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DISENTANGLING LEGAL QUAGMIRES: THE LEGAL CHARACTERISATION OF THE ARMED CONFLICTS IN AFGHANISTAN SINCE 6/7 OCTOBER 2001 AND THE QUESTION OF PRISONER OF WAR STATUS¹

Yutaka Arai-Takahashi²

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1. INTRODUCTION

The September 11 attacks and the ensuing military operations in Afghanistan have raised a multitude of complex and disturbing problems for the existing humanitarian normative order.³ Much of the legal scholarship on recent events concerning Afghanistan has focused on the issues of the legal status of captured Taliban and Al Qaeda soldiers under humanitarian law,⁴ their detention conditions at Guantána-

3. For the examination of the implications of both the September 11 attacks and the war against Afghanistan on humanitarian law, see in particular, Y. Dinstein, 'Humanitarian Law on the Conflict in Afghanistan', *American Society of International Law Proceedings* (2002) p. 23.

4. See *inter alia*, G.H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', 96 *AJIL* (2002) p. 891, Editorial Comments; R. Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan', 7 *Journal of Conflict and Security Law* (2002) p. 37; M.H. Hoffman, 'Terrorists are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law', 34 *Case Western Reserve JIL* (2002) p. 227; H.-P. Gasser, 'Acts of

mo Bay in Cuba and the inadequacy of procedural safeguards for judicial proceedings of the proposed Military Commissions⁵ under the US Presidential Order⁶ and the Department of Defence Order.⁷ This paper takes a somewhat different approach, looking first at the legal characterisation of the armed conflicts in Afghanistan since 6/7 October 2001 and particularly the internecine hostilities that have continued since the apparent end of the war, before examining the status of combatants and that of prisoners of war. Clarification of the nature of the armed conflicts and of the scope of application of the rules on prisoners of war is essential for disentangling the legal quagmire surrounding the controversy over the legal status of both Taliban and Al Qaeda soldiers under the *jus in bello*.

The analysis presented in this paper can be divided into five main areas. First, the paper seeks to delineate the legal nature and characteristics of armed conflicts that have been waged in Afghanistan since 6/7 October 2001.⁸ The author argues that the Afghan 'war' can be considered as consisting of several armed conflicts, each of which has a distinct normative nature. The establishment of the transitional government, following the Agreement on Provisional Arrangements in Afghanistan pending the Reestablishment of Permanent Government Institutions (the Bonn Agreement) on 5 December 2001, constitutes a watershed for determining the legal nature of ongoing armed conflicts against Taliban and Al Qaeda remnants.

Second, on the basis of the preceding analysis, the paper attempts to provide clarity as to the criteria for prisoners of war under the Third Geneva Convention of 1949 and 1977 Additional Protocol I. In view of the non-ratification of the latter by the United States and Afghanistan, it is essential to explore the customary law status of relevant rules.

Third, examination focuses on special categories of captured soldiers, namely, the so-called 'unlawful combatants' or 'unprivileged belligerents', who do not benefit from the rights and privileges of prisoners of war.

Fourth, the analysis turns to the conditions under which a 'competent tribunal' may be established to determine the legal status of a captured soldier in accordance

Terror, Terrorism' and International Humanitarian Law', 84 *RICR/IRRC* (2002) p. 547; R.P. Master-ton, 'Military Commissions and the War on Terrorism', 36 *International Lawyer* (2002) p. 1165; S.R. Ratner, 'Jus ad Bellum and Jus in Bello After September 11', 96 *AJIL* (2002) p. 905, Notes and Comments; and P. Rowe, 'Response to Terror: The New "War"', 3 *Melbourne JIL* (2002) p. 301.

5. See *inter alia*, C.M. Evans, 'Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission', 51 *Duke LJ* (2002) p. 1831; J. Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism', 96 *AJIL* (2002) p. 345; H. Hongju Koh, 'The Case Against Military Commissions', 96 *AJIL* (2002) p. 337; M. J. Matheson, 'U.S. Military Commissions: One of Several Options', 96 *AJIL* (2002) p. 354; D.A. Mundis, 'The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts', 96 *AJIL* (2002) p. 320; J. Steyn, 'Guantánamo Bay: The Legal Black Hole', 53 *JCLQ* (2004) p. 1; and R. Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions', 96 *AJIL* (2002) p. 328.

6. President George W. Bush, Military Order of November 13, 2001, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', 66 *Fed. Register*, 16 November 2001, p. 57,833. See also Federal Register website, <<http://www.gpoaccess.gov>>.

7. US Department of Defense, Military Commission Order No. 1 (21 March 2002), 41 *ILM* (2002) p. 725, available at <<http://defenseink.mil/news/Mar2002/d20020321ord.pdf>>.

8. The official date of the coalition's initiation of the attack was 6 October 2001, but it was on the following day according to Afghan time.

with Article 5 of the 1949 Third Geneva Convention and Article 45(1) of Additional Protocol I.

Fifth, in view of the armed conflicts of a non-international character that exist in Afghanistan, the types of humanitarian rules applicable to internal armed conflict must be ascertained. Again, the absence of ratification of 1977 Additional Protocol II by both the United States and Afghanistan necessitates an evaluation of customary rules applicable to non-international armed conflict.

The investigations of this paper are strictly confined to the Afghan context in light of the five foregoing angles, excluding analysis of both the humanitarian rules governing the conduct of hostilities and the conditions of detainees at detention centres, most notably at Guantánamo Bay, and the procedural rules that should be observed for trials of military commissions. At a time when the fallout of the war against Iraq is keenly felt in terms of continuing guerrilla attacks carried out by Baathist remnants and other militant groups against the Anglo-American occupying forces, revisiting the still live Afghan theatre and closely examining the rights and privileges of captives through the juridical prism will enable us to gain useful lessons regarding both the potential effectiveness and limits of humanitarian rules.

2. LEGAL CHARACTERISATION OF ARMED CONFLICTS IN AFGHANISTAN SINCE 6/7 OCTOBER 2001

2.1 General overview

From a strict legal point of view, the war that has been, or is being, waged in Afghanistan since the attack initiated by the US-led coalition forces on 6/7 October 2001 can be considered to consist of five separate conflicts, each of which is subject to a distinct normative regime.

Three types of armed conflicts in Afghanistan can be discerned in the period between 6/7 October and 5 December 2001. First, there was an international armed conflict between the US-led coalition and the Taliban government. Second, an 'armed conflict' between the coalition forces and Al Qaeda needs to be treated separately from the conflict between the coalition and the Taliban in view of the controversy over the humanitarian norms applicable to members of Al Qaeda, a transnational terrorist organisation. Third, an armed conflict was fought between the Northern Alliance and the Taliban government, which was *prima facie* an internal armed conflict but could be perceived as 'internationalised' by virtue of the close link between the Northern Alliance and the coalition member states.⁹ Fourth, since the coming into existence of the Karzai government, the Taliban forces have been transformed into armed rebels or insurgents, to which Al Qaeda remnants are thinly aligned. The fighting between the newly established governmental forces and the anti-governmental 'coalition' forces of Islamic militants (consisting of the

9. Cf., T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 *AJIL* (1998) p. 236.

Taliban and Al Qaeda remainders and supporters of a Mujaheddin warlord, Gulbuddin Hekmatyar) is classified as internal armed conflict, and not only the government but also insurgent troops are bound by customary law relating to internal strife. Fifth, there is a continuing armed conflict between the US-led coalition forces and the anti-government insurgents. Sixth, the armed hostilities between the International Security Assistance Force (ISAF) acting in self-defence and the anti-governmental rebels raises questions relating to the types of humanitarian rules applicable to multilateral troops acting in furtherance of a Security Council enforcement action.

2.2 The nature of hostilities prior to 5 December 2001

2.2.1 *Armed conflict between the coalition forces and the Taliban: international armed conflict*

It is incontrovertible that the armed conflict between the US-led coalition and the Taliban government was an international armed conflict, governed by international humanitarian rules based on 'Hague rules' and 1949 Geneva Conventions I, III and IV. While the applicability of 1977 Additional Protocol I to both the Taliban government and the US is hampered by their non-ratification of this treaty, some coalition states are parties to it. Further, many rules embodied in Protocol I have hardened into customary law¹⁰ and are applicable to both the coalition forces and the Taliban government.

2.2.2 *'Armed conflict' between the anti-terrorism coalition forces and Al Qaeda*

The regulatory framework of traditional humanitarian law does not foresee a scenario such as the hostilities between the anti-terrorism coalition forces and Al Qaeda.¹¹ Al Qaeda is a transnational terrorist organisation which based its main operational camps in Afghan territory under the auspices of the Taliban government. Analysis of the applicability of humanitarian law to the conduct of warfare by the coalition forces and by Al Qaeda requires examining the threshold question as to whether there existed an 'armed conflict' between the coalition forces and Al Qaeda in the sense of humanitarian law. Despite the internationalisation of the conflict based on the military campaign carried out by UN-led coalition forces, it seems that, at first glance, international humanitarian law does not apply. Common Article 2(1) of the Geneva Conventions defines international armed conflict as 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties'.

10. For analysis of customary humanitarian norms, see T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996) p. 238.

11. Fitzpatrick, loc. cit. n. 5, at p. 8.

Although loosely aligned with the Taliban regime, Al Qaeda is not an insurgent in a non-international armed conflict,¹² benefiting from the traditional practice of belligerent recognition, now in disuse. Nor can Al Qaeda be considered oppressed 'peoples' entitled to exercise the principle of self-determination against occupying or colonial forces within the meaning of Article 1(4) of Protocol I.

It might, however, be argued that the conflict between the coalition forces and Al Qaeda should be subsumed into the conflict between the coalition and the Afghan (Taliban) government. Such an argument can be made on the basis that Al Qaeda could be regarded as 'other militias and members of other volunteer corps ... belonging to a Party to the conflict', namely Afghanistan, within the meaning of Article 4A(2) of the Third Geneva Convention, although the mere act of fighting in concert is not sufficient to meet the test of 'belonging'.¹³ The remaining questions would be whether such belligerents are considered as 'belonging to a Party to the conflict' and if so, whether they acted in observance of the four established conditions under this provision, which are constitutive of the status of POWs.

2.2.3 *Armed conflict between the Northern Alliance and the Taliban government*

There existed an internal armed conflict fought between the Northern Alliance and the Taliban government. The Afghan Northern Alliance was the loosely formed anti-Taliban forces made up of disparate ethnic and religious groups (though mainly non-Pashtun ethnic groups), which was united for the sole aim of toppling the Taliban government. The Northern Alliance can be considered insurgents fighting against the Taliban government.

This conflict was *prima facie* an internal armed conflict. It is, however, arguable that this conflict can be classified as an 'internationalised non-international armed conflict',¹⁴ in view of the close link between the Northern Alliance and the coalition member states (in particular, the United States). Internationalised non-international armed conflicts, which have occurred with intense frequency since 1945,

12. For examinations of non-international armed conflicts, see G. Abi-Saab, 'Non-International Armed Conflict' in UNESCO, ed., *International Dimensions of International Humanitarian Law* (Dordrecht, Martinus Nijhoff/Geneva, Henry Dunant Institute/Paris, UNESCO 1988) pp. 217, at p. 222; R.K. Goldman, 'International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts', 9 *Amer. Univ. JIL & Pol.* (1993) p. 49; T. Meron, 'Towards a Humanitarian Declaration of Internal Strife', 78 *AJIL* (1984) p. 859; T. Meron, 'Application of Humanitarian Law in Noninternational Armed Conflicts', 85 *American Society of International Law Proceedings* (1991) p. 83; T. Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) p. 554; and T. Meron and Allan Rosas, 'A Declaration of Minimum Humanitarian Standards', 85 *AJIL* (1991) p. 375.

13. Rowe, loc. cit. n. 4, p. 301.

14. See D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979-II) *Receuil des Cours* 121, at p. 150. For examination in specific context, see B. Akinrinade, 'International Humanitarian Law and the Conflict in Sierra Leone', 15 *Notre Dame Journal of Law, Ethics and Public Policy* (2001) p. 392; H.-P. Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', 33 *Amer. Univ. LR* (1983) p. 145.

remain mired in confusion with respect to the applicable humanitarian rules. Where foreign troops intervene on behalf of a government fighting against rebels that are regarded as falling outside the oppressed people exercising self-determination in the sense of Article 1(4) of Protocol I, such intervention is governed by humanitarian rules on internal armed conflict, as it does not engender an armed conflict between two states.¹⁵ On the other hand, where a foreign state intervenes in aid of rebels against a government, it is clear that this will bring into forth the whole array of rules on international humanitarian law. The artificial nature of the dichotomy between international and internal armed conflicts, however, has become increasingly contested in view of the growing recognition of human rights law. In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) acknowledged that '[i]f international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the ... dichotomy should gradually lose its weight.'¹⁶ Moir observes that the convergence of the two bodies of law (with respect to international and internal armed conflict) will eventually reach the stage where the focus of examinations should turn to the threshold question relating to whether or not there exists an armed conflict.¹⁷

Since Afghanistan is not a party to Additional Protocol II, the fighting between the Taliban and the Northern Alliance in Afghanistan is characterised as internal armed conflict, the humanitarian rules applicable to such conflict are, strictly speaking, limited to common Article 3 of the Geneva Conventions and customary rules. However, an argument might be made that the degree of control exercised by the United States over the conduct of the Northern Alliance was sufficiently close to impute the conduct of this anti-Taliban insurgent to the responsibility of the United States. According to this reasoning, the responsibility for the killing of a number of Taliban and Al Qaeda prisoners subsequent to the uprising at Qala-e Jhangi Fort near Mazar-e Sharif between 25 November and 1 December 2001,¹⁸ as well as other incidents of grave concern,¹⁹ might be attributed to the coalition states.

It might further be surmised that the satisfaction of the attribution test under the rubric of state responsibility would transform what is *prima facie* an internal armed

15. L. Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press 2002) at pp. 50-51. In relation to the Soviet intervention, ostensibly on the side of the Afghan government against Mujahidin groups, until its withdrawal in 1989, the ICRC described the conflict as internal: H. McCoubrey, *International Humanitarian Law* (Aldershot, Dartmouth 1990) p. 175.

16. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72 (Appeal on Jurisdiction), 35 *ILM* (1996) p. 32, para. 97.

