THE STATUS OF THE AL QAEDA AND TALIBAN DETAINNEES AT GUANTANAMO BAY

by

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Dear Lord, I have nothing except what you give me, and can do nothing except what you enable me to do.

This thesis is dedicated to my dear mother who always encouraged me to study. To my lovely wife Yasmine, whose linguistic proficiency and insightful inputs I found invaluable. To my children, Kimberley and Kyle, for putting up with me.

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# TABLE OF CONTENTS

**SUMMARY** ................................................................................................................................. iii

**CHAPTER 1: INTRODUCTION** ................................................................................................. 1

**CHAPTER 2: HISTORICAL DEVELOPMENT OF THE LAW RELATING TO PRISONERS OF WAR** ............................................................................................................. 3

2.1 Introduction............................................................................................................................. 3
2.2 The position prior to the Second World War........................................................................... 6
2.3 The position after the Second World War.............................................................................. 11
2.4 Conclusion.............................................................................................................................. 14

**CHAPTER 3: THE LAWS OF WAR** ....................................................................................... 17

3.1 Introduction............................................................................................................................. 17
3.2 The Afghanistan Conflict: International or Non-International............................................ 18
3.3 The Difference between a Lawful Combatant and Unlawful Combatant............................. 23
3.4 Conclusion.............................................................................................................................. 31

**CHAPTER 4: THE APPLICABILITY OF ARTICLE 4(A)(2) OF THE THIRD GENEVA CONVENTION TO THE GUANTANAMO DETAINES** .................................................................................................................. 33

4.1 Introduction............................................................................................................................. 33
4.2 Entitlement to Prisoner of War Status.................................................................................... 34
4.3 Members of the Armed Forces............................................................................................... 34
4.4 The Determination of the Status of the Guantanamo Bay Detainees:
    Article 5 of the Third Geneva Convention........................................................................... 45
4.5 The Humane Treatment of the Guantanamo Bay Detainees.................................................. 51
4.6 Conclusion.............................................................................................................................. 54
CHAPTER 5: THE GUANTANAMO BAY DETAINES AND THEIR TRIAL RIGHTS

5.1 Introduction ................................................................................................................ 56
5.2 The Right to a Fair Trial ............................................................................................ 58
5.3 Court Proceedings Regarding the Detention of Enemy Combatants .................. 62
5.4 The Guantanamo Bay Detainees: Challenging the United States Authorities ...... 64
5.5 Conclusion .................................................................................................................. 73

CHAPTER 6: CONCLUSION ............................................................................................ 74

TABLE OF STATUTES ................................................................................................. 76

INTERNATIONAL INSTRUMENTS .............................................................................. 77

TABLE OF CASES ......................................................................................................... 78

BIBLIOGRAPHY ............................................................................................................ 79

BOOKS
JOURNALS

INTERNET SOURCES ................................................................................................... 81
SUMMARY

The United States of America has in its custody several hundred Taliban and Al Qaeda combatants who were captured after the September 11, 2001 attack and during the war in Afghanistan. These prisoners are incarcerated at the Guantanamo naval base in Cuba. The treatment given to these detainees has elicited widespread criticism, as well as unprecedented intellectual and legal debates regarding prisoners of war.

In order to fully understand the position of the Guantanamo Bay detainees, one has to be aware of the origins of the prisoner-of-war phenomenon. From biblical times, through the countless conflicts that were waged across the globe through the ages, the concept of “prisoner of war” gradually evolved. Growing concern for the plight of prisoners of war was paralleled by the development of the laws of war, which sought to regulate the conduct of combatants during an armed conflict. The laws of war that have bearing on modern day States are those documented in the Geneva Conventions.

The Geneva Conventions regulate armed conflicts and set out the requirements for prisoners of war, as well as their trial rights. The United States, in declaring the Guantanamo Bay detainees “unlawful combatants” or “illegal enemy combatants”, terms which are undefined in International Law, have sought to evade the prescripts of the Geneva Conventions. In direct contravention of the Geneva Conventions, the Guantanamo Bay detainees are denied the right to humane treatment, a fair trial and due process of the law.

Prior to Hamdan vs Rumsfeld, the United States’ position was challenged with very little success. The Supreme Court, in Hamdan vs Rumsfeld, directed the president to accord the detainees the protections of the Third Geneva Convention. The relief brought by this decision was very short lived. In September 2006 the United States Congress passed the Military Commissions Act of 2006. This Bill gives the president of the United States unfettered power in dealing with anyone suspected of being a threat to the State, as well as the authorisation to interpret and apply the Geneva Conventions according to his sole discretion.
CHAPTER 1

INTRODUCTION

On September 11, 2001, the United States of America became the victim of an unprecedented terrorist attack. The use of hijacked passenger aircraft as lethal weapons flown into buildings resulted in the death of thousands of people. This event brought to light a new dimension of terrorism with a previously inconceivable scale of casualties, death and destruction. The apparent reason for the attack was to destroy American economic, military and political power. The attack forced the United States and the world to address the urgent issue of international terrorism. The outpouring of anger and helplessness in the United States culminated in the approval of military force against the persons responsible for the terror attack, namely, the Al Qaeda network.

The western world, led by the United States, identified Al Qaeda, under the leadership of Osama bin Laden, as the main group responsible for the escalation of terror attacks worldwide. Al Qaeda was supported by one of the world’s most repressive governments namely, the Islamic fundamentalist Taliban government of Afghanistan. Al Qaeda’s Emir – General, Osama bin Muhammed bin Laden, the son of immigrants, was born in Riyahd, Saudi Arabia, on July 30, 1957. After the Soviet invasion of Afghanistan, bin Laden left for Pakistan where he came under the influence of the Jordanian Palestinian, Sheikh Dr Abdullah Azzam, an influential member of the Jordanian Brotherhood. In 1984, bin Laden and Azzam established the Afghan Service Bureau (MAK), which organized, trained and financed the anti-Soviet resistance. Contrary to popular belief, it was Azzam and not bin Laden, who conceptualized and formulated the broad doctrine of Al Qaeda.

Al Qaeda planned and executed its terrorist operations from its base in Afghanistan. United States Armed Forces were dispatched to Afghanistan with the explicit objective to use all necessary and appropriate force to apprehend and destroy the perpetrators of the September 11 terror attacks. The invasion of Afghanistan by the United States-led Alliance led to the capture of hundreds of Taliban and Al Qaeda combatants. On January 11, 2002, the first captured prisoners of war were transferred to Guantanamo Bay, Cuba. These detainees were labeled by the United States as “unlawful combatants”, who were not entitled to claim...
prisoner of war status as provided for in terms of the Third Geneva Convention. The position adopted by the United States regarding prisoner of war status for the Guantanamo detainees elicited unprecedented legal and intellectual debate. This debate focused world attention on a number of International Law instruments, specifically the Third Geneva Convention dealing with the treatment of prisoners of war during armed conflict.

This treatise will examine the relevant aspects of International Law which deal with the treatment of prisoners of war. The historical development of the law relating to prisoners of war will be dealt with first. This will entail a brief discussion of developments regarding prisoners of war from Biblical times until after the Second World War. Secondly, the laws of war will be discussed with specific reference to international and non-international armed conflict. In this chapter reference to various International Law instruments will be made. Thirdly, the difference between a lawful and an unlawful combatant will be discussed. Thereafter, the applicability of Article 4(A)(2) of the Third Geneva Convention to the Guantanamo Bay detainees will be dealt with. In Chapter 5 a brief discussion will follow on the Guantanamo Bay detainees and their trial rights. The discussion is concluded in Chapter 6.
CHAPTER 2

HISTORICAL DEVELOPMENT OF THE LAW RELATING TO PRISONERS OF WAR

2.1 INTRODUCTION

“Prisoners of War! That is the least kind of prisoner to be, but it is nevertheless a melancholy state. You are in the power of your enemy. You owe your life to his humanity, and your daily bread to his compassion. You must obey his orders, go where he tells you, stay where you are bid, await his pleasure, possess your soul in patience.”

Winston S. Churchill

There appears to be no documentary evidence of the origins of Humanitarian Law or the “author” of International Humanitarian Law. Existing evidence indicates that during confrontations between tribes and clans, rules were established to limit the effects of these violent battles. These rules were present in all cultures, and were, in effect, the forerunner of the present International Humanitarian Law. These rules are to be found in cultural and religious books such as the Indian Mahabharata, the Bible and the Quran. In Japanese culture, the rules on the art of war, which are the rules of Manu, or the bushido, constitute the Japanese code of behaviour.

According to Levie, the development of Humanitarian Law preceded the use of the term “prisoner of war” as it appears in the four existing Geneva Conventions to describe individuals captured during an armed conflict. The development of Humanitarian Law stems in part from the objective of religious figures. Levie remarks that early history does not record that captured persons enjoyed any protection in terms of any rules and customs, and that they were summarily executed with no differentiation between man, woman or child, combatant or non-combatant. During Christian Biblical times, for instance, the practice of executing captured civilians or combatants was common among warring nations and the captured individual was considered to be the property of the captor who could kill or refrain from killing the captive.

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1. Levie Prisoners of War in International Armed Conflict (1907) 1.
3. Ibid.
4. Ibid.
This practice continued unabated for centuries. The captured combatant became the captors’ “chattel”. Islam, on the other hand, is credited by Mawdudi for conceptualizing humane and decent rules of war. Mawdudi also credits the great work of Grotius, De jure belli ac pacis, for influencing the introduction of humane practices during the 17th Century. For example, with the advent of the period of the Rightly-Guided Caliphs, Islam propagated that slaves should be set free. Muslims, i.e. followers of Islam, heeded this directive. Forty years later, prisoners of war captured on the battlefield were the only slaves left in Islamic society. These captives were either exchanged for Muslim soldiers or ransomed. If the captives were not exchanged or ransomed, the captor Muslim government gave them to the soldiers that captured them. This was seen as a humane manner of disposing of them, rather than incarcerating them and forcing them to work.

Islam interprets war as the means of taking up arms against the enemy. War is called “jihad”, which means “to fight against the enemy”. Such a fight is deemed to be both a lawful and necessary means of suppressing aggression. However, it was never the intent of Islam to propagate war as a national policy or to gain spoils. Therefore, Muslims are not warmongers and neither do they desire to kill or mutilate other human beings. Muslim jurists contend that in the face of an attack or armed aggression Muslims will resort to war. Islam is, however, emphatic in its doctrine that civilians and non-combatants are not to be killed or attacked.

The development of Humanitarian Law was also influenced by the economic and political imperatives that prevailed in different historical eras. During the Egyptian and Mesopotamian eras the practice of executing captives was abolished for economic rather than humanitarian reasons. Captives were deployed to work in the fields to enhance the agricultural economy. The Romans followed this practice and developed the rules regarding the treatment of enslaved enemy captives. With the collapse of the Roman Empire and the advent of the Dark Ages, the practice of enslaving enemy combatants was

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7 Levie 3.
9 Mawdudi 35.
10 On the Laws of War and Peace.
11 Mawdudi 20.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
abolished.\textsuperscript{17} During the Crusades, however, the rights of captured enemy persons became non-existent again and the ruthless execution and enslavement of captives continued relentlessly.\textsuperscript{18}

An upswing in the fortunes of prisoners of war occurred during the Middle Ages when the chivalric code was adopted to determine battlefield conduct in wars between Christians. This code allowed warring parties to enter into agreements regarding the fate of prisoners of war.\textsuperscript{19} In wars between Christians, for example, the Lateran Council of 1179 prevented captors from selling or enslaving captured combatants. Christians were not the only adherents of these rules. For example, Saladin, the commander of the Islamic army, allowed wounded Christian soldiers to receive care during the Crusades and the exchange of captives between Muslims and Christians occurred regularly.\textsuperscript{20} Towards the conclusion of the Thirty Years War (1648), the notion of the captive being the property of the individual captor had ceased and the accepted practice was that the captive was in the custody of the State and not the individual captor, a principle on which the humanitarian treatment of prisoners was founded.\textsuperscript{21}

From the above it would appear that it was the objective of religious figures, wise men and warlords, from the earliest periods of history, to adopt rules to limit the consequences of armed conflict.\textsuperscript{22} Today, the rules governing armed conflict are formalized as Humanitarian Law, which focuses on the protection, life and freedom of the individual. The branch of Humanitarian Law applicable to armed conflict is the Law of Geneva, which includes the four Geneva Conventions and the 1977 Additional Protocols.\textsuperscript{23} The Law of Geneva, which was developed by the International Committee of the Red Cross,\textsuperscript{24} is focused on the safety and treatment of military personnel not active in hostilities, as well as victims such as prisoners of war. Geneva Law limits the right which the State has over the rights of the individual.\textsuperscript{25}

\textsuperscript{17} Levie 4.
\textsuperscript{18} Ibid.
\textsuperscript{19} Gasser in Haug 7.
\textsuperscript{20} Coursier 59.
\textsuperscript{21} Levie 5.
\textsuperscript{22} Gasser in Haug 7.
\textsuperscript{23} Pictet Development and Principles of International Humanitarian Law (1985) 2.
\textsuperscript{24} Hereinafter referred to as the ICRC.
\textsuperscript{25} Pictet 2.
Resulting from the 1899 and 1907 Hague Conventions, the Law of The Hague on the other hand, is focused on the lawful monitoring of conflicts. Hague Law contains provisions regarding the status of prisoners of war, the status of wounded and shipwrecked persons and civilians. These provisions were made part of Geneva Law in 1929 and 1949. The 1977 Additional Protocols to the Geneva Conventions embody provisions that relate to the conduct of soldiers, which in effect belong in the Law of The Hague. This shows that the distinction between the Law of Geneva and that of The Hague is beginning to fade.

2.2 THE POSITION PRIOR TO THE SECOND WORLD WAR

International Law finds its origin from, amongst others, Treaty Law and Customary International Law. Customary International Humanitarian Law is therefore a major source of the rules applicable during armed conflicts. A rule is considered binding Customary Law if it reflects the “widespread, representative and uniform” practice of States as accepted by law and expressed in “military manuals, legislation, case law and official statements.” Formal acceptance of these rules of Customary Law is not a requirement for it to be binding on States. Treaty Law on the other hand, such as the four Geneva Conventions of 1949 and its 1977 Additional Protocols, is based on written conventions where States formally establish certain rules. Treaty Law, according to the ICRC, cannot adequately deal with the legal protections of individuals affected by non-international armed conflict where the suffering of people is severe. Customary International Humanitarian Law fills this gap where Treaty Law is silent on attacks on civilian targets. All parties, including resistance and rebel groups, are bound by applicable customary law to refrain from such attacks. In light of the above, it is lamentable, therefore, that universal ratification of the four Geneva Conventions of 1949 has been accomplished, while ratification of its 1977 Additional Protocols has stalled. The latter abound with rules and principles that reflect Customary Law, which is applicable to all

26 Pictet 2.
27 Ibid.
28 Ibid.
30 Henckaerts 179.
31 Henckaerts 178.
32 Ibid.
33 Ibid.
States, notwithstanding their ratification of other treaties. These customary rules apply regardless of whether the conflict is international or non-international.\\(^{34}\)

The idea of formalizing the treatment of prisoners of war was conceived by Jean Henry Dunant in 1859.\\(^{35}\) Dunant was born on May 8, 1828 in Geneva, Switzerland. Due to his mother’s influence and the Calvinist atmosphere in Geneva, Dunant’s religious convictions and high moral principles were deep-rooted. He was involved in a number of movements that engaged in charitable and religious projects that were beneficial to the poor, sick and afflicted.\\(^{36}\) Dunant was instrumental in unifying The Young Men’s Christian Union in Europe with the Young Men’s Christian Association in England, into a World Union in 1855.\\(^{37}\) His idea of formalizing the treatment of prisoners of war was a result of his witnessing firsthand the suffering of the thousands of unattended, wounded combatants in the armed conflict during the War of Italian Unification in 1859 at Solferino in northern Italy.\\(^{38}\) This experience at Solferino inspired him to author his book, *A Memory of Solferino* in 1862.\\(^{39}\)

*A Memory of Solferino* documents Dunant’s ideas and proposals about how to prevent a reoccurrence of the suffering he witnessed in Solferino.\\(^{40}\) On the one hand, it raises the question of whether it would be possible in peaceful times to form “relief societies for the purpose of having care given to the wounded in wartime” by devoted and qualified volunteers.\\(^{41}\) On the other hand, Dunant enquires from the military authorities of a number of countries whether they could formulate “some international principle, sanctioned by a convention inviolate in character”, which, once agreed upon, would serve as the basis for the relief societies.\\(^{42}\) The formulation of this principle became, in effect, the precursor to the Geneva Conventions.\\(^{43}\) The success of Dunant’s work led to the establishment of a five man committee, comprising of Dunant, Gustave Moynier, General Dufour, Dr Louis Appa and Dr

\[\text{References:}\]

\(^{34}\) Henckaerts 177.

\(^{35}\) Pictet 3.

\(^{36}\) Dunant *A Memory of Solferino* (1939) 7.

\(^{37}\) Dunant 8.

\(^{38}\) Dunant 64.

\(^{39}\) *Ibid.*

\(^{40}\) Dunant 64.

\(^{41}\) Dunant 129.

\(^{42}\) *Ibid.*

\(^{43}\) Dunant 129.

