domestic and international law. If the detainees had been held on American soil, they could have claimed the same

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[132] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross*, Volume 87 Number 857 March 2005.
[133] Ibid.
[134] Ibid.

rights as ordinary American citizens, including a right to due process, to apply for asylum and to sue the American government for any alleged wrongs. From the outset, the 775 or so men and boys (some as young as 13) sent by Mr. Bush to Guantánamo were branded as guilty. Donald Rumsfeld, the former defense secretary, described them as "hard-core, well-trained terrorists" who, if released, would simply "return to the fight and continue to kill innocent men, women and children". The Pentagon says that all were "caught in the battlefield". But many were given to the Americans by Afghan bounty-seekers; others were seized as far away as Bosnia and Zambia. Meanwhile, dozens, perhaps hundreds, of detainees are apparently to be left to rot in their cages--if not in Guantánamo, which Mr Bush says he wants to close--then somewhere else. America has also engaged in so-called "extraordinary rendition"--the abduction of suspected terrorists to face not justice, but harsh interrogation, perhaps torture, in a third country. Up to 100 nameless "high-value" suspects are believed to have been seized by CIA agents and then transferred to secret jails, some never to resurface. Around 15 have recently been transferred to Guantánamo, where they may or may not face trial. But most of the detainees remaining at the camp may never be charged or tried. The Pentagon says it hopes eventually to put up to 80 detainees on trial for war crimes by special military commissions. Even if acquitted, they may still be held as enemy combatants for the rest of the "war on terror".[135]

Belmarsh prison in London, where most terror suspects were held, was dubbed "Britain's Guantánamo"--a bit unfairly. Britain never claimed to be in the midst of a war or to be holding "unlawful enemy combatants" with no legal rights. Its foreign detainees, totaling no more than 18, always had access to a lawyer and could challenge their detention before an independent tribunal, though they were not allowed to see classified evidence against them. The government said they were not being held indefinitely, just awaiting deportation. But as they could not be sent to their own countries (because they might be tortured), and no other state wanted them, the effect was the same.

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[135] The stuff of nightmares; Civil liberties: detention without trial. *The Economist,* October 6, 2007, U.S. Edition.

In December 2004 the House of Lords, Britain's highest court, judged this system to be incompatible with the European Convention. For Lord Scott, one of the Law Lords involved, indefinite detention on undisclosed grounds was "the stuff of nightmares", reminiscent of a Stalinist regime. The law was duly scrapped. But it was replaced by new powers allowing the home secretary (not a judge) to impose an indefinitely renewable "control order"--including electronic tagging, a ban on phone and internet use, and strict curfews amounting at times to virtual house arrest--on any suspected terrorist, British or foreign. [136]

4.3.1 Relevant case law

In *Abu Ali* v. *Ashcroft*[137] a US court has taken a huge step towards holding the executive accountable in relation to the detention of persons abroad by third States on behalf of the US. The judge ruled that, in principle, the US courts have jurisdiction to entertain a petition for *habeas corpus* by an individual detained by a foreign government where there is *prima facie* un rebutted evidence that he is in the "constructive custody" of the US, in that, *inter alia*, agencies of the US had "initiated" his arrest abroad, US officials had been involved throughout his detention and in his interrogation abroad, and the foreign State would release the individual into the custody of US officials if so requested. In rejecting the argument of the executive that *habeas corpus* was not available on the sole basis that the individual was detained by a foreign State, the judge observed:

> The full contours of the position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny; to arrest a citizen of the United States through the intermediary of a foreign ally and ask the ally to hold the citizen at a foreign location indefinitely at the direction of the United States; or even to deliver American citizens to foreign governments through the use of torture (...). This Court simply cannot agree that under our constitutional system of government the executive retains such power

[136] The stuff of nightmares; Civil liberties: detention without trial. *The Economist,* October 6, 2007, U.S. Edition.

