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In Legal Limbo?

**The status and rights of detainees from the 2001 war in
Afghanistan**

A thesis
submitted in fulfilment
of the requirements for the degree
of
Master of Laws
at
The University of Waikato
by
Megan Vant

The University of Waikato

2007

Abstract

During the 2001 war in Afghanistan hundreds of people associated with the Taliban or al Qaeda were arrested by United States forces and transported to the Naval Base at Guantánamo Bay, Cuba. The legal status and treatment of these detainees has been an ongoing problem over the last five years. The majority have been given no recourse to justice and allegations of inhuman treatment and torture have been frequent. The first issue raised by the incarceration of these people is whether any of them may be entitled to Prisoner of War status. The evidence shows that, in general, the Taliban and al-Qaeda fighters were not lawful combatants, and hence they are not entitled to Prisoner of War status. While the rights of Prisoners of War are well documented and generally uncontested, the rights of people not entitled to Prisoner of War status are not so easily definable.

Despite classification as unlawful or unprivileged combatants, the detainees are not in legal limbo – they are still entitled to the benefit of certain fundamental human rights. There are applicable protections under the Fourth Geneva Convention, Additional Protocol I, the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture. The main rights upheld by these documents are the right to liberty and freedom from arbitrary detention; the right to a fair trial; and the right to life. Furthermore, there is a requirement of humane treatment and an absolute prohibition on torture.

Reports from international humanitarian watchdogs such as the International Committee of the Red Cross, Amnesty International and Human Rights Watch suggest that the United States Government is not upholding the rights held by the detainees. It is essential that the United States Government recognises the fundamental rights owed to the detainees and ensures that they receive the requisite treatment and access to justice.

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Abbreviations

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| HRC | Human Rights Committee |
| HRW | Human Rights Watch |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| MCP | Malayan Communist Party |
| POW | Prisoner of War |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| UNCAT | United Nations Convention Against Torture |
| US | United States of America |
| WWI | World War I |
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Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.¹

Chief Justice Barak

¹ *Legality of the GSS Interrogation Methods* Supreme Court of Israel (6 September 1999).
Reproduced in 38 *International Legal Materials* (1999) 1471.

Chapter One

Introduction

Background

September 11, 2001 is a date which has become synonymous with modern terrorism and the concept of a 'war on terror'. On this date 19 men affiliated with the al-Qaeda terrorist network hijacked four commercial passenger jets and, in a series of coordinated suicide attacks on the United States of America (US), two planes were flown into the World Trade Centre in New York, the third plane was flown into the Pentagon in Virginia, and the fourth crashed in a field in Pennsylvania. The death toll totalled nearly 3000 people, predominantly civilians. On October 7, 2001 the US, with assistance from, *inter alia*, the United Kingdom (UK), Australia, New Zealand and the Northern Alliance and "supported by the collective will of the world"² began a military invasion of Afghanistan, reacting in self-defence to the September 11 attacks. The purpose of the military action, codenamed Operation Enduring Freedom, was to target Osama bin Laden who was suspected of planning and funding the attacks, his terrorist network al-Qaeda, and the Taliban government in Afghanistan which had allegedly provided support to al-Qaeda and extended them protection. The 2001 war in Afghanistan was a legitimate war on the basis of self-defence and was supported by the United Nations (UN).³

The Taliban was the *de facto* government of Afghanistan as it controlled the majority of the territory of the country but it was not recognised as the legitimate government of Afghanistan.⁴ Al-Qaeda was a terrorist network which allegedly conducted operations and training on Afghan territory and was supported by the

² President George W. Bush "Presidential address to the Nation" [7 October 2001] <<http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>>.

³ See UN General Assembly Res. A/Res/56/176 [19 December 2001].

⁴ Lansford, T *A bitter harvest. US foreign policy in Afghanistan* (2003) 136.

de facto Taliban government.⁵ During the conflict following the September 11 terrorist attacks the US led coalition apprehended many Taliban and al-Qaeda fighters on the battlefield. A significant number of those captured were transferred to a detention facility on the US naval base at Guantánamo Bay, Cuba. The war in Afghanistan began in 2001. It is now 2007 and there are still Taliban and al-Qaeda members detained in Guantánamo Bay who have not been charged or given access to justice of any kind. The information available on the total number of detainees and their treatment is insufficient and inconclusive. As of the end of September 2006 the International Committee of the Red Cross (ICRC) estimated that Guantánamo Bay housed around 450 prisoners in long-term indefinite detention.⁶ Amnesty International asserts that detainees are being kept in a “legal black hole”⁷ due to the lack of access to judicial proceedings, legal counsel or family visits. In fact, Amnesty International declares, the black hole is literal as well as metaphorical as many of the detainees are “subjected to confinement in small cells for up to 24 hours a day with minimal opportunity to exercise.”⁸

Some detainees have been charged with crimes and have had their cases heard by courts or military commissions. A small number of these cases have come before the US Supreme Court in spite of the difficulties in accessing justice:

“Despite the logistic obstacles to representing incarcerated clients who did not even know that they had lawyers or that lawsuits had been brought on their behalf and who until after, or just before, the Supreme Court heard their cases never got to see or talk to anyone about their legal rights, a half dozen habeas corpus suits were filed and lurched their way up to the Supreme Court.”⁹

These cases will be mentioned where they are relevant. However, the vast majority of prisoners have not been charged and nor have they had access to justice or legal counsel. As the prisoners have not been charged or tried they have not been given the opportunity to dispute their alleged status as ‘enemy combatants’. A serious concern is the numerous allegations that the detainees at

⁵ Dinstein, Y *The conduct of hostilities under the law of international armed conflict* (2004) 47.

⁶ ICRC, “US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC” [30 September 2006]
<<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList454/3AA18DEB7A670BEBC12571FB00533D3F>>.

⁷ Amnesty International, “Guantánamo detainees: More than 4 years without justice” [2006]
<<http://web.amnesty.org/pages/usa-100106-action-eng>>.

⁸ *Ibid.*

⁹ Wald, P “The Supreme Court goes to war” in Berkowitz, P (ed) *Terrorism, the laws of war, and the constitution* (2005) 37, 39.

Guantánamo include some civilians – people with no meaningful ties to either the Taliban or al-Qaeda.¹⁰ It is not uncommon for civilians to be apprehended during an armed conflict and a brief period of detention while their status is determined is unavoidable. This is one of the hazards of war. However, there have been no attempts on the part of the US government to determine the status of those captured and to release any civilians who were simply in the wrong place at the wrong time. The focus of this thesis is the legal situation of detainees who were members of the Taliban or al-Qaeda, but it is important to realise that civilians may also have been incarcerated. It is significant, and unlawful, that there has been no individual consideration of the case of each detainee. Rather they have been lumped together and publicly determined to be guilty *sans* trial.

Detention conditions

The lack of access to justice and fair trials is not the only matter for concern at the Guantánamo Bay detention facility. There have been frequent allegations of torture and mistreatment of the detainees. Renowned international human rights group, Amnesty International, controversially referred to the detention centre at Guantánamo Bay as “the gulag of our times,”¹¹ likening it to the Soviet camps for political repression from the 1930s to 1960s. This allegation from Amnesty International was described by the Bush Administration as “absurd, reprehensible and offensive”¹² but Amnesty International refused to back down, claiming that there are similarities between the two detention regimes.¹³ William Schulz, the American Director of Amnesty International, defended the comment with the following assertion:

“The United States is maintaining an archipelago of prisons around the world, many of them secret prisons into which people are being literally disappeared, held in indefinite, incommunicado detention without access to lawyers or a judicial system, or to their families, and in some cases at least, we know that they are being mistreated, abused, tortured and even killed. And those are similar at least in character, if not in size, to what happened in the Gulag.”¹⁴

¹⁰ Roth, K “Human Rights Watch letter to Donald Rumsfeld” [6 March 2003] <<http://hrw.org/press/2003/03/us030603-ltr.htm>>.

¹¹ Khan, I “Amnesty International Report 2005” [25 May 2005] <<http://web.amnesty.org/library/Index/ENGPOL100142005>>.

¹² Sales, L “Amnesty International refuses to back down from ‘gulag’ comments” *The World Today*, 6 June 2005, <<http://www.abc.net.au/worldtoday/content/2005/s1385518.htm>>.

¹³ *Ibid.*

¹⁴ *Ibid.*

In 2005 prolonged hunger strikes were undertaken on a number of occasions by at least 130 detainees.¹⁵ They were often life-threatening and presented an attempt by the detainees to protest their detention and treatment. Force feeding through nasal tubes was carried out “but without effective medical care.”¹⁶ Human Rights First suggests as many as 200 detainees have participated in hunger strikes, but admits that the details remain unclear.¹⁷ In 2006 three Guantánamo detainees committed suicide, supposedly in protest at their detention and the conditions of that detention. This act was followed by the now infamous statement issued by the commander of the Guantánamo Bay detention facility that the three men had committed “an act of asymmetric warfare against us.”¹⁸ The statement attempted to draw criticism away from the conditions of detention which may well have been what forced the three men to commit such an act. Due to the situation at Guantánamo Bay, a report from the United Nations Economic and Social Council calls for the closure of the detention facility “without further delay.”¹⁹

The Centre for Human Rights and Global Justice at New York University School of Law, Human Rights Watch and Human Rights First jointly undertook to consider allegations of abuse of detainees in US custody. In 2006 they published the results of the project which had tracked allegations of abuse and examined the investigations, disciplinary measures or criminal prosecutions that were linked to them.²⁰ In the report it was asserted that at least fifty cases of abuse had taken place at the Guantánamo Bay detention centre in Cuba.²¹ It is clear from the report that detainee abuse has been widespread but that many abuses were never investigated, and investigations that did occur often closed prematurely, or stalled without resolution. Furthermore, where abuse cases were substantiated and

¹⁵ Human Rights Watch, “Guantánamo Bay and military commissions” [18 January 2006] <<http://hrw.org/english/docs/2006/01/18/usdom12292.htm#Detainee%20Abuse>>.

¹⁶ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 ILM 673, 675.

¹⁷ Human Rights First, “Guantánamo Bay hunger strikes” [30 September 2005] <http://www.humanrightsfirst.org/media/2005_alerts/etn_0930_gitmo.htm>.

¹⁸ White, J “Three detainees commit suicide at Guantánamo” *Washington Post*, 11 June 2006, A01.

¹⁹ United Nations Economic and Social Council “Situation of detainees at Guantánamo Bay” [15 February 2006] E/CN.4/2006/120 <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_Guantánamo.pdf> 38.

²⁰ Detainee Abuse and Accountability Project, “By the numbers” [April 2006] <<http://hrw.org/reports/2006/ct0406/ct0406webwcover.pdf>> 2.

²¹ *Ibid*, 6.

perpetrators identified by military investigators, military commanders often chose to use weak non-judicial disciplinary measures as punishment, instead of pursuing criminal courts-martial.²²

In summary, a large group of men is being held indefinitely without recourse to justice. It is possible that some are indeed hardened terrorists, but even they are entitled to a fair trial and the benefit of basic human rights. Furthermore, there may well be others who have no connection whatsoever to terrorism or the conflicts in Afghanistan or elsewhere. Many of these people have been held for upwards of five years and there seems to be no end in sight for their incarceration.

This led me to ask my research question: what rights, if any, do these people have? I had read many articles and news reports on the situation but was unable to find a comprehensive study which showed, in a clear and logical manner, the rights of the detainees. This thesis is my attempt to provide such a document.

Question

What rights do the Taliban and al-Qaeda detainees held in the Guantánamo Bay detention facility have?

To answer this question it first had to be determined whether the Taliban and al-Qaeda detainees were lawful or unlawful combatants. Lawful combatants have the right to Prisoner of War (POW) status whereas unlawful combatants do not. To this end Chapter Two gives a comprehensive discussion of the law of combatancy. In Chapter Two it is explained that there are only two categories of persons during an armed conflict – lawful combatants or civilians. People who satisfy the four criteria in the Third 1949 Geneva Convention for lawful combatancy are combatants and are entitled to POW status; people who do not satisfy the four criteria are civilians. Civilians who engage directly in hostilities are not entitled to POW protections and are referred to as unlawful combatants. Unlawful combatants may be prosecuted for the act of having taken up arms, and

²² Ibid, 7.

may even be executed. In contrast, POWs cannot be prosecuted for taking part in hostilities provided they do not breach the laws of war.

In Chapter Three the law on combatancy (explained in Chapter Two) is applied to the situation in Afghanistan during the recent armed conflict. This is done to determine whether the members of the Taliban and al-Qaeda were lawful or unlawful combatants. Information on the Taliban and al-Qaeda as regards the combatancy criteria is limited, however the available evidence suggests that some of the Taliban members fulfilled the combatancy criteria. Hence, individual determinations of their status should be made under article 5 of the Third Geneva Convention. As regards al-Qaeda, due to their failure to adequately distinguish themselves from the civilian population, no members of this terrorist group were lawful combatants and hence they are not entitled to POW status.

Having decided that some Taliban members may be entitled to POW status but that no al-Qaeda members were I could then consider my main question: what rights do these prisoners have? The rights for POWs are well documented and hence those rights will not be considered here. The focus of this thesis is on the rights of unlawful combatants, not entitled to POW status, as these people are not recognised as a particular group and it is therefore harder to extrapolate their rights from law. Chapter Four seeks to answer the question of rights for unlawful combatants by first considering what rights may be found under international humanitarian law documents such as the Fourth 1949 Geneva Convention;²³ common article 3 of the Geneva Conventions; and article 75 of Additional Protocol I to the Geneva Conventions.²⁴ Secondly, consideration is given to the rights unlawful combatants have under international human rights law, focusing on the International Covenant on Civil and Political Rights²⁵ and the United Nations Convention Against Torture.²⁶ In brief, the detainees have the right to liberty and freedom from arbitrary detention; the right to a fair trial; the right to

²³ 1949 Geneva Conventions, online at <<http://www.genevaconventions.org>>.

²⁴ Additional Protocol I 1977, online at <<http://www.unhchr.ch/html/menu3/b/93.htm>>.

²⁵ International Covenant on Civil and Political Rights 1966, online at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

²⁶ United Nations Convention Against Torture 1984, online at <http://www.unhchr.ch/html/menu3/b/h_cat39.htm>.

life; and the right not to be tortured or subjected to cruel, inhuman or degrading treatment.

From the application of the evidence to the law it is possible to conclude that many of the rights unlawful combatants are entitled to are not being upheld by the US authorities in their treatment of prisoners in the Guantánamo Bay detention centre. Unlawful combatants have many of the same rights as lawful combatants granted POW status. The main difference between the rights of lawful combatants (POWs) and unlawful combatants (non-POWs) is that unlawful combatants can be tried and executed simply for taking part in hostilities. POWs can not be prosecuted due to taking part in hostilities although they can be tried, and possibly put to death, for war crimes or crimes against humanity. Apart from this significant difference the fundamental rights of those granted POW status and those who are not POWs are remarkably similar.

Research

This thesis has been structured using a simple yet effective framework to present the evidence gathered. The first section of research was on the international law in the areas of combatancy and human rights. This information was gathered from international law documents such as treaties and conventions, in particular the 1949 Geneva Conventions, as well as secondary sources including text books and journal articles. Second, the facts had to be determined in order to apply them to the law described. To do this the websites of highly respected international human rights groups such as the ICRC, Human Rights Watch and Amnesty International were used. From these websites it was possible to gather a relatively comprehensive view of the conditions at the Guantánamo Bay prison and determine whether the US authorities were upholding their international obligations.

It is necessary to mention that the factual problem described – the scarcity of rights being accorded the prisoners at Guantánamo Bay – is not an isolated incident. This thesis uses Guantánamo Bay as an example of a much more extensive, worldwide problem. There are allegedly many other detention facilities in the US and around the world about which little is known but it is likely that

conditions are inadequate, people treated inhumanely, and the risk of torture, significant.²⁷ There is some evidence that ‘extraordinary renditions’ (kidnapping people and taking them to other countries for detention, interrogation and torture) and ‘forced disappearances’ are happening on a large scale and such actions have been soundly condemned by international human rights groups.²⁸ Guantánamo Bay is discussed as there is more evidence available, but there is no intention to detract from the conditions at any other detention facility. The rights discussed which are applicable to the Guantánamo detainees are largely minimum guarantees so will be equally applicable to detainees the world over.

Customary international law

Customary international law will be mentioned often in this thesis so it is useful to provide an explanation of it early on. Customary international law is law which arises from the general practice of States rather than from international treaties or agreements. There are two conditions which must be met for a practice to become customary international law. It must be the accepted, widespread practice of States and they act in that way because they believe they are legally obliged to. Evidently, something in addition to state practice is necessary to constitute customary law, as it is essential to be able to distinguish between legally binding rules, and patterns of behaviour which are not legally required. The best evidence for a customary rule of international law is

“to be found in what States say they think the rule is (*opinion juris*), and what they say they are doing (or not doing) in terms of that rule.”²⁹

It was held in the *Anglo-Norwegian Fisheries case*³⁰ that there must be evidence of substantial uniformity of practice by a significant number of States before a custom can come into existence. However, the *Nicaragua case*³¹ emphasised that it is not necessary for the practice in question to be “in absolutely rigorous conformity” with the purported customary rule. It is

“sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should

²⁷ Human Rights Watch, “Statement on U.S. secret detention facilities in Europe” [7 November 2005] <<http://hrw.org/english/docs/2005/11/07/usint11995.htm>>.

²⁸ Naqvi, Y “The right to the truth in international law: fact or fiction?” (2006) 88 IRRC 245, 266.

²⁹ Rodley, N *The treatment of prisoners under international law* (2nd ed, 1999) 67.

³⁰ *Anglo-Norwegian Fisheries case* [1951] ICJ Reports 116.