\(^{44}\) *Ibid.*
Theodore Maunoir.\textsuperscript{45} This committee was known as the International Committee for Relief to the Wounded, which met for the first time on February 17, 1863.\textsuperscript{46} The second meeting was held on March 13, 1863 and on August 25, 1863 the Committee decided to convene an international conference in Geneva, which took place in October 1863.\textsuperscript{47}

The 1863 conference took as a basis for discussion, a draft convention prepared by the International Committee for Relief to the Wounded and the conference concluded with the adoption of ten resolutions, which formed the first draft of the charter for the envisaged organization, the ICRC, which was to be formed.\textsuperscript{48} Because of the continuous improvement in the treatment of prisoners of war, a new school of thought developed which held that the inhumane treatment of prisoners of war had no place in civilized society.\textsuperscript{49} The King’s advocate fittingly summarizes this belief as follows:

“… cases may possibly occur in which the treatment of Prisoners of War by a nation may be so barbarous and inhuman as to call upon other powers to make common cause against it, and to take such measures as may be necessary to compel it to abandon such practice, and to conform itself to the more lenient exercise of the rights of war, adopted by other states …”\textsuperscript{50}

Towards the end of the nineteenth century various attempts were made to codify the laws of war and these efforts led to the “first effective multilateral codification of the law of war”.\textsuperscript{51} It must be noted, however, that the movement pioneered by Dunant was preceded and paralleled by other developments in different parts of the world. Arguably the first attempt to codify the rules of Humanitarian Law in the West took place during the seventeenth century in 1648.\textsuperscript{52} Article 43 of the Treaty of Westphalia determined how prisoners of war should be treated and specifically that prisoners of war should not be kept incarcerated, but freed “without payment of ransom and without any exception or reservation”.\textsuperscript{53}

\begin{footnotesize}
\begin{enumerate}
\item Boissier \textit{History of the International Committee of the Red Cross, from Solferino to Tsushima} (1978) 54.
\item Boissier 57.
\item \textit{Ibid}.
\item Boissier 58.
\item Levie 7.
\item \textit{Ibid}.
\item Levie 8.
\item Montejo 4 (accessed on 7 November 2005).
\end{enumerate}
\end{footnotesize}
In 1785 the Treaty of Amity and Commerce between Prussia and the United States during peacetime, provided for the protection of prisoners of war in the event of war breaking out between the two nations. The purpose of its provisions was “to prevent the destruction of prisoners of war”. This initiative moved the French National Assembly to pass legislation that unilaterally formalized a code of humanitarian rules to regulate the treatment of prisoners of war.

A similar attempt at formalizing Humanitarian Law was made by a German-American philosopher, Francis Lieber. Lieber engaged in student politics and was harassed by the police for his liberal ideas. As a result of this harassment, he was forced to flee to England in 1826. In England, Lieber lectured in history and Political Economy from 1835 to 1856. It was during the American Civil War that Lieber prepared a standardized code for conduct during armed conflict for the forces of the Union Government. This code of conduct was formally issued by United States President Abraham Lincoln as General Orders No. 100 of 1863, Instructions for the Government of Armies of the United States of America in the Field. These Instructions became known as the Lieber Code. The code embodied the first ever stipulation that there should be no retaliation against prisoners of war. It further attempted to minimize destruction and to protect civilians. The main sections of the Code were concerned with martial law, military jurisdiction, the treatment of spies and deserters and how prisoners of war should be treated. It was the first codified law that expressly forbade giving “no quarter” to the enemy, except in cases where the survival of the unit that held the captured prisoners, was threatened. The Lieber Code became a recognized authority on military law that influenced war conduct for many years.

54 Levie 6.
55 Ibid.
56 Ibid.
57 Montejo 5 (accessed on November 7, 2005).
58 Ibid.
59 Ibid.
60 Ibid.
61 Gasser in Haug 9.
62 Ibid
64 Montejo 5 (accessed on 7 November, 2005).
65 Ibid.
66 Ibid.
There were several further international attempts by governments to formalize the treatment of prisoners of war. One of these is the draft International Declaration that was formulated at the 1874 international conference in Brussels.\textsuperscript{67} Although the result of this conference, the Declaration of Brussels, never developed into an international instrument, it played a major role in future international discussion on the codification of International Humanitarian Law.\textsuperscript{68} The Oxford Manual written by the International Law Institute in 1880 followed the Declaration of Brussels.\textsuperscript{69}

However, it was only with the formulation of the Hague Conventions of 1899 and 1907 that a Detaining Power legally protected prisoners of war from inhumane treatment.\textsuperscript{70} The Regulations annexed to the Hague Conventions of 1899 and 1907, which dealt with the Laws and Customs of War on Land, prohibited arbitrary treatment of prisoners of war by a State.\textsuperscript{71} When the Hague Regulations proved to be inadequate, they were revised through the Berne agreements of 1917 and 1918.\textsuperscript{72}

All the attempts at providing protection and assistance for prisoners of war came to fruition during the First World War of 1914 to 1918, when an International Prisoner of War Agency was formed at Geneva.\textsuperscript{73} It was at this stage that the efforts by the ICRC to improve the conditions of prisoners of war, was recognized.\textsuperscript{74} In 1921 the ICRC’s proposals were officially accepted and the organization was requested to compile and submit a draft code, which subsequently was presented and accepted at the 1929 Diplomatic Conference,\textsuperscript{75} which took place at Geneva in Switzerland. This code became known as the Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929.\textsuperscript{76} It was accepted that the protections accorded prisoners of war by the newly formulated 1929 Convention, which was in force throughout the Second World War, were superior to the treatment prisoners of war received during the First World War.\textsuperscript{77}

\textsuperscript{67} Pictet Commentary 5.  
\textsuperscript{68} Ibid.  
\textsuperscript{69} Ibid.  
\textsuperscript{70} Ibid.  
\textsuperscript{71} Ibid.  
\textsuperscript{72} Ibid.  
\textsuperscript{73} Pictet Commentary 3.  
\textsuperscript{74} Pictet Commentary 4.  
\textsuperscript{75} Ibid.  
\textsuperscript{76} Ibid.  
\textsuperscript{77} Pictet Commentary 5.
2.3 THE POSITION AFTER THE SECOND WORLD WAR

Changes in the conduct and consequences of war necessitated the re-conceptualisation of a number of provisions of the 1929 Convention. It was felt that the categories of persons entitled to prisoner of war status should be broadened. The provisions that were reviewed were the following:

(i) The granting of prisoner of war status to members of armed forces that surrendered;

(ii) The regulation of work being done by prisoners of war, assistance received by them and judicial proceedings they are involved in;

(iii) The immediate release and repatriation of prisoners of war after the end of an armed conflict; and

(iv) The independence of the agencies responsible for the monitoring of the protections and rights of prisoners of war.

In response to these concerns the ICRC immediately convened a further Diplomatic Conference in Geneva in 1949, with the intention of reviewing and rectifying the shortcomings exposed during the Second World War. The 1949 Diplomatic Conference had to deliberate and decide on a number of important issues, such as the declaration or warning of the commencement of a conflict, which was not adhered to in all situations. In the interim the ICRC convened a Preliminary Conference of National Red Cross Societies in 1946 to address this issue and it was recommended that the article dealing with the declaration of war be revised. At the 1949 Diplomatic Conference the new article was adopted without any discussion by the delegates. The article read as follows:

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78 Pictet Commentary 6.
79 Ibid.
80 Ibid.
81 Ibid.
82 Leve 10.
83 Pictet Commentary 19.
84 Pictet Commentary 20.
“…the present Convention shall apply 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.”

The deliberations led to the formulation of a new set of rules governing the treatment of prisoners of war, which became the Third Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

As the initiator of the process, which led to the formulation of the four Geneva Conventions of 1864, 1906, 1929 and 1949, the ICRC is widely regarded as the developer of International Humanitarian Law. The objective of the further development was to lessen the severity of the conduct of parties during armed conflicts. The ICRC also led the process of concluding and revising the provisions of the Geneva Conventions which dealt with the protection of victims in armed conflicts. The Conventions were adequate for the demands of the time, and saved countless of lives. However, not all facets of human suffering during wars were covered satisfactorily. For this reason the Geneva Conventions were expanded in 1949. The first three Conventions: for the wounded and sick; the shipwrecked; and for prisoners of war, were reviewed and improved. The new Fourth Convention provided protection against unlawful enemy acts.

Since the formalization of the Geneva Conventions of 1949 until the present, every continent has been affected with a number of armed conflicts. Although legal protection was guaranteed for individuals not active in the conflict, as well as civilians, a number of fatalities were caused by violations of the provisions of International Humanitarian Law. There was consensus that an unwillingness to apply the provisions was instrumental in the large number of violations that were taking place.

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84 Pictet Commentary 20.
85 Levie 10.
86 Pictet Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of August 12, 1949 XXIX.
87 Pictet Commentary on the Additional Protocols XXIX.
88 Ibid.
89 Ibid.
91 Henckaerts 175.
92 Henckaerts 176.
93 Ibid.
By the early 1970’s it appeared that the reviewed and improved provisions were inadequate and also that the Law of The Hague, which dealt with the development of the rules of hostilities and the use of weapons, required urgent revision. The Law of The Hague had not been revised since 1907.\textsuperscript{94} Therefore, an immediate agenda that focused on development was initiated to revise the Hague Regulations Respecting the Laws and Customs of War on Land. The issues to be developed dealt with the conduct of combatants and the protection of civilians from the effects of armed conflict.\textsuperscript{95} At the XIXth International Conference of the ICRC at New Delhi, in 1957, draft rules regarding the protection of civilians were adopted. This draft did not receive the expected support from governments because of the implications that it had for the use of nuclear weapons.\textsuperscript{96}

At the XXth International Conference of the Red Cross at Vienna in 1965, Resolution XXVIII adopted four principles dealing with the protection of civilians against indiscriminate warfare.\textsuperscript{97} The Conference strongly advised the ICRC to develop International Humanitarian Law.\textsuperscript{98} Acting on this advice the ICRC engaged all signatories to the Geneva Conventions by issuing a memorandum dated May 19, 1967 regarding the issue of developing International Humanitarian Law.\textsuperscript{99}

In May 1968 the United Nations expressed its interest and mandated the Secretary-General to establish contact with the ICRC.\textsuperscript{100} During September 1968 the ICRC presented its ideas to the National Societies of the Red Cross and Red Crescent in Geneva.\textsuperscript{101} The objective was not to rewrite or to revise, but to formulate additional protocols to the Geneva Conventions, which would guarantee, cover and clarify important points concerning protection for victims of armed conflict.\textsuperscript{102} The ICRC presented a report at the XXIst International Conference of the Red Cross in September 1969 where the Conference confirmed and formalized the ICRC’s mandate in terms of Resolution No XIII to investigate and propose rules, which would enhance existing Humanitarian Law.\textsuperscript{103}

\textsuperscript{94} Pictet \textit{Commentary on the Additional Protocols} XXIX.
\textsuperscript{95} Ibid.
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid.\textsuperscript{\textit{Commentary on the Additional Protocols}} XXX.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Pictet \textit{Commentary on the Additional Protocols} XXX.
The ICRC then convened the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts from May 24 to June 12, 1971. The ICRC drafted documentation that focused on the mandate to put forward proposals. The first draft text was submitted to all the National Societies of the Red Cross in March 1972. Thereafter the draft text was presented to the XXIIInd International Conference of the Red Cross in Teheran in November 1973, where it was adopted in terms of Resolution XIII as draft protocols.

The adoption of the draft protocols placed upon governments the responsibility of formalising and applying the provisions in situations that demanded it. The formal adoption of the draft protocols took place when the Swiss government convened the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law Applicable in Armed conflicts, with the first of four sessions taking place from February 20, to March 29, 1974. The formal adoption of the Additional Protocols took place on June 8, 1977.

### 2.4 CONCLUSION

As part of International Humanitarian Law, the Geneva Conventions and their Additional Protocols provide the international community with a whole system of legal safeguards that cover the way wars may be fought as well as the protection of individuals. They specifically protect non-combatants and combatants who are not active anymore, such as prisoners of war and sick and shipwrecked troops. These treaties demand that measures are put in place to deter breaches of its provisions and to hold individuals who commit breaches responsible for their actions.

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104 Pictet Commentary on the Additional Protocols XXXI.
105 Ibid.
106 Pictet Commentary on the Additional Protocols XXXI.
107 Pictet Commentary on the Additional Protocols XXXII.
108 Pictet Commentary on the Additional Protocols XXXIII.
The revision of the 1929 Convention was a major step in placing obligations on States to accord prisoners of war the rights and protections they are entitled to, and to respect the human dignity of the individual. In this respect the 1949 Conventions represented an enormous advancement in Humanitarian Law. This advancement ensured that members of armed forces captured during an armed conflict are guaranteed the protections that go hand in hand with prisoner of war status; a status which is determined by whether a captured combatant has fulfilled the requirements set by the Third Convention. The Geneva Conventions benefited thousands of individuals with its constant development and adaptation to the needs of the situations, but it still did not deal with all aspects of the suffering of the victims of war. As mentioned above, the vacuum regarding the suffering of the victims of war led to further discussion, which subsequently culminated in the adoption of the Additional Protocols.

The Afghanistan conflict resulted in the capture and detention of a number of Al Qaeda and Taliban combatants. A situation developed which demanded clarity on how and in terms of which law these combatants are to be treated. Central to this situation was the question of whether or not the Afghanistan conflict was subject to the Geneva Conventions. The status of prisoners of war and, more specifically, the status of the Al Qaeda and Taliban detainees at Guantanamo Bay, and how they are to be treated, will be dealt with in view of the applicable International Humanitarian Law.

In light of the controversy surrounding the treatment of the Al Qaeda and Taliban captives, the United States had to consider two policy issues: (i) an approach which satisfy the demands for national security by indefinitely incarcerating dangerous individuals, eliciting information from them and effectively punishing those guilty of committing or supporting the hostile acts of September 11, 2001 and (ii) the injunction to adhere to the requirements of the laws of war by allowing due processes of the law to take its course as far as the perpetrators of September 11 are concerned. The following chapter will discuss the laws of war with reference to the classification of the Afghanistan conflict as either an

113 Brockington 2.
international or a non-international armed conflict and the distinction between a combatant and non-combatant.
CHAPTER 3

THE LAWS OF WAR

3.1 INTRODUCTION

When States are unable to resolve disputes it leads to war. Wars are naked outbursts of primitive, raw violence, of which the result in suffering and damage cannot be measured. The laws of war, which are now called International Humanitarian Law, attempt to reduce the human suffering and material damage.\(^{114}\) This branch of International Law attempts to regulate military operations in order to mitigate human suffering. Most importantly, it determines that parties to an armed conflict must protect and preserve persons not active in the hostilities.\(^{115}\)

Although the establishment of rules of war was historically part of the policies of certain governments, the process of establishing these rules had to contend with radical changes in the way war was conducted. The introduction of new weaponry and new strategies resulted in a “new warfare” which proved difficult to regulate. The perception that the laws and customs of war were of no consequence in the “new warfare” led the parties in an armed conflict to evade the rules of war. The humanitarian Conventions brought a semblance of stability, but indiscriminate utilization of new, destructive weapons limited regulation thereof.\(^{116}\)

The laws of war, as codified in the Geneva Conventions, encompass diverse groups of rules: rules regulating armed conflict on land, sea and air, and rules protecting the victims of war.\(^{117}\) These groups of rules also cover civilians and individuals not active in hostile operations, such as prisoners of war. The Law of Geneva demands that parties to an armed conflict respect, protect and treat humanely, war casualties and prisoners of war.\(^{118}\) It is,

\(^{114}\) Gasser in Haug 3.
\(^{115}\) Ibid.
\(^{116}\) Rambach 3.
\(^{117}\) Rambach 5.
\(^{118}\) Rambach 6.
however, a growing concern that the reason why warring parties do not commit excesses is not because of the existence of these rules, but because of the fear of retaliatory measures.\textsuperscript{119}

According to Mawdudi,\textsuperscript{120} the laws of war adopted in the nineteenth century do not meet the requirements of laws, because a number of nations are reluctant to adhere to the provisions thereof if their adversaries do not adhere to it. Mawdudi, therefore, is of the opinion that this is the reason why International Law is continuously disregarded.\textsuperscript{121} Islamic rules, in contrast, brought a semblance of civility and humanity to war, irrespective of how the enemies of Islam behaved.