17. Moir, *op. cit.* n. 15, at pp. 51-52.

18. A. Roberts, 'Counter-terrorism, Armed Force and the Laws of War', 44 *Survival* (2002) pp. 7 at pp. 20-21.

19. There were numerous reports of dozens of Taliban fighters being asphyxiated in shipping containers transporting them to prison in Shibarghan, a northern city near Mazar-e-Sharif, after their surrender to the Northern Alliance. Reports also refer to beatings of the detainees in order to extract confession; C. Gall, 'A Nation challenged: Prisoners; Witnesses Say Many Taliban Died in Custody', *The New York Times* (11 December 2001) Section A, p. 1; and R. Caroll, 'Afghan jailers beat confessions from men', *The Guardian* (28 December 2001) p. 13.

conflict into an international one. The armed conflict between the Northern Alliance and the Taliban government till the latter was overthrown may be described as an 'internationalised non-international armed conflict', on the ground that the military operation of the Northern Alliance was closely supervised and even controlled by the United States. The statement made by Donald Rumsfeld, the US Defense Secretary, that the US enjoyed a 'relationship with all of those elements on the ground', in view of supply of food, ammunitions and of assistance with overhead targeting,²⁰ might indicate that the US exercised a degree of control ranging between an overall control and an effective control over conduct of the Northern Alliance. There was close military coordination between the coalition and the Northern Alliance, so that the coalition's air campaign was directed against specific Taliban strongholds on the ground at the request of the Northern Alliance. Without the coalition's effective contribution, it would be unimaginable that this anti-Taliban insurgent that exercised control only over one tenth of the territory at the inception could so swiftly advance and eject the Taliban government.²¹

Applying the test of 'effective control' that the International Court of Justice (ICJ) established in the *Nicaragua* case with respect to the assessment of state responsibility,²² the Trial Chamber of the ICTY, in the *Tadić* case, ruled that the degree of authority wielded by a state over armed forces fighting on its behalf, which is sufficient to invite the application of international humanitarian law, must be 'effective control'. However, rejecting the view of the Trial Chamber, the Appeals Chamber held that the degree of control exerted over armed forces fighting against the same adversary must be set at a lower level of 'overall control'.²³ The degree of control is not so strong as to require specific orders to be issued for each military action,²⁴ but it must go beyond the mere coordination and cooperation between allies in political and military activities.²⁵ The Appeals Chamber expressed a caveat that where the controlling state in question was not an adjacent state with territorial ambitions with respect to the territories where the conflict occurred, the standard of evidence would be set at a high level. It added that 'more extensive and compelling evidence' revealing not merely the act of financing and equipping but also that of generally directing or helping plan, must be adduced to demonstrate that the conflict became internationalised.²⁶ Doubt may remain as to whether the test employed to examine the question of state responsibility can be

20. Rumsfeld, Press Briefing with General Pace, 30 November 2001, <<http://www.defenselink.mil/news/Nov2001/briefings.html>>.

21. See Cryer, loc. cit. n. 4, at pp. 44-47 and the BBC sources cited in n. 48.

22. *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, (1986) ICJ 14, at pp. 62, 64-65, paras. 109 and 115 (27 June 1986).

23. Case IT-94-I, *Prosecutor v. Tadić*, Judgment of 15 July 1999, paras. 145, 146 and 162. See also *Cyprus v. Turkey*, where the European Court of Human Rights ruled that Turkey's state responsibility under the European Convention on Human Rights could arise, with her 'effective overall control' over northern Cyprus suggesting her 'acquiescence or connivance' in acts of private individuals violating others' rights: Eur. Ct. H.R., Judgment of 10 May 2001, paras. 77 and 81.

24. *Ibid.*, para. 145.

25. *Ibid.*, para. 152.

26. *Ibid.*, para. 138.

imported to the issue of identifying the international armed conflict as defined in common Article 2 of the Geneva Conventions.²⁷ The Appeals Chamber's approach is even more puzzling, in that the conditions under which irregulars such as organised resistance groups are regarded as 'belonging' to a party to the conflict within the meaning of common Articles 13(2)/13(2)/4A(2) of the 1949 First, Second and Third Geneva Conventions were mixed up with the conditions for the internationalisation of an internal armed conflict.²⁸

In the context of Afghanistan, it may not be sustainable to argue that on the basis of the rationale used by the Appeals Chamber, the degree of control exercised by the coalition over the conduct of the Northern Alliance reached the overall control sufficient to internationalise the armed conflict between the latter and the Taliban. Considerable doubt remains concerning whether the stringent standard of evidence required for 'overall control' exercised by an external power other than a neighbouring state was met in the Afghan context. In that sense, as Cryer notes,²⁹ the Northern Alliance may not be considered to 'belong' to the coalition forces in the sense of the Appeals Chamber in the *Tadić* case, so that the violations of *jus in bello* by the Northern Alliance would not give rise to the responsibility of the coalition states. This construction can leave open the possibility that the armed conflict between the Taliban and the Northern Alliance was non-international.

2.3 The nature of hostilities after 5 December 2001

2.3.1 *The armed conflict between the Afghan government forces and the US-led coalition forces on one hand, and the anti-governmental insurgents on the other in the Post-Bonn Process*

Since 11 August 2003, more than 12,000 US troops in Afghanistan, together with troops from NATO member states, have been fighting as part of the ongoing *Enduring Freedom* operation against the Taliban and Al Qaeda remnants. These are in addition to about 5,500 ISAF soldiers stationed in and around Kabul.³⁰ The resurgence of the Taliban and the Al Qaeda groups, in loose collaboration with supporters of Gulbuddin Hekmatyar, a former prime minister, and regular armed attacks against US and Afghan governmental forces as well as some against aid workers, reveal the tenacious nature of the insurrectional forces and the remote prospect of the end of the hostilities in Afghanistan.³¹ While NATO has assumed

27. J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge, Cambridge University Press 2002) at p. 112. See also the separate opinion of Judge Shahabudeen, Case IT-94-1, *Prosecutor v. Tadić*, paras. 145-146, 162.

28. R. Provost, *International Human Rights and Humanitarian Law* (Cambridge, Cambridge University Press 2002) at p. 92.

29. Cryer, loc. cit. n. 4, at p. 47.

30. See 'Afghan in trouble', *The Financial Times*, Editorial (6 June 2003) p. 20; P. Reeves, 'Afghan battle ends with death of 40 guerrillas', *The Independent* (6 June 2003) p. 13; and J. Dempsey, B. Benoit and G. Wiesmann, 'Nato expects to come under pressure to patrol outside Kabul', *The Financial Times* (11 August 2003) p. 6.

31. See E. MacAskill, 'Extra troops must fill vacuum beyond Kabul to quell warlords, warns

command of ISAF since 11 August 2003,³² the US and British coalition forces have established 'Provincial Reconstruction Teams' (PRTs) as a backdoor effort to introduce an international military and civilian presence in remote areas where governmental control is weak.³³

Since the coming into existence of the Interim Afghan government led by Hamid Karzai, the Taliban forces have been transformed into armed rebels or even insurgents, to which Al Qaeda remnants are thinly aligned. The fighting between the nascent governmental forces and the anti-government insurgents consisting of the Taliban and Al Qaeda remainders as well as Mujahidin militants goes beyond the threshold of internal disturbances and tensions and it can be classified as internal armed conflict.³⁴ Moreover, the ongoing armed hostilities between the US-led coalition forces and the Taliban and Al Qaeda forces can be subsumed into the non-international armed conflict, since the involvement of the US troops is based on the express consent and invitation of the Kabul government. All the humanitarian rules germane to civil wars, namely, common Article 3 of the Geneva Conventions and customary rules, bind all the parties to this type of conflict. While both Afghanistan and the United States are not parties to Additional Protocol II, query is needed as to customary law status of many rules embodied in this Protocol.

With respect to customary law applicable to internal armed conflict, not only the government but also insurgent troops are bound by customary law relating to internal strife. In its 1999 Third Report on the Situation of Human Rights in Columbia, the Inter-American Commission on Human Rights stated that humanitarian law is binding on paramilitary groups.³⁵ In the *Tadić* case, the Appeals Chamber of the ICTY went so far as to suggest that Article 3 of the ICTY Statute (relating to violations of the laws or customs of war) encompasses all (serious) violations of international humanitarian law (both Geneva and Hague rules, except for grave breaches of the Geneva Conventions (as prescribed by Art. 2 of the Statute), genocide (Art. 4) and crimes against humanity (Art. 5)).³⁶ Concurring with Aldrich,³⁷ Meron criticises the Appeals Chamber's approach as over-inclusive, entailing the implication that both Hague law and the provisions of the Geneva Conventions (bar provisions on grave breaches) apply to both international and non-interna-

Musharraf', *The Guardian* (19 June 2003) p. 15; 'Kandahar berates Straw for a leftover life of gun law and broken promises', *ibid.* (2 July 2003) p. 13 and V. Burnett, 'UN forced to halt aid work in southern Afghanistan', *The Financial Times* (11 August 2003) p. 6.

32. Demsey et al., *loc. cit.* n. 30.

33. Reeves, *loc. cit.* n. 30; Burnett, *loc. cit.* n. 31. Since 6 January 2004, the German-led Kunduz Provincial Reconstruction Team (PRT) has been officially transferred from Coalition Forces Command to the ISAF.

34. Art. 1(2) of Additional Protocol II sets the minimum threshold of its applicability, providing that it 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.

35. OAS Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, para. 13, available at <<http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm>>.

36. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, reprinted in 35 *ILM* (1996) p. 32 at pp. 49-50, 71, paras. 87-88, 137.

37. G.H. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia', 90 *AJIL* (1996) pp. 64 at 67-68.

tional armed conflicts.³⁸ In other words, the implication is that there are rules of customary humanitarian law applicable to internal armed conflict, the basis of which lies outside the framework of common Article 3 of the Geneva Conventions, Protocol II and Article 19 of the 1954 Hague Convention on Cultural Property.³⁹

It might be questioned whether subsequent to the establishment of the Karzai government, the Taliban remnants, in collaboration with other anti-governmental militants and Al Qaeda can be regarded as ‘peoples’ fighting against an occupying power. For all the near universal antipathy toward the Taliban theocracy for its gross violations of human rights, especially those of women, such an argument cannot be brushed aside. It is not to belittle the Taliban’s oppressive nature to hypothesise a scenario of unlawful occupation from a juridical perspective. Indeed, the situation in Afghanistan might be compared to the circumstances in Cambodia after the Vietnamese invasion, which ousted the Khmer Rouge in 1979. The continued fighting in Cambodia between the Vietnamese forces on one hand and the Khmer Rouge and other Khmer forces on the other did not cease even after the instalment of the Vietnamese-backed ‘puppet regime’ (the Hen Samrin government). It is possible to consider that the hostilities between the Vietnamese forces and the troops of the Khmer Rouge after the establishment of the Hen Samrin government were governed by the law of *international* armed conflicts, with the hostilities perceived as an extension of the conflict between the Vietnamese forces in alliance with the coalition of insurgents, the United Front (which later formed the Hen Samrin government) and the Khmer Rouge forces.⁴⁰

The armed hostilities in Afghanistan between the US-led coalition forces and the anti-governmental forces might be regarded as a prolongation of the initial phase of the war, namely the international armed conflict between the coalition forces and the former Taliban government. This hypothesis is based on the assumptions that the Karzai government has been installed by the occupying power, namely, the US-led coalition forces, and that the government set up by the occupying power is debarred from obtaining a license for ‘friendly presence’ of its troops, by entering into an agreement between them. Such assumptions would mean that the relation between the US-led forces and the Afghan civilian population has been covered, uninterruptedly since 6/7 October 2001 onward, by rules on belligerent occupation under the Fourth Geneva Convention, so that the civilian population must not be deprived of ‘the benefits from the present Convention by any change introduced ... into the institutions or government’ of the territory concerned.⁴¹ A twist of this hypothesis would be to view the Taliban-led coalition as fighting against an ‘alien occupation’ within the meaning of Article 1(4) of Protocol I,⁴² albeit that state

38. Meron, loc. cit. n. 10, at p. 243.

39. Moir, op. cit. n. 15, at pp. 188-189

40. Gasser, loc. cit. n. 14, at p. 154.

41. Art. 47 of the Fourth Geneva Convention 1949.

42. A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal* (Cambridge, Cambridge University Press 1995) pp. 201-204.

practice has so far proved insufficient to warrant the argument that this provision has ripened into a customary international norm.⁴³

However, the fundamental pitfall of drawing an analogy from the Cambodian case to the Afghan context is that, unlike the Hen Samrin government which did not receive the UN's recognition for geopolitical reasons, the Bonn process, and hence the Afghan Interim Authority led by Hamid Karzai, have been expressly endorsed by a series of Security Council resolutions passed under Chapter VII.⁴⁴ Security Council Resolution 1378, although not adopted under Chapter VII, even called on the Afghan people to exercise the right of self-determination to overthrow the Taliban regime. Surely, it may be argued that as a non-binding resolution, Resolution 1378 cannot be seen to yield 'constitutive' effects of delegitimizing the then Taliban government. However, there has been both in state practice and *opinio juris* a universal recognition that the Karzai government, which has the effective control over most of the Afghan territory and population, is the sole legitimate government representative of the Afghan people.⁴⁵

2.3.2 *'Armed conflict' between the International Security Assistance Force and the Taliban and Al Qaeda remnants*

The International Security Assistance Force⁴⁶ is a peacekeeping force established under the Security Council's Chapter VII Resolution 1386 of 20 December 2001.⁴⁷ Its main objective is to assist the Afghan Interim Authority to maintain national security in Kabul and its surrounding areas, facilitate UN personnel to work in a secure environment and ensure that the war-torn society can initiate the process of national reconstruction.⁴⁸ The prospect of expanding peacekeepers to other cities depends on the outcome of the continued US military campaign against the Taliban and Al Qaeda remnants. Where ISAF troops exchange fire with the resurgent Taliban or Al Qaeda soldiers, or with any other warring factions, can such 'hostilities' be regarded as an 'armed conflict' susceptible to normative constraints of *jus in bello*?

ISAF is a multinational force under the unified command of the troop-contributing states that signed the joint Memorandum of Understanding in London on 10 January 2002.⁴⁹ As such, it is not under the UN Force Commander. It was initially

43. *Ibid.*, at pp. 203-204.

44. See, *inter alia*, Resolution 1387, 20 December 2001, S/RES/1386 (2001); Resolution 1413, 23 May 2002, S/RES/1413 (2002); and Resolution 1444, 27 November 2002, S/RES/1444 (2002).

45. For discussions on the recognition of governments, see *Tinoco Concessions Arbitration (Great Britain v. Costa Rica)*, (1923) 1 *RIAA* 369; and S. Talmon, *Recognition of Governments in International Law* (Oxford, Oxford University Press 1998).

46. So far, 18 mainly western countries (Austria, Belgium, Bulgaria, Great Britain, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Portugal, Romania, Spain, Sweden, Turkey, France, Italy, Germany and Britain) have provided troops.

47. See also additional authorization derived from Security Council Resolution 1413, 23 May 2002, S/RES/1413 (2002); and Resolution 1444, 27 November 2002, S/RES/1444 (2002).

48. Resolution 1386 of 20 December 2001, operative para. 1.

49. The Memorandum, which was signed by Austria, Denmark, Finland, France, Germany, Greece,

under the British unified command for six months, followed by the command exercised by other troop-contributing states (Turkey and Germany/the Netherlands), and since August 2003 was handed over to NATO. Nevertheless, ISAF's mandate has been specifically provided by binding Chapter VII resolution, and it works closely with the United Nations and the Afghan interim government. The normative framework for its use of force follows the models of the multilateral forces against Iraq⁵⁰ and the involvement of the NATO member states in Yugoslavia⁵¹ and UNITAF in Somalia.⁵² In all these cases, the Security Council, with its renewed assertiveness after the end of the Cold War, has granted member states an express authorization to use force. Such a form of delegation of the Security Council's enforcement function to member states has been seen in Rwanda,⁵³ Haiti,⁵⁴ Albania,⁵⁵ the Central African Republic,⁵⁶ Kosovo,⁵⁷ East Timor⁵⁸ and Congo.⁵⁹

The question as to whether, and if so what part of, humanitarian law applies to the conduct of UN and other multilateral forces acting pursuant to enforcement action of the Security Council is not only of academic but also practical importance.⁶⁰ Multinational forces can form part of the enforcement action pursuant to the Security Council's Chapter VII resolutions, or act as a humanitarian mission⁶¹ based on non-binding Security Council resolutions outside the framework of

Italy, New Zealand, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Turkey and the UK, formally initiated Operation Fingal: available at <<http://www.operations.mod.uk/fingal/index.htm>>.