[137] Civil action No 051-2374 (RMU) District Court of Columbia (U.S.A), 350 F.supp.2d 28 (D.D.C.2004), http://www.oyez.org/cases/ Last accessed on 15 October, 2007.

free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated."[138]

4.4 Indefinite detention without trial in the war on terror

Hauled before a military tribunal at the American naval base in Guantánamo Bay, the detainee, picked up in Afghanistan, asked why he was being held. For associating with a member of al-Qaeda, he was told. Give me his name, the detainee demanded. The tribunal's president said he didn't know it. Nor did any of the tribunal's other members. "How can I respond to this?" the detainee cried before being taken back to his cell to continue his detention, perhaps for the rest of his life. This Kafkaesque story was related this summer by Arlen Specter, the ranking Republican on the Senate Judiciary Committee, in support of a bill he and Patrick Leahy, the committee's Democratic chairman, were co-sponsoring to restore *habeas corpus* charge, without access to a lawyer or any indication of when, if ever, they might be released. The Pentagon has said they could be held for the duration of the (open-ended) "global war on terror".[139]

Freedom from arbitrary arrest and detention, coupled with the right to challenge it in an independent court--known as *habeas corpus* in common-law countries like Britain and America--are among the civilized world's most sacred and ancient liberties, going back to medieval times. But these days, there is more talk of pre-emption and "preventive detention ", even in democracies. "You can't allow somebody to commit the crime before you detain them," said Condoleezza Rice, the secretary of state, when asked about America's secret "renditions" programme for suspected terrorists.

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[138] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross*, Volume 87 Number 857 March 2005.
[139]The stuff of nightmares; Civil liberties: detention without trial. *The Economist,* October 6, 2007, U.S. Edition.

Under the American constitution, *habeas corpus* may not be suspended except when "in cases of rebellion or invasion, the public safety may require it". And only very rarely has it been suspended. Abraham Lincoln did so during the civil war, but was rebuked by the courts. And the internment of 120,000 people of Japanese descent, two-thirds of them American citizens, in the Second World War, was lawful but is now viewed as a shameful misdeed.

Britain likewise suspended *habeas corpus* in the second World War to allow it to detain around 1,000 suspected fascists. All were released after three years. During the "troubles" in Northern Ireland in the early 1970s, nearly 2,000 suspected extremists were interned. But the practice was scrapped in 1975, as it was clearly fuelling support for terrorism--just as Guantánamo is doing now. Mr. Bush claims that, under international law, parties to an armed conflict may hold enemy combatants "for the duration of active hostilities". This is correct. Nor is "unlawful enemy combatants" a term he invented. In the Geneva Conventions, it describes a foe who is not a member of official armed forces or an organized resistance movement, does not carry arms openly, wears no uniform or other distinctive sign, and refuses to heed the laws of war. As such, he fails to qualify for the rights of a prisoner of war. But, contrary to what the administration first claimed, he is entitled to some protections, including humane treatment and, if charged, to a fair trial by a "regularly constituted court". But is America's war on terror a real war in the legal sense? If not, then the detainees should be treated as ordinary criminal suspects. This is the path that most European countries have chosen. Even if it could be deemed a real war, it is clearly unlike an ordinary state conflict: it has neither a definable end nor even an identifiable enemy with whom to sue for peace. It could last for decades.

Tony Blair has already announced plans for a new anti-terrorist law--Britain's fifth since 2000. Among his proposals is an extension of the maximum time a suspected terrorist can be held without charge from 28 days, already the longest in the West, to 56 days. Most democracies allow no more than three days. France permits four, Greece six. But no leader of a Western democracy has obtained a completely free hand in detaining people. America has seen a tug of war between the government and the courts, with many rounds. In June 2004, the Supreme

Court ruled that *habeas corpus* remained available to everyone detained on American soil, unless explicitly suspended. The case involved Yaser Esam Hamdi, an American citizen being held as an unlawful enemy combatant on a naval brig in Virginia. Two years later, in a case involving a Guantánamo detainee, Salim Hamdan, the Supreme Court said the basic protections afforded to all wartime detainees under the Geneva Conventions applied to everyone, even to unlawful enemy combatants outside America.