The humaneness of Islamic rules of war is attributed to the Prophet Muhammed. Approximately one thousand four hundred years ago, according to Islamic faith, the Prophet Muhammed issued an instruction to Muslims to “treat the prisoners of war kindly”.\textsuperscript{122} Consistent with this instruction, Muslims were subjected to specific laws of war, which set out in detail when, against whom, and how to wage war. During the era of the Prophet, prisoners of war received treatment of such high standards that it surpassed anything similar elsewhere in the world. The basic rule set and followed by Islam is that “the captive is protected by his captivity and the wounded by his injury”.\textsuperscript{123} It is therefore noteworthy that the Western world ultimately embraced the laws of war introduced by Islam centuries ago.\textsuperscript{124}

\subsection*{3.2 THE AFGHANISTAN CONFLICT: INTERNATIONAL OR NON-INTERNATIONAL}

The Geneva Conventions regulate the relationship between States, and not relationships between States and private organizations.\textsuperscript{125} This is clearly set out in all four Geneva Conventions, which state: “This present Convention shall apply to all cases of declared war

\begin{footnotesize}
119 Rambach 11.
120 Mawdudi 35.
121 Ibid.
123 Ibid.
124 Mawdudi 35.
\end{footnotesize}
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.” 126  The Geneva Conventions further regulate “armed conflict not of an international character” 127  It appears that common Article 3 refers specifically to a conflict between a State and an armed movement within its territory, and does not include all armed conflicts. In particular, it does not include international armed conflicts involving international terrorist organizations. 128  It is further clear that Article 3 addresses only non-international conflicts that occur within the borders of a State party; in other words, civil wars. Article 3, therefore, does not cover a conflict where one of the parties is conducting hostile operations from bases in different States. 129  An example of the latter was the armed struggle waged between the African National Congress 130  and the South African Nationalist Government. During this conflict the ANC demanded that their combatants be accorded prisoner of war status, a demand that the Nationalist Government rejected.

It is accepted practice that the legal status of opposing parties to a conflict determines whether it is an international armed conflict or a non-international armed conflict and, specifically, whether the conflict is waged, not by States, but by one State against one or more armed groups within its territory. 131  The United States Department of Justice’s position is that when the Geneva Conventions were adopted, international thinking was focused on two forms of armed conflict, namely hostilities between two States, subject to Article 2, and civil war within the borders of a nation-State. 132

The laws of war went through three developmental stages. The first stage was characterized by uncertainty as to whether the armed conflict constituted belligerency or insurgency. Belligerency was seen as a conflict between sovereign States, and insurgency as a conflict within the borders of a sovereign State. These were deemed by International Law to be different classes of conflict. Therefore, wars between States were subject to specific international legal rules, which governed the conduct of the warring parties and protected non-combatants. However, non-international conflicts within a State’s borders were subject

126  Common Article 2 to all four Geneva Conventions.
127  Common Article 3 to all four Geneva Conventions.
128  Bybee 6.
129  Ibid.
130  Hereinafter referred to as the ANC.
131  Ibid.
132  Bybee 7.
to very few international legal rules. This first stage clearly represented a sovereignty-oriented phase.¹³³

The second phase from 1936 to 1939 brought about a change in State practice, which saw the application of Humanitarian Law in conflicts that were essentially large-scale civil wars.¹³⁴ Uncertainty remained about whether the provisions of Article 3 were applicable to fully-fledged civil wars.¹³⁵

The third phase ushered in a radical shift from the “State-sovereignty-oriented approach” of International Law.¹³⁶ Individual human rights were the focal point of this new approach, and, as a result, the distinction between international and internal armed conflicts became blurred. During the Bosnian conflict, for example, the International Criminal Tribunal for the Former Yugoslavia,¹³⁷ in a decision¹³⁸ that illustrates the acceptance of the human rights approach, creates the impression that Article 3 is applicable to all armed conflicts.¹³⁹ This interpretation by the ICTY suggests that Article 3 might include the armed conflict between the United States and Al Qaeda, which would then trigger the application of the provisions that deal with the treatment of prisoners of war.¹⁴⁰

In contrast to the ICTY, the United States appear to interpret Article 3 of the Geneva Conventions according to the letter rather than the spirit of the law by arguing that the thinking of the time did not anticipate the notion of an armed conflict in which the warring parties are a nation-State and an international terrorist movement, respectively. Because of their claims that Article 3 was not drafted with this type of conflict in mind, the United States State Department’s position is that the conflict between the United States and Al Qaeda is not covered by the Conventions.¹⁴¹ The argument put forward by the United States is strengthened by the fact that two new protocols additional to the Conventions were adopted¹⁴² to address shortcomings in Geneva Conventions I to IV. Because the United

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¹³³ Bybee 7.
¹³⁴ Ibid.
¹³⁵ Bybee 8.
¹³⁶ Ibid.
¹³⁷ Hereinafter referred to as the ICTY.
¹³⁹ Bybee 8.
¹⁴⁰ Ibid.
¹⁴¹ Ibid.
States did not ratify Additional Protocols I and II, they do not consider themselves subject to it. 143

In view of the United States’ interpretation that Al Qaeda is both a non-State actor and a non-governmental terrorist organization, which has members in different countries, the United States concluded that the conflict between them and Al Qaeda is not subject to the Third Geneva Convention.144 Article 3, read with Article 2, confirms that only conflicts between States, and civil wars, are provided for in the Conventions. The United States-Al Qaeda conflict, therefore, does not fit either category because Al Qaeda is not a State and, as a result, cannot be a party to an international conflict between nation-States in terms of common Article 2. In terms of common Article 3, the conflict between the United States and Al Qaeda does not fit the description of a civil war, because Al Qaeda launches its hostile operations from different countries.145 It therefore seems that the conflict between the United States and Al Qaeda is undefined in International Humanitarian Law.

The applicability of the Geneva Conventions regarding the detention of the Taliban combatants is less complicated because Afghanistan is a signatory to the four Geneva Conventions. It may be argued, therefore, that the Geneva Conventions are applicable to the Taliban detainees.146 However, in terms of the United States Constitution,147 the President is authorized to suspend United States treaty obligations if there are sufficient grounds to justify such a decision.148 It is submitted that such a decision to suspend treaty obligations would not be correct, as a country’s domestic law may not override the provisions of International Law.

The United States Defence Department’s contention is that sufficient grounds existed during the Afghanistan conflict for the President of the United States to suspend the latter’s treaty obligations towards Afghanistan.149 The following compelling reasons appeared to justify the suspension:

143 Bybee 9.
144 Ibid.
145 Bybee 10.
146 Bybee 11.
147 Article 11.
148 Bybee 11.
149 Ibid.
The Taliban, whose members were armed and violent, held large areas in Afghanistan. Therefore, Afghanistan was a “failed state”, with no operating government structure. In reality, Afghanistan was incapable of honouring any of its international obligations. In view of Afghanistan’s incapacity, the United States could, therefore, exercise its discretion to suspend its treaty obligations towards the Taliban government.\(^{150}\)

Sufficient reason existed to confirm the Taliban’s dependence on the terrorist Al Qaeda organization. It was widely accepted that the influence Al Qaeda exerted over the Taliban had reached a stage where the latter could not formulate foreign policy with the global community.\(^{151}\) This effectively rendered the Taliban a terrorist organization and not a legitimate government.\(^{152}\) In light of the above, the United States contends that the Third Geneva Convention, specifically those provisions dealing with the status of prisoners of war, should be interpreted as not covering the Taliban combatants.\(^{153}\) Therefore, it is submitted that the United States did not want to honour its treaty obligations with regard to Afghanistan.

The American Executive Presidential decision issued on February 7, 2002 directed that Al Qaeda combatants would not be afforded the protection of the Geneva Conventions, irrespective of whether the conflict was in Afghanistan or anywhere else in the world.\(^{154}\) Regarding the Taliban, it was decided that the Geneva Conventions were applicable to them, but that the Taliban combatants would not be granted the protections of the Third Geneva Convention because they were unlawful combatants.\(^{155}\) It is submitted that the Presidential decision clearly demonstrates the application of double standards. In view of this decision by the President of the United States there is a clear need to distinguish between a lawful combatant and an unlawful combatant in terms of International Law. This distinction will be dealt with in the following section.

\(^{150}\) Bybee 11.
\(^{151}\) Bybee 19.
\(^{152}\) Bybee 11.
\(^{153}\) Ibid.
\(^{154}\) Article 4 of the Third Geneva Convention.
\(^{155}\) Brockington 3.
3.3 THE DIFFERENCE BETWEEN A LAWFUL COMBATANT AND UNLAWFUL COMBATANT

All members of the armed forces of a country, except medical and religious personnel, are entitled to carry out acts of war during times of war. These members are referred to as combatants. The first attempt at formulating an internationally accepted definition of a combatant was embodied in the Project of an International Declaration concerning the Laws and Customs of War, which was adopted by the Brussels Conference of fifteen European States, convened by Alexander II of Russia in 1874.

Much controversy and criticism regarding the status and treatment of the Guantanamo Bay detainees have been generated worldwide. Issues that were raised included the question of whether the status of the detainees would be determined outside the parameters of the Geneva Conventions, and also the question of what requirements needed to be met to determine their status. Green contends that the Hague Regulations’ definition of a combatant, and whether the combatant is entitled to prisoner of war status if captured, should be considered in view of the Third Geneva Convention, which regulates the rights and responsibilities of combatants during armed conflicts.

Humanitarian Law divides individuals into distinct categories in the event of them being captured by opposing forces during an armed conflict. This principle of distinction forms one of the foundations of Humanitarian Law on which the rules of Conventions and Customary Law are founded. The principle of distinction finds application when the category and status of combatants and non-combatants must be determined. In other words, the category and status that need to be determined are of those individuals who have a right to prisoner of war status when captured, and those individuals who are not entitled thereto.

156 Article 33 of the Third Geneva Convention, Article 43(2) of Additional Protocol I of 1977.
159 Green 108.
The Third Geneva Convention defines two categories of enemy combatants:

(i) Lawful enemy combatants who form part of the regular armed force of a party to the conflict and, when captured, are termed “prisoners of war” and, therefore, should be accorded the protection guaranteed by the Third Geneva Convention.\(^\text{162}\)

(ii) The second category of lawful enemy combatants who are not absorbed into a regular armed force, but are members of other organized militia or resistance movements who have to fulfill specific criteria to be accorded prisoner of war status.\(^\text{163}\)

When the United States Administration established the detention centres at Guantanamo Bay to hold combatants captured during the Afghanistan conflict, as well as suspected terrorists, it undertook to respect and consider the spirit of the Third Geneva Convention as far as prisoners of war was concerned. The underlying purpose was to guarantee the humane treatment of their prisoners of war.\(^\text{164}\) Some of the relevant provisions which the Administration had to observe but did not, and now were compelled to observe after the United States Supreme Court ruling in *Hamdan vs Rumsfeld*\(^\text{165}\) on June 29, 2006, regarding prisoners of war are the following:

(i) Prisoners of war are required to only divulge their name, rank, date of birth and army serial number. Any other information cannot be demanded from them, neither can it be elicited from them by force.\(^\text{166}\)

(ii) Prisoners of war must be removed from the conflict zone immediately after being taken captive.\(^\text{167}\)

(iii) Their removal must be effected in the same way as is done for the forces of the Detaining Power.\(^\text{168}\)

(iv) Prisoners of war must be incarcerated only in detention centres situated on land.\(^\text{169}\)

\(^{162}\) Articles 4-5; 12-17 of the Third Geneva Convention.

\(^{163}\) Article 4 of the Third Geneva Convention.

\(^{164}\) Article 13 of the Third Geneva Convention; Abraham “‘Essential Liberty’ versus ‘Temporary Safety’: The Guantanamo Bay internees and combatant status” 2004 *SALJ* 833.


\(^{166}\) Article 17 of the Third Geneva Convention.

\(^{167}\) Article 19.

\(^{168}\) Article 20.

\(^{169}\) Article 22.
(v) The standard and condition of detention centres must be equal to those provided for the forces of the Detaining Power and consideration must be given to the cultures and religion of the prisoners of war.\textsuperscript{170}

(vi) Prisoners of war must have access to medical care.\textsuperscript{171}

(vii) The freedom of prisoners of war to exercise their religion must not be impeded.\textsuperscript{172}

International Law makes a clear distinction between persons taking part in an international armed conflict as either combatants or civilians and this distinction determines the international legal status of these two categories.\textsuperscript{173} By defining combatants as “all persons who may take direct part in hostilities”, the legal definition of combatants contained in Protocol I\textsuperscript{174} is repeated.\textsuperscript{175} It is therefore clear that a combatant is a person who fights, and that as an international legal term, the combatant is a person who is authorized by International Law to fight in accordance with the provisions applicable in international armed conflicts.\textsuperscript{176}

It is submitted that no ambiguity exists with regard to the provisions of Protocol I,\textsuperscript{177} which state that a soldier in a State’s armed forces is a combatant, who is entitled to engage in combat during armed conflicts.\textsuperscript{178} The combatant has permission to exert force, which may result in the death of enemy soldiers and the destruction of structures without the sanction of legal constraints hanging over him, which would normally be the case if he should act in this way during peacetime as an ordinary citizen.\textsuperscript{179} However, the lawful combatant is subject to International Law, and is not allowed to kill or destroy with impunity. There are specific rules in International Law, which determine how a combatant should wage war.\textsuperscript{180} Combatants who contravene these rules do not forfeit their status as combatants, but can be held criminally responsible.\textsuperscript{181}

\textsuperscript{170} Article 25.
\textsuperscript{171} Articles 30-33.
\textsuperscript{172} Article 34.
\textsuperscript{173} Ipsen in Fleck 65.
\textsuperscript{174} Article 43.
\textsuperscript{175} Ipsen in Fleck 66.
\textsuperscript{176} Ipsen in Fleck 67.
\textsuperscript{177} Article 43 para 2.
\textsuperscript{178} Gasser in Haug 24.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid.
\textsuperscript{181} Article 44(2) of Additional Protocol I of 1977; Article 85 of the Third Geneva Convention.
An equally clear distinction between combatants and non-combatants can be found in Islamic Law. The instructions of the Prophet Muhammad regarding the non-combatant population, which include women, children, old people and the disabled, are unambiguous: “Do not kill any old person, any child or any woman. Do not kill the monks in monasteries and do not kill the people who are sitting in places of worship.” It is a cornerstone of the Islamic faith that non-combatants should not be victims during or after armed conflicts.

However, the reality of the situation, it is submitted, is that radical fundamentalist Islamic movements blatantly ignore the Prophet’s instructions. Movements such as Al Qaeda, Hamas, Hizbollah and Islamic Jihad, plan and execute indiscriminate armed attacks on civilians, killing anyone, including women, children, and the elderly, and then publicly take responsibility for their actions.

Islam decrees further that during an armed conflict, all combatants on each side are accorded certain rights and duties which are:

(i) Victors are not allowed to torture or burn vanquished combatants alive;
(ii) Wounded combatants not actively involved in combat are not to be attacked;
(iii) Prisoners of war should under no circumstances be executed;
(iv) Combatants should abstain from executing any captured individual who is tied;
(v) Combatants are forbidden to plunder and destroy the adversary’s land. The explicit instructions to combatants were: “Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.”
(vi) Equipment, provisions taken from the adversary’s camps and military headquarters may be appropriated;
(vii) Combatants are forbidden to take anything belonging to civilians in the vanquished country, without remunerating the owner;
(viii) Fallen combatants from the opposing armed forces are not to be mutilated.

It is submitted that the violent acts committed by Al Qaeda on September 11, 2001 are in total contradiction to the teachings of Islam. Where Islam forbids the burning alive of adversaries in an armed conflict, Al Qaeda considers every American civilian and those who

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182 Mawdudi 36.
183 Ibid.
184 Ibid.
185 Ibid.
186 Ibid.
187 Mawdudi 37.
188 Ibid.
align themselves with the United States, which include women, children and elderly people, as legitimate targets for their suicide bombers. The consequences of suicide bombings are the burning and mutilation of innocent civilians. Where Islam expressly prohibits the execution of captured individuals while they are tied, Al Qaeda launched a campaign of beheading hostages while they are bound. The graphic television images of Al Qaeda’s execution of a British hostage in Iraq are an example of how the teachings of the Prophet Muhammed are ignored. The Taliban forces, on the other hand, used civilians as human shields during the Afghanistan conflict to deter United States military attacks.

Historically, there were fewer complexities in the recognition of combatants in regular armies than in the case of liberation fighters and irregular fighters.\textsuperscript{188} It was customary for earlier armies to wear attire that clearly distinguished them from civilians, but irregular and resistance fighters did not wear uniforms that could distinguish them from the civilian population.\textsuperscript{189} The absence of uniforms created uncertainty about whether members of irregular armies were deemed combatants or not.\textsuperscript{190}

The solution to the problem of recognizing combatants offered by the 1949 Conventions only affected the regular armies. It was only with the adoption of Additional Protocol I\textsuperscript{191} that clear directives required parties to a conflict to ensure that their fighters were clearly distinguishable from the civilian population.\textsuperscript{192} Whereas the Geneva Conventions are only applicable to regular armies, the definitions given to “armed forces” and “combatant” by Additional Protocol I\textsuperscript{193} dispense with the difference between a State’s armed forces and the armed forces of a liberation movement.\textsuperscript{194} In terms of the Protocol I provision the armed forces of a liberation movement are subject to express requirements, which are:

i. “A measure of organization”;

ii. “A responsible command”; and

iii. “An internal disciplinary system” to ensure adherence to all the rules of armed conflict.\textsuperscript{195}

\begin{thebibliography}{9}
\bibitem{188} Kalshoven and Zegveld \textit{Constraints On The Waging of War, An Introduction to International Humanitarian Law} (2001) 86.
\bibitem{189} Ibid.
\bibitem{190} Ibid.
\bibitem{191} Article 48 of Protocol I of 1977.
\bibitem{192} Article 44(3).
\bibitem{193} Article 43 of Additional Protocol I.
\bibitem{194} Kalshoven and Zegveld 87.
\bibitem{195} Article 43 of Additional Protocol I.
\end{thebibliography}
Individual members of the armed forces of liberation movements qualify as combatants and can lawfully engage in combat.\textsuperscript{196} In terms of the provisions of Additional Protocol I it is not required for armed force members to wear uniforms in order to be recognized as an armed force.\textsuperscript{197} However, Protocol I\textsuperscript{198} compels individual combatants to distinguish themselves from civilians when engaged in combat or when preparing to attack enemy lines. If the combatant is unable to distinguish himself from civilians, he will be able to retain his combatant status on condition that his weapons are visible during every military operation as well as when he is in sight of the enemy when deployed in preparation for an attack.\textsuperscript{199} Failure to fulfill these requirements will lead to the combatant not being accorded the rights normally associated with prisoner of war status.\textsuperscript{200}

The laws of war further determine that any privately appointed combatant or army does not have any right to engage in military operations. However, such individuals can engage in combat \textit{levee en masse} with an advancing enemy if they adhere to the laws and customs of war,\textsuperscript{201} but their rights to engage as combatants cease the moment the enemy forces are in control of the disputed territory. The Al Qaeda organization appears to be a private army with no mandate from any State to engage in military operations on its behalf. It is therefore clear that Al Qaeda is operating outside the existing precepts of International Law.