³¹ *Nicaragua v United States* [1986] 14 ICJ Reports 190.

generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”³²

For a practice to become customary international law there must be a general recognition by States that the practice amounts to an obligation binding on States in international law.³³ In the 1969 *North Sea Continental Shelf Cases*³⁴ the International Court of Justice (ICJ) stated that:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”

In essence, States creating new customary rules must believe that those rules already exist, and that their practice therefore, is in accordance with previously binding rules of law.³⁵ Both acts and statements are evidence of developing international law.

The status of *jus cogens* is reserved for fundamental principles or ‘peremptory norms’ of international law. Ordinary customary international law can be altered by States via treaties but peremptory or *jus cogens* norms cannot be violated or modified by any State. Under article 53 of the 1969 Vienna Convention on the Law of Treaties a treaty is void if it conflicts with a peremptory norm of general international law. Article 53 defines a peremptory norm as

“a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”³⁶

Jus cogens is the highest form of international law and there are few norms which are undeniably peremptory in nature.³⁷ It has been suggested that the only generally accepted examples of *jus cogens* are the prohibitions on the use of force (as laid down in the UN Charter) and on genocide, slavery and torture.³⁸

³² Ibid.

³³ *Lotus case* [1927] PCIJ, Series A, No. 10, 28.

³⁴ *North Sea Continental Shelf Cases* [1969] 3 ICJ Reports 22, para 77.

³⁵ Byers, M *Custom, power and the power of rules: International relations and customary international law* (1999) 131.

³⁶ Vienna Convention on the Law of Treaties 1969, article 53. Online at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

³⁷ Dinstein, Y *The conduct of hostilities under the law of international armed conflict* (2004) 7.

³⁸ Aust, A *Handbook of international law* (2005) 11.

Customary international law is a central concept in this thesis as many of the rights under international humanitarian law and human rights law which will be mentioned are applicable due to their status as customary international law. For international conventions to be binding on States in their relations with individuals the rules in the convention must have been incorporated into domestic law or have the status of customary international law. Rather than delving into the domestic law of the US it is more straightforward to prove the position of a number of the conventions as customary international law.

Chapter Two

Combatancy law

*The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war.*³⁹

Justice O'Connor

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³⁹ *Hamdi v Rumsfeld* 542 U.S. 507 (2004), 517.

Introduction

It is a core concept of international humanitarian law (and one which will be referred to frequently throughout this thesis) that there are two, and only two, distinct categories of people during an armed conflict – civilians and combatants. Chapter Two will firstly focus on the position of, and protections for, civilians during times of war. Mention must be made of civilians, as protecting civilians is one of the underlying reasons for combatancy law. Subsequently, the main body of this Chapter examines the legal position of combatants and provides a comprehensive discussion on the requirements which must be fulfilled in order to reach lawful combatant status. Furthermore, consideration will be given to the status of people who take part in hostilities despite the fact that they do not fulfil the conditions for lawful combatancy – civilians who take up arms or lawful combatants who lose their combatancy status.

It is necessary to have a clear understanding of the law of combatant status so that in Chapter Three this law can be applied to the factual situation of the Taliban and al-Qaeda fighters and their status can be determined.

2.1 Civilians

Prior to a discussion on the law of combatancy it is necessary to mention two of the fundamental principles regarding the protection of civilians as these function in conjunction with combatancy law. One of the main reasons for the law on combatancy status and the laws of war is, *prima facie*, to protect civilians from the ravages of war. Civilians are not sacrosanct but there are a number of principles in force to protect them and a brief description of two of these is given below. The most important principle concerning civilians and combatancy is the principle of distinction. The associated principle of civilian immunity is also significant as it is this that the principle of distinction serves to uphold.

The principle of distinction

During times of armed conflict there is a requirement that there be a clear distinction between combatants and civilians. It must be possible for all parties to the conflict to be able to distinguish between civilians and enemy soldiers; and therefore to ensure that war is waged only between the combatants of the belligerent parties:

“A distinction must exist if [international humanitarian law] is to be respected: civilians can and will only be respected if enemy combatants can expect those looking like civilians not to attack them.”⁴⁰

The primary reason for the distinction principle is to protect civilians from the sufferings caused by war. The requirement is the foundation on which the laws of war rest, many others of which are also deliberately designed to protect civilians. By requiring that combatants distinguish themselves from civilians, the principle of distinction helps to uphold the concept of civilian immunity.

Civilian immunity

Like the principle of distinction, the principle of civilian or non-combatant immunity attempts to protect civilians from the sufferings caused by war. It is the longest established principle of restraint in war, predating prohibitions on weaponry⁴¹ and was codified in the Hague Conferences of 1899 and 1907 and later developed in the 1949 Geneva Conventions and Additional Protocol I. The principle of civilian immunity prohibits the direct targeting of civilians. According to article 51 of Additional Protocol I military operations must be directed against military targets, not civilian ones. Indiscriminate attacks are those which are not directed against a specific military target; those which employ weapons that cannot be so directed; or those which have effects which cannot be limited as required. These attacks are consequently “of a nature to strike military objectives and civilians or civilian objects without distinction.”⁴² The prohibition on indiscriminate attacks is an attempt to protect civilians from the worst consequences of war.

⁴⁰ Sassòli, M and Bouvier, A *How does law protect in war?* (1999) 117.

⁴¹ McKeogh, C “Why may non-combatants not be killed in war?” in Solomon, R (ed) *Rights, rules and responsibilities in international conduct* (2000) 116.

⁴² Additional Protocol I, article 51(4).

The laws on civilian protection relate directly to combatancy law, as to be lawful combatants belligerents must ensure they uphold the principles of distinction and civilian immunity.

2.2 Combatants

There are only two categories of persons during times of armed conflict – civilians, discussed above, and combatants. Combatants can be grouped into two separate categories – lawful combatants and unlawful combatants, both of which will be discussed in detail below.

2.2.1 Lawful combatants

The law of combatancy is central to the goal of this thesis which is to determine the status and rights of the detainees at the Guantánamo Bay detention centre in Cuba. Combatants are people who are legally allowed to participate directly in hostilities, and therefore cannot be punished for acts which do not violate the laws of war – this is called *combatants' privilege*. The privilege can be likened to a licence to kill (within the laws of war). Those who benefit from this privilege have a corresponding obligation to observe international humanitarian law. A combatant who violates the laws of war can be punished for their illegal actions.

In the words of General Telford Taylor, Chief Prosecutor at the Nuremberg court:

“war consists largely of acts that would be criminal if performed in time of peace – killing, wounding, kidnapping, destroying or carrying off other people’s property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.”⁴³

The limited immunity which he refers to is the combatants’ privilege, acting in accordance with the laws of armed conflict, which prevents combatants being prosecuted for those actions which would be criminal in peace time.

However, there are certain requirements which must be met in order for people to obtain combatant status. These requirements will be discussed in depth below.

⁴³ Taylor, T *Nuremberg and Vietnam: An American tragedy* (1970) 19.

International humanitarian law provides an incentive for combatants to fulfil these conditions of lawful combatant status as, if they are captured, they will be entitled to POW status:

“Great attention was given to developing distinctive means of identification of belligerents and, as an incentive and, to an extent, a reward, assuring those who were so identified of the special protections available to prisoners of war.”⁴⁴

POWs enjoy greater protections⁴⁵ under international humanitarian law than detainees who do not qualify as POWs. Hence, the guarantee of POW status works as an inducement to people participating in hostilities to satisfy combatancy requirements.

The right to detain combatants as POWs during an armed conflict is not based on the supposition of ‘guilt’ for any crime. Combatants may be detained by the opposition for the duration of the conflict for security purposes - simply to prevent them from continuing to participate in combat.⁴⁶ The 1947 Military Tribunal at Nuremberg held that captivity during war is

“neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”⁴⁷

Having ascertained the advantages that attach to lawful combatant status – combatants’ privilege and POW status – a detailed explanation is given as to how one attains this position of ‘lawful combatant’. The steps taken in the codification of the law on combatancy status over the century leading up to the creation of the 1949 Geneva Conventions will be outlined. This process culminated in article 4A of the Third Geneva Convention which contains the criteria for lawful combatant status and is central to this thesis. The drafters of Additional Protocol I attempted to make changes to the combatancy criteria. However, the US refused to ratify the Protocol due to those very provisions. Hence, article 4A remains the foremost law in this area when considering any conflict involving the US.

⁴⁴ Reisman, W and Antoniou, C *The laws of war* (1994) 41.

⁴⁵ Chapter Four will actually show that the basic rights POWs have under international law and the rights of non-POWs are remarkably similar. However, the differences that do exist are significant which means that POW status is an incentive and a reward for fulfilling the combatancy criteria.

⁴⁶ Elsea, J *Treatment of “battlefield detainees” in the war on terrorism* (2003) 9.

⁴⁷ *Judgment of the International Military Tribunal at Nuremberg* [1 October 1946]. Reproduced in (1947) 41 AJIL 172, 229.

The origins of the laws of war and combatancy

The idea of having rules regarding the conduct of hostilities has long been considered by philosophical, legal and military minds. There is documentation showing that fifth century B.C. China recognised that no war should begin without just cause and India had rules regulating land warfare in the fourth century B.C.⁴⁸ Similarly, in the Aztec Empire there were rules for warfare and the ancient Egyptians believed humanitarian actions important enough to be included in their records of war.⁴⁹ Clearly the concept of having laws for war is not a new one. Nor is the opposing view that there can be no law during wartime. Over 2000 years ago the Latin political theorist Cicero maintained “*silent enim leges inter armes*”⁵⁰ which has been translated as “when arms speak the laws are silent”⁵¹ or “laws are inoperative in war.”⁵² Clausewitz, a military theorist writing in the early 19th Century, asserted that “to introduce the principle of moderation into the theory of war itself would always lead to logical absurdity.”⁵³

However, it is evident that as far back as Roman times, the idea of civilians becoming self-appointed warriors was frowned upon.⁵⁴ Cicero asserted that “it is not lawful for one who is not a soldier to fight [against] the enemy.”⁵⁵ In the Middle Ages civilians were forbidden to fight without the authority of their sovereign⁵⁶ and it is from the Codes of Chivalry of this time (the *jus militaire*) that the roots of the idea that there is a privileged class of soldiers who are bound by and benefit from the law of war can be found.⁵⁷ This law was primarily concerned with the loss of personal honour or valuable ransom but it did entail a separation of military forces from the civilian population.⁵⁸ It is clear that the idea of a distinction between combatants and civilians is by no means a new one.

⁴⁸ Christopher, P *The ethics of war and peace* (3rd ed, 2004) 8.

⁴⁹ Ibid.

⁵⁰ Cicero, M *The speeches of Cicero* Watts, N (trans) (1931) 16.

⁵¹ Ibid, 17.

⁵² Green, L *The contemporary law of armed conflict* (2nd ed, 2000) 1.

⁵³ Clausewitz, C von *On war* Howard, M and Paret, P (eds, trans) (1993) 84.

⁵⁴ Neff, S *War and the law of nations* (2005) 208.

⁵⁵ Cicero, M *On duties* Griffin, M and Atkins, E (eds) (1991) 16.

⁵⁶ Neff, supra n 54.

⁵⁷ Keen, M *The laws of war in the late Middle Ages* (1965) 19.

⁵⁸ Watkin, K “Warriors without rights? Combatants, unprivileged belligerents, and the struggle over legitimacy” [2005] <<http://www.reliefweb.int/library/documents/2005/hPCR-gen-09may.pdf>> 12.

It is generally accepted that the earliest modern writer on the laws of war was Grotius, a Dutch jurist and philosopher writing in the seventeenth century.⁵⁹ Grotius does not give a definition of combatants, but he did consider the position of enemy civilians. In his treatise, *The Law of War and Peace*, Grotius allows for the killing of all enemies, whether they be civilians or soldiers:

“As for those who are actually subjects of the enemy...the law of nations permits injuring them in their persons wherever they are....Such people, then, may be killed with impunity on our own soil, on enemy’s soil, on no man’s soil, or on the sea.”⁶⁰

Grotius goes so far as to assert that “the slaughter of infants and women too is committed with impunity.”⁶¹ However, later he claims that moderation in the exercise of this right is required by morality:

“An enemy...who wishes to show respect not for what human laws permit him to do but for what is his duty and what is right and godly, will spare the blood of his adversary....[E]xcept for grave reasons affecting the safety of multitudes, nothing should be done that may threaten the destruction of innocent people.”⁶²

Furthermore, Grotius determined indiscriminate weapons to be objectionable as they could not be employed in ways to separate innocents from combatants.⁶³

Finally, Grotius considered that once a soldier had been taken prisoner he should not be killed, but pitied.⁶⁴

The concept of having laws for wartime and the particular distinction between combatants and non-combatants (civilians) has been the focus of some consideration for centuries. The industrial revolution and major advances in science and technology led to the creation of new types of weapons with greatly increased killing potential. This considerably intensified the brutality of war and amplified the need for general written agreements on restrictions on war. Hence, the international community began to codify limits on the means and methods of warfare.

⁵⁹ Green, supra n 52.

⁶⁰ Grotius, H *The law of war and peace* Loomis, L (trans) (1949) 296.

⁶¹ Ibid, 297.

⁶² Ibid, 353.

⁶³ Ibid, 301.

⁶⁴ Ibid, 356.

Lieber Code 1863

The first modern codification of the laws of war was initiated during the American Civil War by President Abraham Lincoln.⁶⁵ At his behest legal philosopher Francis Lieber drafted the Lieber Code. President Lincoln was facing a war to preserve the Union and end slavery and hence needed a document outlining how captured Confederate soldiers ought to be treated. Furthermore, the US military had been massively expanded and a clearly written set of rules and values was needed to keep the new volunteers and conscripts in check.⁶⁶ The Lieber Code was a set of instructions which dictated how soldiers should conduct themselves during war time. It was put into effect on April 24, 1863 by Lincoln's Secretary of War, Townsend. Paragraph 155 states:

“[a]ll enemies in regular war are divided into two general classes--that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.”⁶⁷

It appears then that even as far back as 1863, in the first modern document on the laws of warfare, there was an understanding that the population of an opposing party in an armed conflict were divided into two categories and two categories only – combatants and civilians.

Furthermore, POWs are also mentioned in the Lieber Code. Paragraph 49 states:

“all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.”

Paragraph 56 requires that no punishment be inflicted on a POW simply for being a “public enemy,” and nor may any revenge be imposed through the intentional infliction of suffering, disgrace, cruel imprisonment, starvation, mutilation, death, “or any other barbarity”.⁶⁸

Brussels Conference 1874

The first attempt to produce an internationally accepted definition of combatants occurred in the Project of an International Declaration concerning the Laws and Customs of War adopted by the Brussels Conference in 1874. The reason behind

⁶⁵ Michaelsen, S and Shershow, S “Beyond and before the law at Guantánamo” (2004) 16 Peace Review 296.

⁶⁶ Ross, J “Bush, torture and Lincoln’s legacy” [5 August 2005] <<http://hrw.org/english/docs/2005/08/05/usdom11610.htm>>.

⁶⁷ The Lieber Code 1863, para 155. Online at <<http://www.civilwarhome.com/liebercode.htm>>.

⁶⁸ Ibid, para 56.

the desire to define combatants was the atrocities which occurred during the Franco-Prussian War of 1870-1871. During this war the uncommanded, irregular French forces fighting against the German occupation forces were indistinguishable from civilians. Hence, the frustrated Germans retaliated indiscriminately against the civilian population.⁶⁹ Therefore, when the Brussels Conference was convened there was considerable interest in creating regulations which would require the obvious separation of combatants from civilians and thereby prevent indiscriminate warfare against civilians in future conflicts.

Article 9, under the heading of “Who should be recognised as belligerents combatants and non-combatants” (sic) reads as follows:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- (1) That they be commanded by a person responsible for his subordinates;
- (2) That they have a fixed distinctive emblem recognisable at a distance;
- (3) That they carry arms openly; and
- (4) That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'.⁷⁰

It is possible that the criteria originated due to the necessity of compromise between States with strong standing armies and weaker States whose defence might depend on armed citizens.⁷¹ The Brussels Declaration effectively included armed citizens as combatants provided they fulfilled the stated conditions, thereby bestowing on States with weaker armies the ability to turn citizens into lawful combatants. Importantly, the Brussels Declaration was the first international document to express the four criteria for combatancy status which will be discussed in greater detail below. Although the Brussels Declaration was never ratified, it provided the framework for the Hague Conference of 1899.

Oxford Manual 1880

The Institute of International Law, founded in 1873, was an association which aimed to aid the growth of international law by endeavouring to state the general principles of the law and by giving assistance to the gradual codification of

⁶⁹ Holmes, R (ed) *The Oxford Companion to military history* (2001) 320.

⁷⁰ Project of an International Declaration concerning the Laws and Customs of War 1874, article 9. Online at <<http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>>.

⁷¹ Elsea, supra n 46 at 25.

international law. The Oxford Manual⁷² was unanimously adopted by the Institute in 1880. Article 2 of the Manual states that:

- “The armed force of a State includes:
1. The army properly so called, including the militia;
 2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions:
 - (a) That they are under the direction of a responsible chief;
 - (b) That they must have a uniform, or a fixed distinctive emblem recognisable at a distance, and worn by individuals composing such corps;
 - (c) That they carry arms openly;
 3. The crews of men-of-war and other military boats;
 4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organise themselves.”