The court also ruled that Mr. Bush had exceeded his authority in setting up, without congressional approval, special military commissions to try some of the Guantánamo detainees. In response, the president pushed through the 2006 Military Commissions Act giving him just such authority. That law also stripped Guantánamo detainees of any vestige of *habeas corpus* rights, with retroactive effect. This seemed to dash the hopes of hundreds of Guantánamo detainees with challenges pending before American civilian courts. In April, that view appeared to be confirmed when the Supreme Court turned down, without comment, a *habeas corpus* petition from the above-mentioned Mr. Hamdan.[140]

4. 5 The Issue of 'Ghost Detainees' and black sites

It has been reported in various media that certain persons deprived of their liberty have been detained in undisclosed locations for interrogation for extended periods of time without notifying the ICRC or granting access to the ICRC. Under the Third and Fourth Geneva Conventions, parties to an international armed conflict are obliged to register and notify to the ICRC any prisoner of war and detained or interned civilian. This obligation is of key importance because it allows their families to be informed of their fate and makes it possible for the ICRC to individually follow persons deprived of their liberty in order to prevent their disappearance. Article 126 GC III and Article 143 GC IV oblige States to give permission to representatives of the ICRC to go to all places where prisoners of war or persons protected under the Fourth Geneva Convention may be,

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[140] The stuff of nightmares; Civil liberties: detention without trial. *The Economist* October 6, 2007, U.S. Edition.

particularly to places of internment, imprisonment, detention and labor. ICRC delegates shall also have access to all premises occupied by prisoners of war or protected persons under the Fourth Geneva Convention. They shall be able to interview the prisoners or persons protected under the Fourth Geneva Convention without witnesses, either personally or through an interpreter.

The Geneva Conventions allow for ICRC visits to detainees to be delayed – for example, under Article 143 Para. 3 GC IV, ICRC access to a civilian internee may not be prohibited except "for reasons of imperative military necessity, and then only as an exceptional and temporary measure."152 The reference to "imperative military necessity" most probably indicates that the drafters primarily had in mind particular battlefield constraints due to military operations, for example if ongoing fighting prevents access to detention facilities. This postponement is, however, not foreseen for the notification of a detainee to the ICRC, which should be done "immediately" and "by the most rapid means" (Article 137 GC IV). Parallel articles are Article 126 GC III on access delays to prisoners of war and Article 122 GC III on notification. It should be kept in mind that the Geneva Conventions represent a carefully crafted compromise between the security needs of States and the obligations to protect the lives and dignity of human beings including those held in detention. Clearly, notifying a detainee to the ICRC in no way presents an obstacle to interrogating him[141]

4.5.1 Unlawful rendition

One method by which the administration made use of torture and other ill treatment to obtain information from detainees in the ''war on terror'' was to render (or transfer) them to other states, including the person's home country, for interrogation. Unlike extradition, which is normally a treaty-based process that may entail provisions to ensure the protection of the rights of the person being transferred for criminal prosecution, rendition is typically ''off the books''. The term ''extraordinary rendition'' had been used in the context of the A ´ lvarez

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[141] Knut Dormann and Laurent Colassis, "International Humanitarian Law in the Iraq conflict," http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/Iraq-legal-article 31122004/$File/IHL%20in%20Iraq%20conflict.pdf. Last accessed on 29 September 2007.