Lawful combatants captured by opposing armed forces are as a matter of cause accorded prisoner of war status. However, spies and mercenaries are notable exceptions to this general rule. These exceptions prove that certain captured individuals may not meet the requirements to be accorded prisoner of war status.\textsuperscript{202} An individual, who is not a combatant, who engages in combat with enemy forces during an armed conflict, is prohibited from claiming combatant privileges and is individually responsible for his actions.\textsuperscript{203} Such an individual, who is not authorized to take a direct part in hostilities but nevertheless does, is labeled as an “unlawful combatant”. Unlawful combatants are legitimate targets of attack while engaging

\begin{itemize}
\item \textsuperscript{196} Article 4 A(2); Article 43 of Protocol I.
\item \textsuperscript{197} Kalshoven and Zegveld 87.
\item \textsuperscript{198} Article 44 (3).
\item \textsuperscript{199} Article 44 (3) of Protocol I of 1977.
\item \textsuperscript{200} Article 44(4) of Protocol I.
\item \textsuperscript{201} Article 4 A(6) of The Third Geneva Convention.
\item \textsuperscript{202} Articles 46 and 47 of Additional Protocol I; Ipsen in Fleck 98-99.
\item \textsuperscript{203} Gasser in Haug 24.
\end{itemize}
combat. If, after a fair trial, an unlawful combatant is convicted of a crime committed during an armed conflict, the capturing party may impose punishment by means of any lawful methods available.

Neither The Hague nor Geneva Conventions define the term “unlawful combatant”, although, historically, it was a legally accepted term. Uncertainty continues to surround the definition of the term as far as International Law is concerned. In a war zone only two combating groups are identified by International Law, namely:

(i) Individuals which include soldiers, combatants in the armed forces and militias who are lawful combatants; and

(ii) Lawful combatants who forfeit their rights to be afforded prisoner of war status when captured by enemy forces.

The Third Geneva Convention determines that in order for an organization’s members active in an armed conflict to qualify as lawful combatants, the organization’s members are compelled to fulfill four requirements (which will be dealt with in the following chapter). Failure to do so, would render individual members unlawful combatants, who will not be accorded the protection of the Third Geneva Convention. In failing to meet the requirements, the unlawful combatant is at risk not only of being detained, but also of being subjected to interrogation and trial by military tribunal for engaging in impermissible hostile acts during an armed conflict. These “unlawful combatants” are not guaranteed protection against “physical coercion and intensive interrogation”; they are exposed to “unmediated and unsupervised interrogation”. The Guantanamo Bay detainees are labeled as “unlawful combatants” and are denied their rights in terms of Article 5 of the Third Geneva Convention. They are further subjected to intensive interrogation with reports of torture appearing regularly in major United States newspapers.

205 1907 Regulations.
206 I, II, III & IV.
208 Article 4(A)(2).
209 Ex Parte Quirin 317.US at 31; Padilla vs Bush 233 F.Supp.2d at 593.
Initially the United States considered the Guantanamo Bay detainees to be prisoners of war (and thus subject to the laws of war). Following the September 11, 2001 attacks, the United States Administration unilaterally determined that captured Al Qaeda and Taliban detainees, who fail to meet the requirements of the Third Geneva Convention, are unlawful combatants. It appears that by declaring the detainees unlawful combatants, the United States Administration is effectively saying that the Al Qaeda and Taliban detainees are not entitled to the protections afforded by the Geneva Conventions such as immunity from prosecution for lawful acts of war.

The United States’ declaration elicited widespread criticism and allegations of violations of International Law. Legal opinion holds that the term “unlawful combatant”, or “illegal enemy combatant”, is completely foreign to United States Criminal Law, International Law and the laws of war. Therefore, the reason for its use is to withhold the right to legal representation and the right to a speedy trial from the detained combatant, a move which is perceived to be an unacceptable and arbitrary suspension of the rule of law. The fact that no vacuum exists between the Third and Fourth Geneva Conventions means that there is no such entity as an unlawful combatant.\(^{211}\)

In order to justify their revocation of prisoner of war status for the Guantanamo Bay detainees, new descriptive categories were created for these detainees, the use of which absolved United States Administration from any legal obligations.\(^{212}\) A further manoeuvre by the United States government was to issue a draft document titled “Joint Doctrine for Detainee Operations: Joint Publication 3-63”,\(^{213}\) which created a new category of detainee, thereby formalizing the “enemy combatant” category. Armed force members who are denied prisoner of war status are, in terms of the JP 3-63, designated as “enemy combatants”. The JP 3-63 is, however, not limited to Al Qaeda and Taliban members, but to any individual whom the United States is engaged with in the war on terror. The JP 3-63 determines further that any detained individual with ties to a terrorist organization is to be classified as an enemy combatant.


\(^{213}\) Hereinafter called JP 3-63.
The United States Government’s strategy of re-classifying the Guantanamo Bay detainees has elicited widespread criticism. Firstly, the JP 3-63 is criticized for not setting criteria on how to identify organizations or individuals as terrorist entities. Furthermore, by issuing the JP 3-63 document, the United States government condoned the unlawful action by the Defence Department of ignoring the provisions in the Geneva Conventions that deal with prisoners of war and protected persons\textsuperscript{214}

The untenable situation that obtains on Guantanamo Bay can be ascribed to the lack of clarity about the categories “illegal combatants”, “enemy combatants” and “unlawful combatants”. This lack of a clear definition effectively positioned the detainees “outside the law and beyond justice”). Pictet, however, states that “[t]here is no intermediate status, nobody in enemy hands is outside the law… which is a satisfactory solution from the humanitarian point of view.”\textsuperscript{215}

Pictet’s point above is confirmed by the provisions of the Geneva Conventions. In the event of a combatant failing to fulfill the Article 4\textsuperscript{216} requirements and if he is declared an unlawful combatant, he will nevertheless be protected in terms of the Fourth Geneva Convention with regard to his treatment and fair trial rights.\textsuperscript{217} Whenever there is doubt about whether an individual is a lawful combatant, that person must be held captive as a prisoner of war, pending status determination by a competent tribunal. If the tribunal, in its status determination, finds that the individual is an unlawful combatant that person’s status reverts back to that of a civilian, who in terms of the Fourth Geneva Convention, is guaranteed certain rights as a protected person.

3.4 CONCLUSION

In light of the above it is submitted that the Guantanamo detainees should retain their civilian status and should, therefore, be eligible for protection under the United States Constitution. However, the capturing party to the conflict may limit these rights, if granting

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such rights would prejudice the security of that State.\textsuperscript{218} It is, however, submitted that the granting of constitutional rights to the detainees would not prejudice State security for the following reasons: firstly, the detainees are incarcerated and, secondly, if sufficient evidence against them exists, they can be charged and tried in the civilian courts, where the State with its abundant resources is in a position to prove its case.

The United States’ declaration that the captured Al Qaeda and Taliban combatants are unlawful combatants, created a new controversy regarding the Geneva Conventions. The official United States policy is that the detainees do not fulfill the requirements, in terms of the Third Convention, to be regarded as lawful combatants. They are therefore labeled as unlawful combatants who should be denied the status and protections usually accorded to prisoners of war. The United States Administration is furthermore of the opinion that these unlawful combatants cannot be dealt with in terms of United States Criminal Law, which is perceived to be inadequate to deal with this category of offender. Therefore, the United States will not treat the Guantanamo detainees as common criminals.\textsuperscript{219}

The opinion that the detainees do not fulfill the requirements of the Third Convention is shared by various commentators. They believe that “the detainees are not being labeled as prisoners of war, because they did not engage in warfare according to the precepts of the Geneva Conventions; they hide their weapons, do not wear uniforms, and try to blur the line between combatant and non-combatant”.\textsuperscript{220} It is submitted that in view of the above comments, the detainees, by their actions and the fact that they did not adhere to the requirements as set out in the Third Geneva Convention, determined their own status. The requirements, which need to be met to acquire prisoner of war status, will be discussed in more detail in the following chapter.

\textsuperscript{218} Article 5 of the Fourth Geneva Convention of August 12, 1949.
\textsuperscript{219} Wedgewood and Roth “Combatants or Criminals? How Washington Should Handle the Terrorists” [online] available at \url{http://www.foreignaffairs.org/2004501faresponse83312/ruth-wedgwood-kenneth-roth/combatants-or-}. (accessed on 20 September, 2006).
CHAPTER 4

THE APPLICABILITY OF ARTICLE 4(A)(2) OF THE THIRD GENEVA CONVENTION TO THE GUANTANAMO BAY DETAINEEs

4.1 INTRODUCTION

The status of the captured Guantanamo Bay detainees has become a controversial public debate with no unified resolve in the current international climate. William Winthrop, an American lawyer, commented as follows regarding the status of prisoners of war: “Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war.”

The status of prisoners of war, as defined by International Humanitarian Law, is determined by the nature of the conflict they were party to. For instance:

(i) Humanitarian Law as embodied in the four Geneva Conventions and Protocol I of 1977 is applicable if the detainees were taken captive during an international armed conflict;

(ii) International Humanitarian Law embodied in common Article 3 to the Geneva Conventions and Additional Protocol II is applicable if the detainees were captured during a non-international armed conflict;

(iii) International Humanitarian Law is not applicable if the detainees were captured outside the context of an armed conflict.

Therefore, in order to determine the law applicable to the Guantanamo detainees at the time of capture, it has to be determined what type of armed conflict was being waged.

The United States’ position is that the Afghanistan conflict was international in character in terms of Article 2 common to the four Geneva Conventions. The Geneva Conventions of 1949 constitute a comprehensive legal regime governing the treatment of detainees in an armed conflict. The most important objective of the Conventions is to protect soldiers and civilians from the horrors of war and to implement the rules dealing with the treatment of...
It is submitted that the Afghanistan conflict was indeed international in character and that the Al Qaeda combatants captured during that conflict formed part of the Taliban forces, thus making them subject to the provisions of International Humanitarian Law.

The Third Geneva Convention defines prisoners of war as members of armed forces captured during a conflict, or members of other militias and members of other volunteer corps, provided that such militias or volunteer corps fulfill the following requirements:

(i) That of being commanded by a person responsible for his subordinates;
(ii) That of having a fixed, distinctive sign recognizable at a distance;
(iii) That of carrying arms openly; and
(iv) That of conducting their operations in accordance with the laws and customs of war.

4.2 ENTITLEMENT TO PRISONER OF WAR STATUS

Article 4 of the Third Geneva Convention that deals with the status of prisoners of war, appears to be the most comprehensive and detailed Article in the Convention. It was at the Stockholm Conference in 1948 that the definition of prisoners of war was formulated as, “individuals who have fallen into the power of the enemy”. At the 1949 Conference this definition was drafted into the opening sentence of Article 4.

In light of the importance of determining which individuals are entitled to prisoner of war status, it is both logical and imperative that Article 4 be discussed in a detailed, categorized manner in order to assess its applicability to the Al Qaeda and Taliban detainees at Guantanamo Bay.

4.3 MEMBERS OF THE ARMED FORCES

The term “members of the armed forces” refers to all members of a nation’s regular armed forces. National law sets out the fundamental requirements that determine the armed forces

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224 Article 4(A)(2).
225 Levi 48.
226 Levi 49.
of a State. When called up for active duty, the conscript, and the wartime volunteer, the reservist and the career soldier are all members of a State’s regular armed forces.\textsuperscript{227}

The Third Geneva Convention grants prisoner of war status not only to “militias and volunteer corps”, but also to members of other militias and other volunteer corps and organized resistance movements if they complied with the four conditions set out in the Convention.\textsuperscript{228} These conditions are separately set out below and briefly discussed.

The first condition is “That of being commanded by a person responsible for his subordinates.”\textsuperscript{229} This condition is open to interpretation. On the one hand, it may mean “responsible to some higher authority” or, on the other hand, “responsible to a commander” who orders individuals to carry out belligerent acts and expects them to comply with these orders.\textsuperscript{230} The ICRC’s interpretation of responsible leadership is that there should be “the guarantee of a certain order and a certain discipline ensuring respect for international law”, which would secure the utmost compliance with the laws and customs of war.\textsuperscript{231} It is also not clear how a captured member of an organized resistance movement will be able to convince the Occupying Power that he is entitled to prisoner of war status and that he is answerable to a responsible commander.\textsuperscript{232} To divulge the name of the resistance movement’s commander would mean the immediate extinction of the movement. It would be virtually impossible to comply with such a condition, as compliance would render future operations by the resistance movement practically non-existent.\textsuperscript{233} Nevertheless, to be accorded prisoner of war status, captured combatants must fulfill the above condition and subject themselves to the laws of war. Failure to do so, would prevent them from obtaining prisoner of war status.\textsuperscript{234}

It is important, for the purpose of this treatise, to determine whether the Al Qaeda and Taliban combatants fulfill the requirement of “being commanded by a person responsible for

\begin{footnotes}
\item[227]Levie 50; Article 4(A)(1).
\item[228]Levie 53; Article 4(A)(2).
\item[229]Article 4(A)(2)(a).
\item[230]Levie 45.
\item[231]Levie 45:46.
\item[232]Levie 46.
\item[233]Ibid.
\end{footnotes}
his subordinates.” The cell structure of the Al Qaeda network makes it difficult to prove that a chain of command existed in the organization, although Bin Laden, as the leader, may be seen as “a person responsible for his subordinates”.235 If the captured combatants were to be classified as members of the armed forces of a party to the conflict, the classification may account for the Taliban despite the fact that Afghanistan was never recognized by the United States or the United Nations, but not the Al Qaeda detainees.236 An irregular militia such as Al Qaeda does not, in view of the above, meet the first requirement and is, therefore, not entitled to prisoner of war status.237 It is submitted that this contention may not be correct in light of the fact that Al Qaeda was actively involved with the Taliban in military operations against the United States Alliance during the Afghanistan conflict.

In order to determine whether the Taliban detainees are entitled to prisoner of war status in terms of the Third Geneva Convention, one will have to establish whether they resemble a traditional army, which was commanded by a “person responsible for his subordinates” as required by the Third Convention,238 despite the fact that Afghanistan was never recognized by the United States or the United Nations.239 The captured Taliban combatants clearly fulfill the first condition.240

If the Al Qaeda detainees can prove that they were part of the armed forces of Afghanistan, they would be entitled to prisoner of war status while failure to do so, would automatically disqualify them from obtaining that status.241 The contention that Al Qaeda does not fulfill the first requirement, does not take into consideration the existence of the 005 Brigade, which was the guerilla arm of the Al Qaeda network.242 The 005 Brigade has been combined with, and absorbed into, the armed forces of the Islamic Emirate of Afghanistan with the objective of assisting the Taliban forces in the fight against the Northern Alliance. The 005 Brigade operated as the shock troops of the Taliban forces and functioned as an integral part

235 Dorf (accessed on October 5, 2005).
237 Dorf (accessed on 5 October, 2005).
238 Dorf (accessed on 5 October, 2005); Article 4(A)(2)(a).
239 Article 4(A)(3).
240 Dorf (accessed on 5 October, 2005).
of the latter’s military apparatus.\textsuperscript{243} It is, therefore, submitted that the Al Qaeda detainees at Guantanamo Bay were captured during the armed conflict in Afghanistan and, as members of the 005 Brigade, they were part of the Taliban armed forces, a party to the armed conflict. This clearly proves that the Al Qaeda detainees fulfill the first requirement.