The criteria specified in the Manual for determining who was included in the “armed force of a State” were the same as that put forward by the Brussels Declaration six years earlier, with the exception of the requirement to obey the laws of war. Subsection (4) includes people engaged in what is known as a *levée en masse* as combatants. This situation is discussed below.⁷³

Hague Conventions 1899 and 1907

The Hague Conventions were negotiated at the First and Second Peace Conferences held in The Hague, Netherlands, in 1899 and 1907. Both the Peace Conferences were called by Russia and were initiated with the intention of reducing armaments. Although they were unsuccessful in this main purpose, there were important discussions at both the Conferences on the provisions relating to belligerent status.⁷⁴ The issue was of significance as it was already clear that if a person was accorded belligerent status they were bound by the obligations of the laws of war, and entitled to the rights which they conferred – most importantly the right, following capture, to be treated as a POW. Both Hague Convention II 1899⁷⁵ and Hague Convention IV 1907⁷⁶ have an annex entitled Regulations Respecting the Laws and Customs of War on Land. These

⁷² The Oxford Manual 1880. Online at <<http://www.icrc.org/ihl.nsf/WebART/140-80003?OpenDocument>>.

⁷³ Infra page 45.

⁷⁴ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 3) (1960) 46.

⁷⁵ Hague Convention II 1899. Online at <<http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>>.

⁷⁶ Hague Convention IV 1907. Online at <<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6>>.

annexes contain the same article 1, which describes the groups of people to whom the laws, rights and duties of war apply. It is identical, in all material aspects, to article 9 of the 1874 Brussels Conference quoted above.

As the 1907 Hague Conventions had not been ratified by a number of the participants in World War I (WWI) they were not legally binding during that war. However, the 1899 Hague Convention regarding the laws and customs of war on land (Hague Convention II) had been ratified by all participants of WWI. It was therefore binding on all parties and governed the conduct of hostilities.⁷⁷

Geneva Convention on POWs 1929

During WWI deficiencies in the law relating to POWs were revealed. Furthermore, it became apparent that the relevant Hague Regulations lacked precision.⁷⁸ Hence, the ICRC requested that a special convention be adopted specifically on the treatment of POWs. A draft was submitted to the Diplomatic Conference at Geneva in 1929 and subsequently became the 1929 Geneva Convention relative to the Treatment of Prisoners of War.⁷⁹ The new Convention did not replace the Hague Regulations but sought to complete them. Article 1 extends the protections in the Convention to all persons covered by the Regulations annexed to the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907 previously mentioned. Hence, the 1929 POW Convention covers the same groups of people as are covered by the 1874 Brussels Conference quoted above. Furthermore, the 1929 Convention explicitly applies also to all persons belonging to the armed forces of a belligerent party captured in the course of maritime or aerial war.⁸⁰ This statement needed to be added as the Hague Regulations annexed to the Hague Conventions only related to the laws of land warfare.

⁷⁷ Garner, J *International law and the world war* (vol 1) (1920) 19.

⁷⁸ Schindler, D and Toman, J *The laws of armed conflicts* (1988) 345.

⁷⁹ Ibid, 351.

⁸⁰ Geneva Convention relative to the Treatment of Prisoners of War 1929, article 1(2). Online at <<http://www.icrc.org/ihl.nsf/FULL/305?OpenDocument>>.

The 1929 POW Convention, along with the Hague Conventions governed the hostilities of World War II (WWII) and formed the applicable international law for the post-WWII trials.

Geneva Convention III – article 4A

Following WWII the four Geneva Conventions were drafted to prevent such atrocities occurring in future wars. It was clear after this war that greater and more specific protections and laws were needed during times of war. The maltreatment of POWs constituted an important part of the war crimes indictments. Furthermore, the USSR retained a large number of German POWs for several years after the conclusion of the war. It was clear that the 1929 Convention required revision on many points. Like the Brussels Declaration and Hague Conventions before it, the Third Geneva Convention defines the categories of persons who should, on falling into the hands of the enemy, be granted POW status. This distinguishes lawful combatants from unlawful combatants as POW status is only extended to lawful combatants. Article 4 of the Third Geneva Convention is more extensive than any of the previous definitions and is correspondingly more complicated. During the Diplomatic Conference of 1949 article 4 was discussed at great length and there was unanimous agreement that the categories of persons to whom the Convention should apply was to be defined in harmony with the previous Hague Conventions.⁸¹ The four criteria imposed on militias and volunteer corps by the Brussels and Hague agreements, delineated above, were reproduced in article 4A(2). The entire text of article 4A has been included as it is the current applicable law on lawful combatancy status in any conflict involving the US. Hence, it is central to the determination of whether or not the Taliban or al-Qaeda fighters were lawful combatants.

⁸¹ Pictet, *supra* n 74 at 49.

Article 4A reads as follows:

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 organised 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 organised resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The basic principle under article 4A is that recognition as a POW, and therefore a lawful combatant, depends on two essential conditions: firstly, a person must have fallen into the power of the enemy, and secondly, they must belong to one of the categories specified in parts (1) to (6) of paragraph A. If these two conditions are fulfilled then the person in question is a lawful combatant and is entitled to be treated as a POW. The relevant subsections of article 4A for this thesis are 4A(1)-(3). People falling under subsections 4A(4) and (5) are also entitled to POW status but it will not be necessary to refer to those parts as they have no direct bearing on detainees from either the Taliban or al-Qaeda. Subsection 4A(6) deals with the situation of a *levée en masse* which is discussed below.⁸²

⁸² Infra page 45.

The four criteria from article 4A(2) are the same as those found in the Brussels and Hague agreements. Whether the four criteria apply to subsections (1) and (3) under article 4A will be discussed in the following section. When considering whether the criteria have been satisfied a question arises as to whether the group as a whole must fulfil the four criteria or whether it is the individual members of the group who must do so. If, for example, one member of a militia group breaches the laws of war does the entire group lose its status as lawful combatants? The answer to this question is 'no'. The first requirement – that of being commanded by a person responsible for their subordinates – does apply to the group collectively. However, the other three criteria apply both to the group collectively and to its individual members.⁸³ Hence, an individual determination must be made for each captured fighter as to whether they had a fixed distinctive sign; carried their arms openly; and conducted their operations in accordance with the laws of war. The failure to fulfil one or more of these requirements by one member of a group does not automatically exclude other members of the group from lawful combatant status.

The four criteria and regular armed forces

There is a clear distinction in article 4A between subsections (1) and (2). Subsection (2) contains four criteria which must be fulfilled by members of militias and volunteer corps in order for them to be POWs on capture. However, these criteria are not listed under subsection (1) for members of armed forces and militia or volunteer corps forming part of the armed forces. The key uncertainty concerning article 4A is whether people falling under subsections (1) and (3) must also fulfil the four criteria listed under subsection (2) in order to qualify as lawful combatants and be entitled to POW status. Is the right to POW status for members of *regular armed forces* conditional upon the fulfilment of the four criteria or is it an absolute right?

Some authors argue that the fact that the criteria are clearly only under the subsection for volunteer groups and militias not forming part of the regular army of the State, indicates that there is no similar test for members of a regular army

⁸³ Goldman, R and Tittlemore, B “Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law” [December 2002] <<http://www.asil.org/taskforce/goldman.pdf>> 14.

and their status is not in doubt – they need fulfil no more stringent test than simply being members of the armed forces.⁸⁴ However, others have suggested that despite the structure of the article it is implicit that a captured combatant must fulfil the criteria in subsection (2) in order to qualify as a POW, as only those elements describe properly a member of the armed forces, and the drafters of the Convention felt it would be superfluous to list the criteria with regard to regular armies.⁸⁵

The original formulation of the combatancy requirements article, in the Brussels Declaration of 1874, was ambiguous and could be read as applying the four criteria to regular armies as well as to militia and volunteer corps:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions...”⁸⁶

This article remained materially unchanged in the 1899 and 1907 Hague Conventions. However, it was substantially changed before being incorporated into the Third Geneva Convention in 1949. It is important to note that neither the Hague Regulations nor Geneva Convention III explicitly state that a member of regular armed forces must fulfil the four criteria in order to be a POW in the event of capture. The four criteria are in fact only mentioned for irregular forces and not for regular ones.

However, this is because the drafters of the 1899 and 1907 Hague Conventions and the 1949 Geneva Conventions considered that regular armed forces implicitly fulfilled the four characteristics and that there was “consequently no need to specify those requirements for the said forces.”⁸⁷ The authoritative ICRC commentary on the Third Geneva Convention observes that the drafters of the Convention

“considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition.”⁸⁸

⁸⁴ Elsea, J *Treatment of “battlefield detainees” in the war on terrorism* (2003) 26. See for example Paust, J “There is no need to revise the laws of war in light of September 11th” [November 2002] < <http://www.asil.org/taskforce/paust.pdf>>.

⁸⁵ See for example Baxter, R “The duties of combatants and the conduct of hostilities (Law of the Hague)” in UNESCO, *International Dimensions of Humanitarian Law* (1988) 229; Mallison, T and Mallison, S “The juridical status of irregular combatants under international humanitarian law of armed conflict” (1977) 9 *Case Western Journal of International Law* 56.

⁸⁶ Brussels Declaration 1874, article 9; Annex to Hague Convention II 1899, article 1; Annex to Hague Convention IV 1907, article 1.

⁸⁷ Pfanner, T “Military uniforms and the law of war” (2004) 86 *IRRC* 93, 111.

⁸⁸ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 3) (1960) 52.

This shows States do have a duty to ensure that members of its armed forces can be immediately recognised as soldiers and to make certain that they are easily distinguishable from members of the enemy armed forces or from civilians. The ICRC commentary continues:

“The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.”⁸⁹

The reason the Third Geneva Convention does not specifically state that members of the regular armed forces must wear uniforms is because this requirement is self-evident.

Although, *prima facie*, the Geneva Conventions do not appear to place conditions on the eligibility of regular forces to POW status,

“nevertheless regular forces are not absolved from meeting the cumulative conditions binding irregular forces. There is merely a *presumption* that regular forces would, by their very nature, meet those conditions” (emphasis added).

The idea underlying the article 4A definitions is that

“the regular armed forces fulfil these four conditions *per se* and, as a result, they are not explicitly enumerated with respect to them.”⁹⁰

Due to the fact that regular armed forces are expected to automatically fulfil the criteria – simply due to being regular armed forces – it is not necessary to explicitly mention the criteria under subsections (1) and (3). Furthermore, it would in fact be illogical to read ‘armed forces’ in article 4A(1) as somehow relieving members of armed forces from the same requirements imposed on members of militias or volunteer corps.

The foremost distinction developed by the Hague and Geneva Conventions was the distinction between soldier and civilian. To prevent civilians being fired upon in error, features which can easily distinguish combatants from civilians are necessary – and they are necessary for both regular armed forces and irregular fighters. In order to protect civilians, soldiers must be able to tell the difference between civilians and opposition forces. This difference needs to be clear for both regular and irregular opposition soldiers. The principle of distinction cannot be maintained if only irregular soldiers are required to distinguish themselves from the civilian population. Historically, there has been an emphasis on carrying arms

⁸⁹ Ibid.

⁹⁰ Henckaerts, J and Doswald-Beck, L *Customary international humanitarian law. Volume 1: Rules* (2005) 15.

openly and wearing uniforms in order to preserve this essential distinction between civilians and combatants.⁹¹ This emphasis has been apparent for both regular and irregular fighters. It has been suggested that ‘the soldier’ means “the uniformed regular soldier, fighting under his country’s flag against other similar soldiers fighting under theirs.”⁹² This implies that the requirement that members of the regular armed forces wear a uniform is axiomatic. Furthermore, it has been bluntly stated that

“the absence of a military uniform usually indicates that a person is a civilian, is therefore not allowed to perform military functions and must not be attacked.”⁹³

Undoubtedly the principle of distinction requires that members of regular armed forces must, at the very least, wear uniforms.⁹⁴

Article 44(7) of Additional Protocol I 1977 (which will be discussed in greater detail below) states:

“This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”

This clearly shows that the wearing of uniforms is an accepted practice which is expected to be upheld by regular armed forces. Furthermore, it has been suggested that

“although this provision was introduced to counterbalance the loosening in Protocol I of the identification requirement for guerrilla fighters, it was also intended to point out that regular troops normally wear uniforms.”⁹⁵

In discussing subsection (3) the ICRC commentary explains that the four elements required under subsection (2) are not mentioned under subsection (3) because it is simply assumed that ‘regular armed forces’

“have all the material characteristics and all the attributes of armed forces in the sense of subparagraph (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war.”⁹⁶

Clearly if ‘regular armed forces’ under subsection (3) are implicitly required to fulfil these conditions then ‘armed forces’ under subsection (1) must be also.

⁹¹ Reisman, W and Antoniou, C *The laws of war* (1994) 43.

⁹² Best, G *War and law since 1945* (1994) 128.

⁹³ Pfanner, *supra* n 87 at 94.

⁹⁴ The term ‘uniform’ is being used loosely to mean any fixed distinctive sign which is recognisable at a distance and serves to distinguish soldiers from the civilian population. Article 4A does not require combatants to wear a full military uniform.

⁹⁵ Pfanner, *supra* n 87 at 102.

⁹⁶ Pictet, *supra* n 88 at 63.

There exists much support for the theory that the same requirements that apply to irregular forces are also valid for members of regular forces. Indeed, there is

“ample evidence that this is a rule of law....Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant. ‘Unlawful’ combatants may thus be either members of the regular forces or members of resistance of guerrilla movements who do not fulfil the conditions of lawful combatants.”⁹⁷

Evidently, members of regular forces will not be entitled to lawful combatancy status unless they satisfy the criteria explicitly applied to irregular forces.

In the case of *Mohammed Ali v Public Prosecutor*⁹⁸ the Privy Council held that it is not enough to establish that a person belongs to the regular armed forces in order to guarantee him POW status. Members of the regular armed forces must observe the conditions imposed on irregular forces even though this is not expressly stated in article 4 of the Third Geneva Convention. The House of Lords gave a similar verdict in the 1969 Malaysian case of *Osman v Prosecutor*.⁹⁹ Their Lordships held:

“for the ‘fixed distinctive sign recognisable at a distance’ to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent, with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed forces of a country”.

Clearly both these cases provide support for the position that regular armed forces are required to fulfil the four criteria.

The military manuals of many States define the armed forces of a party to the conflict by requiring them to be under a command responsible to a party for the conduct of its subordinates and be subject to an internal disciplinary system which enforces compliance with the laws of war.¹⁰⁰ This is compelling evidence suggesting that many States believe their armed forces are required to fulfil at least requirements (a) and (d) from article 4A(2) in order to be the regular armed

⁹⁷ Dettler, I *The law of war* (2nd ed, 2000) 136.

⁹⁸ *Mohammed Ali v Public Prosecutor* [1969] 1 AC 430, 449.

⁹⁹ *Osman and Others v Public Prosecutor* [1969] 1 Law Reports, Appeal Cases, 453 (PC).

¹⁰⁰ See for example the Military Manuals of Argentina (*Law of War Manual* 1989, section 1.07); Australia (*Defence Force Manual* 1994, section 512); Canada (*LOAC Manual* 1999, section 7); Croatia (*LOAC Compendium* 1991, p5-6); Hungary (*Military Manual* 1992, p16); Kenya (*LOAC Manual* 1997, p7); New Zealand (*Military Manual* 1992, section 805); Nigeria (*Military Manual* 1994, p38); Spain (*LOAC Manual* 1996, vol 1, section 1.3); UK (*LOAC Manual* 1981, section 3).

forces. The UK Laws of Armed Conflict Manual¹⁰¹ defines armed forces as being under a commander responsible for the conduct of his subordinates and being subject to an internal disciplinary system enforcing compliance with the law of armed conflict. It further states that it is “customary” for members of organised armed forces to wear uniforms but this is not stated as a necessary part of the definition of armed forces.¹⁰²

In a 2002 memo to the White House Counsel, General Bybee, then Assistant Attorney General, now a US federal judge, concluded that “the four basic conditions that apply to militias must also apply, at a minimum, to members of armed forces”.¹⁰³ He supports this conclusion with the following assertion:

“There was no need to list the four Hague conditions in Article 4(A)(1) because it was well understood under pre-existing international law that all armed forces were already required to meet those conditions.”¹⁰⁴

Bybee continues:

“there is no evidence that any of the...drafters or ratifiers of [the Third Geneva Convention] believed that members of the regular armed forces ought to be governed by *lower standards* in their conduct of warfare than those applicable to militia and volunteer forces.”

This comment is valid – it does not seem reasonable to require members of militia and volunteer forces to meet higher standards than those burdening regular armed forces.

The law and theories discussed thus far provide evidence for the assertion that members of the regular armed forces of a State *are* required to fulfil the four criteria listed under subsection (2) of article 4A. However, there are also some opposing arguments maintaining that members of regular armed forces are entitled to POW status regardless of whether they fulfil the criteria, and that the criteria consequently only relate to militia or volunteer corps. The most obvious rationale for asserting that members of regular armed forces are not obliged to satisfy the four criteria is the structure of article 4A. The ordinary reading of the article clearly only includes the four criteria under subsection (2). Furthermore, the *travaux préparatoires* show that regular armed forces, including members of

¹⁰¹ UK, *LOAC Manual* (1981), section 3.

¹⁰² *Ibid.*

¹⁰³ Bybee, J “Memorandum from Assistant Attorney General Jay S. Bybee to The White House Counsel (Alberto Gonzales) on the status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949” [7 February 2002]

<<http://news.findlaw.com/hdocs/docs/torture/bybee20702mem2.html>> 4.

¹⁰⁴ *Ibid*

militia and volunteer corps forming part of them, do not have to formally fulfil the four criteria in order to qualify as POWs.¹⁰⁵

It has been suggested that

“the key factor in determining the lawfulness of a combatant...is the affiliation of the combatant to a party to the conflict.”¹⁰⁶

Under this view the organised armed forces (including militias and volunteer corps) of a party to the conflict are lawful combatants simply due to their position as part of the armed forces and they do not have to fulfil the four criteria to verify this position.¹⁰⁷ The determinative criterion for POW status for regular armed forces of a party to a conflict is purely membership of the armed forces.¹⁰⁸ It has been observed that the regular armed forces of a State, even if it is a government or an ‘authority’ not recognised by the opposing party, “need not necessarily satisfy the four criteria in order for their members to be entitled to POW status.”¹⁰⁹ This analysis of the situation accepts that while compliance of the law might reasonably be *expected* of members of regular armed forces, it is not *required* for their obtaining POW status. This casts into doubt the assertion that members of regular armed forces must fulfil the four criteria in order to be granted POW status.