Machaı´n case from the 1990s with respect to the controversial practice of abducting persons abroad to prosecute them at home – so-called renditions to justice. Post-9/11, the term came to be applied to cases of renditions from justice, where persons would be sent without legal safeguards to another country that had no intention of fairly prosecuting them. The very nature of these US renditions is such that their number is not – and probably cannot be – known. Several cases of alleged rendition to torture have been widely reported, most notably those of Maher Arar, a Syrian-Canadian national who was picked up by US authorities while in transit in 2002 and sent to Syria, where he was brutally treated for nearly a year, and Khaled el-Masri, a German citizen of Lebanese descent, who alleged being picked up in Macedonia in 2003 and sent to a CIA detention facility in Afghanistan, where he was mistreated. Article 3 of the Convention against Torture provides that no state "shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Article 3 adds that for the purpose of making this determination, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". Despite cases of evident abuse, the Bush administration continues to assert that it may lawfully send terrorism suspects to states that regularly engage in torture so long as it has obtained "diplomatic assurances" – promises from the receiving state that it will treat the detainee humanely. These promises cannot be enforced and neither state has an incentive in uncovering abuse, so there is little likelihood that diplomatic assurances provide protection to the individual so transferred.[142]

4.6 Legal controversy in transnational law enforcement operation

The "global war on terror" waged by the United States and its allies after the attacks of 11 September by definition transcends national borders. The very nature of the "enemy" in this so called "war" implies that states are required to

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[142] James Ross, "Black letter abuse: the US legal response to torture since 9/11," *International Review of the Red Cross*, Volume 89 No 867 September 2007.

take action against international terrorist organizations not only within their territory, but also often outside their national borders, in areas subject to the territorial sovereignty of other states. Whilst in the past most anti- terrorist actions had the character of internal law enforcement operations conducted by governments with in their own territory, after 11 September most of the operations in the "war on terror" have been carried out outside the national borders of the state spearheading the campaign, often – but not always – with the consent and cooperation of the state exercising sovereign authority over the area where the operations are taking place. Owning to the extraterritorial character of these operations, in many cases persons captured have been detained by armed forces or non–military law enforcement agencies operating outside their national territory. [143]

The Geneva Conventions and their Additional Protocols of 1977 have laid down a number of measures and procedures to ensure compliance with their provisions. In particular, serious violations of the more important provisions are international crimes — "grave breaches" in the words of the Geneva Conventions — and all States parties have jurisdiction to prosecute offenders (universal jurisdiction). Acts of terrorism are grave breaches of international humanitarian law. Moreover, the Geneva Conventions do not exclude action by third States with a view to responding to grave breaches or preventing further violations, especially if the State concerned does not take appropriate action itself. Whether such third-party involvement includes the right to use force is not a question for international humanitarian law but for the law of the UN Charter.[144]

Like humanitarian operations, the recent wave of terrorism and counter-terrorism high lights the difficulty of the war/not-war distinction; it also brings into focus the difficulty of applying the distinctions among different categories of armed conflict. The UN Security Council considered the 9/11 attacks as engaging *jus ad bellum* rights. In its resolution of September 12, 2001, the council "[r]ecogniz[ed]

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[143] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross,* Volume 87 Number 857 March 2005.
[144] Hans-Peter Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of third states and the United Nations," *The British Institute of International and Comparative Law,* (London: Hazel Fox and Michael A. Meyer (eds), 1993), 15-49.

the inherent right of individual and collective self-defense," a right that, under the Charter, is only applicable in response to an "armed attack." It also referred to terrorism as a "threat to international peace and security," which would permit the Council to take military action against it. Nonetheless, despite the innovation of the Security Council's apparent interpretation of the attacks' *jus ad bellum* implications, they posed difficult challenges to the *jus in bello* rubrics. The attacks didn't meet the test for "international armed conflict" because they were not inter-state attacks. Nor would Al-Qaeda meet the traditional test for "belligerency status," since it had not established a government over a relatively stable territory. Yet, neither did the attacks seem to fit within the rubric of "non international armed conflicts." It would be quiet a stretch to say that they fell within the Geneva Conventions' Article 3 category of conflicts "not of international character occurring within the territory of one of the High Contracting parties." The attacks seemed too trans-border in nature to be non-international, but also too non-international in nature (and not even proto-inter-state) to be international in the traditional sense.[145]