The second condition is “That of having a fixed distinctive sign recognizable at a distance.”\textsuperscript{244} The rationale behind this condition was, firstly, to protect members of the armed forces of the Occupying Power from treacherous attacks by apparently harmless individuals\textsuperscript{245} and, secondly, to protect innocent, truly non-combatant civilians from suffering when the actual perpetrators of a belligerent act seek to escape identification and capture by merging into the general population.”\textsuperscript{246}

The question is raised as to what interpretation should be attached to the words “fixed distinctive sign” and whether the sign should be attached or just tied to an arm. The ICRC itself did not have much success in its interpretation of the term.\textsuperscript{247} Nevertheless, a clear interpretation is imperative for a distinction between the combatant and the civilian. Therefore it is important that, for its interpretation to be meaningful, the requirement of a fixed distinctive sign has to be interpreted as meaning “fixed” and “distinctive”.\textsuperscript{248} When fixed, it must not be possible to remove the fixed distinctive sign at the first signs of danger; therefore a rag or handkerchief does not fulfill this requirement.\textsuperscript{249} In most armies, military regulations stipulate how uniforms and insignia are to be worn. However, in a changing world the rules of armed conflict could not remain unchanged.\textsuperscript{250} The requirement of a “fixed distinctive sign recognizable at a distance” was relaxed with the adoption of Protocol I.\textsuperscript{251}

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\textsuperscript{243} Gunaratna 68. \\
\textsuperscript{244} Article 4(A)(2)(b). \\
\textsuperscript{245} Levie 46. \\
\textsuperscript{246} Levie 46. \\
\textsuperscript{247} Levie 46. \\
\textsuperscript{248} Levie 47. \\
\textsuperscript{249} Pfanner “Military Uniforms and the Law of War” International Review of the Red Cross [online] available at http://www.themissing.cicr.org/web/eng/siteeng0.nsf (accessed on 21 April, 2005) 99; Levie 48. \\
\textsuperscript{250} Pictet (ed) Commentary on the Additional Protocols 521. \\
\textsuperscript{251} Green 111; Article 44(3).
\end{flushright}
For soldiers engaged in physical combat, there is nothing more important than being able to identify whom one’s allies and enemies are.\textsuperscript{252} This is not necessarily the case in conflicts where the parties are unequal. A party that is weak and poorly equipped will have no interest in uniforms or distinctive signs.\textsuperscript{253} This was and still is the reality faced by resistance movements in Africa, Asia and South America, who do not have the resources that governments have. A notable exception is the ANC’s armed struggle, which was supported by the international community.

The foregoing, notwithstanding, commentators are agreed that no ambiguities exist and that the most important factor in terms of Humanitarian Law is that there must be a clear separation between combatants and civilians.\textsuperscript{254} Official United States policy upholds Humanitarian Law in this regard. The United States Air Pamphlet determines that a uniform guarantees the identification of combatants, but that “less than a complete uniform will suffice, provided it serves to distinguish combatants from civilians.” It would appear, therefore, that the identification of a particular group is not the sole purpose of the fixed distinctive sign, but rather the separation between soldiers and civilians and a uniform serves that purpose.\textsuperscript{255}

The issue, however, of what constitutes a distinctive sign is still clouded with uncertainty as it has not been defined. Therefore, claims that an armband or beret is accepted as conforming to the requirements of a distinctive sign may not be correct because it would not fulfill the requirement that the sign must be fixed.\textsuperscript{256}

The additional requirement of this condition that the sign must be “recognizable at a distance”\textsuperscript{257} has also been criticized. For instance, in 1924 Fooks commented on this requirement as follows: “The distance at which the sign must be distinguishable is vague and undetermined.”\textsuperscript{258} The ICRC attempted to clarify this requirement by stating that the sign must be “recognizable at a distance by analogy with uniforms of the regular army.” The reality is that very few combatants belonging to resistance groups have worn distinctive

\begin{flushleft}
\textsuperscript{252} Pfanner 100.
\textsuperscript{253} Ibid.
\textsuperscript{254} Pfanner 106; Levie 48.
\textsuperscript{255} Pfanner 107.
\textsuperscript{256} Ibid.
\textsuperscript{257} Article 4(A)(2)(b).
\textsuperscript{258} Fooks, as quoted in Levie 48.
\end{flushleft}
signs comparable to that of regular armed forces. They could not, in most instances, when they were involved in an armed conflict, be compelled to wear it. Lauterpacht expands on the viewpoint of the ICRC by stating:

“It is reasonable to expect that the silhouette of an irregular combatant standing against the skyline should be at once distinguishable from that of a peaceful inhabitant by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined.”

One criticism against the requirement set by the ICRC and Lauterpacht is that it is more difficult for resistance groups to meet the requirements of having a fixed sign and being recognizable at a distance. Another viewpoint is that the requirement does not conform to traditional military strategies of avoiding being detected or an easy target. Therefore, the identification of combatants from civilians cannot be based solely on the fact that the combatant is wearing a uniform or distinctive sign recognizable from a distance. In the light of the above, it is submitted that the distinction can also be derived from the weapons the combatants are using as long as the said weapons are not concealed.

The distinction between combatants and civilians lies at the very core of International Humanitarian Law, and therefore forms the basis of the laws and customs of war. The definition for this principle is found in Additional Protocol I to the Geneva Conventions, which states:

“In order to ensure respect for and protection for the civilian population and civilian objects, the Parties to a conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must conduct their operations only against military objectives.”

International Humanitarian Law does not compel armies to wear uniform, but the practice of wearing it is generally accepted by States. In terms of International Humanitarian Law, States must legislate the wearing of uniform in their domestic law. During the

259 Levie 48.
260 Lauterpacht-Oppenheim as quoted in Levie 48.
261 Levie 48.
262 Pfanner 108.
263 Pfanner 104.
264 Article 48 of Additional Protocol I.
265 Pfanner 104.
Afghanistan conflict the Taliban and Northern Alliance forces did not wear traditional uniform. It is therefore submitted that the Al Qaeda combatant, active in the Taliban forces as a member of Al Qaeda’s 005 Brigade, was for all intents and purposes part of the Taliban forces, who did not wear uniform.

Given the composite nature of their military forces, the Taliban and the Northern Alliance could not fulfill the “fixed distinctive sign” stipulation, and unless these combatants depicted themselves as civilians, they cannot, if captured, be denied prisoner of war status. Their rights are determined by the kind of combat they were engaged in and not by their nationality or their attire during an armed conflict.

During the Afghanistan conflict, the black turban of the Taliban forces was not recognized as a distinctive sign by the United States Government. Their reasoning was that the Taliban did not wear uniform and neither did they display a distinctive sign to distinguish themselves from civilians. In so far as the Taliban and Northern Alliance forces wore dark turbans and scarves respectively, one can assume that they recognized each other. Distinguishing themselves from civilians would, therefore, not have presented a problem. If the Taliban and Northern Alliance forces could recognize each other, it stands to reason that the United States forces should have been able to do the same. For this reason, the United States’ contention that the Taliban did not distinguish themselves, is flawed.

Contrary to their position on the Taliban, as discussed above, the United States appears to justify the use of traditional attire by their Special Forces in order for them to blend in with the locals and to infiltrate enemy forces, in conflicts where irregular forces, who do not wear any uniform, have to be able to identify each other. When captured, it is not required of these members of the armed forces to have a fixed distinctive sign recognizable at a distance.

In terms of International Law the importance of this requirement is centred on recognizing

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267 Ibid.
268 Ibid.
270 Ibid.
the difference between belligerents and peaceful citizens. For members of an armed group fighting secretly against an occupying force, a distinctive sign takes the place of a uniform. Therefore it should be worn continuously to demonstrate the wearer’s loyalty.

The third condition is “That of carrying arms openly.” This condition poses the least difficulty for compliance. Weapons concealed by clothes do not conform with the requirement, whereas carrying a rifle or machine gun openly does. The aim of this provision is to limit the concealment of weapons. There should be no uncertainty regarding the carrying of weapons openly and visibly. Because the element of surprise plays an important role in armed conflict, the intention of this provision is to assure the fairness of the fighting. Opposing parties to a conflict must be in a position to recognize their adversaries, whatever their weapons. It would be treacherous for a civilian to gain entry into the enemy’s military post by posing as a non-combatant, and then open fire on the unsuspecting enemy soldiers. It is submitted that the ways in which resistance movements conducted their armed struggles did not conform to the requirements of International Law. The art of confusing the enemy and preventing detection when carrying out military operations determined success or failure for the resistance movements. It is submitted that the manner in which they were operating was justified in view of the vast difference in access to finances and resources between the resistance movements and the governments they were opposing.

The conditions of carrying arms openly and wearing a distinctive sign serve the same purpose, namely to distinguish combatants from civilians. The reality, however, is that regular armed force members do not always carry weapons, and that the weapons, if carried, may not be seen from a close distance. On the other hand, the carrying of arms is not a requirement for participation in an armed conflict, because to deliver arms and ammunition to combatants may be construed as taking part in the hostilities.

It is submitted that during the Afghanistan conflict, the Taliban, Al Qaeda, the Northern Alliance, and its ally the United States, waged an armed conflict that covered vast areas of

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272 Pfanner 106.
275 Levie 50.
277 Watkin 31.
that country and opposed each other openly, with weapons clearly exposed. There should, therefore, be no doubt that the combatants of Al Qaeda’s 005 Brigade and the Taliban forces complied with the condition of carrying arms openly. In contrast, the covert operations of the United States Special Forces require the concealment of weapons, which is a direct violation of the requirement.

The fourth and final condition is “That of conducting their operations in accordance with the laws and customs of war.” Commentators are agreed that parties engaged in armed conflict must subject themselves to the laws of war, and that no party can claim its protection if they openly violate the restraints and prohibitions embodied in the laws of war. According to one school of thought, there is no ambiguity surrounding the equal application of the laws of war to anyone claiming to be a combatant. Compliance with the laws of war is imperative and should apply also to organized resistance movements and irregular forces. However, it should be taken into consideration that it would be difficult for guerrilla forces to meet all the requirements of Humanitarian Law in view of the nature of irregular combat. Nevertheless, if organized resistance movements do not maintain the standard of compliance, non-compliance with the other requirements could become the order of the day. Furthermore, upholding a different standard in the application of the laws of war with regard to irregular forces would severely diminish its equal application.

Regarding organized resistance movements, it should be borne in mind that, “[i]nasmuch as compliance with all four conditions is ‘constitutive’ in nature, the failure of the organized resistance movement as a whole to meet the fourth condition makes it impossible for any of its members to qualify for prisoner of war status.” It is therefore submitted that in view of the inability of resistance movements to comply with all four conditions it would be reasonable and fair that only the conditions of carrying arms openly and conducting military operations in accordance with the laws and customs of war, should be applicable to organized resistance movements, in order to make it possible for them to be accorded prisoner of war status.

279 Leve 50; Watkin 34; Goldman and Tittemore 14.
280 Watkin 34.
281 Leve 50; Watkin 34.
282 Leve 51.
283 Watkin 34.
284 Leve 53.
The limitations placed on the terrorist operations of the Al Qaeda network after September 11, 2001 have driven the organization to exhort other radical Islamists groups to embark on “mass casualty terrorism”. This clearly demonstrates that Al Qaeda does not and will not abide by the customary laws of war. A further indication is the nature of the Al Qaeda attacks, which are focused on killing innocent civilians through a “publicly acknowledged terror campaign.” It is submitted that the Guantanamo Bay detainees captured during the Afghanistan conflict should be protected in terms of International Law, and that the Al Qaeda operatives who blatantly fail to adhere to the laws and customs of war, and who engage in terror campaigns against civilians, should not receive the protection of the Geneva Conventions.

There appears to be uncertainty as to whether the burden of proof rests with the individual, irregular captive to prove that his group, when executing their operations, adhered to the laws and customs of war. If it is left to the individual and he fails to discharge that burden, it will be open to abuse by Detaining Powers, who may deem all members of such a group to be unprivileged combatants. It is submitted that the discharge of this burden is exactly what the United States Government requires of each individual detainee at Guantanamo Bay, whereas regular armed force members are not expected to furnish proof of compliance with the laws of war.

The internationalization of the Afghanistan conflict was brought about through United States armed intervention against the Taliban, which fulfilled the requirement set by the 1949 Conventions. It is therefore submitted that, in view of the fact that both the United States and Afghanistan are signatories to the Geneva Conventions, both parties are subject to the provisions and requirements of the laws and customs of war. Following a protracted silence regarding their interpretation of the 1949 Conventions, the United States indicated that although they were committed to the provisions of the Third Convention, they held the view that “the war on terrorism is a war not envisioned when the Geneva Conventions were signed in 1949.” Therefore, the United States adopted the position that in this war on terror

285 Gunaratna 224-225.
286 Watkin 35-36.
287 Goldman and Tittemore 15.
the Third Convention simply does not cover every situation in which people may be captured or detained in Afghanistan today.\textsuperscript{289}

Although Afghanistan is not recognized as a Sovereign State by the United States, the latter accepts Afghanistan as a signatory to the Geneva Conventions and, therefore, the Taliban’s armed forces should be covered by the Conventions.\textsuperscript{290} The fact that the United States recognizes Afghanistan as a signatory, confirms the United States’ tacit acknowledgement of the international status of the Afghanistan conflict.\textsuperscript{291} It is submitted that all parties to the conflict are subject to the laws of war, which includes all Al Qaeda operatives captured during the conflict and held at Guantanamo Bay and elsewhere in the world.

The Taliban’s open support of Al Qaeda in the latter’s unlawful terrorist operations moved the United States to determine that the Taliban did not fulfill the requirements of the Third Convention,\textsuperscript{292} which are prerequisites for regular armed force members if they are to be accorded prisoner of war status.\textsuperscript{293} The United States did not find the Taliban compliant with the legal requirements and thus refused to accede to the Taliban receiving prisoner of war status.\textsuperscript{294} The United States’ position, it is submitted, is criticized with good reason. The reason for the criticism is that the adversaries of the United States can rightfully demand the same compliance from United States combatants. The adversary might refuse prisoner of war status to all captured United States members active in hostilities, if compliance with the four conditions were imperative for the granting of prisoner of war status to regular armed force personnel who are guilty of committing war crimes.\textsuperscript{295}

It is submitted that the United States’ position creates an untenable situation, which may result in innocent combatants on the southern border of Afghanistan being held responsible for war crimes committed by an individual stationed on the eastern border of the country. Other warring countries may adopt this unhealthy stance, which does not augur well for combatants captured in armed conflicts all over the world. In terms of policy and law the United States’ position on this issue appears to be flawed. It would have been consistent with

\begin{itemize}
  \item \textsuperscript{289} Goldman and Tittemore 24.
  \item \textsuperscript{290} Ibid.
  \item \textsuperscript{291} Goldman and Tittemore 25.
  \item \textsuperscript{292} Article 4(A)(2).
  \item \textsuperscript{293} Goldman and Tittemore 26.
  \item \textsuperscript{294} Ibid.
  \item \textsuperscript{295} Goldman and Tittemore 27.
\end{itemize}
existing law and practice if the Taliban armed forces were unconditionally accorded prisoner of war status. Such an action would not have prevented the United States from eliciting information from the Taliban detainees or from instituting prosecution for crimes committed prior to or related to September 11, 2001.\textsuperscript{296}

The United States’ view that Al Qaeda is an international terrorist organization which cannot legally ratify the 1949 Conventions may be correct, because at no stage prior to or after September 11, did any State mandate Al Qaeda to launch armed attacks on the United States.\textsuperscript{297} It is therefore submitted that Al Qaeda is, except for their part in the Afghanistan conflict, not part of the armed forces of any State, but rather an organization, which executed its own private, hostile agenda against the United States, resulting in every member of Al Qaeda being liable to punishment in the event of capture. The Guantanamo Bay detainees should, therefore, be accorded prisoner of war status in terms of International Humanitarian Law.


As mentioned above earlier, the United States’ declaration that the Guantanamo Bay detainees are unlawful combatants and not prisoners of war, has elicited an international debate about the provisions of the Third Geneva Convention that deal with the issue of prisoner of war status. The United States Government’s intransigence in according prisoner of war status to Al Qaeda and Taliban combatants is questionable and clearly does not comply with the Third Geneva Convention.\textsuperscript{298} This position adopted by the United States is indicative of their belief that the status of the captured combatants was never in doubt, thus obviating the need for status determination in terms of Article 5.\textsuperscript{299} The Convention states clearly that “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”\textsuperscript{300}. Any

\textsuperscript{296} Goldman and Tittemore 27.  
\textsuperscript{297} Goldman and Tittemore 29.  
\textsuperscript{298} Goldman and Tittemore 30.  
\textsuperscript{299} Ibid.  
\textsuperscript{300} Article 5 of the Third Geneva Convention; Pictet \emph{Commentary on the Additional Protocol I} 544.
combatant active in the hostilities when taken captive is presumed a prisoner of war, and, until his status has been determined, should be treated as a prisoner of war. The United States has, however, never attempted to determine the status of the detainees by way of a tribunal.

The attitude of the United States is disconcerting in view of the fact that the Vietnam and Gulf War conflicts saw the operation of such tribunals by the United States armed forces. These tribunals succeeded in verifying the status of significant numbers of civilian detainees in the Gulf War. In the case of the Afghanistan conflict, the United States’ Colin Powell preferred status determination by a military judge, which was not accepted. His concern was that failure to apply the Third Convention would put the future safety of United States soldiers at risk. The reality facing the United States, it is submitted, is that not only are United States soldiers at risk, but so is every United States citizen captured by Al Qaeda operatives.

It is submitted that the United States’ policy of circumventing status tribunals clearly demonstrates a blatant disregard for and violation of International Law. If the captive has been refused prisoner of war status and is suspected of having committed an offence during the hostilities, he should be allowed to claim his right to prisoner of war status and demand that a judicial tribunal deal with his claim. Status determination has to be concluded before the onset of a military hearing regarding the offence. This avoids wrongful prosecution of captives whose offences are decriminalized when they are awarded prisoner of war status.