In summary, arguments have been given for and against the question of whether regular armed forces are required to satisfy the four criteria specified under article 4A(2) of the Third Geneva Convention. Firstly, the principle distinction protected by the laws of war – that between civilians and combatants – requires the criteria to be binding on members of regular armed forces as well as irregular forces or the distinction cannot be sustained. Secondly, it would have been unnecessary to spell out the criteria for members of armed forces as it is simply assumed that members of armed forces do in fact fulfil them as a matter of course. Furthermore, the Privy Council, the House of Lords and the military manuals of many States add weight to the idea that regular armed forces are required to satisfy the requirements. On the other hand there are arguments to suggest that

¹⁰⁵ Pfanner, *supra* n 87 at 115.

¹⁰⁶ Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 22.

¹⁰⁷ *Ibid.*

¹⁰⁸ Paust, J “There is no need to revise the laws of war in light of September 11th” [November 2002] < <http://www.asil.org/taskforce/paust.pdf>>.

¹⁰⁹ Elsea, J *Treatment of “battlefield detainees” in the war on terrorism* (2003) 21.

regular armed forces are not required to satisfy the four criteria in order to be treated as POWs, the most obvious of these being that the basic layout of article 4A does not apply the criteria to subsections (1) and (3). The only other ground given by a variety of commentators as to why regular armed forces do not have to fulfil the criteria seems to be that the determinative factor for POW status is the simple fact of belonging to the regular armed forces. Belonging to the forces is enough and it is not necessary to fulfil the criteria.

The arguments establishing the theory that regular armed forces are required to satisfy the four criteria are much more compelling than those opposing the theory. It is a firm condition of the laws of war that soldiers – both regular and irregular – be easily distinguishable from the civilian population. Hence, it is necessary for regular armed forces to wear a fixed distinctive sign (such as a uniform) and carry their arms openly. Furthermore, it would be unreasonable to impose harsher conditions on irregular fighters than those imposed on regular armed forces. It was simply assumed in 1949, when the Geneva Conventions were drafted, that regular armed forces would fulfil the criteria as a matter of course, simply due to being regular armed forces. Therefore, the four criteria were not included under subsections (1) and (3) but regular armed forces are required to fulfil them in order to qualify for POW status. Consequently, the rest of this thesis will be based on the assumption that in order to be lawful combatants, and therefore entitled to POW status, regular armed forces, as well as irregular forces, must fulfil the four criteria in article 4A of the Third Geneva Convention.

Additional Protocol I

The 1949 Geneva Conventions were not the last endeavour to define exactly who could be a lawful combatant. In 1977 Additional Protocol I had another attempt at this difficult task and defined lawful combatants as:

“all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.... 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.”¹¹⁰

¹¹⁰ Additional Protocol I, article 43(1).

The reasons for the 1977 rejuvenation of the combatancy criteria; exactly what the new definition entailed; and why it is not applicable to this thesis will be discussed below.

Historically, wars of national liberation involving struggles against colonial domination, alien occupation or racist regimes were considered to be internal conflicts, non-international in nature, and entailing the direct involvement of only one sovereign State. The 1949 Geneva Conventions upheld this historical state of affairs but in the years following their creation there were many such wars and many countries were sympathetic to the cause of national liberation movements. However, national liberation movements often had to fight unconventionally, using guerrilla tactics in order to have an impact, and hence did not always carry arms openly or wear uniforms. Therefore, they were not fulfilling the criteria to be lawful combatants or POWs.

In 1948 the Malayan Communist Party (MCP) began an armed struggle to overthrow British colonial rule in Malaya. This was a war of national liberation fought for the most part through guerrilla tactics due to the fact that the MCP did not have sufficient numbers or weapons to use traditional methods of warfare. The loss of civilian lives was extensive as a result of the nature of the conflict.¹¹¹ Similarly, guerrilla warfare played a significant part in the Algerian war of independence (1954-1962) fought against the French colonists by the *Front de Libération Nationale* (National Liberation Front).¹¹² The war was characterised by guerrilla and terrorist tactics utilised by the nationalists and the counter-insurgency measures with which the French military responded. De Gaulle returned to power in 1958 and increasingly became convinced that while the war in Algeria was militarily winnable it was not internationally defensible. Hence, Algeria achieved its independence in 1962.¹¹³ Due to the guerrilla tactics of the nationalists, the harsh counter-insurgency measures undertaken by the French and the extensive loss of civilian lives, the war was generally unpopular with the

¹¹¹ Holmes, R (ed) *The oxford companion to military history* (2001) 534.

¹¹² *Ibid.*, 32.

¹¹³ *Ibid.*

international community and garnered more sympathy for the plight of national liberation movements or freedom fighters.¹¹⁴

The Vietnam war (1959-1975) was also a battle by a liberation movement against foreign domination. Vietnam gained its independence from France following the Indochina war (1946-1954) and was temporarily partitioned at the 17th parallel. Above the parallel the Vietminh established a socialist state under the leadership of Ho Chi Minh; below the parallel a non-communist state was established under the Emperor Bao Dai. In 1955 the French-backed Emperor was deposed by US-supported Ngo Dinh Diem as the President of the newly established Republic of Vietnam.¹¹⁵ The 17th parallel had been intended as a temporary partition and it was anticipated that general elections would be held by 1956 to bring about the reunification of Vietnam.¹¹⁶ However, an election was not held and opposition to President Diem's rule grew in South Vietnam. A low-level insurgency began in the South in 1957 and in 1959 the North agreed to support an armed revolution against Saigon.¹¹⁷ The National Liberation Front was formed in order to overthrow the government of the South. The ensuing conflict involved much guerrilla warfare due to the mountainous and jungle-covered terrain of Vietnam. International condemnation of the war was extensive and once again the difficulties faced by people attempting to fight for liberation from foreign domination were recognised.

These three examples represent the type of conflict that took place between the signing of the Geneva Conventions in 1949 and the drafting of Additional Protocol I in 1977. Wars of national liberation obtained the sympathy of the international community and it was appreciated that it was not possible for guerrilla fighters to live up to the high standards required for combatancy status under the Third Geneva Convention. It was thought that more protections needed to be extended to guerrilla fighters and hence the combatancy requirements should be less strict.¹¹⁸

¹¹⁴ Ibid.

¹¹⁵ Ibid, 953.

¹¹⁶ Geneva Accords 1954. Online at <<http://www.mtholyoke.edu/acad/intrel/genevacc.htm>>.

¹¹⁷ Holmes, supra n 111 at 953.

¹¹⁸ Solf, W "A response to Douglas J. Feith's Law in the Service of Terror – The Strange Case of the Additional Protocol" (1986) 20 Akron Law Review 261, 273.

Change was sought through the Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflicts, held in Geneva 1974-1977. The ICRC had two declared goals for the Diplomatic Conference. One was to develop international humanitarian law as development was clearly needed in this area. Hague Law was seriously outdated and there were gaps in the protection under the Geneva Conventions. It was thought that there were inadequate provisions for guerrilla warfare and a marked absence of environmental protections. The second main aim of the ICRC was to reaffirm the existing principles of international humanitarian law commonly considered to be customary international law, but neglected or ignored by States in practise during WWII and since.¹¹⁹

More than 100 governments sent delegations to the conference and it was notable as the first time Third World nations had the opportunity to participate in a conference on the codification of humanitarian law.¹²⁰ Third World countries had their own special concerns and their agenda was quite different to the declared goals of the ICRC. They were eager to relax the requirements of combatant status so ‘freedom fighters’ waging a guerrilla war could be able to attain the status of POWs.¹²¹ Furthermore, they wished to have wars of national liberation qualified as international armed conflicts rather than internal armed conflicts. This would mean that the majority of the Geneva Conventions would apply to wars of national liberation and ‘freedom fighters’ would enjoy greater protections. Following a lengthy debate this proposal was adopted by a majority vote.¹²² The Additional Protocols have been called the

“international community’s most ambitious attempt to escape from the shadow of the Second World War and to legislate for a new generation of conflicts...frequently conducted by irregular, guerrilla methods rather than by set piece battles between opposing bodies of regular, uniformed armed forces.”¹²³

Additional Protocol I was drafted at the Diplomatic Conference with the purpose of filling the gaps perceived in the protection provided by the Geneva

¹¹⁹ Greenwood, C “A critique of the Additional Protocols to the Geneva Conventions of 1949” in Durham, H and McCormack, T (eds) *The changing face of conflict and the efficacy of International Humanitarian Law* (1999) 6.

¹²⁰ Gasser, H “An appeal for ratification by the United States” (1987) 81 AJIL 912, 915.

¹²¹ Greenwood, supra n 119.

¹²² Gasser, supra n 120.

¹²³ Greenwood, supra n 119 at 3.

Conventions. This was to be done by extending the categories of people entitled to combatant status and removing some of the ambiguities to be found in the Conventions. Articles 43 to 47 of the First Additional Protocol reflected a compromise between the need to protect civilians during times of armed conflict and the need to relax the standard for unconventional fighters, especially those acting in occupied territory. The compromise was essentially to

“relax the rigid requirements of the Hague and Geneva Standards sufficiently to provide guerrillas a possibility of attaining privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise.”¹²⁴

It was thought that this would strengthen the protection of the civilian population from the effects of hostilities, particularly in occupied territory. By extending greater protections to irregular fighters, such fighters would no longer be obliged to mingle with civilians in order to gain an advantage, and hence the risk to civilians of being targeted by the enemy would be lessened.¹²⁵

Alternatively, articles 43 to 47 of Additional Protocol I can be seen as weakening the previously strict distinction required between combatants and civilians which acted to protect civilians during wartime. One of the overarching principles of international humanitarian law is the separation of combatants and non-combatants (civilians). The Third Geneva Convention provides incentives in order to ensure that the laws of war are upheld and that combatants distinguish themselves from the civilian population. Additional Protocol I extended greater protections to irregular fighters and in doing so the gap between combatants and civilians was lessened. This deteriorated and blurred the previously sharp distinction between combatants and civilians.

Article 43(1) of Additional Protocol I outlines the people who are the ‘armed forces’ of a Party –

“all organised 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 recognised 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.”

¹²⁴ Solf, *supra* n 118.

¹²⁵ *Ibid.*

Article 43(2) states that members of these ‘armed forces’ are combatants – they have the right to participate directly in hostilities. Article 44(1) applies POW status to combatants:

“[a]ny combatant, as defined in article 43, who falls into the power of an adverse Party shall be a prisoner of war.”

Article 43 thus eliminates the distinction between regular armed forces and irregular voluntary corps, militias and other organised resistance movements advocated by Geneva Convention III. The article essentially puts all components of a party’s armed forces on an equal footing for status. Furthermore, under the Third Geneva Convention, POW status was extended to captured members of the regular armed forces professing allegiance to a government or authority not recognised by the Detaining Power, but not to irregular fighters professing allegiance to such an unrecognised power. Article 43 removes this distinction so regulars and irregulars alike are protected when they fight for an unrecognised authority.

Under the Third Geneva Convention’s traditional view of combatancy abiding by the laws of war is a firm requirement in order to be granted POW status. However, under article 44(2) of Additional Protocol I

“violations of these rules shall not deprive a combatant of his right to be a combatant or...a prisoner of war”.

All combatants are still required to obey the laws of war (such as the non-targeting of civilians), but if they do not the privilege of POW status will not be withheld from them. Bestowing POW status on all combatants irrespective of whether they have complied with the rules of international law removes the incentive to comply.

As well as removing the incentive to obey the laws of war the First Additional Protocol weakens the strict distinction between combatants and civilians that the Third Geneva Convention espouses. The four criteria under article 4 of the Third Convention clearly require combatants to distinguish themselves from the civilian population. However, Additional Protocol I recognises that in some armed conflict situations combatants are unable to do so and determines that combatants indistinguishable from the civilian population will retain their status as

combatants provided they carry their arms openly.¹²⁶ Should a combatant fall into the power of the enemy while failing to carry his arms openly he will forfeit his POW status but shall, nevertheless,

“be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.”¹²⁷

This means that although official POW status is withheld, combatants who fail to carry their arms openly will still be treated like POWs on capture. To some extent this removes the incentive to carry arms openly or for combatants to distinguish themselves from the civilian population. A combatant who failed to distinguish himself under Geneva Convention III lost his position as a privileged combatant, was therefore not entitled to POW status on capture, and could be tried as a common criminal for his unprivileged involvement in hostilities. The new rule under the First Additional Protocol, as elucidated by article 44(3), makes it clear that should a combatant fail to distinguish himself when required the sanction is trial and punishment for a breach of the laws of war, but no loss of combatant and POW status.

Article 45 of Additional Protocol I requires that a person who has fallen into the power of an adverse Party be presumed to be a POW. If there is any doubt as to a person’s status they must be treated as a POW until a competent tribunal has adjudicated on the issue.¹²⁸ Article 45(3) determines that if a person is not entitled to POW status and they do not benefit from more favourable treatment under the Fourth Geneva Convention they shall have the protection of article 75 of Additional Protocol I (examined in Chapter Four) which gives a minimum standard of treatment.

¹²⁶ Additional Protocol I, article 44(3). Article 44(3) states:

“[i]n order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, 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).”

¹²⁷ Ibid, article 44(4).

¹²⁸ Ibid, article 45(1).

Despite having lowered the threshold requirements for identification as a combatant, making it much easier for irregular armed groups such as members of guerrilla forces to attain combatancy status, Additional Protocol I still claims to protect the distinction between civilians and combatants. Article 48, entitled “Basic rule”, states that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants”. This is simply a restatement of the commonly accepted civilian or non-combatant immunity principle. However, ironically, it follows directly after a number of articles which weaken that very principle.

A short break must be taken from the First Additional Protocol to consider the two different areas of the laws of war – the *jus ad bellum* and the *jus in bello*. The *jus ad bellum* is the part of the laws of war which governs the legality of the use of force – whether it is legal to go to war. The *jus in bello* refers to the humanitarian rules which must be respected during warfare. Additional Protocol I tends to confuse these two areas of law which ought to be kept separate at all times. Best¹²⁹ asks

“should not the *jus in bello* go easy on irregular combatants fighting for a cause which the *jus ad bellum* pronounced to be just?”

He calls it an “embarrassing fact” that international humanitarian law

“applies impartially and indifferently to both or all sides in an armed conflict without regard to the merits of the conflict’s causes.”

This is known as the doctrine of belligerent equality. However, as ‘embarrassing’ as this fact may be, it is necessary. It is too hard, and takes too long, to establish the rights and wrongs of a war at the time it is being fought in order to determine exactly how, and to whom, international humanitarian law should apply. Furthermore, in all wars both sides would claim to have a ‘just cause’. Best¹³⁰ cites Sir Robert Craigie, during the final reading through of the articles of the Third Geneva Convention, as stating “a war is still a war in the eyes of international law even though it has been illegally commenced.” Once a war has begun, the *reasons* for that beginning have no influence. However the conflict started, the onus is still on both parties to fight the war in accordance with the laws of war.

¹²⁹ Best, *G War and law since 1945* (1994) 129.

¹³⁰ *Ibid*, 130.

The idea of having a ‘just cause’ is in fact the very reason Additional Protocol I revisited the definition of lawful combatant status. People fighting wars of national liberation were seen as espousing a ‘just cause’ and therefore it was thought that more protections should be accorded to them. Theories of ‘just war’ only concern *jus ad bellum* and

“cannot justify (but are in fact frequently used to imply) that those fighting a just war have more rights or less obligations under [international humanitarian law] than those fighting an unjust war.”¹³¹

Additional Protocol I purports to take into account the fact that a party to a conflict may be fighting on just grounds but need to use guerrilla warfare in order to advance their cause. This lessening of the standards of the *jus in bello* due to the possibility of a strong *jus ad bellum* case is unacceptable. Despite the fact that one side of an armed conflict may be using force unlawfully and the other lawfully, it remains essential that international humanitarian law be respected by both sides and apply to both sides.¹³² Inevitably, each party to the conflict will have civilian victims of war and they are equally entitled to and need the protections provided by the laws of war. It must also be remembered that even if the violation of *jus ad bellum* was committed by their side the civilians are not necessarily responsible for that violation and must still benefit from international humanitarian law protections.

The right to react in self-defence (a *jus ad bellum* rule) does not exempt the defending State from its obligations under the laws of war (the *jus in bello*).¹³³ This principle is even enshrined in the preamble to Additional Protocol I, despite the fact that the sections of the Protocol discussed above are guilty of mingling the two areas of international humanitarian law. The preamble includes the statement that the provisions of the Geneva Conventions and of the Protocol

“must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts”.¹³⁴

¹³¹ Sassòli, M and Bouvier, A *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (1999) 84.

¹³² Ibid.

¹³³ Müller, A “Legal issues arising from the armed conflict in Afghanistan” [2004] 4 *Non-State Actors and International Law* 239, 257.

¹³⁴ Additional Protocol I, preamble.

It is a firm requirement that all parties to an armed conflict obey the laws of war regardless of the justice of the cause they claim to be fighting for. The fact that the First Additional Protocol intermingles the *jus ad bellum* and the *jus in bello* is a distinct mark against it.

In 1977 Additional Protocol I was drafted in an attempt to redefine the requirements for combatancy status. World opinion had been sympathetic to the causes of freedom fighters and the Protocol endeavoured to extend some protections to these people. However, in protecting people forced to fight using guerrilla tactics the Protocol blurred the previously sharp distinction between combatants and civilians. As civilian immunity is one of the paramount principles of the laws of war it should not be sacrificed to allow the inclusion of freedom fighters as lawful combatants.