50. See Security Council Resolution 678, 29 November 1990, S/RES/678 (1990).

51. The first such authorization was granted by Resolution 770 (1992).

52. For examinations of multinational forces, see Gray, *op. cit.* n. 66, at p. 187.

53. Resolution 929 of 22 June 1994, S/RES/929 (1994).

54. Resolution 940 of 31 July 1994, S/RES/940 (1994).

55. Resolution 1101 of 28 March 1997, S/RES/1101, operative para. 4 (compare reference to multinational forces for non-enforcement purposes under operative para. 2).

56. Resolution 1125 authorized member states, which contributed to the MISAB, the Inter-African Mission to Monitor the Implementation of the Bangui Agreements, (established in January 1997) to use force for secure the security of their personnel: Resolution 1125 of 6 August 1997, S/RES/1125 (1997).

57. Resolution 1244 was passed under Chapter VII, authorizing member states and relevant international organisations to create KFOR, to which NATO contributed.

58. Resolution 1264, adopted under Chapter VII, authorised the creation of a multinational force under a unified command structure assumed by Australia, INTERFET.

59. See the deployment of the Interim Emergency Multinational Force (IEMF) in Bunia, Congo in close coordination with the UN peacekeeping force, the MONUC: Resolution 1484 of 30 May 2003, S/RES/1484 (2003), operative, para. 1.

60. L. Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars', in M. N. Schmitt and L.C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium* 71 *US Naval War College International Law Studies* (1998) pp. 39 at pp. 59-62; R.D. Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', 17 *Michigan JIL* (1995) p. 53; C. Greenwood, 'Protection of Peacekeepers: the Legal Regime', 7 *Duke JCIL* (1996) p. 185; P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: the Legal Quagmire for Military Contingents', 5 *Journal of Conflict and Security Law* (2000) p. 45; and B.D. Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford JIL* (1997) p. 61.

61. Doswald-Beck, *ibid.*, at p. 60.

Chapter VII.⁶² With respect to multilateral forces under the Chapter VII mandate, existing humanitarian law treaties do not recognise such forces as a party to the armed conflict. As compared with UN peacekeeping forces,⁶³ which are expected to be neutral forces rather than adversarial 'parties to a conflict',⁶⁴ there should be no obstacle to the idea of the multinational forces as a whole being recognised as a belligerent. In the context of UN peacekeeping forces, the UN model agreement between the United Nations and troop-contributing countries (TCCs) includes only a general reference to compliance with the laws of war.⁶⁵ The *Brahimi Report*⁶⁶ is confined to such general compliance with humanitarian law⁶⁷ and the recommendation to secure a clear chain of command for UN peacekeeping forces.⁶⁸

A temporary solution to the lack of humanitarian law applicable to multinational forces as a whole is to surmise that each national contingent is bound by humanitarian treaties that its flag state has ratified. This means that there would be an ineluctable difference in the humanitarian laws applicable to national troops contributing to the ISAF. The fact that not all participating states are parties to specific humanitarian treaties gives rise to problems of 'interoperability'. Such problems can arise in relation both to a regional organisation such as NATO and the Organisation for Security and Cooperation in Europe (OSCE) and to ad hoc multilateral forces, such as the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) in Liberia in 1990.⁶⁹ In order to fill such legal loopholes, amending existing humanitarian law treaties or supplementing them through a protocol would be essential. With specific regard to the Afghan situation of armed hostilities between the anti-governmental rebels and the ISAF acting in self-defence, it is possible to foresee a scenario in which the ISAF's action exceeds the remit of self-defence by getting actively involved in the fight against the rebels. Such likelihood reinforces the argument that the ISAF as a whole should be bound by the humanitarian rules based on common Article 3 of Geneva Conventions and customary norms applicable to internal armed conflicts.

62. See for instance, Resolution 1101 of 28 March 1997, which relates to Albania: S/RES/1101 (1997), operative para. 2.

63. See Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 38 *ILM* (1999) p. 1656.

64. Doswald-Beck, loc. cit. n. 60, at pp. 59-60; and Tittmore, loc. cit. n. 60, at p. 80.

65. Doswald-Beck, loc. cit. n. 60, at p. 60.

66. The Report of the Panel on UN Peace Operations of 21 August 2000 (The Brahimi Report), A/55/305, S/2000/809, available at <http://www.un.org/peace/reports/peace_operations/>; 39 *ILM* (2000) p. 1432. For the commentary on the report, see C. Gray, 'Peacekeeping after the Brahimi Report: is there a Crisis of Credibility for the UN?', 6 *Journal of Conflict and Security Law* (2001) pp. 267 at 281; and N. White, 'Commentary on the Report of the Panel on UN Peace Operations (The Brahimi Report)', 6 *Journal of Conflict and Security Law* (2001) p. 127.

67. A/55/305, S/2000/809, p. 17, para. 6.

68. *Ibid.*, p. 61, para. 267.

69. Doswald-Beck, loc. cit. n. 60, at p. 60.

3. CRITERIA FOR COMBATANTS UNDER HUMANITARIAN LAW

Having examined the nature of armed conflicts in Afghanistan and determined the applicable laws in each facet of the war, the next section explores the criteria for 'lawful combatants' under the 1949 Third Geneva Convention and 1977 Additional Protocol I. The analysis of Additional Protocol I is necessary to the extent that part of it may be considered as having attained the status of customary international law applicable to both parties. There is also brief appraisal of laws governing internal armed conflict, such as common Article 3 of the 1949 Geneva Conventions, Additional Protocol II, as well as customary rules.

3.1 **Criteria for combatants under Article 4 of the Third Geneva Convention**

3.1.1 *General overview*

The first two paragraphs of Article 4(A) of the Third Geneva Convention stipulate that:

'Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the Power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.'

Article 4A(2) of the 1949 Third Geneva Convention reaffirms the four conditions laid down in Article 1 of the Hague Regulations,⁷⁰ subject to a minor linguistic change in the second condition concerning the distinct sign, such as uniform or outfit. The only marked change is that, in response to the crucial contribution made by organised resistance movements in Axis-occupied territories in Europe, it was felt necessary to extend, under Article 4A(2) of the Third Geneva Convention, the scope of combatants to cover organised resistance movements in occupied territories. The four criteria set out in Article 4A(2) of the Third Geneva Convention need to be cumulatively met. It is generally accepted that though the stringency

70. See also Arts. 1 and 2 of the Geneva Convention relative to the Treatment of Prisoners of War 1929, available at <<http://www.icrc.org/IHL.nsf/>>.

with which to interpret each of the criteria may vary, these criteria are ‘constitutive’ in nature for the purpose of claiming the qualification of POW status on the part of independent forces.⁷¹

3.1.2 *The four defined conditions*

3.1.2.1 Being commanded by a person responsible for his subordinates

With respect to the first condition, such a responsible leader may be civilian or military. This condition suggests the existence of an organisational structure that enforces discipline, with its essence being to provide ‘reasonable assurance’ that the other three conditions will be observed.⁷²

3.1.2.2 Wearing of fixed distinctive signs

As regards the second condition, its main objective is two-fold: to protect the members of the armed forces of the occupying power by avoiding treacherous attacks; and to safeguard non-combatant civilians from adverse effects of war by preventing a perpetrator of a belligerent act from escaping into the general population.⁷³ The question of the types of ‘fixed distinctive sign’ remained unresolved when the identical terms were used in the two Hague Conventions and in the 1929 Geneva Prisoner-of-War Convention.⁷⁴ The ICRC’s Commentary on the Third Geneva Convention explains that a variety of signs other than an arm-band can be used by partisans, including a cap, a coat, a shirt, an emblem or a coloured sign worn on the chest.⁷⁵ Another aspect of controversy concerns the interpretation of the phrase, ‘recognizable at a distance’. Oppenheim/Lauterpacht proposed a more stringent requirement for a member of a resistance group than for members of the regular armed forces, stating that ‘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’.⁷⁶ However, such a proposal does not seem compatible with the ensuing humanitarian trend to approximate resistance groups to the status of regular armed forces. The ICRC’s position has been that the visibility of the ‘distinctive sign’ should be treated in a manner analogous to a uniform.⁷⁷

71. H.S. Levie, *Prisoners of War in International Armed Conflict* Vol. 59 (Newport RI, US Naval War College International Law Studies 1978) at p. 53.

72. J.S. Pictet, ed., *Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War* (hereinafter *Commentary, GCIII*) (Geneva, ICRC 1960) p. 59.

73. Levie, *op. cit.* n. 71, at pp. 46-47.

74. *Ibid.*, at p. 47.

75. *Commentary, GCIII*, *op. cit.* n. 72, at p. 60.

76. L. Oppenheim, *International Law*, 7th edn., H. Lauterpacht, ed. Vol. II, (London, Longman 1952) p. 257, fn. 2. See also *Military Prosecutor v. Kassem* (1971) 42 *ILR*, at p. 478.

77. Levie, *op. cit.* n. 71, at p. 48. See also *Commentary, GCIII*, *op. cit.* n. 72, at p. 60.

3.1.2.3 Open carrying of arms

In relation to the third condition, the ‘open’ carrying of arms, this does not require ‘visibility’, so that a hand-grenade or a revolver can be placed in a pocket or under a coat.⁷⁸ However, a soldier concealing a sidearm or hand-grenade or dagger in the clothing is not held to this requirement.⁷⁹

3.1.2.4 Compliance with the laws and customs of war

Among the four defined conditions, the fourth condition leaves many questions unanswered. It seems indisputable that in order to avail themselves of the entitlement to POW status, the irregular forces must ensure that their members comply with the laws and customs of war. The ICRC’s Commentary is confined to the general statement that partisans are obliged to observe the Geneva Conventions ‘to the fullest extent possible’.⁸⁰ It is not required that combatants both as a group and individually strictly observe all details of humanitarian law provisions.⁸¹ What remains unclear is whether this requirement is a constitutive condition for POW status or a general obligation for all combatants.⁸² Rosas argues that the fourth condition of Article 4A(2) should be treated as a constitutive condition both for combatants and POWs in respect of independent forces.⁸³

Moreover, it is contested whether this condition should be regarded as an individual or group requirement. While the question as to an individual or collective requirement can also arise in respect of the second requirement of wearing fixed distinctive signs and the third requirement of carrying arms openly, it has become the focus of examinations with regard to the requirement of observing *jus in bello*. Can an individual belligerent’s scrupulous observance of the laws and customs of war reward him/her the POW status even if the group as a whole to which s/he belongs has openly disregarded such laws and customs? It is reasonable to argue, on the basis of the collective criterion, that where the great majority of an organised resistance movement comply with the laws and customs of war as a matter of official policy, this would satisfy the fourth condition, notwithstanding individual cases of violations and even of war crimes.⁸⁴ There is an implicit recognition under Article 4A(2) of the Third Geneva Convention that if non-fulfilment by

78. Commentary, GCIII, *ibid.*, at p. 61.

79. Oppenheim, *op. cit.* n. 76 at p. 257, n. 3; Levie, *op. cit.* n. 71, at p. 50. See also *Military Prosecutor v. Kassem*, *supra* n. 76, at pp. 478-79.

80. Commentary, GCIII, *op. cit.* n. 72, at p. 61.

81. A. Rosas, *The Legal Status of Prisoners of War – A Study in International Humanitarian Law Applicable in Armed Conflicts* (Helsinki, Suomalainen Tiedeakatemia 1976) at pp. 362-363.

82. *Ibid.*, at pp. 359-375.

83. *Ibid.*, at pp. 363.

84. Levie, *op. cit.* n. 71, at p. 52; and G.L. Neuman, ‘Humanitarian Law and Counterterrorist Force’, 14 *EJIL* (2003) pp. 283 at p. 294. See US Department of the Army, *The US Army Field Manual 27-10, the Law of Land Warfare* (1956), <<http://www.adtdl.army.mil>>, para. 64(d), which reads that ‘[t]his condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime.’

members of the resistance movement is incidental, there is no collective violation that would deny the whole group the entitlement to POW status.⁸⁵ Yet the assertion may be made that since the observance of all the four conditions should be regarded as constitutive in nature, the converse is not the case, so that gross and systematic non-compliance by the organised resistance movement with most (as opposed to detailed) rules of humanitarian law deprives any of its members of POW status.⁸⁶ As will be explained below, however, the rule embodied in Article 44(2) of Protocol I, which accords the right to be a prisoner of war even to an individual soldier who has not honoured *jus in bello*, can be considered as transformed into customary law. There might be some scope to argue that while accepting the parallel existence of two sources of law on the same subject,⁸⁷ the emergence of such a customary norm has strengthened (if not overstretched) the normative effectiveness of Article 4A(2) of the Third Geneva Convention, allowing the meaning of this provision to be modified.⁸⁸ This would mean that while this provision is premised on a collective assumption, the systematic policy of a group riding roughshod over rules of humanitarian law should not detrimentally affect the right to be a prisoner of war of an individual member who has conscientiously observed such rules.

3.1.3 *Applicability of the four conditions to Article 4A(1) of the Third Geneva Convention*

There are two schools of interpretation regarding whether the four criteria for evaluating lawful combatants as laid down under Article 4A(2) of the Third Geneva Convention should apply to all categories of 'lawful combatants' enumerated in Article 4A(1). The first view is to hold that, consistent with the textual meaning and structural framework of Article 4A, only '[m]embers of other militias and members of other volunteer corps' under the chapeau of Article 4A(2) have to meet the four criteria set out in this paragraph. This means that members of the regular armed forces and members of militias or volunteer corps incorporated into the national army are *ipso facto* considered lawful combatants and, if captured, entitled to the status of a prisoner of war, without the need to determine whether their overall conduct has satisfied the four criteria laid down in the second para-

85. Rosas, *op. cit.* n. 81, at p. 337.

86. Levie, *op. cit.* n. 71, at pp. 52-53; and Rosas, *ibid.*, at pp. 361 and 363. Neuman's position is close to such view, though he emphasizes the need to examine the structure of the group and the degree to which an individual member has participated in serious violations of humanitarian law: Neuman, *op. cit.* n. 84, at p. 294.

87. *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Judgment of 27 June 1986, *ICJ Rep.* (1986) pp. 14, at 94, para. 176.