The intention of securing minimum protection for individuals acting on their own in an armed conflict led the ICRC to submit proposals which resulted in the adoption of Article 5 of the Third Geneva Convention. The Diplomatic Conference expressed the view that captured combatants are at their most vulnerable when taken captive, because their situation

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301 Article 45(1), Additional Protocol I of 1977.
303 Goldman and Tittemore 31.
304 Former Chief of Staff of the United States Armed Forces in the George Bush (Snr) Administration and then Secretary of State in the George W. Bush (Jnr) Administration.
305 Abraham 2004 SALJ 845.
is determined by decisions regarding their status, which is not very clear at the time of capture.\textsuperscript{308} The importance of determining the status of captured combatants becomes paramount when it is considered that the daily welfare of prisoners of war is dependent on their status. Therefore the 1949 Conference agreed that the provisions of Article 5 should apply with immediate effect upon capture. Exception to this decision was discouraged. However, it is accepted that difficulties are experienced at the time of capture and that prisoners of war are, for a certain period of time, denied the rights they are entitled to.\textsuperscript{309}

The ICRC later concluded that Article 5 of the Third Convention did not guarantee sufficient protection. Therefore, to limit the “categories of persons entitled to prisoner of war status”, and to curb the disagreements which would follow from the qualification for such status, Article 45 was adopted by the Diplomatic Conference in 1977, where it was accepted that the nature of modern warfare demanded that procedures be established to guarantee the granting of prisoner of war status to captives entitled to it. Consensus was reached that the procedures were important to save the humanitarian cause. The reason was that any combatant who commits a hostile act while not part of any armed force recognized by the adversary, risk being punished severely by the latter, and may even be sentenced to death.\textsuperscript{310}

The Third Convention specifies that a “competent tribunal” should adjudicate the process of status determination. The reasoning was that decisions regarding a captive’s status should not be placed in the hands of one low ranking individual, but that a court should rather deal with such matters because the possible sentences that could be handed down included capital punishment.\textsuperscript{311} The possibility exists that tribunals may not be able to eliminate all of the doubts regarding the captured combatant’s status. Lingering doubt may be created by the circumstances surrounding the individual’s entitlement to prisoner of war status, or the status of the armed forces he aligns himself with. However, no uncertainty should exist that, where an individual is captured and is not considered either a prisoner of war or a civilian who has not participated in hostilities, he should there and then be treated as a prisoner of war until such time that his status determination has been concluded by a competent tribunal.\textsuperscript{312}

\textsuperscript{308} Pictet (ed) \textit{Commentary on the Additional Protocol I} 550.
\textsuperscript{309} Pictet (ed) \textit{Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949} 74.
\textsuperscript{310} Pictet (ed) \textit{Commentary on the Additional Protocol I} 545.
\textsuperscript{311} Pictet (ed) \textit{Commentary on the Additional Protocol I} 544.
\textsuperscript{312} Pictet(ed) \textit{Commentary on the Additional Protocol I} 550; Article 45 Paragraph 1 of Protocol I.
A combatant, furthermore, retains his status when captured, irrespective of whether he has violated the law of armed conflict.\textsuperscript{313} However, the law of armed conflict is applicable without exception to the armed forces the combatant was aligned to. Therefore, if it is established that the armed forces the combatant belonged to did not subject themselves to the laws of war, the status of the sentenced combatant would be in doubt even though he fulfilled the requirements expected of him.\textsuperscript{314} A competent tribunal would, therefore, be required to determine his status in terms of the Third Geneva Convention.\textsuperscript{315} The tribunal does not have to be a court, but the Detaining Power should determine its nature.\textsuperscript{316}

It is submitted that the correct forum for determining the status of the Guantanamo detainees would be a competent tribunal and not the United States Government, because of the presumption created by the Third Convention. United States military manuals and the fact that tribunals were established in the past, support the Article 5 procedure for status determination, provided for in the Convention.\textsuperscript{317} The United States Army Field Manual states that the Convention “applies to any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in aid of the armed forces and who asserts he is entitled to treatment as a prisoner of war or concerning whom any other doubt of like nature exist.”\textsuperscript{318}

The United States Air Pamphlet determines that “[u]pon capture, any person, who does not appear to be entitled to prisoner of war status, but who had committed a belligerent act is required to be treated as a prisoner of war until his status is properly determined.”\textsuperscript{319} The need to have a formalized procedure to deal with cases where doubt existed was realized by the United States Army in 1966 already. The directives, which were issued then, were “probably the first one[s] issued by any armed forces fully implementing the provisions of the second paragraph of Article 5.”\textsuperscript{320} The use of status determining tribunals where there is doubt is basically non-negotiable. The United States Military Judge Advocate General Handbook states that “when doubt exists as to whether captured enemy personnel warrant

\textsuperscript{313} Pictet (ed) \textit{Commentary on the Additional Protocol I} 551; Article 44 paragraph 2 of Protocol I.

\textsuperscript{314} Ibid.

\textsuperscript{315} Article 5 paragraph 2.

\textsuperscript{316} Abraham 2004 \textit{SALJ} 845.

\textsuperscript{317} Goldman and Tittemore 30.

\textsuperscript{318} Goldman and Tittemore 31.

\textsuperscript{319} Ibid.

\textsuperscript{320} Ibid.
prisoner of war status, Article 5 of the Third Geneva Convention tribunals must be convened.”

The United States’ refusal to accord prisoner of war status to the Al Qaeda and Taliban combatants drew scathing criticism, which was reflected in the following statement by the ICRC:

“International Humanitarian Law foresees that the members of armed forces as well as militias associated with them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.”

Procedural status determination is considered to be more just and impartial than a conclusive pronouncement by the executive branch. The implementation of competent tribunals to determine the status of the detainees would, therefore, have curtailed the criticism leveled against the United States. It is submitted that the implementation of such status determination procedures would have been in compliance with the prescripts of International Law, and although the Al Qaeda and Taliban combatants have not been accorded prisoner of war status, they are protected in terms of specific basic rules of international human rights and Humanitarian Law.

The attitude of the United States Government regarding tribunals is not understandable in view of the sentiments voiced by some United States officials. The principle that there is no intermediate status and that a captured individual cannot fall outside the law, is embraced by officials in the United States government. Michael Matheson, a former Deputy Legal Advisor, affirmed that the United States agrees with the position that the Article 5 procedure for status determination is the correct one.

In 1997 the United States armed forces formulated procedures to constitute status determination tribunals in terms of the Third Geneva Convention. These procedures outline the rules that should be adhered to when there is doubt concerning a captured individual’s status. The rules stipulate that captured individuals should:

321 Goldman and Tittemore 31.
(i) be informed of their rights at the commencement of proceedings against them,
(ii) be allowed to be present at all open sessions of the proceedings,
(iii) have the proceedings interpreted if necessary,
(iv) be allowed to call witnesses and cross examine those witnesses called by the tribunal,
(v) have the right to state their case,
(vi) have the right to address the tribunal and,
(vii) be able to exercise their right to silence.  

It is submitted that the United States’ position clearly does not conform to the Geneva Conventions for a number of reasons. Firstly, the United States has no authority to unilaterally declare that all detainees captured during the Afghanistan conflict are not prisoners of war. By doing that, the United States is usurping the function of the tribunals provided for in the Third Geneva Convention. Secondly, the United States ignores the presumption that all combatants captured during an armed conflict are prisoners of war until proper status determination by a competent tribunal takes place. The assertion by the United States Government that the Geneva Conventions only protect lawful prisoners of war is not correct, because all combatants captured during an armed conflict are guaranteed some protection in terms of the Conventions. Finally, the United States’ attitude that the provisions of the Conventions are not applicable to the global war on terror creates the perception that the United States is deliberately violating the Conventions, and by doing so wants to determine its own rules for status determination and protection of battlefield detainees, parallel to the provisions of the Geneva Conventions. In the process of contravening the Conventions, the United States compromises important international standards which could hamper efforts to sensitize its armed forces to the provisions of the Geneva Conventions.

Following the proper status determination of captured combatants, it is the responsibility of the Detaining Power to ensure the proper treatment of the captured combatants. The next section will provide an overview of the law applicable to the protection of the Al Qaeda and Taliban detainees.

322 Goldman and Tittemore 31.
4.5 THE HUMANE TREATMENT OF THE GUANTANAMO BAY DETAINEES

The applicable Humanitarian Law protecting defenceless individuals during an armed conflict cannot be changed by individual States. It is binding and must be adhered to by all States. The Conventions and Additional Protocol I place a general obligation on armed forces to treat combatants and civilians in their custody humanely. These provisions expressly prohibit discrimination against captives based on “race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.” Section III of Additional Protocol I places significant emphasis on the absolute prohibition of subjecting captives to “torture of all kinds, whether physical or mental”. All four Geneva Conventions emphasize the express prohibition on the use of torture. There is no exception, whether in the interest of the State or the survival of the nation, which could justify the use thereof. Therefore, any individual or State that employs torture as a tool to extract information, may be committing a grave breach of the Conventions, which may lead to an indictment for a war crime.

A number of Human Rights treaties have a bearing on the situation of the Guantanamo Bay detainees. The United States is a signatory to, amongst others, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human rights instruments make provision for the deviation from fundamental rights by States in certain circumstances. However, there are rights which are not subject to these provisions, whatever the emergency may be. One such right, which is enshrined in the ICCPR, is the right of captured individuals not to be subjected to torture, or the cruel, inhuman or degrading treatment or punishment.

The Convention on Torture defines torture and provides guidelines to be followed by States to prevent their officials and soldiers from carrying out acts of torture. The Convention states that “[n]o exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability or any other public emergency, may be invoked as a justification

323 Gasser in Haug 26.
324 Gasser in Haug 27.
325 Gasser in Haug 28.
326 Hereinafter referred to as the ICCPR.
327 Hereinafter referred to as the Convention on Torture.
328 Article 7.
of torture.”\(^{329}\) It is submitted that an individual’s right not to be subjected to torture cannot be deviated from under any circumstances. Moreover, the United States, as a signatory to the Convention on Torture, the ICCPR and the Geneva Conventions, is compelled to adhere to the provisions of these international instruments, which prohibit the use of torture and ill treatment to extract information from captured individuals or for any other reason.

The torture and inhumane treatment of captured individuals during an armed conflict constitute war crimes.\(^{330}\) Acts of this nature are grave breaches of the Conventions for which perpetrators, or those issuing the orders to carry out such acts and those who fail to prevent such acts, can be criminally charged for war crimes. These acts are subject to universal jurisdiction and perpetrators can be brought to justice in any country that is a signatory to the Conventions.\(^{331}\) Several reports of inhumane treatment of the Guantanamo Bay detainees such as violations of their personal dignity through humiliating and degrading treatment, have surfaced.\(^{332}\) The humane treatment of captured individuals during armed conflict is the fundamental theme that runs through all four Conventions.\(^{333}\) Therefore, when understanding the concept of humanity, one realizes that the Conventions set out the correct manner in which one individual should treat another individual in times of armed conflict.\(^{334}\)

In view of the allegations of torture and inhumane treatment that are being visited on the Guantanamo Bay detainees, the issue of whether International Law is criminalized and whether the perpetrators of these acts will be held accountable, should be discussed. The International Criminal Tribunals for the former Yugoslavia and for Rwanda demonstrated that the world was moving in the direction of criminalizing International Law, and that the perpetrators of grave breaches\(^ {335}\) of the Geneva Conventions would be held accountable.\(^{336}\)

It is submitted that the trial for war crimes of the former Liberian Head of State, Charles Taylor, in Sierra Leone, confirms that the criminalization of International Law is a reality.

\(^{329}\) Article 2(2).

\(^{330}\) Article 8 of The Rome Statute of the International Criminal Court (hereinafter referred to as the Statute).

\(^{331}\) Abraham 2004 SALJ 835.

\(^{332}\) Article 2(2) of the Convention against Torture.

\(^{333}\) Article 12 of the First and Second Conventions; Article 13 of the Third Convention; Article 27 of the Fourth Geneva Convention.

\(^{334}\) Pictet Commentary on the Third Geneva Convention 140.


\(^{336}\) Meron 1998 EJIL 18.
More than sixty countries ratified the Rome Statute which created the International Criminal Court. In terms of its provisions, which came into force on 1 July 2002, perpetrators of war crimes can be charged, convicted and sentenced. It is further required that, for international conflicts, State parties must criminalize certain grave breaches in their domestic law and prosecute or extradite perpetrators.\footnote{Meron 1998 \textit{EJIL} 23.} It is submitted that the enforcement of sanctions against the United States for committing grave breaches of the Geneva Conventions and other International Law instruments will not be an easy task. The question arises as to which international organization or country should enforce the sanction. The problems that can be encountered are, firstly, that the United States did not ratify the Rome Statute and, secondly, that the United States is the biggest financial contributor to the United Nations, which is the only international organization which can possibly influence United States’ policy.

It has become a growing concern that the detainees are being subjected to inhumane treatment by the United States’ Central Intelligence Agency,\footnote{Hereinafter referred to as the CIA.} in violation of the provisions of International Law. There is a real concern that CIA operatives have been granted the liberty to apply coercive interrogation methods on the terror suspects. The general concern is that the United States Government is attempting to ensure that these operatives are not restricted by law in applying “cruel, inhuman or degrading treatment” on the detainees. The methods employed by these agents are not allowed in the United States or in any other military context.\footnote{Dworkin “Crimes of War Project: The CIA Exception: Can Intelligence Agents Subject Detainees to Inhuman and Degrading Treatment?” [online] available at \url{http://www.crimesofwar.org/news-CIA.html} (accessed on 13 April, 2005).} It is submitted that the United States is attempting to rewrite the definition of torture to condone interrogation methods that are not allowed in terms of the internationally accepted definition of torture.

The belief that the CIA is not required to meet humane standards was contained in a document issued by the United States State Department on February 2, 2002. This document echoed the sentiments of a number of Administration lawyers, which was that, as far as the conflict with the Taliban and Al Qaeda is concerned, the Third Geneva Convention does not apply. CIA attorneys expressed the view that if the protections guaranteed by the Convention are applicable as a matter of policy, that this policy should not limit the CIA in its treatment of the detainees. The manner in which the CIA attorneys interpreted the State Department’s
memorandum was endorsed by the President of the United States on February 7, 2002, when he stated that “the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”

The aforementioned directive by the United States President clearly illustrates that the United States Government’s interprets International and domestic law relating to the interrogation of terror detainees on foreign soil by government agents, in a manner that exempts CIA agents. It is submitted that the United States, in its attempt to exempt CIA agents from being subjected to laws prohibiting the use of coercive interrogation methods, in contravention of the Geneva Conventions, creates the impression that the treatment of detained terrorist suspects is not regulated by any part of International Law. This practice is disconcerting and disturbing, because it is a known fact that the United States, together with other democracies, have in the past recognized and adhered to the rules of customary law that deal with the treatment of terrorist detainees.

4.6 CONCLUSION

There appears to be consensus among legal experts that parties to an armed conflict must observe the laws and customs of war. It is submitted that such observance would be in keeping with the spirit of Henry Dunant’s vision with the founding of the ICRC, which was to minimize the suffering of civilians caught in the crossfire during armed conflicts and also to address the situation of captured combatants, irrespective of their status. Although it may be argued that Al Qaeda and the Taliban did not adhere to the laws and customs of war, it would be consistent with the intention of Humanitarian Law and human rights law that the Guantanamo Bay detainees be accorded the rights enshrined in various International Law instruments.

In view of the above it is clear that the United States of America is in breach of the Geneva Conventions with regard to the provisions dealing with, firstly, the correct legal procedure for the status determination of the Guantanamo Bay detainees, and, secondly, the provisions dealing with the humane treatment of the detainees. The United States of America is further

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340 Ibid.
also in breach of a number of other International Law instruments such as the Additional Protocols, the ICCPR, and the Convention on Torture.

In view of the provisions contained in the International Law instruments mentioned above, of which the United States is a signatory, the Guantanamo Bay detainees are entitled to exercise their right to have the legality of their incarceration tested in a court of law. The following chapter will deal in more detail with the detainees’ right to a fair trial in terms of the International Law instruments.
CHAPTER 5

THE GUANTANAMO BAY DETAINEEES AND THEIR TRIAL RIGHTS

5.1 INTRODUCTION

“War is war, and it has never been the case that when you captured a combatant you have to give them a jury trial in your civil courts, I had a son on that battlefield and they were shooting at my son and I’m not about to give this man who was captured in a war a full jury trial. I mean it’s crazy.”

Justice Antonin Scalia

The United States has been using Guantanamo Bay as a naval base for more than a century. Control over the area was established in terms of a lease obtained during the 1898 Spanish-American War. After diplomatic discussions between Cuba and the United States the lease was re-affirmed in 1934. The Castro Administration, however, does not recognize the lease in light of the provisions of article 52 of the 1969 Vienna Convention on the Law of Treaties, which determines that leases obtained by force are not legitimate.

The United States Government transferred the first “war on terror” detainees to Guantanamo Bay, Cuba in 2002. Approximately five hundred detainees are currently being held without charge or trial and are denied their rights in terms of International Law. They find themselves in a legal black hole, with no access to any court, legal representative or family visits. Therefore any discussion regarding the trial rights of the detainees has to first establish the legal regime which applies at Guantanamo Bay.