Inapplicability of Additional Protocol I

The reasons for the introduction of Additional Protocol I into international law and the relevant sections contained in this document have been discussed. It was necessary to do this as Additional Protocol I does play a major part in combatancy law due to the fact that it has altered this area of law radically. However, it will now be explained why it is not possible to apply Additional Protocol I to this thesis.

As international law currently stands international treaties only become binding on a State in so far as they are ratified by that State. However, should a treaty reach the status of customary international law it will be binding on all States whether they have ratified it or not. The US signed Additional Protocol I on December 12, 1977 but it has not ratified the Protocol and nor has Afghanistan. The reservations the US made to Additional Protocol I were very specific and related to the combatancy articles discussed above. The fact that the US reservations were only on the basis of certain specific provisions has meant that many other provisions in the Protocol have been able to become customary international law despite the reservations.¹³⁵ This means that the US is bound by

¹³⁵ Docherty, B and Garlasco, M “Off target: The conduct of the war and civilian casualties in Iraq” [2003] <<http://hrw.org/reports/2003/usa1203/>>.

those provisions of the Protocol which are customary international law, but not those it objected to.

As explained in section 1.5, customary international law is international law which develops from the co-existence of two elements: firstly, there must be a consistent and general practice among States; and secondly, those States must consider their practice to be in accordance with international law.¹³⁶ Parts of Additional Protocol I have reached this status of being practised by States believing that they are acting in accordance with international law. However, not all of the Protocol is considered to be customary international law. When declining to ratify the Protocol the US made it quite clear that it objected on the basis of article 44, claiming that this article would extend Geneva Convention protections to some unlawful combatants.¹³⁷ They clearly did not wish to be bound by these provisions and hence they cannot be forced to abide by them simply as a result of a claim that all of Additional Protocol I is customary international law.

The letter written by President Reagan to the Senate¹³⁸ in 1987 concluded that the US could not ratify the First Additional Protocol as it was “fundamentally and irreconcilably flawed.”¹³⁹ According to the President, the Protocol contained “provisions that would undermine humanitarian law and endanger civilians in war” and he emphasised that “we must not... give recognition and protection to terrorist groups as a price for progress in humanitarian law.”¹⁴⁰ President Reagan foresaw difficulties with the provisions extending combatant status to irregular forces, claiming that they “would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”¹⁴¹ He thought that the problems in the Protocol were so fundamental in character as to not be able to be remedied through reservations even though he considered other parts of the Protocol to be “of real humanitarian benefit.”¹⁴²

¹³⁶ Byers, M *Custom, power and the power of rules: International relations and customary international law* (1999) 130.

¹³⁷ President Reagan, “Letter to the Senate” [29 January 1987]. Reproduced at 81 AJIL 910, 911.

¹³⁸ *Ibid.*, 910.

¹³⁹ *Ibid.*, 911.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

As the US expressly refused to ratify the First Additional Protocol on the basis of articles 43 and 44 those articles cannot be said to have become customary international law binding on the US. Therefore, article 4A of Geneva Convention III continues to provide the standard of law regarding combatancy requirements and entitlement to POW status applicable to armed conflicts between the US and another State, even if the other State has ratified the 1977 Protocol.

Geneva Convention III – article 5

The law concerning combatants applicable to this thesis is article 4A of the Third Geneva Convention. This article determines the criteria for lawful combatancy status and who is entitled to POW status when captured by opposition forces. Article 5 of the Third Geneva Convention deals with a situation in which there is *doubt* as to the status of a detainee and reads as follows:

“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 means that if there is doubt as to whether a detainee is entitled to POW status, a competent tribunal must determine the issue and until that determination is made the detainee must be treated as a POW. This provision was inserted into the Convention at the request of the ICRC¹⁴³ as prior to this requirement decisions were often made by soldiers of relatively low rank on the battlefield which led to situations where a captive could be presumed unlawful and executed on the spot.¹⁴⁴

The main impediment to the easy application of article 5 is due to the phrase ‘no doubt’. Michaelsen and Shershow¹⁴⁵ ask “whose doubt is sufficient to trigger the protection of article 5 and to mandate the convening of competent tribunals?” Not surprisingly, the Bush Administration has claimed that there is no doubt about the status of the detainees being held at Guantánamo Bay, Cuba – they are undoubtedly not POWs – so there is no need to give them access to a ‘competent

¹⁴³ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 3) (1960) 77.

¹⁴⁴ Levie, H *Prisoners of war in international armed conflict* (1977) 56.

¹⁴⁵ Michaelsen, S and Shershow, S “Beyond and before the law at Guantánamo” (2004) 16 *Peace Review* 293.

tribunal' to clarify their status.¹⁴⁶ The US position is that the doubt must come primarily “or even overwhelmingly” from the detaining power and that as the US has no doubts in this case about the classification of the prisoners, there is no need to have their status determined by a competent tribunal.¹⁴⁷

The issue of doubt under article 5 was mentioned by Justice Souter in his dissenting opinion in the 2004 US Supreme Court case of *Hamdi v Rumsfeld*.¹⁴⁸ He stated that the government’s reliance on the categorical pronouncement that there was no doubt to trigger the application of the article was at odds both with international law and the incorporation by the US of that law into domestic law.¹⁴⁹

Furthermore, the pronouncement by the US that no doubt exists infringes the United States Army Field Manual, *The Law of Land Warfare*, which gives the following interpretation for article 5:

“[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”¹⁵⁰ (emphasis added).

This clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities claims the right to be a POW.¹⁵¹ All that is necessary for doubt to arise is an assertion by the captive that he is entitled to POW status. Once this assertion has been made, doubt has arisen, and a competent tribunal must be convened to determine the issue.

The US has not convened tribunals to determine the status of Guantánamo detainees where doubt has been claimed. This needs to be done in order to ascertain whether they are in fact entitled to POW status.

¹⁴⁶ Boucher, R “Daily Press Briefing” [8 February 2002]

<http://findarticles.com/p/articles/mi_ponn/is_200202/ai_3045890130>.

¹⁴⁷ Michaelsen and Shershow, *supra* n 145.

¹⁴⁸ *Hamdi v Rumsfeld* 542 U.S. 507 (2004).

¹⁴⁹ *Ibid*, 554.

¹⁵⁰ US Dept of the Army, “The Law of Land Warfare” (Field Manual 27-10, 1956), para 71(b).

¹⁵¹ Aldrich, G “The Taliban, Al Qaeda, and the determination of illegal combatants” (2002) 96 AJIL 891, 898.

Levées en masse

In general civilians who take up arms and join hostilities will be considered as unlawful combatants. They lose their entitlement to civilian immunity and can be prosecuted for any belligerent acts they commit. However, there is one exception to this rule – civilians who spontaneously take up arms to resist invading troops, provided they fulfil some conditions, are lawful combatants.

Article 10 of the 1874 Brussels Declaration states:

“The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves..., shall be regarded as belligerents if they respect the laws and customs of war.”

All material aspects of this article can also be found in article 2 of the annex to Hague Convention II, 1899 and Hague Convention IV, 1907. The phenomenon of civilians taking up arms to resist invading forces is similarly described in article 4A(6) of the Third Geneva Convention, with the added requirement that they carry their arms openly as well as respect the laws and customs of war. As such groups form one of the categories under article 4A they are entitled to prisoner of war status on capture and are therefore considered to be lawful combatants.

Civilian bodies who spontaneously take up arms on the approach of the enemy are known as *levées en masse*. As shown by the laws of war documents mentioned, civilians participating in a *levée en masse* are only regarded as combatants as long as they carry their weapons openly and comply with the laws and customs of war. Unlike normal combatants, they are not required to wear a fixed distinctive sign or a uniform but they must be distinguishable from the rest of the civilian population – hence the requirement of carrying arms openly. The promotion to belligerent status is not extended to include groups of the inhabitants of occupied territories who take up arms subsequent to the occupation in order to harass or engage the occupying forces.¹⁵² In order to be accorded combatant status due to participation in a *levee en masse*, civilians must not be acting entirely on their own initiative, but must be under the control of the government or some other organisation that will be responsible for their actions. Should they not be accountable to such a higher authority they will not receive any protection as combatants and will be

¹⁵² Green, L *The contemporary law of armed conflict* (2nd ed, 2000) 106.

regarded as “marauders or bandits” and tried as such on capture.¹⁵³ The entitlement to POW status of participants of a *levée en masse* is a long-standing rule of customary international law.¹⁵⁴

A *levée en masse* does not help determine the combatant status of the Guantánamo detainees as fighters for neither the Taliban nor al-Qaeda could be thought to have been civilians who spontaneously took up arms upon the approach of the Northern Alliance or US forces. However, it is useful as an example of a situation in which civilians can legitimately change their status to that of lawful combatants.

2.2.2 Unlawful combatants

Thus far the rules governing lawful combatant status have been discussed. Now the rules which govern unlawful combatants must be considered. As mentioned earlier, there are only two categories of persons during times of armed conflict – combatants and civilians. The whole purpose of the laws of war is to specify for each individual a single identity “drawn from a universe of two possibilities – either soldier or civilian.”¹⁵⁵ There is currently no special third category under international law for civilians who take part in hostilities – “a category of persons that are neither combatants nor civilians does not exist.”¹⁵⁶ However, each group – civilians and combatants – includes some people who break the rules. These rule-breakers are referred to as unlawful combatants regardless of whether they come from the civilian group or the combatant group. Hence, there are two types of unlawful combatants.

Firstly, from the combatants group, there are people who are authorised to fight by a legitimate party to the conflict but whose perfidious conduct disqualifies them from combatant privilege. Some examples of people in this category are spies, saboteurs, mercenaries and war criminals. These people are combatants, but they have committed some unlawful act which excludes them from receiving

¹⁵³ Ibid, 107.

¹⁵⁴ Henckaerts, J and Doswald-Beck, L *Customary international humanitarian law. Volume 1: Rules* (2005) 387.

¹⁵⁵ Michaelsen and Shershow, *supra* n 145 at 295.

¹⁵⁶ Müller, A “Legal issues arising from the armed conflict in Afghanistan” [2004] 4 *Non-State Actors and International Law* 239, 262.

combatant privileges such as POW status. Secondly, there are rule-breakers in the civilians group. These are civilians who take up arms and fight during an armed conflict even though they are not authorised to do so by a party to the conflict. Despite the fact that these people are fighting, they remain civilians. As civilians they are not legally allowed to fight and any unlawful actions they commit may be considered under civilian law. For example, killing someone would be murder. A brief example of an unlawful combatant from each of the two groups is given below. Although the two types of unlawful combatants have been split up for ease of understanding, a distinction between the two categories is actually unnecessary:

“Once it has been established that a person accused of hostile conduct is not entitled to treatment as a POW, there appears to be no reason to inquire whether the individual is a civilian or a disguised soldier, as they are subject to the same rights and liabilities.”¹⁵⁷

Spies

There are two incentives in place to persuade people to fulfil the requirements of lawful combatant status. These are that lawful combatants cannot be prosecuted for any belligerent acts they may have committed which do not breach the laws of war; and that should they be captured they will be entitled to POW status. If regular armed forces are caught acting as spies or saboteurs behind enemy lines they may be denied POW status. However, they retain the right to not be prosecuted for any belligerent acts they committed prior to becoming a spy which were within the laws of war. They can be prosecuted for acts of espionage or sabotage or any other acts which breach the laws of war. It is clear that spies and saboteurs cannot be treated as lawful combatants with both the privileges attached to that status as otherwise States would incorporate saboteurs and spies into their regular armed forces as a matter of course.

There is a “consensus”¹⁵⁸ that espionage does not violate the laws of war but that the power of a party to a conflict to punish such conduct

“arose not from the fact that the law prohibited the activity but from the danger which clandestine acts created and the resulting necessity that they be dealt with severely.”¹⁵⁹

¹⁵⁷ Ibid.

¹⁵⁸ Baxter, R “So-called ‘unprivileged belligerency’: Spies, guerrillas, and saboteurs” (1951) 28 *British Year Book of International Law* 323, 329.

¹⁵⁹ Ibid.

The fact that a State is entitled to prosecute the spies they catch should not be understood as an assertion that espionage violates international law – given that most States engage in espionage themselves. Rather, the ability to prosecute should be considered as an effort to deny information to other States.¹⁶⁰ The plane in which spies operate is in fact akin to a legal black hole.¹⁶¹ Some inconsistencies and hypocrisies are inherent in rules surrounding a clandestine activity such as espionage as States wish to denounce the spies of their enemies while maintaining agents of their own.

The 1863 Lieber Code, the 1874 Brussels Declaration and the 1899 Hague Regulations define espionage as gathering or attempting to gather information in territory controlled by an adverse party through an act undertaken on false pretences or deliberately in a clandestine manner.¹⁶² This includes combatants who wear civilian attire or who wear the uniform of the adversary but excludes combatants who are gathering information while wearing their own uniform. If a spy is captured in the act of espionage they may be denied POW status. However, a spy who has rejoined his or her armed forces and is subsequently captured is entitled to POW status and incurs no responsibility for previous acts of espionage.¹⁶³

Article 88 of the Lieber Code states that a

“spy is punishable with death by hanging by the neck, whether or not he succeeds in obtaining the information or in conveying it to the enemy.”

However, a spy who is captured may not be punished without a trial. This is recognised in article 20 of the Brussels Declaration and article 30 of the Hague Regulations. The fact that captured spies are entitled to fundamental guarantees, including the right to a fair trial, is found in article 75 of Additional Protocol I. Consequently, the summary execution of spies is prohibited.

The only reference to spies made by the Geneva Conventions can be found in the Fourth Geneva Convention – the Convention which relates to the protection of

¹⁶⁰ Chesterman, S “The spy who came in from the Cold War: Intelligence and international law” [2006] IILJ Working Paper 7.

¹⁶¹ Best, G *War and law since 1945* (1994) 291.

¹⁶² Lieber Code 1863, article 104; Brussels Declaration 1874, article 21; Annex to Hague Convention II 1899, article 31; Annex to Hague Convention IV 1907, article 31.

¹⁶³ *Ibid.*

civilian persons in times of war. Article 5 of this Convention states that a person engaged in activities hostile to the security of the State is not entitled to the rights and privileges under the Convention if bestowing such rights and privileges would prejudice the security of the State. However, they must still be treated with humanity and be accorded the rights of fair and regular trial prescribed by the Convention, if they are tried.¹⁶⁴

The laws laid down in the Lieber Code, the Brussels Declaration and the Hague Regulations have been reiterated and consolidated in the First Additional Protocol. Article 46(1) denies POW status to spies captured in the act of espionage and allows such a person to be “treated as a spy”; article 46(2) asserts that a person is not considered to be a spy if he is acting in the uniform of his armed forces; and article 46(4) states that POW status will not be lost if a spy has rejoined his armed forces prior to capture.

It is evident that the rule that combatants engaged in espionage do not have the right to POW status is well established. There is some difficulty involved in assessing the punishment for people who lose their privileged status but it has “generally been understood that such persons are subject to the death penalty.”¹⁶⁵ However, the fact that spies may not be convicted or sentenced without a trial can be found in the Brussels Declaration and the Hague Regulations although it is not espoused directly by Additional Protocol I. It is undoubtedly a rule which is less well established in international law documents but which has, nevertheless, reached the status of customary international law.¹⁶⁶ Although Additional Protocol I does not directly mention the fact that spies cannot be punished without a trial it does point out that anyone who is not entitled to POW status and does not benefit from more favourable treatment in accordance with the Fourth Geneva Convention, will still enjoy the fundamental guarantees of article 75 of the Protocol.¹⁶⁷ Article 75 includes the guarantee of a fair trial so a spy is entitled to a fair trial. Consequently, the summary execution of spies is prohibited now, just as it was a hundred years ago by the Lieber Code, the Brussels Declaration and the Hague Regulations.

¹⁶⁴ Geneva Convention IV, article 5.

¹⁶⁵ Baxter, *supra* n 158 at 327.

¹⁶⁶ Henckaerts and Doswald-Beck, *supra* n 154 at 389.

¹⁶⁷ Additional Protocol I, article 45(3).

The fact that spies cannot be summarily executed is of importance to this thesis. Despite the fact that they are not lawful combatants and are not entitled to POW status, spies are still entitled to a fair trial, although the outcome of that trial can be execution if it is provided for by the law of the prosecuting State. It is not suggested that spies cannot be executed – they can be. What is important however is the fact that they must first be granted a fair trial. To extrapolate this issue it seems reasonable that if a spy cannot be detained or executed without a trial, nor should other types of combatants who do not satisfy the combatancy criteria.

Civilians as unlawful combatants

The second type of unlawful combatant is civilians who break the rules by participating directly in a conflict. The problem of non-combatants becoming involved in hostilities is by no means a new one. The problem has arisen repeatedly since WWII.¹⁶⁸ If civilians take up arms and take a direct part in hostilities they “remain civilians but become lawful targets of attacks for as long as they do so.”¹⁶⁹ Civilians who participate in a conflict are not acting on behalf of a higher authority with whom peace can be negotiated, and they are therefore not immune to punishment for any belligerent acts they commit. Although civilians, by participating in a conflict lose their privileged status and become lawful targets, they do not lose the protections they have as civilians under the Fourth Geneva Convention if they are captured. Furthermore, they cannot be entitled to POW status but they “retain a claim to certain fundamental guarantees regarding their detention and any judicial proceedings against them.”¹⁷⁰

An example of a civilian being charged with a criminal action due to unlawfully taking part in hostilities can be found in the case of *Mohammed Ali v Public Prosecutor*.¹⁷¹ In this case a member of the Indonesia armed forces operating in Malaysia, wearing civilian clothes, committed sabotage in an office building in Singapore and killed three civilians. The court held that as he was not operating as a member of the Indonesia armed forces at the time and did not comply with

¹⁶⁸ Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 22.