Of course, the subsequent war between the United States and the Taliban merited the label "international armed conflict" by all reasonable definitions, at least as long as the Taliban remained the *de facto* government of Afghanistan. Yet, the world wide conflict between Al-Qaeda and the United States, ongoing for at least a decade, is far more elusive. It would seem to fit the far reaching definition of armed conflict given by the International Criminal Tribunal for Yugoslavia – "resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups.... Or, rather, it would meet that definition provided that the word "protracted" includes a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years – and provided that such a discontinuous conflict is not disqualified as an armed conflict by describing it as "sporadic" This quality of a discontinuous, yet protracted, conflict, ill suited to the traditional categories, makes it akin to anti –occupation and anti-colonial

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[145] Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 2004, p 32

struggles. One could attempt to refuse this problem by categorizing Al-Qaeda" attacks as purely criminal and the response as law enforcement activities that should be closely disciplined by domestic civil liberties law and international human rights law. This categorization would, however, defy the way all parties to the struggle conduct and define it. It would also take one of the key armed conflicts of our time, conducted by military means, out of the jurisdiction of the laws of war. No matter which body of law one chooses, to place this conflict within its sole jurisdiction seems to expand its conceptual framework beyond reasonable bounds. It is the discontinuous quality of the war on terror that makes it akin to the confrontation with Iraq that has persisted for over fourteen years- and that has continually shifted back and forth between exceptional, war like activities and normalized, ongoing regulation.[146]

4.7 The principle of non-refoulement

The principle of non –refoulement is expressly stated in several instruments for the protection of human rights and is generally considered to be a rule of international customary law, binding on all states whether or not they have acceded to any of the treaties governing international refugee law and international human rights law. In this scenario a state may be considered responsible for a breach of its obligations under international human rights law, even when the actual violation of an individual's fundamental rights takes place outside its national territory and under the jurisdiction of a third state. The main corollary of this principle is that a state will violate its international obligations if it hands over a person to another state where there are reasonable grounds to believe that there is, in the formulation of the European Court, a "well-founded fear" or a "real risk" that he or she will suffer a violation of his or her fundamental rights in the receiving state. The list of fundamental rights whose potential violation precludes rendition includes at least the right not to be subjected to torture or cruel, inhuman or degrading treatment, basic fair trials, and

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[146]s Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 2004, p 32

the right to life and physical integrity. The risk of being subjected to the death penalty has also in certain cases provided a bar to extradition. [147]

This principle applies to every case in which an individual subjected to the jurisdiction of the state (whether or not within its territory) is transferred from its jurisdiction. The formal characterization of the act through which the individual is actually transferred to the jurisdiction of another state is with out relevance for the applicability of the principle of non-refoulement, as that principle applies equally to extradition, deportation, expulsion of illegal immigrants and irregular renditions. Furthermore, the principle of non-refoulement applies to every person, whatever his or her past crimes or the danger he or she is perceived to pose to the state in the custody of which he or she is held. It should also be emphasized that the prohibition of refoulement not only prohibits states to surrender individuals under their jurisdiction to states where there is a substantial risk that they will be subjected to violation of their fundamental rights, but also prohibits their surrender to countries which are likely, in turn, to surrender them to states where their fundamental rights may be breached. Lastly a state cannot avoid its human rights obligations when transferring individuals who are in its custody to another state, even if they are not and never have been held on its national territory. [148]

4.8 Which rules apply to the treatment of the victims of war on terror?

The purpose of international humanitarian law is to protect and assist victims of armed conflict. The 1949 Geneva Conventions and the other IHL treaties do not provide essential or indispensable tools for the fight against terrorism. International humanitarian law cannot eradicate terrorism, among other things because terrorism has multiple and complex causes.