The United States maintains that United States domestic law does not apply in Guantanamo Bay. The detainees are not considered to be legal subjects because they are not on United States territory. Therefore, they have no legal standing in the United States domestic courts. In terms of the lease contract between the United States and Cuba, the former has control

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342 Lease to the United States of Lands in Cuba for Coaling and Naval Stations 1903 U.S.- Cuba T.S. No.418.
343 Treaty Between the United States of America and Cuba Defining Their Relations May 29, 1934.
over Cuban territory. The United States, however, claims that it is allowed to suspend United States law on Guantanamo Bay because the area is subject to Cuban sovereignty.

It is submitted that if the territory is subject to Cuban sovereignty, the detainees should be accorded the status of legal subjects in terms of Cuban law. If the detainees are charged for war crimes and the United States is reluctant to prosecute them in their domestic courts, they should hand them over to the Cuban authorities for prosecution in the latter’s domestic courts. The detainees could also be tried by the International Criminal Court. The I.C.C. is an independent, permanent court that tries persons accused of genocide, crimes against humanity and war crimes. The I.C.C.’s policy of complimentary jurisdiction makes provision for the prosecution of the Guantanamo detainees by this forum. However, the United States did not ratify the Rome Statute of the I.C.C., which makes such prosecution improbable. It is submitted that the United States, as a signatory to all four Geneva Conventions, is compelled to accord the detainees due process and a fair trial if they are charged for grave breaches. This submission is supported by the finding of the United States Supreme Court that the detainees “have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.” This would imply that the detainees should be accorded due process in terms of the Fifth Amendment.

Several hundreds of the detainees incarcerated at Guantanamo Bay were captured during the Afghanistan conflict. They are not accorded prisoner of war or civilian status. Their constitutional rights are not respected and not one detainee has been given a fair trial. This is happening against the background of the United States being a signatory to the Geneva Conventions and the ICCPR, both of which determine the requirements for the fair trial of enemy combatants or any individual who has been deprived of his freedom.

344 Coalition of Clergy et al vs Bush et al Case No CV 02-570 (U.S District Court C.D. California) 22-23.
346 Hereinafter referred to as the I.C.C.
347 Article 1 of the Rome Statute of the I.C.C.
349 Constitution of the United States of America.
5.2 THE RIGHT TO A FAIR TRIAL

It would appear that the United States Administration’s application of justice has been rooted in controversy from the moment the first detainees arrived at Guantanamo Bay. The detainees arrived without the protection of International Law or the Geneva Conventions. Held outside the United States, the detainees are seemingly not protected by the United States Constitution and therefore not entitled to a trial by jury. The detainees are held without charge and denied their democratic and legal rights. There is no indication as to whether they will be charged before a proper court of law. Their incarceration can be indefinite in light of their current situation, a situation which is in violation of the Geneva Conventions, the ICCPR and the United States Constitution.

The requirements of the right to a fair trial, as embodied in International Law instruments and the United States Constitution, are the following:

(i) The right to be informed of the charges;
(ii) The right to prepare and to present a defence;
(iii) The right to be assisted by counsel;
(iv) The right not be forced to confess;
(v) The right to be tried without undue delay, and
(vi) The right to be presumed innocent until proven guilty.350

The Guantanamo Bay detainees are denied all of the aforementioned rights. It is submitted that, even if the detainees pose a threat to the world order, the United States is still required by law to respect the individual’s basic human rights, such as the right to a fair trial. The right to a fair trial is central to the provisions of the Third Geneva Convention.351 The Bush Administration endorsed the view that the perpetrators of the September 11, 2001 attacks should not be accorded the protection of the Bill of Rights. President Bush stated, “We must not let foreign enemies use the forums of liberty to destroy liberty itself”.352 It is submitted that this reasoning totally ignores the presumption of innocence, which clearly illustrates that the United States is not adhering to due process principles when they assume that the

350 Article 14 of the ICCPR; article 75 of Additional Protocol I; Fifth and Sixth Amendments to the United States Constitution; Article 6 of the European Convention on Human Rights.
351 Article 5 of the Third Geneva Convention.
detainees are guilty in the absence of their conviction by a properly constituted court. It would be inconceivable to have the detainees tried without recourse to the Fifth and Sixth Amendment Rights, which are the pillars of American justice.

Due process and a speedy trial are guaranteed by the Fifth and Sixth Amendments of the United States Constitution, guaranteed protections that cover all persons and not only United States citizens. There is, however, a school of thought which contends that persons captured outside the United States should not be accorded the protection of the United States Constitution.\footnote{Levy “Misreading Quirin” The National Law Journal 16 January 2006 [online] available at http://www.law.com (accessed on 20 May, 2006).} This opinion supports The Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism\footnote{November 13, 2001, 66 Federal Regulation 57833(2000). Hereinafter referred to as The Military Order. Korematsu vs United States 323 U.S. 214 (1944); Hirabayashi vs United States 320 U.S. (1943); Ex Parte Quirin 317 U.S. 1 (1942).} issued by the President of the United States. The Military Order states that a detainee “shall not be privileged to seek any remedy, directly or indirectly, in any court of the United States”. It is submitted that this directive is a violation of the Constitution that the President of the United States is bound to uphold.

Following the September 11, 2001 attacks, The Military Order introduced a system of military commissions for the trial of individuals linked to terrorist related offences. These military commissions require a lesser burden of proof than domestic courts to secure convictions, and by declaring the detainees unlawful combatants, the United States opened the way for their trial by these military commissions. It is submitted that military commission proceedings against the suspected terrorists pose a challenge to the well established guarantees of due process, a cornerstone of the American Constitution and International Law, as informed by the provisions of the ICCPR and Geneva Conventions.

Proponents for the use of military commissions rely on court decisions\footnote{Resnik “Invading the Courts: We do not need Tribunals to sort out the guilty” [online] available at http://www.law.com (accessed on 24 May, 2006).} from the Second World War.\footnote{347 U.S. 483 (1954).} These decisions demonstrate that during wars the courts are reluctant to lean towards the protection of civil liberties. However, these Second World War decisions clearly predate the decisions such as the equality of law in Brown vs Board of Education\footnote{357} and the
right to counsel in *Gideon vs Wainwright*. These later decisions were followed by progressive developments with regard to due process and the right of access to the courts.

Following the decisions cited above, the United States became a signatory to the Geneva Conventions and the ICCPR, thereby committing itself to the principle of fairness through an independent judiciary. The judiciary’s independence was illustrated in a court decision where the importance of due process was emphasized. In this case the United States Government argued that the trial should take place unfettered by the United States Constitution and without judicial review. The Court, however, concluded that:

“…it is the first principle of American life, not only life at home but life abroad, that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution.”

The Court decided that the accused should be accorded due process of the law. It is clear that if confronted by acts of terrorism, judges are capable of adhering to the principles of due process.

The trial proceedings associated with military commissions created by the Presidential decree would not guarantee the protections usually granted to lawful prisoners of war. It is therefore submitted that United States domestic courts would be reluctant to sanction military commissions, but, as Resnik opines, judges are fallible when they have to challenge executive decisions. It is further submitted that it would be inconceivable to implement the military commissions as envisaged by The Military Order if the detainees are not accorded due process rights in terms of the United States Constitution.

The introduction of military commissions at Guantanamo Bay demonstrates the United States Government’s views on the wide powers of the president during wartime. The Military Order, authorizing the military commissions to try Al Qaeda members, is a manifestation of the wide powers enjoyed by the president. However, no trial has taken place before these commissions yet. These commissions are not similar to courts martial, and do not conform to

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359 *United States vs Tiede* 86 FRD 227 U.S. 1978.
360 *Supra.*
361 *Supra.*
362 Abraham 2004 *SALJ* 848-849.
the laws, Constitution and treaties of the United States. The commissions further allow the
United States to define the crime and to select the prosecutor and judges. Detainees that
appear before these commissions are denied access to legal representation and to the evidence
against them. Any verdict by the commission can be reversed by the United States Secretary
of Defence. These commissions will allow statements which were obtained by undue
influence, thus perpetuating more injustice.\footnote{Goldenburg “Guantanamo’s day of reckoning in Supreme Court” available at
http://www.guardian.co.uk/guantanamo/story/o,,1741825,00.html (accessed on 11 April, 2006).}

It was pointed out earlier that trials by military commissions were made possible through the
unprocedural assignation of unlawful combatant status to the Guantanamo detainees. This
status determination might be superfluous if the intention of the Detaining Power is to
prevent the combatants from taking up weapons again by detaining them indefinitely.\footnote{Hamdi vs Rumsfeld 316 F.3d 450,465-66,468-69 (4th Circuit 2003).} In
compliance with International Law, as per the Third Geneva Convention, prisoners of war
must be repatriated at the end of hostilities.\footnote{Article 118 of the Third Geneva Convention; Article 85(4)(b) of Additional Protocol I.} The conflict in Afghanistan has ended.
Therefore all captured combatants should have been released and repatriated after the
cessation of armed hostilities.\footnote{Article 118 of the Third Geneva Convention.} Any unjustified delay in their repatriation constitutes a
serious breach in terms of international law.\footnote{Article 85(4)(b) of Additional Protocol I.} It is submitted that the continued incarceration
of the detainees at Guantanamo Bay, approximately five years after the cessation of the
conflict, places the United States of America squarely in breach of international law. It is
submitted that, in view of the United States’ War on Terror, it is doubtful whether the
detention of the Guantanamo Bay detainees will end.

The act of designating someone as an unlawful combatant creates the possibility for the said
combatant to test that status through a judicial review mechanism. It is submitted that a
judicial review mechanism should conform to the precepts of the ICCPR and Third and
Fourth Geneva Conventions. However, the president of the United States, through his much-
maligned Military Order, denies the Guantanamo Bay detainees access to American courts,
contrary to International Law. Furthermore, it would be logical to try the detainees in the
functioning civilian courts, or subject them to military jurisdiction but with full judicial
guarantees in terms of The Third Geneva Convention.\footnote{Article 3(1)(d) of the Third Geneva Convention.}
The USA Patriot Act passed on October 26, 2001 did not specifically authorize military commissions or enemy combatant detentions. The Military Order did so.\footnote{Section 3; Section 4 of The Military Order.} The Military Order further determined that “any individual who is not a citizen of the United States” is subject to its provisions.\footnote{Section 2(a) of The Military Order.} It is submitted that the unwillingness of the United States Administration to have the issue of prisoner of war status settled by an appropriate court or tribunal, is a clear indication of political and military interference in the judicial process.

5.3 COURT PROCEEDINGS REGARDING THE DETENTION OF ENEMY COMBATANTS

The Guantanamo Bay detainees claim that they are being held unlawfully in contravention of both International Law and the United States Constitution. Their detention has been challenged in a number of habeas corpus proceedings. However, these matters focused mainly on the court’s jurisdiction to deal with the habeas corpus application. The writ of habeas corpus is an order that an imprisoned individual appear in a court in order to test the lawfulness of his incarceration. The application for the writ is usually filed by the captive or by someone else who objects to the detention of the captive.\footnote{“Habeas Corpus Defined and Explained” available at \url{http://www.lectlaw.com/def/hoo1.html} (accessed on 9 June, 2006).}

The purpose of the writ of habeas corpus as described by the court is to protect individuals “against the erosion of their right to be free from wrongful restraints upon their liberty”.\footnote{Jones vs Cunningham 371 U.S. 236,243 (1963).} The habeas corpus order safeguards the freedom of individuals against arbitrary and lawless state action. The United States courts have dealt with the issue of whether, in times of war, citizens or foreigners could apply for the writ of habeas corpus. Two aspects dealt with were of particular importance to the Guantanamo Bay detainees. Firstly, whether a federal district court had jurisdiction to issue a writ of habeas corpus and, secondly, whether petitions for habeas corpus were subject to judicial review in the event of the petitioners’ capture during an armed conflict.\footnote{Iraola Enemy Combatants, The Courts, and the Constitution available at \url{http://wyomcases.courts.state.wy.us/applications/oscn/DeliverDocument.asp?ID=438669} (accessed on 17 January 2006).}
In a Second World War case, twenty-one German operatives were convicted by a military commission for hostile acts against the United States. The proceedings took place in China. The convictions were approved by the military after review and the Germans were repatriated in view of the German surrender. The prisoners argued that their detention violated the United States Constitution and the Third Geneva Convention. Their application for the writ of habeas corpus was dismissed by the United States district court, which held that it had no jurisdiction to deal with the application.

The United States Supreme Court reviewed the rights and differences between citizens and aliens in times of war. The Court stated that in order to invest enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to United States courts, it would have to find that a prisoner of the United States military authorities is constitutionally entitled to the writ, even though he

(i) was an enemy alien;
(ii) had never been or resided in the United States;
(iii) was captured outside of United States territory and there held in military custody as a prisoner of war;
(iv) was tried and convicted by a military commission sitting outside the United States;
(v) was tried for offences against laws of war committed outside the United States;
(vi) was at all times imprisoned outside the United States.

The Supreme Court refused to make such a finding. The Court reasoned that the presence of an alien in the United States, whether enemy or friendly, “implied protection” and that no such protection could be invoked under the circumstances presented because:

“the prisoners at no relevant time were within any territory over which the United States exercised sovereignty and the scenes of their offence, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”

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375 Supra.
376 Supra 777.
377 Supra 777-78.
The Court also recognized that “[e]xecutive power over enemy aliens, undelayed and unhampered by litigation ha[d] been deemed, throughout our history, essential to wartime security.”

That security, the Court noted, would be jeopardized if field commanders were called to account for their actions by their enemies in their own civil courts, thereby diverting attention from their military mission.

In another United States Supreme Court case one of the accused contended that because he was a United States citizen he was protected from being held accountable for his unlawful belligerency. The Court ruled that:

“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of belligerency, which is unlawful because it is in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. Put another way, Haupt was charged with entering the United States as an enemy belligerent and unlawful belligerency [was] the gravamen of the offense of which he [was] accused.”

5.4 THE GUANTANAMO BAY DETAINES: CHALLENGING THE UNITED STATES AUTHORITIES

Some of the detainees held at the naval base in Guantanamo Bay challenged the authority of the government to hold them without charges and deny them the right of access to lawyers by applying for writs of *habeas corpus* in a federal court. These cases are now examined.

In the first case the petitioners applied for a writ of *habeas corpus* in the United States District Court for the Central District of California on behalf of all captives held in Guantanamo Bay. The petitioners alleged that the government held the prisoners in violation of both the Constitution and the laws and treaties of the United States because the government, firstly, failed to inform them of the nature of the accusations against them; secondly, denied them the right to the assistance of counsel; and, thirdly, deprived them of their liberty without due process of the law. The respondents argued that petitioners lacked

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378 *Supra* 774.
379 *Supra* 779.
380 *Ex Parte Quirin* 317 U.S. 1 (1942).
381 *Supra* 38.
382 *Coalition of Clergy vs Bush supra*.  

64
standing to bring the petition, but even if they could, no federal court had jurisdiction to entertain it. The Court agreed.

The Court found that the petitioners did not have locus standi to lodge any claims on behalf of the detainees. The petitioners lacked the required relationship with the detainees to bring the cause of action. Recognizing that the petitioners might attempt to remedy this problem by applying for leave to file an amended petition to support the issue of locus standi, the Court ruled that such a request would be denied because an amended petition would also not satisfy the writ’s jurisdictional requirements.\(^{383}\)

The Court lacked jurisdiction to issue the writ because none of the named respondents were found within its district. The Court recognized, however, that jurisdiction could lie in a district court where anyone in the “chain of command” with control over the prisoners was present and that at least some of the respondents identified in the petition were present within the jurisdiction of the United States District Court for the District of Columbia. Accordingly, the Court went on to consider whether a transfer of the petition to that district court, in terms of the United States Constitution,\(^ {384}\) would be appropriate and concluded that such a transfer would be inappropriate because that district court also lacked jurisdiction. The Court relied on *Johnson*\(^ {385}\) in reaching its conclusion. The Court found no meaningful distinction between the petitioners in *Johnson* and the detainees in Guantanamo Bay because both groups were aliens who had been captured abroad in combat, were identified as enemy combatants, were held under the exclusive control of the military, and had never set foot on American soil.\(^ {386}\)

The Court then turned to the remaining question of whether the detainees were “present” in the United States by virtue of their detention at the Guantanamo Naval Base. The Court found that there was a distinction between territorial jurisdiction and sovereignty, and that sovereignty was the key in determining whether the United States exercised jurisdiction or sovereignty over the naval base. The Court examined the lease agreement entered into by the United States and Cuba in 1903 after the Spanish-American War. The Court found that Article III of the agreement clarified the question of sovereignty. The court stated that while,

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\(^{383}\) *Supra* 12.

\(^{384}\) Article 28.

\(^{385}\) *Johnson* supra 763.