88. The possibility that the normative content of a treaty provision changes through the concurrent emergence of state practice and *opinio juris*, despite apparent contradiction with another treaty provision, is recognised by the European Court of Human Rights in *Öcalan v. Turkey* (the recognition that capital punishment may be considered as 'inhuman and degrading treatment' in breach of Art. 3, notwithstanding Art. 2 of the European Convention on Human Rights): Judgment of 12 March 2003, para. 198.

graph.⁸⁹ Lawful combatants must not be punished for the fact of having taken part in an armed conflict.

The second view considers that all participants in armed hostilities, including members of regular armed forces, must satisfy the four conditions set forth in Article 4A(2).⁹⁰ According to this view, customary international law prior to 1949 always required members of regular forces to adhere to these four conditions.⁹¹ It can be contended that the application of the four conditions to members of the regular armed forces is implied in their definition under the Third Geneva Convention.⁹² With the four defined conditions deemed as constitutive, the failure to meet any of them would justify the approach whereby the right to POW status, if not combatant status, could be removed. The support for the second view can be found in national jurisprudence. In *Mohamed Ali v. Public Prosecutor*,⁹³ the Judicial Committee of the Privy Council of the United Kingdom was asked in 1968 to adjudicate on the question whether the defendants belonging to the Indonesian Army, who landed in Singapore (then a part of Malaysia) and killed some civilians by explosives, could claim POW status. A state of armed conflict existed between Indonesia and Malaysia. Though the case concerned the defendants wearing civilian clothes when they set explosives, the Privy Council held that '[s]hould regular combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents ... mean[ing] that they would not be entitled to the status of prisoners of war upon their capture.'⁹⁴

The ICRC's Commentary on the Third Geneva Convention states that there was an overall agreement at the 1949 Diplomatic Conference that it was superfluous to expressly lay down the four criteria, as mentioned under Article 4A(2), for members of regular armed forces under Article 4A(1).⁹⁵ While the Commentary sug-

89. Aldrich, loc. cit. n. 4, at p. 894 and Matheson, loc. cit. n. 5, at p. 355. Rowe seems to follow this reasoning, stating that since the Taliban fighters belonged to the armed forces of a party to the conflict, i.e., Afghanistan, they 'are likely to be prisoners of war', without referring to the four conditions under Article 4A(2) of the Third Geneva Convention: Rowe, loc. cit. n. 4, at p. 317.

90. See for instance, Y. Dinstein, 'The Distinction Between Unlawful Combatants and War Criminals', in Y. Dinstein, ed., *International Law at a Time of Perplexity – Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff 1989) pp. 103 at p. 105; H. Fischer, 'Protection of Prisoners of War', in D. Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press 1995) Ch. 7, at p. 335 (the requirement of carrying arms openly as a 'constitutive element' both of combatant and of prisoners of war status); Levie, op. cit. n. 71, at pp. 36-37; W. T. Mallison and S. V. Mallison, 'The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict', 9 *Case Western Reserve JIL* (1977) pp. 39, at 44-45, 48, and 61-62; and Wedgwood, loc. cit. n. 5, at p. 335.

91. For instance, Art. 3 of the *Oxford Manual* provides that '[e]very belligerent armed force is bound to conform to the laws of war.'

92. S.R. Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 96 *AJIL* (2002) pp. 905, at p. 912.

93. 42 *ILR* (1971) p. 458.

94. *Ibid.*, at p. 466 (emphasis in the original). See also *The Military Prosecutor v. Omar Mahmud Kassem and Others* (Israeli Military Court, 1969), where the Israeli Military Court agreed that the four conditions of Article 4A(2) must apply to regular forces as well, pp. 17, at 32. *Law and Courts in the Israel-Held Areas* 42 *ILR* (1971) pp. 470 at p. 479.

95. The Commentary states that the expression 'members of regular armed forces' denotes that

gests that the second strand of argument – that regular forces are also covered by the four conditions – may take the upper hand, further dissection of the nature of the conditions is needed. As suggested by Rosas' analysis,⁹⁶ it is submitted that the four defined conditions under Article 4A(2) are constitutive and collective conditions only for independent forces. In contrast, the same cannot *a priori* be said with respect to regular forces under Article 4A(1), and the four conditions can be regarded as declaratory and individual in respect of such forces.

3.2 **Criteria for combatants under 1977 Additional Protocol I**

3.2.1 *General overview*

Article 43(1) of Protocol I stipulates that:

'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'

Article 43 no longer employs the terms, militia and volunteer corps. Article 43(1), in contrast to Article 4A(1) of the Third Geneva Convention, makes it clear that all the participants, including members of armed forces, are required to be subject to some of the established conditions: they must be under a military command and governed by an internal disciplinary system capable of enforcing compliance with humanitarian rules. The second paragraph of Article 43 defines all the members of the armed forces, bar medical personnel and chaplains, as combatants in the sense that they have 'the right to participate directly in hostilities'.

The approach of Protocol I is to reconfirm the overlapping nature of the concept of combatants and that of POWs, with Article 44(1) providing that '[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war'. Article 44(3) entails an innovative aspect, expanding the concept of combatants to cover members of national liberation movements and guerilla fighters, provided that they meet the even less stringent condition of distinction than those laid down in Article 4A(2) of the Third Geneva Convention. This provision was inserted in response to the growing demand of the socialist and newly independent countries in Africa and Asia for upgrading the status of national liberation movements (NLM) and guerrilla movements in the decolonisation

such forces 'have all the material characteristics and all the attributes of armed forces', ... [based on the conditions that] they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war': *Commentary, GCIII*, op. cit. n. 72, at 63. See also Mallison and Mallison, loc. cit. n. 90, at p. 48.

96. Rosas, loc. cit. n. 81, at pp. 328, and 371-372. See also pp. 340-341, 348-349, 354, 358, 363 and 367.

process and the Vietnam War. While the first sentence of Article 44(3) reiterates the requirement that members of such groups must distinguish themselves from civilians, the scope of application of this requirement becomes very narrowly defined in the second sentence.⁹⁷ The most widely accepted view among the delegates at the 1974-77 Geneva Conference was that the requirement of distinction as stipulated in Article 44(3) should equally apply to members of regular armed forces organised in accordance with Article 43.⁹⁸

3.2.2 *The requirement of complying with the laws and customs of war*

Article 44(2) of Additional Protocol I, which reiterates the fourth condition as laid down under Article 4A(2) of the Third Geneva Convention, is not intended to be a prerequisite for combatant status, and even for POW status (unless otherwise provided in Article 44(3) and (4)). Article 44(2) makes it clear that the perpetration by an individual of violations of laws of war, including war crimes, does not affect his/her combatant and POW status. This does not have exculpatory effect on a combatant who has perpetrated war crimes or other violations of laws and customs of war, who remains punishable under national military law or international criminal law. As will be discussed below in relation to detainees belonging to the Taliban or Al Qaeda, there is ample scope for argument that the rule embodied in Article 44(2) of Protocol I can be considered as having attained the status of custom and that it is binding on non-contracting parties, such as the United States and Afghanistan.

The ICRC's Commentary on Protocol I in respect of Article 44(2) makes it clear that Protocol I has changed the previous rule derived from the Hague law and Article 4A(2) of the Third Geneva Convention. Article 44(2) adopts a *uniform* approach to participants in hostilities, irrespective of whether members of regular armed forces or those of independent forces (such as organised resistance movements and national liberation movements).

With respect to the requirement of complying with laws and customs of war, Article 44(2) retains a collective criterion, which is, however, accompanied by an express guarantee that a violation of laws and customs of war by an individual

97. The second sentence of Art. 44(3) reads that: 'Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement; and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).'

98. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, (hereinafter *Official Records*), Vol. XV (Bern, Federal Political Department 1978) p. 157; and Y. Sandoz, C. Swinarski and B. Zimmermann, eds., *Commentary on the Protocol Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (hereinafter *Commentary, Protocol I*), (Geneva, ICRC/Martinus Nijhoff 1987) at p. 535, para. 1719.

combatant does not disqualify him/her for POW status.⁹⁹ It may be argued that the humanitarian objective underlying Article 44(2) supports the argument that even systematic disregard for laws and customs of war by the group, whether regular armed forces or national liberation movements, should not warrant the decision to deprive an individual soldier abiding by such laws and customs of his/her POW status. This means that only where an individual member has followed the general policy of the group and systematically disregarded laws and customs of war, can such an individual lose his/her right to POW status. That the ICRC has consistently asserted that the legal status of each internee at Guantánamo Bay must be determined on an *individual* basis¹⁰⁰ reinforces such progressive construction.

3.2.3 *The requirement of carrying arms openly*

The requirement of distinction is assessed on an individual basis, so that the failure to carry arms openly when captured would deny a soldier the right to be POW, despite the overall compliance with this requirement by a group as a whole.¹⁰¹ The remaining question is whether such a failure to distinguish from civilians would lead to the deprivation of the right to be a combatant as well. The wording of Article 44(4), which provides that a 'combatant' flouting the requirement of distinction as formulated under Article 44(3) is disabled from claiming only his/her right to POW status, might suggest that the combatant status is retained. In contrast, the ICRC's Commentary on Protocol I¹⁰² and many other commentators¹⁰³ suggest that *all* the individuals captured while not meeting the requirement of carrying arms openly lose the right to a combatant as well and may be criminally prosecuted for their participation in hostilities.¹⁰⁴ The two views may not be set apart in practical terms. Even if the first view is accepted, this does not exonerate an individual from the offences based on the failure to distinguish him/herself from civilians, leaving the possibility of trial and punishment pursuant to military law and international criminal law. What is fundamentally at stake, as the representatives of a national liberation movement insisted at the Geneva Conference, is the recognition that a member of a national liberation movement, who face greater difficulty in abiding by the requirement of distinction, should receive no less privi-

99. *Commentary, Protocol I*, *ibid.*, at pp. 525-526, paras. 1689-1690. Many Socialist countries attached reservations to Art. 85 to the effect that perpetrators of war crimes, when convicted, would be deprived of the POW status.

100. See ICRC, 'Guantánamo Bay: the work continues', 9 May 2003, Operational update, available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/5C867C1D85AA2BE541256-C94006000EE>>.

101. Provost, *op. cit.* n. 28, at p. 37.

102. *Commentary, Protocol I*, *op. cit.* n. 98, at p. 538, para. 1719.

103. Dinstein, *loc. cit.* n. 90, at pp. 105 and 111 and Provost, *op. cit.* n. 28, at p. 37.

104. This was also the position of the United Kingdom delegation during the Working Group's discussions at the Geneva Diplomatic Conference. According to the delegation, '[a]ny combatant who violated the rules in paragraph 3 ... lost his combatant status and was therefore to be treated as a person who did not have the right to engage in armed conflict even though he would be accorded rights equivalent to those contained in the third Geneva Convention of 1949.' *Official Records*, *op. cit.* n. 98, Vol. XV, p. 157, para. 14.

lege and benefit as a POW than members of regular armed forces at the captor's will.¹⁰⁵

Protocol I introduces another innovative element of humanitarian considerations, obliging the contracting parties to offer those captured while not meeting the open arms requirement under the second sentence of Article 44(3) the 'protections equivalent in all respects to those accorded to prisoners of war' by the Third Geneva Convention and by Protocol I.¹⁰⁶ This protective status includes the due process guarantees 'equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed'.¹⁰⁷ Even those who fall outside POW status can be assured of a series of specific minimum guarantees as laid down in Article 75 of Protocol I.

4. CONTROVERSIAL CATEGORIES OF BELLIGERENTS

4.1 'Unprivileged belligerents': general overview

The question arises as to the legal status of those participants in hostilities who are not members of regular armed forces and who do not meet the necessary qualifications for lawful belligerents provided in Article 4 of the Third Geneva Convention and Article 44 of Protocol I. Examples of such persons include spies, guerrillas, partisans, saboteurs, mercenaries, 'war-traitors', *francs-tireurs*, terrorists and others.¹⁰⁸ The US military manuals interchangeably use the concepts, 'unlawful combatants',¹⁰⁹ 'unprivileged belligerents'¹¹⁰ and 'illegal combatants',¹¹¹ to refer to such persons. While the terminology, 'unlawful combatant', does not entertain a long lineage, there were some earlier equivalents, such as 'irregular combatants' and 'marauders'.¹¹²

105. *Official Records*, *ibid.*, Vol. VI, p. 148; and *Commentary, Protocol I*, *supra* n. 98, at p. 539, fn. 82.

106. Art. 44(4), first sentence.

107. Art. 44(4), second sentence.

108. R.R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs', 28 *BYIL* (1951) p. 323. See also J. Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', 14 *EJIL* (2003) p. 299.

109. *US Army, Operational Law Handbook* (1997), JA 422, (Charlottesville, Virginia, International and Operational Law Department, The Judge Advocate General's School, US Army, 1997), <<http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf>>, p. 18-19.

110. *US Army, Operational Law Handbook* (2002), (Charlottesville, Virginia, International and Operational Law Department, The Judge Advocate General's School, US Army, 2002), <<https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962-c085256a490049856f?OpenDocument>>, Ch. 2, p. 6.

111. *US Navy, Commander's Handbook of the Law of Naval Operations, NWP 1-14M*, Department of the Navy, 1995, available at <<http://www.nwc.navy.mil/ILD/NWP%201-14M.htm>>, para. 12.7.1.

112. Hoffman, *loc. cit.* n. 4, at p. 228.

When discussing spies, guerrillas and saboteurs, the concept of 'unprivileged belligerents'¹¹³ should be preferred to the expression 'unlawful combatants'.¹¹⁴ Baxter has observed that

'armed and unarmed hostilities, wherever occurring [whether in occupied or unoccupied areas], committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy'.¹¹⁵

It may be argued that Baxter's view augured the progressive construction of humanitarian law that characterised the Geneva Diplomatic Conference in 1977. Article 46 of Protocol I stipulates that those members of armed forces who are captured while engaging in espionage are treated as spies and bereft of the right to be treated as prisoners of war, without, however, alluding to the loss of the right to combatant status.

Capital punishment for unprivileged belligerents is not excluded under the 1949 Geneva Conventions, except for those in occupied territories as prescribed in Article 68 of the Fourth Geneva Convention. However, even those labelled as 'unprivileged belligerents or combatants' are entitled to the minimum guarantees without discrimination. Such minimum guarantees should correspond to the safeguards for participants in civil conflicts, as provided in common Article 3 of the Geneva Conventions.¹¹⁶ They are deemed as having been grafted onto customary law. More detailed guarantees based on the rights to physical and mental integrity and due process are enumerated in Article 75 of Protocol I, which in itself should be considered as customary international law.¹¹⁷

4.2 The right to partake in hostilities

With respect to whether unprivileged belligerents have the right to partake in hostilities, two strands of argument can be presented. First, all such unprivileged belligerents lack the right to engage in warfare with immunity from any liability under national or international law.¹¹⁸ Members of such groups can be punished for their

113. Baxter, loc. cit. n. 108. See also J. Stone, *Legal Controls of International Conflicts* (London, Stevens 1958) at p. 569.

114. Many jurists use the expression, 'unlawful combatants'. See, for instance, Dinstein, loc. cit. n. 90; and Knut Ipsen, 'Combatants and Non-Combatants', in Fleck, op. cit. n. 90, Ch. 3.