Only civil society can attain that goal by concerted effort and patient action at home and abroad. Conflicts of a political nature must be settled by political means, in such a way as to open the door to more justice for all. It must become

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[147] Silvia Borelli, "Casting light on the legal black hole: International law and detention abroad in the "war on terror," *International Review of the Red Cross*, Volume 87 Number 857 March 2005
[148] Ibid.

clear to every player on the domestic and international scene that recourse to indiscriminate violence is illegal and reprehensible – and ultimately useless. Full respect for international humanitarian law in counterterrorist operations is a positive contribution to the eradication of terrorism. No law is perfect and immutable, certainly not international humanitarian law, which has to adapt to changes in the conduct of armed conflict. Constant evaluation is necessary to determine whether the rules are adequate or not, and all constructive proposals for amendments must be taken seriously. It is remarkable that no ideas have yet been put forward on how to strengthen the Geneva Conventions or the Additional Protocols and increase their effectiveness in the fight against terrorism.[149]

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[149] Hans-Peter Gasser, "Acts of terror, "Terrorism" and international humanitarian law," *International Review of the Red Cross*, September 2002 Vol. 84 No 847.

Conclusion

It is now over seven years since the first detainees were taken into custody and held in violation of their rights and international law. Declarations of violations of international law may be of little comfort to all those, whose rights have been violated over this period. However, when what is at stake is the prevention of violations of norms and values as fundamentally important as those implicated in the detention of individuals abroad in the "war on terror", even the merest glimmer of light shed on the "legal black hole" is to be welcomed.

If a person or a group of persons has taken part in hostilities but does not appear to fit into the Article 4 categories of combatants under the third Geneva Convention, States should consider that a doubt has arisen and the Article 5(2) rule should apply. Persons who are not held as prisoners of war, or whose status has not yet been determined, and who are to be tried by the detaining power for offences arising out of the hostilities, have the right to assert their right to prisoner-of-war status and to have that question adjudicated before a judicial tribunal or at least a tribunal guaranteeing all the fundamental fair trial rights. Moreover detention abroad cannot confine the provisions of the Geneva Conventions to be applied to the detainees, and the indefinite detention of the prisoners further escalates the issue.

CONCLUSION AND SUGGESTION

International humanitarian law recognizes two different categories of armed conflict; International armed conflicts, and non-international (or internal) armed conflicts (usually known as civil wars). When and where the "war on terror" manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. The type of armed conflict depends upon the status of the parties to the conflict and the nature of the hostilities. The status and rights of individuals depends, in turn, on the relationship of those individuals to the parties to the conflict.

The Geneva Conventions apply in full to "all cases of declared war or of any other armed conflict which may arise between two or more of the high Contracting Parties, even if the state of war is not recognized by one of them, or in "any cases of partial or total occupation of the territory of a High Contracting Party. International Law has continued to grant the combatants' privilege to most participants even if one side is a state engaged in pure aggression and the other is engaged in self-defense. The equality of belligerents in the eyes of *jus in bello*, regardless of their relative merits on *jus ad bellum* grounds, remains a cardinal principal of the law of war.

Terrorism is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted "fight against terrorism" rather than a "war on terrorism." It is however indisputable that with in the wider context of "war on terror" two international armed conflicts stricto sensu have taken place, namely the conflict in Afghanistan and Iraq. International terrorism might be considered to amount to armed conflict for the purposes of the law of war only if a foreign government is involved.

War on terror is a new paradigm in armed conflict. The rules of IHL apply equally to all parties to an armed conflict whether it is an aggressor or acting in self defense or is a state or rebel group. Thus the IHL rules also apply to the armed conflict named as "war on terror". Humanitarian Law applies in and to armed to armed conflict. Thus, terrorism, and by necessary implications, counter-terrorism, are subject to humanitarian law when, and only when, those activities rise to the level of armed conflict. The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict. The United States, it seems asserts the right to treat the detainees in any way it deems appropriate and unencumbered by international legal obligations. The United States has argued that granting the detainees POW status will interfere with efforts to interrogate them and POW convention would impede the investigation and prosecution of suspected terrorist.