¹⁶⁹ Dörmann, K “The legal situation of unlawful/unprivileged combatants” (2003) 85 *IRRC* 45, 46.

¹⁷⁰ Roberts, supra n 168 at 23.

¹⁷¹ *Mohammed Ali v Public Prosecutor* [1969] 1 AC 430.

article 4A(2) of the Third Geneva Convention he had neither combatant nor POW status and could be tried for murder under Malaysian domestic law.

Unlawful combatants can come from both categories of persons which exist during an armed conflict. That is to say there can be unlawful combatants who are combatants who do not satisfy the combatancy criteria or unlawful combatants who are civilians who take up arms and participate in hostilities. These people are not entitled to POW status but they will retain some fundamental guarantees under international law, such as the right to a trial.

2.3 Combatancy law concluded

The two categories of persons which exist during an armed conflict are civilians and combatants. Both of these groups contain people who break the rules and are known as unlawful combatants. The purpose of this thesis is to determine the rights of Taliban and al-Qaeda members who fought in the 2001 Afghanistan war and are currently detained at the Guantánamo Bay detention facility in Cuba. In order to ascertain what rights they have the first step is to decide whether they should be classified as lawful or unlawful combatants. This is necessary as there is a distinct difference between the rights in international law of lawful and unlawful combatants. Put simply, the rights of lawful combatants are easy to determine because lawful combatants have POW status and the rights of POWs are not controversial. However, if it is concluded that the detainees in question are not POWs, the rights of unlawful combatants – a currently shakier and less well defined territory – will have to be clarified.

The objective of Chapter Two was to determine exactly what is required for a person taking part in an armed conflict to be a lawful combatant. It has been shown that the criteria for lawful combatancy are outlined in article 4A(2) of the Fourth Geneva Convention and that these criteria apply to all participants in an armed conflict. The next step is to apply these criteria to the Taliban and al-Qaeda fighters during the 2001 Afghanistan conflict to ascertain whether they satisfied the criteria.

Chapter Three

Combatancy status – the Taliban and al-Qaeda

*All told, more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let's put it this way – they are no longer a problem to the United States and our friends and allies.*¹⁷²

President George W. Bush

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¹⁷² President George W. Bush, "State of the Union Address" [28 January 2003] <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>>.

Introduction

Chapter Two proved that all combatants in an armed conflict must satisfy the conditions listed under article 4A(2) of the Fourth Geneva Convention in order to obtain lawful combatant status. The purpose of Chapter Three is to apply these criteria to the fighters from the Taliban and al-Qaeda to determine whether they were lawful combatants. Chapter Three begins with a very brief history of Afghanistan in order to introduce the 2001 conflict. Secondly, consideration is given to whether or not the 2001 conflict was one with an international character. This is important as the majority of the Geneva Conventions only apply to international armed conflicts. For non-international conflicts international humanitarian law has fewer protections. Having dealt with these two introductory issues we arrive at the crux of the matter – whether or not the Taliban or al-Qaeda detainees were lawful combatants and therefore entitled to POW status. Finally, the opinion of the US as regards POW status for the detainees is considered. It is interesting to see how the US has chosen to classify the detainees after having discovered what their classification should be under international law.

3.1 A very brief history of Afghanistan

Afghanistan gained its independence from the UK in 1919 when foreign intervention ceased following the last of the Anglo-Afghan wars. From 1933-1973 Afghanistan experienced its longest period of stability under the rule of King Zahir Shah. In 1973 a coup led by the King's brother-in-law brought this stability to an end and another coup followed in 1978 – known as the Great Saur Revolution. In 1979 the Soviet Union occupied Afghanistan resulting in a mass exodus of over 5 million Afghans to refugee camps in Pakistan and Iran. There followed a nine year war between the anti-government Mujahideen insurgents (supported by the US and Pakistan), and the Soviets.¹⁷³ In 1989 the Soviets finally withdrew, leaving Afghanistan with a dangerous leadership vacuum. There was fighting among the Mujahideen factions which, within a year of the Soviet withdrawal, led to a state of warlordism. The country became divided into a number of small fiefdoms led by military commanders or tribal leaders.

¹⁷³ Lansford, T *A bitter harvest. US foreign policy in Afghanistan* (2003) 136.

The Taliban arose out of the midst of this anarchy and confusion and steadily grew in power and accrued territory. Its success was due to its ability to provide stability and order in the midst of chaos and its ranks “grew in direct proportion to the society’s desperate desire for order.”¹⁷⁴ Initially the Taliban was backed by the US as well as Pakistan and Saudi Arabia. However, the order it imposed was based on extremely conservative Islamic principles and employed “repressive and often brutal tactics”.¹⁷⁵ Furthermore, the Taliban became increasingly intertwined with the al-Qaeda terrorist network. Using violent and peaceful methods the Taliban “overran” vast areas of Afghanistan during the early 1990s.¹⁷⁶ Human Rights Watch (HRW) speaks of a ‘scorched earth campaign’ utilised by the Taliban and the summary execution of civilians who remained behind in their homes rather than fleeing from the Taliban’s advance.¹⁷⁷

On September 27, 1996 the Taliban took Kabul, which had been evacuated the previous day by Massoud, the man who was shortly to become the military commander of the forces resisting the Taliban. Out of the groups which resisted the Taliban there emerged the United Front for the Liberation of Afghanistan which became known as the Northern Alliance.¹⁷⁸ The Taliban had managed to establish order in most of the country, “but it was of a fearsome medieval kind.”¹⁷⁹ Women were refused work or an education and were beaten if they showed an arm or wore white; justice was implemented through the chopping off of hands, ears or heads; and public stoning was the punishment for adultery.¹⁸⁰ HRW reports on torture, deaths and massacres of the Hazara ethnic group by the Taliban.¹⁸¹

¹⁷⁴ Tanner, S *Afghanistan. A military history from Alexander the Great to the fall of the Taliban* (2002) 279.

¹⁷⁵ Lansford, supra n 173.

¹⁷⁶ Tanner, supra n 174 at 281.

¹⁷⁷ Docherty, B and Garlasco, M “Off target: The conduct of the war and civilian casualties in Iraq” [2003] <<http://hrw.org/reports/2003/usa1203/>>.

¹⁷⁸ Tanner, supra n 174 at 284.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid, 284.

¹⁸¹ Human Rights Watch, “UN urged to prevent more killings as Taliban offensive continues” [14 September 1998] <<http://hrw.org/english/docs/1998/09/14/afghan1304.htm>>; Human Rights Watch, “Afghanistan: Taliban massacres detailed” [19 February 2001] <<http://hrw.org/english/docs/2001/02/19/afghan282.htm>>.

By 1998 the Taliban had backed the Northern Alliance up into the North of Afghanistan and held 90 percent of the country.¹⁸² Throughout 1998 and 1999 fighting continued and Northern towns frequently changed hands back and forth. But Massoud still defiantly refused to allow the Taliban to claim control of Afghanistan.¹⁸³ By this time the Taliban had established itself as the *de facto* government of Afghanistan.¹⁸⁴ However, Mullah Omar, the leader of the Taliban, had been denied recognition by the international community and would not be considered the legitimate leader as long as the Northern Alliance held out in the North. The only countries which recognised the Taliban as the legitimate government of Afghanistan were Pakistan, Saudi Arabia and the United Arab Emirates.¹⁸⁵ The Taliban had successfully consolidated its rule over almost all of Afghanistan, but it was ostracised by the world community and the military situation in Afghanistan remained at a stalemate. Tanner succinctly sums up the situation:

“Always one of the most forbidding territories in the world, under Taliban rule Afghanistan had also become the most xenophobic, obsessed with pure Islam without concern for what the rest of the world thought.”¹⁸⁶

The situation in Afghanistan was still at an impasse in 2001 when the tragic September 11 terrorist attacks occurred in the US. On September 11, 2001, a small group of men belonging to al-Qaeda carried out simultaneous suicide attacks on the US by hijacking civilian aircraft and crashing them. This resulted in substantial material damage and loss of life by almost 3000 people, the great majority of whom were civilians. The US demanded that the Taliban government hand over Osama bin Laden and al-Qaeda or at least force the terrorist organisation out of the country.¹⁸⁷ The Bush Administration alleged that there was an inexorable link between the Taliban and al-Qaeda and that there would be “no distinction between the terrorists who committed these acts and those who harbour them.”¹⁸⁸ Security Council Resolution 1368 stressed that “those responsible for aiding, supporting or harbouring the perpetrators, organisers and

¹⁸² Dinstein, Y *The conduct of hostilities under the law of international armed conflict* (2004) 47.

¹⁸³ Tanner, *supra* n 174 at 285.

¹⁸⁴ Lansford, *supra* n 173.

¹⁸⁵ Dinstein, *supra* n 182.

¹⁸⁶ Tanner, *supra* n 174 at 286.

¹⁸⁷ Lansford, *supra* n 173 at 161.

¹⁸⁸ President George W. Bush, “Address to the Nation” [11 September 2001] <<http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>>.

sponsors of these acts will be held accountable”.¹⁸⁹ The Taliban refused to negotiate in any meaningful manner over the future of Bin Laden and this accelerated the US drive to war as well as ensured that the US campaign would be against not just al-Qaeda but the Taliban as well.¹⁹⁰ On 6 October 2001, President Bush authorised Rumsfeld to begin the military action later named ‘Operation Enduring Freedom’.¹⁹¹ The military plan of the US was designed to minimise American casualties and leave most of the ground combat to the Northern Alliance forces.

In the course of the armed conflict in Afghanistan the US detained hundreds of persons allegedly associated with either the Taliban or the al-Qaeda terrorist network. Many detainees were transported to the US naval station at Guantánamo Bay, Cuba.¹⁹²

Was there an international armed conflict?

Over the course of history Afghanistan has seen many wars fought on its soil. The most recent one has covered the previous decade and began as a civil war fought between the Taliban rebels and the Northern Alliance – the legitimate government of Afghanistan. In 2001 the US along with a number of other countries, including Australia, New Zealand and the UK, became involved in this war. The question is: Did it become an international war? In order for the majority of the rules of international humanitarian law to be applicable there needs to be an international armed conflict. If it can be shown that the 2001 war in Afghanistan was international the Geneva Conventions and all other international humanitarian laws will apply to it. However, if the conflict was non-international in character then only common article 3 of the Geneva Conventions and the Second Additional Protocol will apply.

Article 2 of all four of the Geneva Conventions states that the Geneva Conventions

¹⁸⁹ Security Council Res. 1368 [12 September 2001].

¹⁹⁰ Lansford, *supra* n 173 at 165.

¹⁹¹ *Ibid*, 166.

¹⁹² Murphy, S “Decision not to regard persons detained in Afghanistan as POWs” (2002) 96 AJIL 475.

“apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.”

It is commonly accepted that all the Geneva Conventions are customary international law, so all parties are bound by the provisions regardless of whether they have signed the Conventions.¹⁹³

It is this author’s opinion that, in order to avoid confusion, it is simplest to employ the concept that the US was in fact fighting two separate conflicts – one against the Taliban and an entirely separate one against al-Qaeda. In practise the two conflicts were not separate and distinct but the legal ramifications are not changed if we utilise this effective legal fiction.

Firstly, consideration will be given to whether the conflict between the US and the Taliban was international in character. It could be suggested that as the Taliban was not the official or *de jure* government of Afghanistan it was not possible for it to be involved in an international armed conflict. The concept of State or diplomatic recognition will be considered and then the question ‘does a State have to be legitimate in order to be able to participate in an armed conflict?’ will be answered. It has been suggested that the criteria required for an entity to be a State are a central structure capable of exercising effective control over a community; a territory which does not belong to any other state; and a community whose members do not owe allegiance to any outside authorities.¹⁹⁴ It has also been suggested that democracy is a developing condition of statehood and that a State will not be recognised as a new State in the international community unless it is democratic: “as far as concerns recognition of new states, democracy is clearly an important, or even the most important, condition.”¹⁹⁵ Conversely, Cassese¹⁹⁶ does not consider democracy to be a criterion of new statehood, but he suggests that recently some states, especially Western states, have begun to require respect for human rights and the rights of minorities and respect for existing international frontiers as conditions of granting recognition.

¹⁹³ Holmes, R *The Oxford Companion to military history* (2001) 353.

¹⁹⁴ Cassese, A *International law* (2nd ed, 2005) 48.

¹⁹⁵ Detter, I *The international legal order* (1994) 73.

¹⁹⁶ Cassese, supra n 194 at 50.

Once an entity fulfils the criteria of statehood the question of international recognition arises. Recognition is not required for a normal democratic change of government but if a dramatic and unconstitutional change occurs in government, such as a revolution or a *coup d'état*, the recognition of other states is required in order to clarify the situation.¹⁹⁷ The act of recognition has no legal effect – it does not confer rights or impose obligations on the new state.¹⁹⁸ However, recognition is politically important as it confirms that the recognising States are ready to initiate international interaction with the new State. Additionally, recognition is legally important as it proves that the recognising States consider that the new entity fulfils all the factual conditions considered necessary for becoming an international subject.¹⁹⁹ For diplomatic recognition to occur it is necessary that the new government have effective control over the majority of the territory of the State and that such control is well established and likely to continue.²⁰⁰

The Taliban government was only recognised as legitimate by three States.²⁰¹ As a State which was not recognised, was Afghanistan able to participate in an international armed conflict? The question is ‘does a State have to be a legitimate State to be able to participate in an international armed conflict?’ The answer to this question is ‘no’. For the Geneva Conventions to apply there does not have to be a formal state of war between two State parties – all that is necessary is that there be an armed conflict. For an armed conflict to exist it is not obligatory for there to be formal recognition of one State by another – therefore the fact that the US and the majority of the world did not recognise the Taliban as the legitimate government of Afghanistan does not change the status of the armed conflict.²⁰² The Geneva Conventions would have minimal legal effect if States could simply escape their obligations by declaring that an adversary State was not the legitimate government of the country. Furthermore, article 4(A)(3) of the Third Geneva Convention confers POW status on members of regular armed forces professing allegiance to a government not recognised by the opposition State. Clearly, the recognition of a government is irrelevant to the determination of POW status.

¹⁹⁷ Detter, *supra* n 195 at 62.

¹⁹⁸ Cassese, *supra* n 194.

¹⁹⁹ *Ibid*, 49.

²⁰⁰ Shaw, M *International law* (5th ed, 2003) 378.

²⁰¹ These were Pakistan, Saudi Arabia and the United Arab Emirates. See Dinstein, *supra* n 182.

²⁰² Human Rights Watch, “Background paper on Geneva Conventions and persons held by US forces” [29 January 2002] <<http://hrw.org/backgrounder/usa/pow-bck.pdf>>.

Having dealt with the issue raised due to the lack of recognition of the Taliban government the question remaining is ‘was the conflict international in character?’ The ICRC Commentary on the Geneva Conventions broadly defines an armed conflict as any difference between two States leading to the intervention of armed forces.²⁰³ There are differing views on whether the conflict in Afghanistan was an international or non-international one. The most logical analysis is clearly summarised by Goldman and Tittlemore:²⁰⁴

“The U.S. intervention on the side of the Northern Alliance against the Taliban effectively ‘internationalised’ the conflict... That intervention satisfied the conditions in common article 2 of the 1949 Geneva Conventions for the existence of an international armed conflict between the United States and Afghanistan.”

Under this view the conflict between the Northern Alliance and the Taliban was a non-international conflict – a civil war. Following the intervention of the US led coalition in October 2001 the conflict became an international conflict and hence all international humanitarian laws applied.

It is also possible to look at the situation in terms of an international armed conflict on the basis of self-defence. On September 11 2001 the US was attacked by al-Qaeda – a terrorist network harboured by Afghanistan – and the US reacted in self-defence. However, a question arises as to whether

“an attack against a small part of the United States, albeit one with devastating consequences for the people in the area hit, justif[ies] an armed response against a whole country, with the aim not only to root out the terrorists but to destroy and remove the effective, though unrecognised government.”²⁰⁵

Dinstein’s²⁰⁶ response to this question is that there is good authority for self-defence in such a situation in the form of the 1941 Japanese attack on Pearl Harbour. This is indeed a good authority for self-defence in reaction to an offensive action by a State. However, in the case of the September 11 attacks the offensive action came from a non-state actor – al-Qaeda. Does the right to react in self-defence still exist? When is a State’s involvement in terrorism sufficient for it to be the legitimate target of the victim State’s reaction in armed self-defence? This concept of State responsibility for ‘State supported terrorism’ is

²⁰³ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 3) (1960) 23.

²⁰⁴ Goldman, R and Tittlemore, B “Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law” [December 2002] <<http://www.asil.org/taskforce/goldman.pdf>> 23-24.

²⁰⁵ Myjer, E and White, N “The twin towers attack: An unlimited right to self-defence” (2002) 7 *Journal of Conflict and Security Law* 5, 8.

²⁰⁶ Dinstein, Y “*Ius ad bellum* aspects of the ‘War on Terrorism’” in Heere, W (ed) *Terrorism and the military. International legal implications* (2003) 20.

currently one of the controversial issues in international law. Whether or not responsibility can be accredited to the State from which the non-state actor has operated will depend upon the amount of involvement the State had with the non-state actor. This is not the place for an in depth consideration of the principles of State responsibility. Whether or not the US acted legally in self-defence²⁰⁷ is actually immaterial to this thesis as the *jus in bello* is not affected by the *jus ad bellum*. As explained earlier,²⁰⁸ regardless of the reasons for going to war, the laws of war must still be followed. What is of importance here is that the US did in fact respond in self-defence to an attack emanating from a non-state actor based in another country. Hence, the ensuing war was one with an international character.