\(^{386}\) *Coalition of Clergy vs Bush* supra 19.
on the one hand, the United States recognized the continuance of the ultimate sovereignty of
the Republic of Cuba over the described areas, the Republic of Cuba, on the other hand,
consented that during the period of occupation by the United States, the latter would exercise
complete jurisdiction and control over and within those areas.\footnote{387}

Concluding that it lacked the authority to ignore the parties’ distinction between jurisdiction
and sovereignty, the Court rejected the petitioners’ contention that the concepts were
interchangeable. The Court found that in matters that were comparable other federal courts
had held that the naval base at Guantanamo Bay was outside the sovereign territory of the
United States, and thus not the functional equivalent of United States territory.\footnote{388} Finding
that Cuba retained sovereignty over the naval base, the Court applied the decision in \textit{Johnson}
and ruled that the petitioners were not entitled to a writ of \textit{habeas corpus}. On appeal, the
Ninth Circuit Court affirmed the district court’s ruling that petitioners did not have the \textit{locus
standi} to file an application on behalf of the detainees.\footnote{389}

In the second case\footnote{390} the United States District Court for the District of Columbia was
confronted with a legal challenge to the detentions at the naval base in Guantanamo Bay. In
this case two British and one Australian citizen, and some of their parents, filed an
application for a writ of \textit{habeas corpus} requesting access to counsel, the discontinuation of
interrogations while the litigation was in process and their release.

The Court identified two situations where the writ had been found to apply to aliens. In the
one case the aliens sought to prove their citizenship and, in the other, sought to be allowed
into the United States, neither of which were at issue in the petitioners’ case.\footnote{391} The
petitioners’ contention that \textit{Johnson} was inapplicable was rejected by the Court. The
petitioners’ claim was based on the fact that the government had not determined that they
were enemy aliens. The Court held that the lack of jurisdiction in \textit{Johnson} did not “hinge on
the fact that the petitioners were enemy aliens, but on the fact that they were aliens outside
territory over which the United States was sovereign.”\footnote{392} In support of its interpretation, the
Court referred to Justice Douglas’s observation in \textit{Johnson} that “the Court’s opinion

\footnotesize

\begin{itemize}
  \item \textit{Supra} 21-22.
  \item \textit{Supra} 22-23.
  \item \textit{Coalition of Clergy vs Bush supra} 23.
  \item \textit{Supra} 66.
  \item \textit{Supra} 67.
\end{itemize}
inescapably denie[d] courts power to afford the least bit of protection for any alien who [was] subject to our occupation abroad, even if he [was] neither enemy nor belligerent and even after peace [was] officially declared.”

The Court proceeded to consider the issue of whether the naval base at Guantanamo Bay should be considered to be within the territorial jurisdiction of the United States. The Court found the petitioners’ reliance on cases involving the rights of aliens residing in sovereign territories of the United States misplaced, and recognizing that courts had, in other contexts, rejected a *de facto* sovereignty test for claims involving aliens at the naval base in Guantanamo Bay, the Court concluded that the base was outside the sovereign territory of the United States. In applying *Johnson*, the Court ruled that it lacked jurisdiction to entertain the petitions.

The above finding was confirmed by the United States Court of Appeals for the District of Columbia Circuit. Following the District Court’s interpretation of *Johnson*, the appellate court found that no court had jurisdiction to entertain the petitions, “even if the petitioners ha[d] not been adjudicated enemies of the United States”. However, the Supreme Court has indicated that it would consider whether federal courts lack jurisdiction to deal with challenges, by foreign nationals, regarding the legality of their detention at Guantanamo Bay.

Unless the Supreme Court abandoned *Johnson*, it appeared that a federal court could not exercise jurisdiction over the petition of an alien detained at Guantanamo Bay. If a federal court could exercise jurisdiction, detainees under The Military Order would enjoy access to limited judicial review. It should be noted, however, that, according to The Military Order, any individual subject to it “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on [his] behalf in … any court of the United States”.

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393 *Supra* 68.
394 *Supra* 69.
395 *Rasul* 69-72.
396 *Coalition of Clergy vs Bush* supra 21.
397 *AlOdah vs United States* 321 F.3d 1134,1145 (D.C. Cir.2003).
398 *Supra* 1141.
399 Section 7(b)(2)(i) of the Military Order.
A compelling argument exists that since at least September 11, 2001, the United States and Al Qaeda have been actively engaged in a war which was declared and initiated by Al Qaeda and that the Guantanamo Bay prisoners fall within the category of enemy aliens as identified in Johnson. It may also be argued that entertaining petitions from Guantanamo Bay prisoners would interfere with the prosecution of the war by the executive branch. As correctly noted by the Court in Johnson, it is difficult to envisage a more limiting restraint on “a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home”. Whether the Supreme Court would depart from Johnson or distinguish it in any meaningful way, remained to be seen.

It is submitted that the departure from Johnson was dealt with decisively in Hamdan vs Rumsfeld. This decision changed the view of the United States Administration towards the Guantanamo Bay detainees and specifically the Al Qaeda internees. Emphasis is placed on three important issues flowing from the decision, which are:

(i) That the commissions established by The Military Order must comply with the laws of war.
(ii) That the president cannot act beyond the boundaries of domestic law and International Law.
(iii) That legislation passed by Congress should be interpreted as requiring compliance, by the United States president, with the laws of war.

It is submitted that for the Guantanamo Bay detainees this Supreme Court decision is of vital importance. According to the United States Administration’s stated policy, the detainees would not be accorded the protection of the Third Geneva Convention. In a reversal of their policy the United States accepted the Court’s decision that the detainees, particularly the Al Qaeda members, were entitled to the protection of the Third Geneva Convention, and, specifically, Common Article 3. The Court determined that the eliciting of information from

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400 Johnson vs Eisentrager supra 778-79.
401 Hamdan vs Rumsfeld supra 548.
Al Qaeda detainees, by the CIA, by means of torture was unlawful, and a war crime in terms of the War Crimes Act.\textsuperscript{403}

In view of the Hamdan vs Rumsfeld decision it is important that the extent of the protection for the detainees in terms of the Third Geneva Convention be clarified. It is submitted that this issue should be dealt with by considering whether the United States, in terms of International Law, can suspend the Geneva Conventions with reference to Afghanistan and Al Qaeda (which it did), or whether they can suspend it in part and only apply specific principles relating to the Guantanamo detainees.

One school of thought holds that the Geneva Conventions or part of it can be suspended and that this line of thinking is consistent with International Law.\textsuperscript{404} In support of this position it is stated that a general rule exists, which determines that if there is a breach of a multilateral treaty, the suspension of the treaty by the aggrieved party is justified in terms of customary International Law.\textsuperscript{405} However, the United States Attorney General’s Office is of the opinion that in terms of the United States Constitution, customary International Law is not federal law and, therefore, cannot bind the president.\textsuperscript{406} It does, however, accept that withdrawal from or termination of a treaty, due to a breach of its provisions, is recognized in terms of International Law.\textsuperscript{407} It is submitted that, as a signatory to the Geneva Conventions, the United States remains bound by the provisions regarding the humane treatment of the detainees, notwithstanding the unilateral suspension of their obligations towards a fellow signatory, Afghanistan.

The Vienna Convention on the Law of Treaties\textsuperscript{408} confirms that the suspension of the whole treaty or part of it is justified if a breach by one of the parties occurs. The United States is not a party to the latter Convention. It is, however, accepted by the United States Attorney General’s Office that such a suspension does not include the provisions that disallow the inhumane treatment of protected persons.\textsuperscript{409} It would, therefore, be a breach of customary International Law, although the United States president is not bound by it, to suspend the

\begin{itemize}
\item \textsuperscript{403} Lederman (accessed on 3 July 2006).
\item \textsuperscript{404} Bybee 23.
\item \textsuperscript{405} Ibid.
\item \textsuperscript{406} Bybee 37.
\item \textsuperscript{408} Article 60(2)(b).
\item \textsuperscript{409} Bybee 23.
\end{itemize}
Geneva Conventions in its entirety.\textsuperscript{410} If the Third Geneva Convention\textsuperscript{411} is interpreted as disallowing suspension, then any suspension thereof, in part or whole, would be a violation of International Law. It is submitted that the provisions should not be read as prohibiting any suspension at all. A further submission is that the president of the United States, against the spirit of International Law, did suspend all United States obligations in terms of the Geneva Conventions towards Afghanistan, without taking into consideration the protection of the human person. This was manifested in their failure to release the captured combatants after the cessation of hostilities in Afghanistan, as well as in the prolonged detention without trial of the Guantanamo detainees.

Bybee contends that to accept that there can be no temporary suspension of specific provisions of the Geneva Conventions during a conflict would be wrong, because the Geneva Conventions do not provide for such a limitation. Also it would be senseless to include an all-encompassing non-suspension rule in International Law because then the aggrieved party would have no recourse against an enemy who commits a grave breach in terms of a treaty.\textsuperscript{412} However, it is submitted that the Third Geneva Convention\textsuperscript{413} can be interpreted in a manner that allows the aggrieved State to claim war reparations from the State that committed the breach.

In view of the above, Bybee contends that should the United States president suspend certain provisions of the Third Geneva Convention, it would not prevent the United States from applying the principles of these provisions as a matter of policy. Therefore, the United States can, as a matter of policy, decide that the Guantanamo Bay detainees should be treated as if they are prisoners of war, although they have not been accorded such status in terms of the Third Geneva Convention.\textsuperscript{414} It is submitted that a decision to treat the detainees as prisoners of war would be in the interest of captured United States combatants. This decision was forced upon the United States president by the Supreme Court decision in \textit{Hamdan vs Rumsfeld}. The Court directed the president to accord the Guantanamo Bay detainees the

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{410} Bybee 23.
  \item\textsuperscript{411} Article 1.
  \item\textsuperscript{412} Bybee 24.
  \item\textsuperscript{413} Article 131; Pictet \textit{Commentary on the Third Geneva Convention} 630.
  \item\textsuperscript{414} Bybee 25; Article 4.
\end{itemize}
\end{footnotesize}
protection of the Third Geneva Convention with regard to due process of the law and humane treatment.

It is submitted that the Hamdan vs Rumsfeld decision, which guarantees the Guantanamo Bay detainees protection in terms of the Third Geneva Convention, has introduced a different dimension to the particular situation of Al Qaeda. The reality is that Al Qaeda is not a State and clearly does not conform to the laws and customs of war. Al Qaeda combatants are not a conventional army as they are recruited from different countries. It is submitted that they do not, in a legal sense, fall within the ambit of the Third Geneva Convention and, therefore, should be treated as prisoners of war irrespective of their not being accorded prisoner of war status by a competent tribunal. A further submission is that the drafters of the Conventions clearly believed that the principle of humanity should enjoy precedence over issues of uniform, allegiance, race or the nature of a conflict. This belief is reflected in the chronological precedence given to the content of Article 3 over that of Article 4. The Hamdan vs Rumsfeld decision supports the foregoing contention.

As far as the military commissions are concerned, the United States president believed that he was acting within the ambit of his executive authority when he issued The Military Order that authorizes the establishment of military commissions to try the captured Taliban and Al Qaeda detainees in contravention of the Third Geneva Convention. This was challenged by the accused in Hamdan vs Rumsfeld. The Court ruled against the president and emphasized that Congress did not authorize the commissions.

The Court stated that the commissions were contrary to the Uniform Code of Practise and the Geneva Conventions. These instruments direct the president to establish properly constituted military courts, and stipulate that the duty to determine the rules governing captives or the execution of the laws of war is not the prerogative of the president, but that of the United States Congress. The Court held that the application of admissibility rules of evidence in courts martial was preferable to those applied in the military commissions. The admissibility rules governing the commissions allow for the admissibility of evidence against

415 Common Article 3 to all four Conventions.
417 Totenburg (accessed on 21 July, 2006); Hamdan vs Rumsfeld 25-30.
an accused, which the latter might not have had an opportunity to test. This untested evidence could have been elicited from the accused by means of torture.

A former United States Attorney General, Goldsmith, is of the opinion that although the Court in *Hamdan vs Rumsfeld* has rejected the military commissions, nothing prevents the indefinite detention, without trial, of a detainee. If an individual is proved to be an Al Qaeda member, he can be detained indefinitely until the cessation of hostilities, which may never happen. On the other hand, the Court rejected the Administration’s argument that the federal courts could not be seized with issues of military justice. The Court found that the federal courts are constitutionally bound to protect civil liberties and the attacks thereupon. It is submitted that *Hamdan vs Rumsfeld* opened the door for the Guantanamo Bay detainees to challenge their continued detention in the federal courts of the United States.

A further submission is that the *Hamdan vs Rumsfeld* decision created a difficult situation for the Bush Administration given that some of the detainees incarcerated at Guantanamo Bay would continue to pose a threat, if released. The decision opened an avenue for the United States government to approach Congress for clear legislative directives on how to deal with those who pose a threat. It is submitted that in view of the Supreme Court decision, Congress would not lightly consent to or enact any legislation that gives the president unbridled power to ignore the Constitution or the laws of war.

However, in September 2006, the United States Congress did exactly that. Congress passed a new Bill which stipulates, amongst others, that:

(i) The right to *habeas corpus* is annulled for all non-United States citizens and is applied retrospectively to all the detainees at Guantanamo Bay and elsewhere.

(ii) The president is authorized to determine what constitutes torture.

(iii) United States officials are granted retrospective immunity for the authorisation or commission of acts of torture.

(iv) Detainees are prohibited from invoking the protections of the Geneva Conventions.

(v) The president is authorized to interpret and apply the Geneva Conventions according to his sole discretion.

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419 Ibid.

The president has the right to convene military commissions for the prosecution of unlawful enemy combatants, and is allowed to accord such status to any person for whatever reason on his sole authority.

Civilians can be tried by military commissions and there are limitations on a detainee’s right to representation by the counsel of choice.

Evidence obtained by torture can be used against the accused.

Classified evidence can be used but not made available to the defence.

Hearsay evidence and coerced testimony can be used.

Military commissions can impose death sentences.

Secret and indefinite detentions are allowed.\(^\text{421}\)

It is submitted that this new development has effectively robbed the United States Supreme Court of its independence, the United States Constitution of its power, the Geneva Conventions of its vision and the world of its humanity.

**5.5 CONCLUSION**

It is submitted that the United States, in refusing to accord prisoner of war status to the Guantanamo Bay detainees and by denying them due process of the law, is in violation of International Law and the United States Constitution. In terms of the Geneva Conventions and with regard to the passage of the Military Commissions Act, the United States has committed grave breaches for which it should be held accountable. It is submitted, in concurrence with *Hamdan vs Rumsfeld*, that the detainees are prisoners of war in terms of the Third Convention and are entitled to a fair trial.

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International Humanitarian Law finds application during situations of armed conflict between States or between a State and an aggrieved part of the population of that State. However, the nature of armed conflict has evolved to such an extent that the existing definition needs to be broadened to include conflicts outside the present parameters of conflict within State borders. It is submitted that the definition should include armed conflicts against a State by any resistance grouping based outside the borders of a specific State.

The purpose of International Humanitarian Law is, firstly, to protect the rights of combatants captured during armed conflicts, as well as the rights of civilians and non-combatants, such as medical and religious personnel; secondly, to hold States and individuals accountable, during wartime, for the illegal acts and abuses by its armed forces; thirdly, to prevent discrimination against captured combatants and to uphold basic human rights, such as the right to a fair trial and, finally, to provide protection against inhumane treatment for captured combatants during armed conflict.

International Humanitarian Law attempts to ensure that armed forces adhere to humanitarian principles. Combatants are expected to respect the laws of war, while government leaders and their heads of armies are expected to prevent human rights violations and to protect civilians. During armed conflicts all violations of human rights constitute unacceptable breaches of the basic standards of humane behaviour that are to be expected in a civilized society.

During the Afghanistan conflict the United States and its allies have on more than one occasion insisted that their captured combatants and civilians be treated in accordance with the Geneva Conventions. Earlier press statements released by the United States regarding their treatment of the detainees at Guantanamo Bay signaled their awareness that these prisoners, whether legal or illegal combatants, have to be afforded certain basic human rights. Notwithstanding this recognition of the prisoners’ rights, the United States failed to convene suitable forums for establishing the status of the detainees. This failure, it would appear, was a strategy to circumvent the possible assignation of prisoner of war status to the detainees.
because of the obligations that it would place upon the United States regarding due process and other related obligations. Through their actions the United States displayed a selective application of International Humanitarian Law, which suited their particular needs in the so-called War on Terror. In September 2006, however, the United States abandoned all pretence of upholding International Humanitarian Law. The United States Congress passed the Military Commissions Act, which empowers the president and other government officials to violate the principles embodied in the Geneva Conventions.

It is submitted that if one takes into account that the purpose of formulating International Humanitarian Law was not to protect States or groups, but the individual against his captors, then it is irrelevant whether the individual was captured during a conflict between two States or a State and a particular group within its borders. Therefore, it should follow that individuals who are members of Al Qaeda or similar groups should enjoy the protections afforded to prisoners of war under the Third Geneva Convention. It is submitted that objective criteria are needed to determine who should qualify as a prisoner of war and that these criteria should not be clouded by the needs, perspectives and ideologies of the parties to the conflict. Civilized society cannot be governed on the basis of an eye for an eye. Instead, individuals who commit war crimes should be held accountable in terms of the Geneva Conventions.

Atrocities were committed on both sides during the Afghanistan conflict. Therefore it is submitted that International Law should be applied even-handedly to both sides to limit the commission of atrocities and revenge attacks and their potential to worsen the conflict situation.

Finally, it is submitted that, in view of the aforementioned, the Guantanamo Bay detainees are prisoners of war as determined by the Third Geneva Convention.
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</tr>
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