115. Baxter, loc. cit. n. 108, at p. 343.

116. Aldrich, loc. cit. n. 4, at p. 893.

117. C.J. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A.J.M. Delissen and G.J. Tanja, eds., *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, (Dordrecht, Martinus Nijhoff 1991) pp. 93 at p. 103. The US government has also considered Art. 75 as part of the customary rules embodied in Protocol I: *US Army, Operational Law Handbook* (1997), op. cit. n. 109, p. 18-2; and *US Army, Operational Law Handbook* (2002), op. cit. n. 110, Ch. 2, p. 5.

118. Dinstein, op. cit. n. 90, at p. 111.

participation in hostilities and for any crimes, such as murder, assault, rape and looting, that may have been committed in that connection, on the basis of national law. Or, as in the event of a soldier who has killed an enemy soldier while wearing the adversary's uniform, the basis for prosecution can be either a war crime in international law (perfidy) or an ordinary crime in national law (murder).¹¹⁹ The reasoning of the US Supreme Court in *Ex parte Quirin* conforms to this argument. In respect of German saboteurs who clandestinely landed in the United States, the Court, distinguishing lawful and unlawful combatant, ruled that upon capture, '[u]nlawful combatants... are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful'.¹²⁰ Vulnerability of such persons to criminal prosecution for the mere involvement in hostilities is the sanction to deter their entry into armed conflicts.¹²¹

The second strand of argument is to deemphasise the distinction between the members of belligerents whose act of participating in hostilities is lawful and those whose such act itself should be deemed as unlawful. The thrust of the second argument is that susceptibility to punishment is not because their involvement in armed conflicts is regarded as unlawful but due to the danger that they pose to adverse parties. Baxter's seminal work in 1951 adopts this unitary approach, postulating that all the categories of unprivileged belligerents are, while being vulnerable to the forfeiture of their POW status and to punishment upon capture, not unlawful in terms of their participation in hostilities.¹²² Such a unitary approach explains Baxter's criticism that the finding of the United States Supreme Court in *Ex parte Quirin*, that the saboteurs in question violated international law, was 'a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection'.¹²³ The absence of legal protection prescribed by humanitarian law does not suggest that the act of participation in hostilities is unlawful. The result of a captured soldier being classified as an unprivileged belligerent is that s/he would be disentitled to POW status and subject to

119. Aldrich, loc. cit. n. 4, at p. 893; Dinstein, *ibid.*, and G.I.A.D. Draper, *The Red Cross Convention*, (London, Stevens 1958) at p. 52. See also *US Army Field Manual*, *supra* n. 84, para. 73, 'Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War'.

120. *Ex parte Quirin*, 317 US 31.

121. Aldrich, loc. cit. n. 4, at pp. 893-894. Yet, Aldrich states that Al Qaeda personnel 'were combatants in hostilities and are not entitled to POW status', suggesting that they are at least entitled to the right to be combatant: *ibid.*, at p. 893.

122. Baxter argues that: 'Since these qualities [disregard for and deliberate non-observance of the qualifications to be recognized as a prisoner of war] are those which most conspicuously inhere in espionage, resistance activities in occupied areas, guerrilla warfare, and private hostilities in arms, they afford grounds for believing that all these acts of warfare, whether or not involving the use of arms and whether performed by military persons or by civilians, are governed by a single legal principle.' Baxter, loc. cit. n. 108, at p. 342. Baxter applies the same reasoning to simple evaders, escaped prisoners of war captured or recaptured in civilian clothes, as well as military personnel captured while wearing civilian clothes under their uniforms: *ibid.*, at pp. 340-341.

123. *Ibid.*, at p. 340. In another context, Baxter states that '[t]he judicial determination which is necessary before a person may be treated as an unprivileged belligerent is ... not a determination of guilt but of status only and, for the purposes of international law, it is sufficient to ascertain whether the conduct of the individual has been such as to deny him the status of the prisoner or of the peaceful civilian.' *Ibid.*, at pp. 343-344.

the same rights and disabilities as the civilian population, albeit his/her conduct is considered relevant to assessment of penalty.¹²⁴ Such an unprivileged belligerent, who is not held either as a POW or as a peaceful civilian, can be tried under the municipal law of the capturing state for a war crime *stricti juris*, as in the case of killing of civilians, pillage or refusal to quarter.¹²⁵ However, persons arrested and captured in an occupied territory, as contrasted to those captured other than in an occupied territory, will benefit from favourable treatment under Articles 64, 65, 67 and 68 of the Fourth Geneva Convention.¹²⁶

The practice of the United States during the Vietnam War¹²⁷ may be deemed as harmonious with the second position. The US Military Command in Vietnam during the Vietnam War adopted the policy of treating as POWs the captured members of Viet Cong main and local force personnel, and Viet Cong irregulars, despite considerable doubt as to whether members of these groups met the criteria set forth in Article 4A(2) of the Third Geneva Convention.¹²⁸ Members of the Viet Cong were not granted POW status but treated as equal to POWs, on the condition that when captured, they carried arms openly and engaged in combat or a belligerent act, 'other than an act of terrorism, sabotage, or spying'.¹²⁹ The US guidelines did not require that a participant in armed hostilities wear a uniform.¹³⁰ There was also a possibility of an Article 5 tribunal to determine the status of those captured whose status was in doubt.¹³¹

In relation to terrorists,¹³² Baxter's comprehensive approach is again instrumental in bringing a measure of legal discipline and cohesion into their classification under humanitarian law. He discussed 'private hostilities in arms' on the equal footing to spies and guerrillas in view of their 'disregard for the qualifications for a prisoner of war status'. This, together with his argument that 'a single legal principle' should apply to these categories, suggest that members of a transnational terrorist organisation, such as Al Qaeda soldiers, be treated in the same vein as other unprivileged belligerents.¹³³ Baxter's unitary position can corroborate the lib-

124. *Ibid.*, at p. 340.

125. *Ibid.*, at p. 344.

126. *Ibid.* Art. 68 of the Fourth Geneva Convention forbids the application of capital punishment.

127. See Annex A, 'Criteria for Classification and Disposition of Detainees', part of Directive no. 381-46 of 27 December 1967; and Directive no. 20-5 of 15 March 1968, 'Inspections and Investigations: Prisoners of War – Determination of Eligibility'; both reprinted in C. Bevans, 'Contemporary Practice of the United States Relating to International Law', 62 *AJIL* (1968) pp. 754 at 765.

128. Gasser, *loc. cit.* n. 4, at p. 567.

129. Bevans, *loc. cit.* n. 127, at p. 767.

130. Gasser, *loc. cit.* n. 4, at p. 567.

131. Those found outside the status of lawful combatants and POWs were to be transferred to the South Vietnamese authorities. *Ibid.*

132. While acknowledging the obsolete nature of the term, 'belligerency', Hoffman describes terrorists as 'unlawful belligerents', who do not entertain the right to partake in armed hostilities, but perpetrate indiscriminate attack in peacetime (for certain political goals). The 'unlawful belligerents' would be distinguished from 'unlawful combatants', such as saboteurs, guerrillas and spies, who have such a license and direct attack *normally* against lawful military objectives, though by deceptive or treacherous means and methods: Hoffman, *loc. cit.* n. 4, at p. 229.

133. Baxter, *loc. cit.* n. 108, at pp. 342-343.

eral construction, based on the humanitarian object and purpose of the Geneva Conventions, that all those participating in armed conflicts should be described as 'combatants' and *prima facie* deemed as entitled to a POW status till their status is determined by a competent tribunal. The underlying rationale of this argument is that the question of their right to be considered as combatants in modern warfare has lost importance, with the focus of examination having shifted to the conditions of the POW status. As discussed above, such rationale underscores Article 44(4) of Additional Protocol I, according to which, while 'unprivileged belligerents' are stripped of the right to POW status, they can benefit from POW treatment in respect of due process guarantees.

4.3 The detaining power's own nationals

In relation to the status of a belligerent belonging to the nationality of the capturing state or that of its ally, examples of such genus include members of Viet Cong, who were South Vietnamese nationals, and the Taliban soldiers captured after the coming into existence of the new Karzai government, which is allied to the United States. One strand of argument is that a detaining power is not required to accord POW status to its own nationals.¹³⁴ Oppenheim/Lauterpacht explained that nationals of the capturing state falling into its power while serving in the armed forces of the adversary were disqualified from POW status in view of their traitorous act.¹³⁵ While this provided the underlying rationale for the decision of the United Kingdom Privy Council in the *Oie Hee Koi* case,¹³⁶ this decision became the subject of criticism. The argument made by Oppenheim/Lauterpacht entails a pernicious implication that traitorous citizens of a belligerent could be denied the protection of the Geneva Convention from the beginning of captivity, with no account taken of the complexity of nationality and of the sense of allegiance.¹³⁷ The proponents of the teleological construction based on the humanitarian objectives of the Geneva Conventions argue that international humanitarian law should apply to the nationals accused of treason as well, and that they should be granted POW status and all the safeguards as required under the Third Geneva Convention.¹³⁸ The facts that the definition of a prisoner of war in Article 4 does not contain reference to nationality and that there was some precedent for disregarding altogether the question of nationality, are cited to support their argument.¹³⁹

134. See for instance, *US Army Field Manual*, *supra*, n. 84, <<http://www.adtdl.army.mil>>, para. 79.

135. Oppenheim, *op. cit.* n. 76, at p. 268.

136. *Oie Hee Koi v. Public Prosecutor* and connected appeals, Judicial Committee of the Privy Council, 4 December 1967, (1968) 9 *British International Law Cases (BILC)* pp. 250-254, and [1968] AC 829.

137. R.R. Baxter, 'The Privy Council on the Qualifications of Belligerents', 63 *AJIL* (1969) pp. 290-294. See also R.-J. Wilhelm, 'Peut-on modifier le statut des prisonniers de guerre?', 35 *RICR* (1953) pp. 681, 684 and 686.

138. S. Elman, 'Prisoners of War under the Geneva Convention', 18 *ICLQ* (1969) pp. 178 at 180-185.

139. Elman refers to the state practice of the United Kingdom during the Boer War, in which the

There are a few post-WWII US decisions that might provide succour to the second view. In *ex parte Quirin*, the US Supreme Court ruled that hostile acts against the United States by American citizens amounted to violations of the laws of war committed by 'enemy belligerents'.¹⁴⁰ In *Re Territo*, the application for a writ of habeas corpus by a US citizen that served the Italian army was denied on the basis that he was a prisoner of war.¹⁴¹ However, Rosas has questioned the effect of these decisions on the basis that the express recognition of POW status was limited only in the case of *Territo*, and in that case the reasoning was adduced with a view to denying the petitioner a constitutional right available to US citizens. In that sense, it may be contended that these decisions cannot serve to alter the traditional premise that the detaining power is not required to offer POW status to its own nationals.¹⁴² Nevertheless, Rosas concedes that the decisive factor should be 'material allegiance' rather than formal nationality, referring to the members of national liberation movements, and individual persons who have renounced their nationality many years before the outbreak of the war but without their former country (the detaining power) formally acknowledging this.¹⁴³ It must be recalled that the Appeals Chamber of the ICTY in the *Tadić* case ruled that what matters most was the sense of allegiance rather than mere nationality, enabling the grave breach regime under the Fourth Geneva Convention to apply to the atrocities committed by Serbs against Muslims and Croats in the so-called Republika Srpska.¹⁴⁴ This reasoning is equally applicable to the appraisal of the expression, 'fallen into the power of the enemy', under Article 4 of the Third Geneva Convention,¹⁴⁵ so that even nationals of a detaining power should not be excluded from POW status under the Third Geneva Convention while awaiting possible trials for treason.¹⁴⁶

4.4 Judicial guarantees for detainees accused of war crimes

In the aftermath of World War II, national courts of several western allied powers were asked to determine whether detainees of Axis nationals accused of war crimes could plead minimum judicial guarantees underlying Articles 45 to 67 of the 1929 Geneva Convention. Such pleas were rejected on the ground that there was a well-established customary rule that those who have violated the laws of war cannot avail themselves of the protection that they afford, with the captured mem-

Irish prisoners who had taken the oath of allegiance to the South African Republic were treated as prisoners of war. *Ibid.*, at pp. 181-182.

140. *Ex parte Quirin* (US Supreme Court, 1942), 37 *AJIL* (1943) p. 152. See also *Colepaugh v. Looney* (US Court of Appeals, Tenth Circuit, 1956), 23 *ILR* (1956) pp. 759-762.

141. *Re Territo* (US Court of Appeals, Ninth Circuit, 1946), (1946) 156 US FedR. (2d) 142.

142. Rosas, *op. cit.* n. 81, at pp. 385-386.

143. *Ibid.*, at p. 387.

144. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, para. 166.

145. Indeed in the *Oie Hee Koi* case, the counsel for the respondents made this point, arguing that '[i]t is not patriotism or national allegiance which predominates but political allegiance': *Oie Hee Koi* case, *supra* n. 136, 9 *BILC*, p. 242.

146. Even such nationals can benefit from basic guarantees equivalent to POWs under Art. 44(4), as well as Art. 75 of Protocol I.

bers of armed forces who have committed war crimes disentitled to claim the status of POWs.¹⁴⁷ The ICRC Commentary on the Third Geneva Convention criticises that national legislation did not corroborate this interpretation.¹⁴⁸ Indeed the ICRC took initiatives to insert a provision designed to afford minimum procedural guarantees for individual persons accused of war crimes in the course of any judicial proceedings. Such a move was prompted by the concern that it would be dangerous not to supply the accused with the guarantees embodied in a humanitarian law treaty. This trepidation was borne out by the fact that war crimes trials in many national courts were based on the use of special *ad hoc* legislation rather than on the regular penal legislation and that a number of the accused persons were deprived of the protection of the 1929 Geneva Prisoners of War Convention prior to the judicial pronouncement.¹⁴⁹ At the Geneva Conference of Government Experts in 1947, many Anglo-Saxon states were initially opposed to the idea of maintaining the judicial guarantees of the Convention for those accused of war crimes until after conviction. However, their position underwent a complete change, and in conformity with the ICRC's proposal, they advanced that such prisoners of war should continue to benefit from due process rights even after they had been judged. Since then opposition to this innovative approach waned,¹⁵⁰ and this principle is recapitulated in Article 44(2) of Protocol I.

Article 85 of the Convention has introduced an obligation to offer prisoners of war convicted of war crimes all the benefits accruing from the Convention. These benefits encompass 'all the safeguards which the Convention provides', including notification of the protecting power, assistance by a counsel, the right to be informed of the procedure to be followed, and to call witnesses and an interpreter, as well as the right of appeal.¹⁵¹ While the application of Article 85 even in the post-conviction period may be objected to as controversial,¹⁵² one can at least recognise that such an innovative move has been influenced by the development of human rights law. The marked significance attached to due process guarantees is demonstrated by the principle that the denial of the right to a fair trial may constitute a grave breach of the Convention as prescribed by Article 130.¹⁵³ The same rationale underpins the requirement, as laid down under Article 75(7)(b) of Protocol I, that

147. See *inter alia*, *Yamashita* Trial, the judgment of 4 February 1946 of the United State Supreme Court: *Law Reports of Trials of War Criminals*, Vol. 4, p. 1, (with one judge dissenting); and *Rauter* case, 12 January 1949, the Netherlands Special Court of Appeal, *ibid.*, Vol. 14, p. 116.