Aldrich²⁰⁹ appears to believe that it is unnecessary to debate the issue, simply stating that the detainees were “captured in the course of an international armed conflict” and making no effort to prove that the conflict was in fact international. Later he states:

“the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan clearly constitute an international armed conflict to which the Geneva Conventions as well as customary international humanitarian law apply.”²¹⁰

Other authors²¹¹ have similarly claimed that the conflict between the US and Afghanistan is an international armed conflict constrained by international humanitarian law under the 1949 Geneva Conventions and Additional Protocol I of 1977.

On the other hand, Wedgwood,²¹² who agrees that in times of conventional warfare there is no doubt that the Hague Conventions, the Geneva Conventions and, to some extent, the Additional Protocols, apply, contends that these rules and

²⁰⁷ For consideration of whether the US acted legally in self-defence see Conte, A *Security in the 21st century: the United Nations, Afghanistan, and Iraq* (2005).

²⁰⁸ See page 39 for an explanation of *jus ad bellum* and *jus in bello*.

²⁰⁹ Aldrich, G “The Taliban, Al Qaeda, and the determination of illegal combatants” (2002) 96 *AJIL* 891.

²¹⁰ *Ibid*, 893.

²¹¹ See Sands, P *Lawless world* (2006) 153; McDonald, A “Defining the war on terror and the status of detainees: comments on the presentation of Judge George Aldrich” (2002) 4 *Humanitares Volkerrecht – Informationsschriften* 206.

²¹² Wedgwood, R “The Supreme Court and the Guantánamo controversy” in Berkowitz, P (ed) *Terrorism, the laws of war, and the constitution* (2005) 159, 164.

conventions were designed for wars between organised States. She is not positive that they ought to be applied to

“a deadly armed conflict against a private network that has eschewed the laws of war and a belligerent Afghan faction that has sheltered al Qaeda’s terrorist operations.”²¹³

The assertion is that the Geneva Conventions are limited to international armed conflicts between two or more High Contracting Parties and cannot apply to illegitimate governments or non-state actors. However, as explained above, legitimising a *de facto* government through State recognition is not necessary in order for an international armed conflict to exist. *De facto* States are able to take part in an international armed conflict and the rules of international humanitarian law relate to the conflict, not to the status of the parties. Furthermore, the Geneva Conventions are customary international law and hence are no longer restricted to ‘High Contracting Parties’ – even actors which are not party to the Geneva Conventions are bound by them.

It has been fairly straightforward to determine that the US and the Taliban were involved in an international armed conflict. It is the conflict between al-Qaeda and the US coalition which is more difficult to translate into the sphere of international humanitarian law. Al-Qaeda clearly did not resemble a State power, whether recognised or not. It was a

“clandestine organisation consisting of elements in many countries...dedicated to advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations.”²¹⁴

Furthermore, the armed conflict between the US coalition and al-Qaeda was not limited to Afghan territory. The question has now become ‘does a war have to be between States (legitimate or illegitimate) in order for international humanitarian law to apply? Or, alternatively, can a non-state actor be a party to an international armed conflict?’

The first point to be made in the consideration of this question is that the laws of war were created to protect people in times of conflict. They benefit both sides in a war and more importantly, are beneficial to the civilians of both sides and are therefore not something to be restricted lightly. They should in fact be applied liberally. Admittedly, as a group of guerrilla fighters, a terrorist network, al-

²¹³ Ibid.

²¹⁴ Aldrich, *supra* n 209 at 893.

Qaeda is unlikely to comply with the laws of war. However, it still behoves the US and other countries to extend the protections associated with international humanitarian law to all opposition forces, not just those with the status of a State.

Furthermore, it is possible to suggest that international humanitarian law does not simply apply between States but ought also to apply to non-state actors if the non-state actor in question is a large, powerful and organised independent group participating in hostilities.²¹⁵ If this is the case then the non-state actor should be considered a party to the conflict and have all the rights and obligations to be found in international humanitarian law. The nature of warfare is changing and hence the nature of international rules on warfare must change also. Al-Qaeda is a “worldwide movement capable of mobilising a new and hitherto unimagined global conflict.”²¹⁶ It has extensive military, training and intelligence gathering capabilities as well as extensive wealth. Its ability to take part in an international armed conflict should not be doubted.²¹⁷

This author contends that both the Taliban and al-Qaeda were parties to an international armed conflict against the US and its allies. The Taliban was the *de facto* government of Afghanistan which is sufficient to make it a State party to an armed conflict. Al-Qaeda, although a non-state actor, was large, powerful and organised enough to also be considered as a party to an international armed conflict.

3.2 Application of combatancy requirements

Having decided that international humanitarian law is applicable to both the Taliban and al-Qaeda the next step is to determine whether the fighters in either of these organisations may have been lawful combatants. Chapter Two detailed exactly what is required under international law in order for a person to be a lawful combatant and those requirements will now be applied to the Taliban and al-Qaeda to determine whether they were in fact lawful combatants. It must be

²¹⁵ Rogers, *A Law on the battlefield* (2004) 32.

²¹⁶ Gunaratna, R *Inside Al Qaeda. Global network of terror* (2002) 1.

²¹⁷ *Ibid*, 8.

noted that the conclusions drawn in this section have been based on the factual information and evidence available, but much of this evidence is rudimentary.

Attention must also be drawn to the fact that this Chapter overlooks the caution given in the introduction that some people captured in relation to the Afghanistan war and incarcerated at Guantánamo may not have any connection whatsoever to the Taliban, al-Qaeda or the war. Prior to a determination on combatancy status it must be ascertained that all Afghanistan battlefield detainees were in fact associated with the war and were not simply arrested due to being in the wrong place at the wrong time. This Chapter proceeds on the assumption that this has been established, and hence only considers the status of people affiliated with the Taliban or al-Qaeda.

3.2.1 The Taliban

Firstly, consideration will be given to the issue of whether the Taliban can be said to have fulfilled the combatancy requirements discussed in Chapter Two. In order to fall under article 4A(1) of the Third Geneva Convention, the Taliban had to constitute the “armed forces of a Party to the conflict.”²¹⁸ Prior to the onset of war in Afghanistan in 2001 the Taliban had controlled the vast majority of Afghan territory for five years. Despite the fact that the Taliban was not recognised as the government of Afghanistan by the UN or most world governments it was, at the very least, the *de facto* government of the country.²¹⁹ As the *de facto* government of a country at war it can certainly be claimed that the Taliban soldiers were the armed forces of a party to the conflict. However, it is more straightforward to classify the Taliban armed forces as falling under article 4A(3) of the Third Geneva Convention. To fulfil this article, the Taliban had to constitute the “regular armed forces who profess allegiance to a government or authority not recognised by the Detaining Power.”²²⁰ This is a lower threshold than that

²¹⁸ Geneva Convention III, article 4A(1).

²¹⁹ Tanner, *S Afghanistan. A military history from Alexander the Great to the fall of the Taliban* (2002) 285.

²²⁰ *Supra* n 218 at article 4A(3).

required by article 4A(1) and it is indisputable that the Taliban are covered by article 4A(3).²²¹

As explained in Chapter Two, despite being part of the regular armed forces of a Party, a fighter must still fulfil the four combatancy requirements in order to be a lawful combatant. To recap, those four requirements found in article 4A(2) are:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognisable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

To determine whether or not members of the Taliban were lawful combatants, and therefore are entitled to be accorded the status of POWs, it must be determined whether they satisfied these four requirements. To this end the four requirements are laid out separately below with evidence to show whether or not the Taliban members, either individually or collectively, can be said to have satisfied each one.

Commanded by a person responsible for subordinates

The first requirement is that armed forces be commanded by a person who is responsible for his or her subordinates. In February 2002 a memo considering the status of Taliban forces under article 4A of the Third Geneva Convention was sent from Assistant Attorney General Bybee to Alberto Gonzales (then White House Counsel, now Attorney General of the US).²²² Bybee stated that the Taliban militia, as a group, failed to meet three of the four requirements under article 4A and were therefore not entitled to POW status. Firstly, Bybee asserted, the Taliban had no organised command structure and that individuals who had declared themselves to be ‘commanders’ “were more akin to feudal lords than military officers.” The Taliban militia “functioned more as many different armed groups that fought for their own tribal, local, or personal interests.”²²³

²²¹ Borelli, S “Casting light on the legal black hole: International law and detentions abroad in the ‘war or terror’” (2005) 87 IRRC 39, 49.

²²² Bybee, J “Memorandum from Assistant Attorney General Jay S. Bybee to The White House Counsel (Alberto Gonzales) on the status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949” [7 February 2002]

<<http://news.findlaw.com/hdocs/docs/torture/bybee20702mem2.html>>.

²²³ Ibid.

Similarly, it has been suggested that there was a lack of organisation of authority, decision-making structures and military discipline within the Taliban due to the number of Afghan forces fighting under local warlords.²²⁴ Furthermore, Bialke²²⁵ asserts that the Taliban were not commanded by a person responsible for his subordinates and nor did they have a viable internal disciplinary system. He states that

“the Taliban command structure was ambiguous, constantly changing among tribal and warlord alliances, with blurred lines between civilian and military authority.”²²⁶

The suggestion that the Taliban regime did not have a sufficient command structure stems from the warlordism inherent in the Taliban regime. However, although a tribal leadership or warlord structure of command may not be a modern style of military command it would seem that there were leaders responsible for their subordinates. There may have been “no clear military structure with a hierarchy of officers and commanders” but there was a central command giving orders to unit commanders.²²⁷ These unit commanders were responsible for “recruiting men, paying them and looking after their needs in the field.”²²⁸ The style of command does not have to have been a traditional Western military one in order to satisfy the first article 4A(2) requirement. Clearly warlords or tribal leaders did have command over Taliban units and there has been no suggestion that anarchy reigned within the Taliban. Hence, it is likely that the Taliban structure did satisfy the first criterion under article 4A(2).

Fixed distinctive sign

The second requirement under article 4A(2) of the Third Geneva Convention is that fighters wear a fixed distinctive sign which is recognisable at a distance. This condition is essential to distinguish opposition fighters from civilians and hence reduce civilian casualties. In the announcement given by the Office of the White House Press Secretary on February 7 2002 regarding President Bush’s determination of the legal status of the Taliban and al-Qaeda detainees, Fleischer

²²⁴ Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 17.

²²⁵ Bialke, J “Al-Qaeda and Taliban unlawful combatant detainees, unlawful belligerency, and the international laws of armed conflict” (2004) 55 *Air Force Law Review* 1, 10.

²²⁶ *Ibid.*

²²⁷ Rashid, A *Taliban* (2001) 99.

²²⁸ *Ibid.*, 100.

explains that the Taliban failed to satisfy the second requirement: “The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan.”²²⁹ The President’s statement implicitly recognises that Taliban combatants were members of Afghanistan’s regular armed forces, but he clearly takes the position, argued for in Chapter Two, that even regular armed forces are required to fulfil the four criteria under article 4A(2) of the Third Geneva Convention. Finding no such compliance, the President, “with the stroke of his pen and citing essentially anecdotal evidence”²³⁰ decided to disqualify all Taliban fighters as privileged combatants, thereby precluding them POW status. Not only did the President not have enough evidence to deny POW status to all Taliban fighters but he grouped them together collectively rather than undertaking an individual determination for each member.

Bybee gives slightly more evidence for the assertion that the Taliban did not wear a fixed distinctive sign. He states:

“the Taliban wore the same clothes they wore to perform other daily functions, and hence they would have been indistinguishable from civilians. Some have alleged that members of the Taliban would wear black turbans, but apparently this was done by coincidence rather than design. Indeed, there is no indication that black turbans were systematically worn to serve as an identifying feature of the armed group.”²³¹

Donald Rumsfeld (then US Secretary of Defence) also emphasised the Taliban’s lack of uniforms or any kind of insignia.²³² He elaborated on this statement given in January 2002 with another presented less than a fortnight later, asserting that the Taliban

“did not wear distinctive signs, insignias, symbols, or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with the civilian non-combatants, hiding in mosques and populated areas.”²³³

Rumsfeld’s comments assert a breach of parts (b) and (d) of article 4A(2), as seeking to blend in with the civilian population is a direct breach of the laws of war.

²²⁹ Fleischer, A “White House Press Secretary announcement of President Bush’s determination re legal status of Taliban and Al Qaeda detainees” [7 February 2002] <<http://www.state.gov/s/1/38727.htm>>.

²³⁰ Goldman, R and Tittlemore, B “Unprivileged combatants and the hostilities in Afghanistan: Their status and rights under international humanitarian and human rights law” [December 2002] <<http://www.asil.org/taskforce/goldman.pdf>> 26.

²³¹ Bybee, *supra* n 222 at 3.

²³² Rumsfeld, D “Secretary Rumsfeld media availability en route to Camp X-Ray” [27 January 2002] <http://www.defenselink.mil/transcripts/2002/t01282002_t0127sd2.html>.

²³³ Rumsfeld, D “DoD news briefing – Secretary Rumsfeld and Gen. Myers” [8 February 2002] <http://www.defenselink.mil/transcripts/2002/t02082002_t0208sd.html>.

It is necessary to consider the statements provided by the Bush Administration as to why Taliban fighters should not be accorded POW status as they are useful in determining whether the Taliban fighters fulfilled the four requirements for combatancy status. However, the people mentioned and quoted thus far in this section are political actors who gave little specific evidence to substantiate their comments and determinations. Aldrich²³⁴ summarises this idea:

“while I certainly do not know whether or not some or all of the members of the Taliban’s armed forces were distinguishable from civilians, either by wearing black turbans or by some other visible sign, it seems insufficient for the United States merely to assert an absence of distinction without adducing evidence, and it appears most unlikely in any event that all units of the Taliban’s armed forces were indistinguishable from civilians.”

What Aldrich is suggesting is that to group all Taliban fighters together as having not had a fixed distinctive sign recognisable at a distance and therefore not being entitled to POW status seems implausible. He suggests it may be better to consider the circumstances of each individual detainee to determine whether they individually fulfilled the four criteria.²³⁵ If there was an insignia or distinctive sign recognisable at a distance which some groups of Taliban fighters wore to distinguish themselves from the civilian population we can consider the individual circumstances of the detainees to determine whether an individual was wearing one. However, if there was not such a sign that was recognised as distinguishing the Taliban armed forces from the civilian population, it must be said that none of the Taliban fulfilled this criteria.

The Taliban may not have been dressed in a traditional military uniform but there are abundant reports that they sported their trademark black turban and if this is enough to distinguish them from the civilian population then it is enough to fulfil the requirement in article 4A(2)(b). Butcher²³⁶ refers to a man “dressed in the Taliban uniform of black turban, long shirt and baggy trousers”; Goldenberg²³⁷ speaks of a teacher “wearing the black plumed turban of the Taliban militia”;

²³⁴ Aldrich, G “The Taliban, Al Qaeda, and the determination of illegal combatants” (2002) 96 *AJIL* 891, 895.

²³⁵ *Ibid.*

²³⁶ Butcher, T “Man with a mission brings Mohammed to the mountain” *Telegraph*, 21 September 2001, <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/09/21/wpak121.xml>>.

²³⁷ Goldenberg, S “The United States wants to kill a whole nation for one man” *The Guardian*, 22 August 1998, <<http://www.guardian.co.uk/alqaida/story/0,,798316,00.html>>.

Gannon²³⁸ mentions the “distinctive Taliban turban”; and Manyon²³⁹ refers to the “Taliban turban” as “the symbol of their fanatically religious government.”

The question which arises is how distinctive does the uniform or ‘fixed distinctive sign recognisable at a distance’ have to be? In 1969 an Israeli military court ruled in the *Kassem*²⁴⁰ case that the wearing of mottled caps and green clothes fulfilled the requirement of distinction as this was not the usual attire of inhabitants of the area in which the Palestinian partisans were operating. Furthermore, it is stated in the US Air Force Pamphlet²⁴¹ that a uniform ensures that combatants are clearly distinguishable but that “less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians.” A traditional military uniform is by no means necessary to fulfil the requirement of a fixed distinctive sign recognisable at a distance.²⁴² It is only the overall requirement of distinction between military personnel and the civilian population which is important from an international humanitarian law perspective.

It is probable the Taliban and Northern Alliance were able to recognise their respective enemy combatants on sight:

“It is known that the Taliban customarily wear distinctive dark turbans, while combatants of the Northern Alliance wear scarves or other distinguishing apparel. Both modes of dress, while perhaps not ideal, are, nonetheless, sufficient to satisfy the principle of distinction under current law.”²⁴³

It is essential for all soldiers, including members of regular armed forces, to wear some kind of fixed distinctive sign which is recognisable at a distance in order to ensure that the principle of distinction is upheld and combatants are easily distinguishable from civilians. The evidence shows that such a ‘fixed distinctive sign’ may have been worn by some members of the Taliban forces as it is commonly accepted that the wearing of a black turban was a distinguishing mark of the Taliban. As there was a sign which could distinguish the Taliban from the

²³⁸ Gannon, K “Al-Qaida and Taliban figures hiding in Pakistan biding time for a comeback” [19 March 2002] *Lawrence Journal-World*
<http://www2.ljworld.com/news/2002/mar/19/alqaida_and_taliban/>.

²³⁹ Manyon, J “Celebrating Taliban departure” [13 November 2001] *Online News Hour*,
<http://www.pbs.org/newshour/bb/asia/afghanistan/kabul_11-13.html>

²⁴⁰ *Kassam* case, Israel (Military Court at Ramallah), 13 April 1969. Reproduced in Sassòli, M and Bouvier, A (eds) *How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law* (1999) 806-811.

²⁴¹ US Department of the Air Force, “Pamphlet” (1976), para 3.

²⁴² Pfanner, T “Military uniforms and the law of war” (2004) 86 *IRRC* 93, 117.