A central assumption in the contemporary practice of torture is that the victims are guilty. The torture apparatus operates on the assumption that those who are brought in for torture are guerrillas, insurgents or terrorists who have committed and/or about to commit dangerous crimes against states. The technique and practices revealed in Abu Ghuraib had migrated form Guantanamo, Bagram and Kandahar and that they were authorized or justified at various points by high ranking officials in Pentagon and White House.

United States is of the view that Taliban fighters are not to be treated as POWs, however because they repeatedly fail to meet international standards as lawful combatants and Al Qaeda remains outside the Geneva Conventions because it is not a state and not a party to the treaty. Al Qaeda is not in any respect like a state and lacks international legal personality. But UNHCR (United Nation High Commissioner on Human Rights) stance is that all combatants captured on the battlefield are entitled to be treated as POW, until an independent tribunal has determined otherwise. It seems an appropriate midway that those who commits war crimes should be punished but there crimes should not be used as an excuse to deprive others of the protection due POWs.

The laws of war recognize that during an armed conflict, combatants on one side are supposed to try to kill combatant on the other side .if they are later captured,

the opposing force can detain them until the end of hostilities but cannot try them for murder. They have "combatant immunity": if they killed opposing combatants, they were just doing their job. The phrase "Unlawful Enemy Combatants" arises out of the inappropriate conflation of two very different law-of-war concepts. The first relates to the circumstances under which combatants can lose their combatant immunity. If a combatant kills an innocent civilian, for instance, it's a war crime, for which he can be tried. Loosely speaking, the phrase "unlawful enemy combatants" could refer to combatants who lose immunity by committing such crimes. This has been conflated with a different law-of-war concept, that of unprivileged belligerency. Under the Geneva Convention, combatants who fail to follow certain rules -- such as those requiring the wearing of uniforms -- are not entitled to be treated as prisoners of war if captured, a point the Bush administration has used to justify it's decision not to grant POW status to detainees. But not wearing a uniform isn't necessarily a crime under the laws of war -- if it were many members of the U.S. Special Forces, who often operate out of uniform, would technically be war criminals, along with civilians who take up arms against an invading army.

Combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behavior would constitute a serious crime in peacetime. They can be prosecuted only for violations of IHL, in particular for war crimes. Once captured, combatants are entitled to prisoner of war status and benefits from the protection of the Third Geneva Convention. Whenever a question arises regarding the status of the prisoner of war, a tribunal is required to determine the status of that captive. This point has been clearly stated by GCP 111, Article 5 Para 2 and Additional Protocol 1, Article 45. So where there is doubt as to the prisoner-of-war status of a captured person, States Parties are required to have individual status determined by a formal mechanism. In the meantime, the captured person must be treated as if he or she is a prisoner of war. Hans Peter Gasser says that "A denial of POW status to captured enemy "combatants" does not make them legal pariahs. Such persons have to be considered as civilians. They fall within the Fourth Geneva Convention on the protection, in wartime, of civilian persons.

If a person or a group of persons has taken part in hostilities but does not appear to fit into the Article 4 categories of combatants under the third Geneva Convention, States should consider that a doubt has arisen and the Article 5(2) rule should apply. Persons who are not held as prisoners of war, or whose status has not yet been determined, and who are to be tried by the detaining power for offences arising out of the hostilities, have the right to assert their right to prisoner-of-war status and to have that question adjudicated before a judicial tribunal or at least a tribunal guaranteeing all the fundamental fair trial rights. Moreover detention abroad cannot confine the provisions of the Geneva Conventions to be applied to the detainees, and the indefinite detention of the prisoners further escalates the issue.

George Bush chose the American naval base in Cuba as the detention centre for those picked up in his war on terror because officials believed—falsely as it turned out to be—Guantanamo was beyond the reach of Domestic and International Law. The position that, by keeping individuals detained during the "war on terror" outside the national territory of the state, state authorities can bypass some or all of the guarantees and limits on state action enshrined in International Humanitarian Law (IHL) and/or in International Human Rights law is not justified.

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

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