148. *The Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 570-571; and *Commentary, GCIII*, *op. cit.* n. 72, at p. 416.

149. *Ibid.*, at p. 414.

150. *Provost*, *op. cit.* n. 28, at pp. 30-31.

151. *Commentary, GCIII*, *op. cit.* n. 72, at p. 423; and *Ipsen*, *loc. cit.* n. 114, at p. 94. Note that Art. 75(7)(b) of Protocol I provides such judicial guarantees for non-combatants accused of war crimes and crimes against humanity.

152. *Dinstein*, *op. cit.* n. 90, at p. 114. Note that in the *Kappler* case, the Supreme Military Tribunal in Italy ruled out the benefit of Art. 85 in relation to war criminals: *Kappler* Case, Supreme Military Tribunal, Italy, (1952), 49 *AJIL* (1955) pp. 96 at 97.

153. *Commentary, GCIII*, *op. cit.* n. 72, at p. 422.

even non-combatants accused of grave breaches of war crimes should be given the due process guarantees.¹⁵⁴

The approach followed in respect of the POWs accused of war crimes does not appear consistent with the treatment of those persons who have committed perfidious attacks under civilian disguise, war crimes which are expressly proscribed under Article 37(1) of Protocol I and susceptible to the loss of POW status. A proposal submitted at the end of the 1976 session of the Geneva Diplomatic Conference by the Working Group of Committee III was that while losing both their POW status and combatant status, they should benefit from treatment equivalent to that provided for POWs in the Third Convention.¹⁵⁵ It may be seriously questioned how persons convicted of crimes against humanity or even genocide, the nature of which are considered more grave than war crimes of perfidy or war crimes in general,¹⁵⁶ should remain beneficiaries of POW treatment. However, there may be little practical difference in handling these two cases. According to Article 44(4) of Protocol I, persons convicted of perfidy by not distinguishing themselves from civilians can benefit from the rights and privileges akin to those afforded to POWs under the Third Geneva Convention. It should be recalled that the former socialist countries asserted that persons convicted of war crimes and crimes against humanity would forfeit their POW status and entered a reservation on this matter upon their ratification of the Convention. Yet, their assumption was that such convicted criminals would lose their entitlement to POW status only after they are convicted.¹⁵⁷ suggesting that even according to their view war criminals would retain combatant status.

5. INTERNAL ARMED CONFLICT AND THE HUMANITARIAN RULES

An attempt to extend the status of 'lawful combatants' and that of a prisoner of war to those engaging in guerrillas and armed rebels against armed forces of a state has faced a stonewall of opposition by a large number of states. Such a move has been perceived to send a signal of recognising the legal status of members of such groups and even the status of disputed territory. Additional Protocol II responds to that apprehension of states by avoiding any reference to the terms, 'combatants' and 'prisoners of war'. Instead the approach of Protocol II is to capture the wide range of persons, with the field of application *ratione personae* covering all the

154. *Commentary, Protocol I*, op. cit. n. 98, at pp. 887-889, paras. 3131-3143.

155. Rosas, op. cit. n. 81, at p. 312.

156. M. Frulli, 'Are Crimes Against Humanity More Serious Than War Crimes?', 12 *EJIL* (2001) pp. 329 at p. 344. Contrast, however, *Prosecutor v. Kambanda* (Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 14) in which crimes against humanity were recognised as more serious than violations of Art. 3 common to the four Geneva Conventions 1949, with *Prosecutor v. Tadić* (Case No. IT-94-1, Judgment in Sentencing Appeals, 26 January 2000, paras. 65-69), where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia refused to distinguish between them in terms of seriousness.

157. *Commentary, GCIII*, op. cit. n. 72, at pp. 415-416.

persons ‘affected by an armed conflict’, within the meaning of Article 2(1).¹⁵⁸ While Article 4 provides a non-exhaustive list of proscribed acts against such protected persons in an unconditional manner,¹⁵⁹ Article 5 of Protocol II supplements Article 4, laying down concrete measures of obligations to safeguard the rights of the ‘[p]ersons whose liberty has been restricted’, either by internment or detention. Such an expression denoting the protected persons has been chosen in lieu of specific terms such as ‘prisoners’ or ‘detainees’ in order to capture all the persons whose liberty has been circumscribed for reasons relating to the conflict.¹⁶⁰

6. TRIBUNALS FOR DETERMINING THE LEGAL STATUS OF PRISONERS

6.1 ‘Article 5 Tribunals’

The second sentence of Article 5 of the Third Geneva Convention provides 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.’

This general requirement has been incorporated into national military manuals.¹⁶¹ Article 5 does not spell out clear guidelines on the terms and conditions under which a ‘competent tribunal’ is constituted. Just as with limitations on the right to a fair and public hearing as embodied in Article 14 of the ICCPR, proceedings for determining the status of prisoners can be *in camera* to preserve national security. It might be argued that in contrast to the prevailing interpretation of Article 45(2) of Protocol I, which will be discussed below, such proceedings do not have to take place prior to a trial for an offence.¹⁶²

The meaning of ‘[s]hould any doubt arise’ in relation to the inclusion of captured persons in any of the six categories enumerated in Article 4 is not certain. It has been submitted that Article 5 sets out two criteria: procedural criterion and

158. According to the ICRC’s Commentary on Protocol II, such persons include those ‘who do not, or no longer take part in hostilities and enjoy the rules of protection laid down by the Protocol for their benefit’ and who ‘must ... conform to certain rules of conduct with respect to the adversary and the civilian population’: *Official Records*, op. cit. n. 98, Vol. VIII, p. 210; and *Commentary, Protocol II*, op. cit. n. 34, para. 4485.

159. While implicitly connoting the ban on reprisals against protected persons, such an ‘absolute’ and non-derogable nature of the rule embodied in Art. 4 can signify its *jus cogens* status: *Commentary, Protocol II*, *ibid.*, para. 4530 and n. 17.

160. *Commentary, Protocol II*, *ibid.*, at p. 1384, para. 4564.

161. *US Army, Operational Law Handbook* (1997), JA 422, op. cit. n. 109, p. 18-19; *US Army, Operational Law Handbook* (2002), op. cit. n. 110, Ch. 2, p. 16; and *US Navy, Commander’s Handbook of the Law of Naval Operations, NWP 1-14M*, op. cit. n. 111, paras. 11.7 and 12.7.1.

162. Roberts, loc. cit. n. 18, at p. 23.

factual criterion.¹⁶³ First, according to the factual criterion, ‘doubt’ relates simply to the question whether a person appertains to one of the six categories of ‘lawful combatants’ as laid down in Article 4A. This criterion coincides with the ‘quasi-presumption’ of POW status for all participants in hostilities.¹⁶⁴ Second, in contrast to the first, the procedural criterion means that ‘doubt’ arises only when a captured person claims POW status before or at the trial. The United States 1997 Army Regulation follows this position.¹⁶⁵ The second position seems to reverse the presumption, unless a claim for POW status is made. This is the view upheld by the UK Privy Council in the *Oie Hee Koi* case.¹⁶⁶

A question remains as to the meaning of a ‘competent tribunal’ under Article 5 (2) of the Third Geneva Convention, especially with regard to its composition, competence and procedural rules. The reference to a ‘competent tribunal’ can also be seen in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the American Convention on Human Rights (ACHR). The original draft provision of Article 5(2) at the Stockholm Conference in 1949 referred to the requirement that the legal status of an apprehended person be determined by ‘some responsible authority’.¹⁶⁷ Subsequently at the Geneva Conference it was proposed that the term ‘responsible authority’ be replaced by ‘military tribunal’ in order to provide safeguards against the danger that decisions on the right of a captive to benefit from POW status may be made even by a single non-commissioned officer.¹⁶⁸ However, the controversy over serious implications of bringing an apprehended person before a ‘military tribunal’ led to the further amendment that used the term, ‘competent tribunal’, leaving the scope of discretion to national authorities as to the type of tribunals (military, civil or administrative).¹⁶⁹ A captive found not entitled to POW status by a ‘competent tribunal’ might be left with no right to reassert such status before a judicial tribunal convened to examine whether his/her act arising out of hostilities is a lawful ‘belligerent act’ or a criminal offence.¹⁷⁰ The ICRC’s Commentary on Protocol I states that such omission allows a captured person to run a ‘double risk’ of being accused of merely participating in the hostilities, which does not necessarily constitute an offence, and of being denied the same procedural guarantees as should be afforded to prisoners of war.¹⁷¹

163. Y. Naqvi, ‘Doubtful Prisoner-of-War Status’, 84 *RICR/IRRC* (2002) pp. 571 at pp. 574-577.

164. *Ibid.*, at p. 576

165. *Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, (Washington D.C., Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps 1997) <<http://www.usapa.army.mil/pdffiles/r190%5F8.pdf>>, para. 1-6(b).

166. *Public Prosecutor v. Oie Hee Koi*, *supra* n. 134, [1968] AC 829.

167. ‘XVIth International Red Cross Conference, Draft revised or new Conventions’, p. 54, as referred to in *Commentary, GCIII*, op. cit. n. 72, at p. 77.

168. *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department, Bern) Vol. II-A, p. 388; and *Commentary GCIII*, *ibid.* Note, however, that upon the determination of his/her POW status, the captured person must be tried by a military court of the detaining power: Art. 84 of Geneva Convention III.

169. *Commentary, Protocol I*, op. cit. n. 98, at p. 551, para. 1745. See also Bothe et al., op. cit. n. 163, at p. 260; and Naqvi, loc. cit. n. 163, at p. 579.

170. Naqvi, *ibid.*, at p. 580.

171. *Commentary, Protocol I*, op. cit. n. 98, at p. 554, para. 1751.

6.2 A 'competent tribunal' under Article 45 of Protocol I

Article 45(1) elaborates upon the succinct provision of Article 5 of the Geneva Convention III. A participant in hostilities who is captured by an adverse party must be presumed to be a prisoner of war, provided that:

- (i) s/he claims the status of prisoner of war;
- (ii) s/he appears to be entitled to such status; or
- (iii) the Party on which s/he depends claims such status on his/her behalf by notification to the Detaining Power or to the Protecting Power.¹⁷²

The effectiveness of the *prima facie* presumption not only of lawful combatant status but also of POW status is supported by the principle that in cases of doubt, a captured person remains entitled to the POW status 'until such time as his status has been determined by a competent tribunal'.¹⁷³

Article 45(1) of Protocol I, which adopts a combined approach of both factual and procedural criteria, purports to elucidate the imprecise meaning of Article 5 of the Third Geneva Convention.¹⁷⁴ Contrary to the position of Article 5(2) of the Third Geneva Convention, the implication of Article 45 of the Protocol I is that with the presumption of POW status, it assigns onus of proof to a capturing state claiming that there is doubt as to the legal status of a captive.¹⁷⁵ While such a novel approach may cast doubt on the customary law status of Article 45(1) of Protocol I, it is possible to describe a norm prescribing the general presumption of POW status for all participants in hostilities as *evolving* into a customary rule.¹⁷⁶ As Naqvi notes,¹⁷⁷ the fact that for all the US non-ratification of Protocol I, the 1997 US Army Regulation recognises the right of a captured person, who does not appear to be a prisoner of war, to assert entitlement to POW status and to have this question determined before a competent tribunal, suggests that the US treats such a right as reflective of customary law. As discussed above, the practice of the United States during the Vietnam War has contributed to the progressive transformation of the presumptive status rule into a customary norm. While abandoning the initial approach that confined the application of POW status to the North Vietnamese regular forces, the United States decided to accord the privileged status to the Vietcong as well.¹⁷⁸

Article 45(2) in Protocol I has somewhat remedied the deficiency concerning the absence of the right of a detained person who is not being held as a POW by a 'competent tribunal', to reassert such status before a judicial tribunal adjudicating

172. Art. 45(1), first sentence, Additional Protocol I.

173. Art. 45(1), second sentence, Additional Protocol I.

174. *Commentary, Protocol I*, op. cit. n. 98, at p. 544, para. 1726.

175. *Ibid.*, at p. 456, para. 1730. See also Naqvi, loc. cit. n. 163, at p. 576.

176. Naqvi, *ibid.*, at p. 592.

177. *Ibid.*, at p. 593.

178. Mundis, loc. cit. n. 5, at p. 326.

on the legality of his/her acts of hostilities.¹⁷⁹ The 'judicial tribunal' in Article 45 (2) may differ from the 'competent tribunal' in Article 45(1).¹⁸⁰ The 'judicial tribunal' must re-examine the legal status of a captive who is tried for an offence arising out of the hostilities and who, though not held as a prisoner of war by a 'competent tribunal' under the first paragraph, claims such status.¹⁸¹ The ICRC Commentary on Protocol I suggests that Article 45 of Protocol I adopts a 'two-tiered system'.¹⁸² First, a 'competent tribunal' must be set up to determine POW status where substantial doubt can be cast on the general presumption. Second, as stated by the Rapporteur of Committee III when drafting Protocol I, in case a captive who is held to be not entitled to a prisoner of war status is charged with an offence arising out of hostilities, a 'judicial tribunal' must adjudicate *de novo* his/her legal status.¹⁸³ According to Article 45(2) of Protocol I, '[w]henever possible', the adjudication on legal status must precede the trial for an offence by a judicial tribunal,¹⁸⁴ as all procedural protections accorded to prisoners of war by the Third Geneva Convention hinge on such determinations. As the Commentary on Protocol I notes, in some instances such determinations, on whose outcome Article 44(4) depends, are possible only after examining the merits of the accusation in relation to the compliance with the requirements prescribed in Article 44(3), especially the requirement of carrying arms openly.¹⁸⁵ The judicial tribunal, which may or may not be the same one that tries the offence,¹⁸⁶ can be either civilian or military,¹⁸⁷ but it must provide all the necessary procedural guarantees pursuant to the Third or the Fourth Geneva Convention and, otherwise, in conformity with Article 75 of Protocol I.¹⁸⁸ If a captive is held to be a prisoner of war, Articles 84 and 102 of the Third Geneva Convention apply, with the consequence that s/he can be tried only by a military tribunal applying procedural guarantees as afforded by that Convention.¹⁸⁹

179. *Official Records*, op. cit. n. 98, Vol. XV p. 433, CDDH/III/338; and *Commentary, Protocol I*, op. cit. n. 98, para. 1752.

180. Naqvi, loc. cit. n. 163, at p. 578.

181. *Official Records*, op. cit. n. 98, Vol. XV, p. 433, CDDH/III/338.

182. Naqvi, loc. cit. n. 163, at p. 579.

183. *Official Records*, op. cit. n. 98, Vol. XV, at 433, CDDH/III/338.

184. *Commentary, Protocol I*, op. cit. n. 98, para. 1755

185. *Ibid.*, para. 1755.

186. *Official Records*, op. cit. n. 98, Vol. XV, at 433, CDDH/III/338.

187. *Commentary, Protocol I*, op. cit. n. 98, para. 1753.

188. *Ibid.*, para. 1754

189. *Ibid.*, para. 1753.

7. THE LEGAL STATUS OF THE TALIBAN AND THE AL QAEDA DETAINEES

7.1 The legal status of Taliban soldiers captured prior to 5 December 2001

The United States government initially treated both the Taliban and Al Qaeda soldiers as ‘battlefield detainees’ and ‘unlawful combatants’, refusing to apply the Third Geneva Convention both to the Taliban and Al Qaeda.¹⁹⁰ However, on 7 February 2001, President Bush announced that the Third Geneva Convention, to which both Afghanistan and the United States are parties, would apply to the armed conflict between the Taliban and the United States, but not to the ‘armed conflict’ between Al Qaeda and the United States.¹⁹¹ To that extent, the Bush administration did not succumb to the dubious interpretation that the Taliban soldiers were ‘irregular armies’ akin to those of warlords, who were not ‘members of the armed forces’ within the meaning of Article 4A(1). Such an interpretation could not have countered the objection that, although recognition was granted by only three countries, the Taliban government exercised ‘effective control’ over most of Afghanistan.¹⁹²

Despite the pronouncement to apply the Third Geneva Convention to Taliban soldiers, it was decided that since the Taliban soldiers did not meet some of the four conditions of lawful combatants set out in Article 4A(2) of the Convention, they would be stripped of the privilege to be treated as prisoners of war. According to the Bush administration, the Taliban personnel failed to comply with the two requirements of wearing a fixed distinctive sign recognisable at a distance and of undertaking operations pursuant to the laws and customs of war.¹⁹³ The concern that the Taliban (and Al Qaeda) captives would lose protective status was only slightly assuaged by the subsequent announcement that they would nonetheless be treated humanely, in accordance with the general principles of the Convention, and that the United States would allow the ICRC access to each detainee.¹⁹⁴

One policy-oriented explanation of the US intransigency over the legal status of Taliban personnel is that they provided support to Al-Qaeda.¹⁹⁵ The thrust of such argument is that offering sanctuary to Al Qaeda personnel was tantamount to a violation of international law that can warrant the denial of POW status to the

190. White House Spokesman, Ari Fleischer, Press Briefing, 28 January 2002. Available at <<http://www.whitehouse.gov/news/releases/2002/01>>.

191. White House Fact Sheet: Status of Detainees at Guantánamo, 7 February 2002, at <<http://usinfo.state.gov/topical/pol/terror/02020700.htm>> or at <<http://www.state.gov/p/sa/rls/fs/7910.htm>>. Reprinted in this volume at p. 662.

192. Aldrich, loc. cit. n. 4, at p. 894. See also the *Tinoco Concessions* Arbitration, *supra* n. 45, p. 369, which was grounded on the concept of effective control to meld the constitutive and declaratory effects of recognition.

193. Aldrich, *ibid.*, at p. 895.

194. White House Fact Sheet: Status of Detainees at Guantánamo (7 February 2002), *supra* n. 228.

195. *Ibid.*

Taliban.¹⁹⁶ However, while logistical support to Al Qaeda both in peace and in an armed conflict is contrary to international law, this does not, *ipso facto*, amount to a failure to abide by the requirements of the *jus in bello*.¹⁹⁷ Such argument also sits ill with the non-reciprocal nature of the obligations of the Geneva Conventions, as evidenced by common Article 1(1), which provides the duty to ‘respect and to ensure respect’ for the rules of the Geneva Convention ‘*in all circumstances*’.¹⁹⁸ There has also been a suggestion that the granting of POW status to the Taliban and Al Qaeda soldiers would frustrate an attempt to obtain vital intelligence information, as it would debar the US from questioning a POW on anything more than his or her name, rank, date of birth and personal or serial number.¹⁹⁹ However, such a concern must not affect the juridical exercise of determining the POW status of the captured Taliban soldiers.

The dearth of evidence, especially in relation to the failure of Taliban soldiers to distinguish themselves from civilians, makes it difficult to warrant the argument against the granting of POW status. It is questionable whether an assumption can be made that *all* units of the Taliban forces were indistinguishable. Further, an assumption that most Taliban soldiers might have breached the laws and customs of war would not justify measures to treat all of them in a blanket manner.²⁰⁰ Such generalisation would create a slippery slope of abuse. It should be recalled that the decisions of North Korea during the Korean War and of North Vietnam during the Vietnam War to deny POW status to US soldiers was based on the argument that the United States was an aggressor state and that some of its personnel had committed war crimes.²⁰¹

As explained before, it was the implicit understanding at the 1949 Diplomatic Conference that the four defined criteria as set out in Article 4A(2) must be fulfilled by members of the regular armed forces, militia and volunteer forces. The United States could, however, have followed the mode of interpretation that the four defined criteria under Article 4A(2) are only declaratory conditions for regular forces under Article 4A(1), so that all the captured Taliban members should be deemed as prisoners of war. Following this construction, the forcible transfer to and confinement of Taliban captives at Guantánamo Bay would run afoul of the requirement, as provided in Article 118 of the Third Geneva Convention, that prisoners of war must be released and repatriated upon the termination of active hostilities, except in case of pending criminal proceedings against them.²⁰² Be that as it may, the fact that, in harmony with the drafters’ view, the United States has con-

196. Wedgwood, loc. cit. n. 5, at p. 895.

197. Aldrich, loc. cit. n. 4, at p. 895.

198. Emphasis added.

199. Roberts, loc. cit. n. 18, at p. 24.

200. Aldrich, loc. cit. n. 4, at p. 895.

201. *Ibid.*, pp. 895-896. Such an argument implies that these two states regarded the requirement of complying with humanitarian law as constitutive of the entitlement to POW qualification. It should be noted that North Vietnam, together with other former Socialist countries, formed a reservation to Art. 85 of the Third Geneva Convention to the effect that perpetrators of war crimes, if convicted, would not be entitled to POW status.

202. Rowe, loc. cit. n. 4, at p. 317.

sidered the four criteria to cover regular forces as well does not justify its continuing failure to establish a 'competent tribunal' to determine the status of members of the Taliban. As will be discussed below, according to Article 5 of the Third Geneva Convention, until the 'doubt' over their legal status is fully resolved by a competent tribunal, members of regular armed forces like Taliban soldiers entertain the presumption that they are *ipso facto* deemed as entitled to the rights and privileges as POWs. The difficulty in interrogating those classified as POWs cannot be pleaded to warrant the denial of, or the limitation upon, the basic rights accorded to POWs. They can be compelled to disclose only limited information, and they cannot be confined except in cases of penal or disciplinary sanctions.²⁰³ With respect to those Taliban soldiers who may be guilty of war crimes, they could be prosecuted while remaining POWs.²⁰⁴

In relation to the captured Taliban soldiers of foreign nationality, such as John Walker Lindh (the US citizen) and Aïrat Vakhitov (the Russian citizen),²⁰⁵ it could be said that they were members of militia or volunteer corps forming part of the Taliban's regular armed forces, as governed by Article 4A(1). The incorporation of foreigners into the regular armed forces as fully integrated members does not impair the qualification for prisoners of war status.²⁰⁶ As Cryer notes,²⁰⁷ to deprive such foreign Taliban of POW status on the basis that they could be described as mercenaries – a highly unlikely event – could not counter two objections. First, Article 47 of Additional Protocol I, which stipulates that mercenaries are stripped of POW status, is not part of customary law. Second, the motivation of such foreigners was not based on substantial financial reward. The foreign Taliban soldiers should receive the same treatment as the Afghan Taliban soldiers, meaning that they must be granted POW status until a competent tribunal within the meaning of Article 5 of the Third Geneva Convention determines their legal status in light of the four criteria.

7.2 Taliban soldiers captured in the post-Bonn process

To the knowledge of the author, there is no reported case of a foreign Taliban soldier still operative in Afghanistan, so that the following analysis assumes that all the active Taliban members are Afghan nationals. With respect to the Taliban soldiers who have been captured by the US-led coalition forces or by the newly formed Afghan armed forces since the Bonn Agreement of 5 December 2001, it must be noted that the nature of ongoing armed conflict has shifted from international to internal armed conflict. This means that the international humanitarian law applicable to international armed conflicts and concerning POWs has ceased

203. Aldrich, loc. cit. n. 4, at p. 896.

204. Ibid.

205. See S. Shihab, 'Des "talibans" ruses détenus à Guantánamo refusent d'être extradés vers Moscou', *Le Monde* (14 August 2003) p. 4.

206. L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd edn. (Manchester, Manchester University Press 2000) at p. 199.

207. Cryer, loc. cit. n. 4, at pp. 70-71.

to apply, with the result that only customary law applicable during internal armed conflicts, namely, common Article 3 of the Geneva Conventions, and customary parts of Protocol II apply to the new Afghan government and to their armed forces, as well as to resurgent Taliban rebels. The Taliban soldiers have been converted into insurgents who are aligned with the Al Qaeda and Mujaheddin fighters.

Since Afghanistan has become an ally of the United States, the Taliban remnants have not ‘fallen into the power of the enemy’ within the meaning of Article 4A *chapeau* of the Third Geneva Convention,²⁰⁸ and are not deemed prisoners of war under that Convention. Note should also be taken of Article 87(2) of the Third Geneva Convention, according to which the courts and authorities of the detaining power must take into account ‘the fact that the accused, not being a national of the detaining power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will’. The obligation to make allowance for the accused being a non-national can also be found in Article 100(3) of the Convention relating to the death sentence.²⁰⁹

Captured Taliban soldiers are entitled to minimum guarantees as laid down in common Article 3 of the Geneva Conventions and to customary humanitarian rules applicable to internal armed conflict, many of which may derive from Additional Protocol II. It must be noted that the rights and privileges as laid down in Article 5 of Protocol II go beyond the minimum guarantees as provided in Article 75 of Protocol I. A detaining power is enjoined to safeguard humane treatment, due process rights, as well as even economic, social and cultural rights. It is arguable that the rule embodied in Article 5 of Protocol II, which is distilled from the essence of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, has reached the status of customary law.²¹⁰

7.3 The legal status of Al Qaeda soldiers

7.3.1 Preliminary observations

Controversy over whether the Al Qaeda soldiers are regarded as belligerents or combatants entitled to the status of prisoners of war has had earlier equivalents.²¹¹ Al Qaeda, which is not an insurgent entitled to the recognition of a belligerent status, lacks international legal personality. The strict juridical construction might lead to the conclusion that there existed no armed conflict between the coalition forces and the Al Qaeda between 6/7 October and 5 December 2001, so that the Al Qaeda members might be treated as ‘international outlaws’ or ‘enemy combatants’,

208. *Commentary, GCIII*, op. cit. n. 72, at pp. 50-51.

209. All these provisions may, however, suggest that the Third Geneva Convention is based on the assumption that prisoners of war owed no allegiance to the detaining power: Rosas, loc. cit. n. 81, at p. 384.

210. The ICRC’s *Commentary on Protocol II* is silent on whether this provision has attained the status of customary law: *Commentary, Protocol II*, op. cit. n. 34, paras. 4564-4596.

211. Baxter, loc. cit. n. 108, at pp. 323-45; and Levie, op. cit. n. 71, at pp. 76-84.

who would be disentitled to the benefits of humanitarian law. However, close appraisal needs to be made of the argument that the conflict between the coalition forces and Al Qaeda might be subsumed into the international armed conflict between the anti-terror coalition and the Taliban government.

Two modes of distinction need to be made for the purpose of appraising the legal status of members of Al-Qaeda. First, as with the Taliban soldiers, the demarcation point of 5 December 2001 proves crucial to elucidating their legal status. Second, analysis must focus on whether the nationality of Al Qaeda members, namely the distinction between Afghan nationals and non-Afghan nationals, may give rise to different outcomes in assessing their legal status.

7.3.2 *Al Qaeda members captured prior to 5 December 2001*

With regard to Al Qaeda members captured prior to 5 December 2001, query is needed as to whether Al Qaeda was an independent force analogous to 'other militia' or 'other volunteer corps' within the meaning of Article 4A(2) of the Third Geneva Convention. The Al Qaeda soldiers do not meet three of the four conditions as set out in Article 4A(2). They have failed to distinguish themselves openly from civilians by not wearing uniforms and a fixed distinctive sign and not carrying arms openly. They have also patently avowed to disregard the laws and customs of war. As members of a transnational criminal organisation, Al Qaeda soldiers are subject to trial and punishment under national criminal law.²¹² In that sense, the Al Qaeda soldiers can be treated as 'unprivileged belligerents' under humanitarian law, who are entitled only to minimum guarantees as laid down in Article 75 of Protocol I. These guarantees include respect for physical and mental integrity and due process rights, which are deemed as ripening into customary humanitarian law. The Al Qaeda members are also beneficiaries of basic human rights, such as the freedom from torture or other form of maltreatment, the right to life, freedom from forced labour, and the freedom from *ex post facto* application of criminal law, all of which are designated as non-derogable even in time of war under international human rights law and as such considered as part of *jus cogens*.²¹³ In the realm of international criminal law, their tactic of feigning civilian, non-combatant status can be punished as a war crime of perfidy.²¹⁴

Further, captured Al Qaeda soldiers can remain beneficiaries of the protections under the Geneva Civilian Convention.²¹⁵ Examinations are needed in respect of the contingency of the guarantees under the Fourth Geneva Convention upon the concept of nationality. In relation to the Al Qaeda soldiers of Afghan nationality, their participation in armed hostilities render them 'hostile civilians' in the sense of Article 5 of the Fourth Geneva Convention.²¹⁶ While activities hostile to the security of the belligerent state can exonerate it from ensuring rights and privileges of

212. Aldrich, loc. cit. n. 4, at pp. 893 and 898.

213. See Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11, para. 11.

214. See Gasser, loc. cit. n. 4, at pp. 557 et seq.

215. See Aldrich, loc. cit. n. 4, at p. 893, fn. 12.

216. See also Art. 51(3) of Additional Protocol I (which can be described as a customary rule); and

civilians as laid down under that Convention, the right to be treated humanely and the 'rights of fair and regular trial' are specifically classified as non-derogable under that provision. Nevertheless, the entitlement to such minimum guarantees does not mean the granting of immunity from prosecution for war crimes or other criminal conduct.²¹⁷

The overwhelming majority of the Al Qaeda soldiers are non-Afghan nationals, who have not been sent by the states of their nationalities. As with foreign Taliban members, they are not mercenaries, since their motivation can be explained less by 'the desire of private gain' than by spiritual conviction, without any expectation of 'material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party'.²¹⁸ Again, akin to the Taliban soldiers captured by the American forces in the post-Bonn situation, since these Al Qaeda captives are nationals of states with which the United States have had 'normal diplomatic representation', the strict legal construction of the concept of 'protected persons' under Article 4(1) and (2) of the Fourth Geneva Convention suggests that the Civilian Convention might not apply to them.²¹⁹ This means that while the Al Qaeda soldiers belonging to the nationality of the co-belligerent states which can exercise diplomatic protection against the United States, such as nationals of the United Kingdom and Saudi Arabia, preserve the status of foreign nationals,²²⁰ they would be disentitled to the status of 'protected persons' under the Fourth Geneva Convention. Indeed, the ICRC's Commentary on the Fourth Geneva Convention envisions two classes of persons under this concept: first, enemy nationals found within the national territory of each of the Parties to the conflict; and second, the population of occupied territories, bar the nationals of the occupying power.²²¹ Those civilians placed outside the status of 'protected persons' can remain beneficiaries of the protective regime under Part II (Articles 13-26) of the Fourth Geneva Convention, which, according to Article 13, applies to 'the whole of the populations' of the belligerent states, 'without any adverse distinction based, in particular, on race, nationality, religion or political opinion'. However, they would be excluded from the most substantive protections as laid down in Part III (Articles 27-78), which are reserved only to 'protected persons'.

Art. 82 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code).

217. Gasser, loc. cit. n. 4, at p. 568.

218. Art. 47(2) Additional Protocol I.

219. Rowe, loc. cit. n. 4 at p. 316 (though without distinction based on nationality or on the signature of the Bonn Agreement). See also the ICRC's Commentary on Geneva Convention IV, Art. 4, which states that:

'They [nationals of a co-belligerent State] are not considered to be protected persons so long as the State whose nationals they are has normal diplomatic representation in the belligerent State or with the Occupying Power. It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention.'

J.S. Pictet, ed., *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (hereinafter *Commentary, GCIV*), (Geneva, ICRC 1958) p. 48. Available at <<http://www.icrc.org/IHL>>.

220. Gasser, loc. cit. n. 4, at p. 568.

221. *Commentary, GCIV*, op. cit. n. 219, at p. 46.

The main criticism of such a rigidly formalistic view is that the subjective standard should also be used to assess nationality, taking into account the sense of allegiance held by individual persons in question. In the *Čelebići* case, a Trial Chamber of the ICTY was asked to decide whether the Bosnian Serb victims of the alleged offences could be considered 'protected persons' in relation to the detaining power, the Bosnian government. The Trial Chamber emphasized the need to construe the notion of nationality flexibly and to take into account an individual person's link to a specific ethnic group.²²² In the subsequent *Tadić* case, the Appeal Chambers of the ICTY reinforced this approach, ruling that the determination of individual persons' status as 'protected persons' must focus on whether or not they owe allegiance to a party to the conflict in whose hands they are, rather than on the formal link of nationality.²²³ The Appeals Chamber confirmed this rationale in the *Čelebići* case.²²⁴ Such 'creative interpretation' by the ICTY serves to expand the protective scope of the Geneva Conventions based on substantive links between an individual and a party to the conflict.²²⁵ The line of reasoning that the Appeals Chamber of the ICTY adopted in the *Tadić* and *Čelebići* decisions needs to be imported into the appraisal of the nationality of Al Qaeda members. The non-Afghan Al Qaeda members should be treated in the same manner as Afghan comrades, namely as 'hostile civilians' within the meaning of Article 5 of the Fourth Geneva Convention.

7.3.3 *Al Qaeda soldiers captured after 5 December 2001*

Inquiry must be made with respect to the legal status of the Al Qaeda soldiers who have been captured after the initiation of Bonn process. It may be argued that the Al Qaeda remnants are considered as fully integrated into the Taliban-led insurgents in the post-Bonn process, so that they may be treated in the same manner as Taliban soldiers, irrespective of their different nationalities. As discussed above, the incorporation of aliens into a belligerent force is lawful, provided that such persons are fully integrated as members of that force.²²⁶ The principle of non-discrimination based on nationality is embodied in Article 16 of the Third Geneva Convention. As with the Taliban soldiers, the Al Qaeda soldiers captured after the initiation of the Bonn process are considered entitled to minimum guarantees as stipulated in common Article 3 of the Geneva Conventions, as well as to customary law governing internal armed conflict, many of which may derive from Protocol II. In respect of Afghan nationals of Al Qaeda who have fallen into the hands of the fledging Afghan army, or who have been transferred to the Afghan interim government from the capturing US armed forces, they are treasonable, while en-

222. *Prosecutor v. Delalić, Mucić, Delić and Landžo (the Čelebići case)*, Case No. IT-96-21-T, Judgment, 16 November 1998 at pp. 89-99, paras. 236-266, in particular paras. 251-266.

223. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, paras. 165-168.

224. *Prosecutor v. Delalić, Mucić, Delić and Landžo (the Čelebići case)*, Case No. IT-96-21-A, Appeals Judgment, 20 February 2001, paras. 51-106.

225. Provost, *op. cit.* n. 28, at pp. 39-40.

226. See Green, *op. cit.* n. 206, at p. 199.

titled to the minimum core of guarantees as outlined above. Members of Al Qaeda who are nationals of the belligerent or co-belligerent parties, such as citizens of the United States or the United Kingdom, are equally treasonable under the laws of the respective countries while benefiting from such guarantees.

7.4 **The Article 5 Tribunal and the Taliban/Al Qaeda soldiers**

With respect to Taliban soldiers captured prior to the establishment of the Karzai government, it must be questioned whether the persistent refusal of the US to grant POW status to any and all of them suggests that the US has had no doubt about their legal status. However effective and scrupulous it may be, the screening procedure for the captured Taliban soldiers before their transfer to Guantánamo Bay for the purpose of criminal investigation cannot be equated to an Article 5 tribunal under the Third Geneva Convention. This can be readily recognised by the denial of the right of access to court inherent in Article 5. The practice of the US with respect to the Taliban soldiers departs from the interpretation of Article 5 of the Third Geneva Convention, as provided in the *United States Army Field Manual 27-10, The Law of Land Warfare*.²²⁷ According to this *Manual*,

‘[t]he foregoing provision [Article 5] applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.’²²⁸

The US *Field Manual 27-10* requires an ‘Article 5 tribunal’ to be a ‘board of not less than three officers acting according to such procedures as may be prescribed’.²²⁹ As discussed above, wilful removal from a prisoner of war of the rights of fair and regular trial amounts to a grave breach of the Third Geneva Convention.²³⁰

As regards the relevant tribunal to determine the legal status of Al Qaeda soldiers under Article 5 of the Third Geneva Convention, their status is generally accepted as raising little doubt and they are presumed to be non-POWs, so that there may be no obligation to establish an Article 5 tribunal under the Third Geneva Convention. Yet, Article 45(1) of Protocol I requires that in case a captive claims such status, such a person must be given the entitlement to POW status till a competent tribunal determines his/her status. The onus of proof lies on the US authorities. The requirement and the rights prescribed under Article 45(1) and (2) of Protocol I have matured into customary law and as such are binding upon the United States.²³¹

227. Aldrich, loc. cit. n. 4, at pp. 897-898.

228. *US Army Field Manual*, supra n. 84.

229. *Ibid.*, para. 71(c).

230. Art. 130 of the Third Geneva Convention.

231. Aldrich, loc. cit. n. 4, at p. 898.

8. CONCLUDING REMARKS

The continuing controversy over the treatment of Taliban and Al Qaeda soldiers at Guantánamo Bay in Cuba, especially the indefinite nature of their detention and the prospect of military trials, has attracted significant international publicity and widespread criticism. The ICRC expressed its concerns about the standard of treatment at Guantánamo Bay.²³² The ICRC has been involved in an on-site visit and interviewing of detainees since 18 January 2002.²³³ In the meantime the Inter-American Commission on Human Rights indicated precautionary measures, urging the United States to adopt 'the urgent measures necessary' to have the legal status of each of the detainees determined by a competent tribunal and to furnish them with the legal protections commensurate with the 'minimum standards of non-derogable rights'.²³⁴ In its letter dated 23 July 2002, the Inter-American Commission reiterated the importance of providing 'effective and fair mechanisms' for determining their legal status, and emphasized that both Article 5 of the Third Geneva Convention and Article XVIII of the 1948 American Declaration of the Rights and Duties of Man, which provides the right to access to court, must be given 'practical effect'.²³⁵

A report that the United States is preparing for the military trials of seven detainees, including two British citizens, who may be prosecuted on the basis of evidence obtained through plea bargains and may face executions,²³⁶ has re-fuelled unrest and furore among governments around the world. The Parliament Assembly of the Council of Europe passed Resolution 1340 on 26 June 2003, calling on the United States to allow the status of each of more than 600 combatants and non-combatants in United States military custody, especially those held in Guantánamo Bay, to be determined on a case-by-case basis. Resolution 1340 also urged the member states of the Council of Europe whose citizens are held either in Afghanistan and Guantánamo Bay or elsewhere to seek diplomatic protection or extradition of those threatened with the death penalty.²³⁷

232. K. Sengupta, 'Campaign Against Terrorism: American Forces "May Be Breaking POW Convention"', *The Independent* (14 January 2002) at p. 9.

233. ICRC, 'First ICRC visit to Guantánamo Bay prison camp', Press Release 02/03, 18 January 2002.

234. Inter-American Commission on Human Rights, Detainees at Guantánamo Bay, Cuba, Request for Precautionary Measures (petitioned by the Center for Constitutional Rights), 41 *ILM* (2002) pp. 532, at 534. <http://www.photius.com/rogue_nations/Guantánamo.html>. See also Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba (15 April 2002), 41 *ILM* (2002) p. 1015.

235. The Inter-American Commission of Human Rights, the letter dated 23 July 2002, as referred to, in *R. (Abbasi) v. The Secretary of State for Foreign and Commonwealth Affairs*, Court of Appeal, 6 November 2002 (2002) WL 31452052; [2002] EWCA Civ 1598, para. 21. The Abassi decision is reprinted in this volume at p. 604.

236. See for instance, J. Burns, J. Eaglesham, M. Huband and P. Spiegel, 'Blair may let US tribunal try UK al-Qaeda suspects', *The Financial Times* (10 July 2003) p. 1.

237. Resolution 1340, 26 June 2003, 'Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay'.

Despite the clamours of the international community, the Bush administration has yet to establish a judicial procedure for clarifying the legal status of the detainees, making their indefinite detention arbitrary. Nor has it offered minimum due process guarantees, such as the right to contact legal counsel, in contravention to the Third Geneva Convention and international human rights law. There is also a denial of the right to contact their own consular representatives in violation of Article 36(1) of the Vienna Convention on Consular Relations.²³⁸ The most disturbing of all may be the fact that among the detainees at Guantánamo Bay are a number of children, including even those who are between 13 and 15 years of age transferred from the Bagram Air Base in 2003.²³⁹ Subjecting 'child soldiers' to the same harsh detention regime as adult detainees and to the possibility of capital punishment amounts to violations of the customary equivalent of Article 77 of Protocol I, which requires special safeguards for captured child soldiers, including the prohibition of the death penalty for children who were younger than 18 years at the time of the offence.²⁴⁰ Such guarantees must be proffered irrespective of their POW status.²⁴¹ Military trials for children would also contravene Article 40 of the 1989 UN Convention on the Rights of the Child, which provides detailed guarantees for children in judicial proceedings.

While issues of the constitutional review of the detentions in Camp X-Ray exceeds the limit of this paper, it must be noted that the efforts to secure the US constitutional guarantees of *habeas corpus* and other due process rights before the US courts have so far been unsuccessful on jurisdictional grounds.²⁴² Nor has the attempt to stretch the concept of diplomatic protection to secure the rights of a detained person in another country borne fruit.²⁴³

It is incumbent on the Bush administration to put an end to the limbo status of the detainees at Guantánamo Bay by establishing a system of adjudication on the status of detainees and furnishing them with the rights and privileges as prisoners of war until their status is determined on an individual basis. Even those detainees

238. See *LaGrand Case (Germany v. United States)*, Judgment of 27 June 2001; and the pending case of *Avena and Other Mexican Nationals (Mexico v. United States)*, (2001) *ICJ Rep.* (forthcoming).

239. See Parliamentary Assembly of the Council of Europe, Resolution 1340, 26 June 2003, 'Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay.'

240. Note that it is a war crime to conscript or enlist children under the age of 15 into the armed forces or employ them to actively participate in hostilities. See Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court, which correspond to Art. 77(2) of Protocol I and Art. 4(3)(c) of Protocol II respectively. Cf., Arts 1 and 2 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2002) (the lowest age for combatants is set at 18).

241. Paras. 3-5 of Art. 77, Protocol I.

242. See *Rasul et al. v. George Walker Bush et al.*, United States District Court, District of Columbia, 30 July 2002, 215 F.Supp.2d 55; *Al Odah et al. v. United States of America et al.*, United States Court of Appeals, District of Columbia Circuit, 11 March 2003, 321 F.3d 1134; and *Hamdi v. Donald Rumsfeld*, United States Court of Appeals, Fourth Circuit, 9 July 2003, 337 F.3d 335. These judgements are reprinted in this volume at pp. 626-628 and 691-700. Note that in the *Hamdi* case, which awaits the decision of the Supreme Court in relation to petitions for *certiorari*, no question of jurisdiction arises because he is detained on US territory and claims US citizenship. See also C. Dyer, 'Judges Condemn Camp X-Ray', *The Guardian* (11 October 2003).

243. *Abbasi case*, *supra* n. 272, para. 12.

who are found not to meet the criteria for prisoners of war must be accorded the minimum guarantees of humane treatment as required under the customary rule, which derives from Article 75 of Additional Protocol I. The proposed military commissions²⁴⁴ are hardly compatible with the right of accused persons to an 'independent and impartial tribunal' under international human rights law. It is also hard to see such commissions meeting the requirement of providing a 'fair and regular trial' within the meaning of Article 130 of the Third Geneva Convention.²⁴⁵ Detainees who will stand trial are entitled to a fair trial, and the principle of equal arms in defense must be given full effect so that they can exercise the right to a legal counsel of their own choice, the right to appeal, the right to cross-examine witnesses and the right not to incriminate themselves. Further, the subordination of detainees solely of non-US nationality to the 'offshore regime' at Guantánamo Bay, which does not benefit from the US constitutional guarantees such as the right of *habeas corpus*, and to the military commissions, squarely contravenes the requirement, as laid down in Article 102 of the Third Geneva Convention, that prisoners of war be treated in the same judicial procedures as in the case for members of the national armed forces.

The late Judge Baxter observed that '[a]s the current tendency of the law of war appears to be to extend the protection of prisoner-of-war status to an ever-increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status'.²⁴⁶ His insightful prognosis of both the criteria for lawful combatancy and the expanding protective status in future warfare can be most aptly presented at the current juncture, when puddles of academic ink have been spilt over the continuing row about the qualifications of Al Qaeda and Taliban soldiers for POWs. While the unprecedented nature of atrocities committed by Al Qaeda in the September 11 attacks hardly needs any further comment here, it is axiomatic, however trite, to emphasise the importance of the path of the humanitarian rule of law, along which democracy's enduring fight against terror must proceed. The exigency arising from the fight against terrorism must not distract the international community from the spirit underlying the Martens clause and the yearning of humanity for reinforcing (rather than undermining) the edifice of humanitarian law, the bulwark against the retreat into barbarity.

244. For the procedural rules for the commissions, see US Department of Defense Military Commission Order No.1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism (2002) <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>. Reprinted in this volume at p. 766.

245. See also common Art. 3(1)(d), which requires the State Parties to provide 'judicial guarantees which are recognized as indispensable by civilised people'.

246. Baxter, loc. cit. n. 108, at p. 343.