²⁴³ Goldman and Tittlemore, *supra* n 230 at 28.

civilian population it must be asked of each individual member whether they wore that sign. It is not sufficient to decide that in general the Taliban did not wear a uniform and therefore cannot have been lawful combatants. Provided there is a collective sign which is commonly agreed to distinguish a certain armed force from civilians, the wearing of that sign is an individual criterion.

In summary, there was a distinctive sign which was recognised as distinguishing the Taliban from the civilian population – the black turban. Whether or not this sign was worn should have been determined individually for each soldier.

Carried arms openly

The third condition is that fighters carry their weapons openly in order to distinguish themselves from civilians and hence protect civilians from attack. In considering the requirement of carrying arms openly Bybee, as US Assistant Attorney General, admitted that the Taliban did in fact do so. However, he asserted that this is of little significance as “many people in Afghanistan carry arms openly.”²⁴⁴ He suggested that carrying arms openly was not sufficient to distinguish the Taliban from civilians and that the Taliban

“never attempted to distinguish themselves from other individuals through the arms they carried or the manner in which they carried them.”²⁴⁵

It is true that the requirement of carrying weapons openly is in order to distinguish members of the armed forces from the civilian population. If the civilian population itself is in the habit of carrying weapons openly this third requirement is unable to fulfil its stated purpose but members of the armed forces should not consequently be penalised. The duty is on the soldier to distinguish him or herself from civilians. However, if a Taliban member can show that they were wearing the black turban and carrying their arms openly this is enough to fulfil the criteria regardless of the proclivity of the civilian population to carry arms.

²⁴⁴ Bybee, J “Memorandum from Assistant Attorney General Jay S. Bybee to The White House Counsel (Alberto Gonzales) on the status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949” [7 February 2002]

<<http://news.findlaw.com/hdocs/docs/torture/bybee20702mem2.html>> 3.

²⁴⁵ Ibid.

As with the second requirement, this requirement must be fulfilled on an individual basis. It must be determined of each individual detainee whether they did in fact carry their arms openly.

Conducted operations in accordance with the laws of war

The fourth and final condition which must be satisfied in order for a fighter to be a lawful combatant, and therefore a POW on capture, is that all operations were conducted in accordance with the laws of war. In his February 2002 memo Bybee mentions this requirement, submitting that the Taliban

“regularly engaged in practices that flouted fundamental international legal principles. Taliban militia groups have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities. They have killed for racial or religious purposes. Furthermore, [the Department of Defence] informs us of widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war.”²⁴⁶

Presumably Bybee, as Assistant Attorney General, realised that assertions of ‘widespread reports’ and anecdotal evidence would be inconclusive in a court of law.

Rumsfeld asserts that the Taliban were “tied tightly at the waist to al Qaeda”²⁴⁷ and the announcement given by the Office of the White House Press Secretary in February 2002 contains the allegation that the Taliban

“have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al-Qaeda.”²⁴⁸

While it may be true that there were close links between the Taliban and al-Qaeda, providing sanctuary to or ‘harbouring’ a terrorist group is not the same as the Taliban failing to conduct its own military operations in accordance with international humanitarian law.²⁴⁹ The amount of responsibility which could be imputed to the Taliban would depend on how involved the Taliban was with al-Qaeda’s plans.

²⁴⁶ Ibid.

²⁴⁷ Rumsfeld, supra n 232.

²⁴⁸ Fleischer, A “White House Press Secretary announcement of President Bush’s determination re legal status of Taliban and Al Qaeda detainees” [7 February 2002] <<http://www.state.gov/s/1/38727.htm>>.

²⁴⁹ Aldrich, supra n 234.

Rumsfeld also stated that the Taliban,

“far from seeking to distinguish themselves from the civilian population of Afghanistan, sought to blend in with the civilian non-combatants, hiding in mosques and populated areas.”²⁵⁰

The laws of war place the obligation on armed forces to distinguish themselves from the civilian population – seeking to blend in with civilians is a direct breach of the laws of war. However, like the second and third criteria, the fourth criterion is not collective and has to be determined on an individual basis. The commission of war crimes by one member of an armed force cannot automatically disqualify every member of that armed force from entitlement to lawful combatant, and therefore POW, status. It is necessary for the US to show that individually members of the Taliban did not conduct their operations in accordance with the laws and customs of war.

Summary

At a conference in London in early 2002, US Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, summarised the US position as follows:

“a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognisable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status.”²⁵¹

If this statement were to be supported by evidence on an individual basis and proved beyond a reasonable doubt then assuredly the Taliban detainees would not be entitled to POW status as the combatancy criteria would not have been fulfilled. However, evidence is scant.

It has been difficult to verify whether the Taliban fulfilled the four criteria. Obviously, without evidence, a conclusive answer to the question as to whether the Taliban should be accorded POW status cannot be given. However, from the evidence which is available it appears that in some cases Taliban members did wear a distinguishing mark (the black turban) and carry their arms openly. It is

²⁵⁰ Rumsfeld, supra n 233.

²⁵¹ Prosper, P “Status and treatment of Taliban and al-Qaida detainees” [20 February 2002] <http://www.state.gov/s/wci/us_releases/rm/2002/8491.htm>.

possible that the command structure in place was sufficient; and some Taliban members may have upheld the laws of war. That is to say, it is possible that some Taliban members did in fact satisfy all four of the criteria for lawful combatant status. What is certain is that an individual determination for each Taliban detainee at Guantánamo Bay needs to be carried out by the US to determine whether they are entitled to POW status. These individual determinations should be executed under article 5 of the Third Geneva Convention.²⁵² A rudimentary collective determination that no Taliban members were lawful combatants is highly unsatisfactory and inadequate.

3.2.2 al-Qaeda

Having considered the status of Taliban fighters, separate deliberation must be given to whether al-Qaeda members satisfied the four conditions under article 4A of the Third Geneva Convention to determine whether any members of al-Qaeda could have been entitled to POW status. As previously discussed, in order to be lawful combatants the al-Qaeda members needed to fulfil one of the six options under article 4A of the Convention while they were fighting in Afghanistan. The only options which might be applicable are articles 4A(1) and (2).

To satisfy article 4A(1) al-Qaeda would have to have been militia or volunteer forces ‘forming part of’ the Taliban armed forces; and under 4A(2) they would have had to be militia or volunteer forces ‘belonging to’ the Taliban. As previously discussed, the four criteria listed under article 4A(2) apply to regular armed forces or militia or volunteer forces under article 4A(1) *and* to militia and volunteer forces covered by article 4A(2). It is clear therefore that in order for al-Qaeda fighters to be treated as lawful combatants it needs to be proved that they satisfied the four combatancy criteria. Furthermore, it would need to be proved that al-Qaeda fulfilled the requirement of either “forming part of”²⁵³ the Taliban armed forces or “belonging to”²⁵⁴ the Taliban armed forces. If it can be shown that al-Qaeda did not comply with the four combatancy obligations it is

²⁵² Supra page 43.

²⁵³ Geneva Convention III, article 4A(1).

²⁵⁴ Ibid, article 4A(2).

unnecessary to deal with the semantics involved in determining whether or not they ‘formed part of’ or ‘belonged to’ the Taliban armed forces.

Commanded by a person responsible for subordinates

To satisfy the first criterion al-Qaeda forces must have been commanded by a person responsible for his or her subordinates. It has been submitted that it is uncertain that al-Qaeda forces were sufficiently organised to satisfy this requirement, and that it is highly unlikely that they had an internal disciplinary system in place enforcing the laws of war.²⁵⁵ Similarly, it has been suggested that the cell structure of the al-Qaeda network “belies the notion of a chain of command.”²⁵⁶ However, like the warlord structure of the Taliban, the cell structure of the al-Qaeda network does seem to be effective for conducting operations. Al-Qaeda is coordinated

“via a vertical leadership structure that provides strategic direction and tactical support to its horizontal network of compartmentalised cells and associate organisations.”²⁵⁷

It could not be said that al-Qaeda has no leaders and is an anarchical society so it is possible that the structure does conform to the requirement of being commanded by a person responsible for his subordinates.

Fixed distinctive sign

Secondly, al-Qaeda forces would have needed to be wearing a fixed distinctive sign recognisable at a distance to claim POW status. It is unlikely that al-Qaeda had any form of fixed recognisable sign or managed to distinguish themselves adequately from non-combatants.²⁵⁸ While it is necessary for each individual to prove they wore a uniform and upheld the principle of distinction it is not possible to do this if there was not an overall sign, symbol or uniform which was recognised as distinguishing al-Qaeda from the civilian population. As a terrorist network al-Qaeda did not wish to distinguish themselves from the civilian population and cultivated the anonymity which blending in with civilians could

²⁵⁵ Cryer, R “The fine art of friendship: *Jus in bello* in Afghanistan” (2002) 7 *Journal of Conflict and Security Law* 37, 71.

²⁵⁶ Dorf, M “What is an ‘unlawful combatant,’ and why it matters: The status of detained Al Qaeda and Taliban fighters” [23 January 2002] <<http://writ.news.findlaw.com/dorf/20020123.html>>.

²⁵⁷ Gunaratna, R *Inside Al Qaeda. Global network of terror* (2002) 54.

²⁵⁸ Cryer, supra n 255.

give them. Terrorist attacks such as the September 11 hijackings could not be successfully accomplished in uniform. There is no evidence to show that there was an acknowledged al-Qaeda uniform or sign, and hence no al-Qaeda members can have been wearing it.

Carried arms openly

The third requirement under article 4A(2) requires soldiers to carry arms openly in order to distinguish themselves from the civilian population. As a terrorist network, al-Qaeda members deliberately attempted to blend into the civilian population²⁵⁹ – violating the requirements of having a fixed distinctive sign and of carrying arms openly.

Conducted operations in accordance with the laws of war

The fourth criterion requires that all operations be conducted in accordance with the laws of war. In 2002 the White House Press Secretary issued a statement including the assertion that al-Qaeda was a ‘terrorist’ group.²⁶⁰ This is significant as terrorism is illegal under international law – hence, people who commit acts of terrorism are not lawful combatants and cannot be entitled to POW status as they have breached the fourth combatancy requirement – that of conducting operations in accordance with the laws and customs of war. However, this requirement is an individualistic one and it would need to be shown that each individual al-Qaeda detainee had breached it rather than grouping them together collectively as ‘terrorists’.

Summary

As with the Taliban it has been difficult to find evidence on the actions of al-Qaeda as regards the four criteria. However, for lawful combatant status to accrue all four criteria must be satisfied. Ergo, if it can be sufficiently proved that one criterion was breached then there is no entitlement to lawful combatant or POW status. It seems clear that al-Qaeda did not have an acknowledged uniform or distinctive fixed sign with which they could generally be identified and

²⁵⁹ Dorf, supra n 256.

²⁶⁰ Fleischer, supra n 248.

distinguished from the civilian population. If there was no overall sign which was recognised as al-Qaeda's uniform then an individual determination is not necessary – clearly no al-Qaeda member could have been wearing it. Therefore, it is fair to say that no al-Qaeda detainees were lawful combatants and consequently they are not entitled to POW status.

3.3 Application of combatancy requirements summarised

It has been shown that it is possible some members of the Taliban may have fulfilled the four combatancy criteria. As the second, third and fourth combatancy criteria are individual conditions it is necessary for the US to carry out an individual consideration for each Taliban detainee to determine whether, individually, they may be entitled to POW status. It is possible that some of the Taliban detainees may in fact be POWs and they should be treated as such.

As regards al-Qaeda it has been proved that it is impossible for any al-Qaeda detainees to have been lawful combatants and therefore none of them are entitled to POW status.

The US conclusion

Having determined the legal combatancy status of the Taliban and al-Qaeda detainees, it will be interesting to examine the position the US has taken and the possible reasons for this stance. The Office of the White House Press Secretary gave an announcement on 7 February 2002 regarding President Bush's determination of the legal status of the Taliban and al-Qaeda detainees.²⁶¹ This announcement clarified the position of the US on some of the questions surrounding the detainees. In essence, President Bush decided that:

- (1) The Third Geneva Convention was applicable to the armed conflict in Afghanistan between the Taliban and the US;
- (2) However, the Taliban had not fulfilled the requirements of article 4 of the Convention so were not entitled to POW status;

²⁶¹ Ibid.

- (3) The Convention was not applicable to the armed conflict in Afghanistan between al-Qaeda and the US;
- (4) Nevertheless, all captured Taliban and al-Qaeda personnel were to be treated humanely, consistently with the general principles of the Third Geneva Convention, and delegates of the ICRC may privately visit each detainee.

The question which this provokes is ‘was there any benefit to the US in deciding to withhold POW status from captured members of the Taliban and al-Qaeda?’ There are two plausible advantages to the US. The first relates to the conditions of detention – article 17 of the Third Geneva Convention states that POWs are only obliged to give name, rank, date of birth and personal or serial number. This rule dates back to the 1899 Hague Conventions and places a strict limit on the right of the Detaining Power to interrogate combatants. As the US wished to obtain considerably more information than this from the detainees it allowed itself to do so by not classifying the captured fighters as POWs.²⁶²

The second way the US derived benefit due to not according POW status to the Taliban and al-Qaeda detainees is that article 102 of the Third Geneva Convention requires that any sentence of a POW must be pronounced

“by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power”.²⁶³

It has been asserted that US officials feared such procedures would provide opportunities for al-Qaeda suspects and their lawyers to prolong legal processes and attract publicity.²⁶⁴ Furthermore, there were concerns that it would be difficult to produce evidence which would meet the high standards of admissibility and proof and that al-Qaeda may learn in what areas it was vulnerable to intelligence gathering.²⁶⁵ Therefore, categorising Taliban and al-Qaeda detainees as unlawful combatants means the US was not obliged to prosecute them under the same procedures as were used for members of their own armed forces.

²⁶² Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 24.

²⁶³ Geneva Convention III, article 102.

²⁶⁴ Roberts, *supra* n 262.

²⁶⁵ *Ibid.*

In a memo to President Bush on January 25, 2002, Alberto Gonzales suggests a third reason for the blanket decision not to apply the Third Geneva Convention to any of the Taliban or al-Qaeda detainees.²⁶⁶ The determination that the Convention does not apply “eliminates any argument regarding the need for case-by-case determinations of POW status.”²⁶⁷ Clearly determining that none of the detainees qualify for POW status in one all-embracing statement prevents the unnecessary expenditure of time and money on individual determinations of POW status.

It is apparent that there were some significant policy reasons behind the US decision not to classify the Taliban and al-Qaeda fighters as POWs and it was in the best interests of the US not to do so. However, this is an unacceptable reason for breaching international law. The US needs to make individual POW status determinations for the Taliban members held at Guantánamo Bay to decide whether each individual is entitled to POW status or not.

²⁶⁶ Gonzales, A “Memorandum for the President: Decision re application of the Geneva Convention on Prisoners of War to the conflict with al-Qaeda and the Taliban” [25 January 2002] <<http://msnbc.msn.com/id/4999148/site/newsweek/>>.

²⁶⁷ Ibid.

Chapter Four

The rights of unlawful combatants

*Those suspected of being terrorists are not outside the law, nor do they forfeit their fundamental rights by virtue of that fact.*²⁶⁸

Baron Goldsmith

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²⁶⁸ Dyer, C “Democracies must respect terror suspects’ rights says Attorney General” *The Guardian*, 19 September 2003, <<http://www.guardian.co.uk/terrorism/story/0,12780,1045304,00.html>>

Introduction

It has been shown in Chapter Three that al-Qaeda fighters and probably many Taliban fighters did not satisfy the requirements of lawful combatancy and consequently were not entitled to the privilege of POW status. However, the determination that they were unlawful combatants does not place them in legal limbo; even unlawful combatants must be accorded basic human rights as well as a number of rights under international humanitarian law. It has been suggested that

“a strong argument can be made that, whether or not they are formally entitled to such rights, they should have certain of the basic safeguards accorded to PoWs.”²⁶⁹

The Inter-American Commission on Human Rights stated:

“no person under the authority and control of a State, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights”.²⁷⁰

There are a number of international documents where one can find evidence of rights which exist irrespective of combatant status. Initially consideration will be given to the rights of unlawful combatants which can be found under international humanitarian law. The Fourth Geneva Convention – the Convention Relative to the Protection of Civilian Persons in Time of War – contains a number of provisions that can conceivably be applied to unlawful combatants. As previously discussed, there are only two categories of persons – if a person is not a lawful combatant he or she is a civilian and therefore ought to be protected by the Fourth Geneva Convention. However, should it be thought that the Geneva Conventions ought not to apply to al-Qaeda, common article 3 will apply. Article 3, common to all four Geneva Conventions, applies to armed conflicts which are not of an international character and provides evidence of rights which may be applicable to unlawful combatants to whom the majority of the Geneva Conventions do not apply. Furthermore, article 75 of the First Additional Protocol gives a number of universally applicable minimum guarantees which prevent any person slipping between the legal cracks and being treated as though they have no rights whatsoever.

²⁶⁹ Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 23.

²⁷⁰ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 *ILM* 673, 677.

Secondly, the rights unlawful combatants have under international human rights law must be taken into account. International human rights law is applicable during times of armed conflict but during such times international humanitarian law will take precedence in the event of an inconsistency or contradiction. Under human rights law unlawful combatants are entitled to a number of fundamental human rights which can be found in the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

The majority of this Chapter is organised on the basis of the different international law documents rather than on the basis of the different rights owed to unlawful combatants. By structuring the rights in this way it will be more straightforward to prove that the conventions drawn upon are applicable to the detainees. Certain fundamental rights are included in both international humanitarian law and human rights documents leading to some necessary repetition in the following discussion, which highlights the themes running through the documents.

4.1 International humanitarian law

In this section the rights unlawful combatants have under international humanitarian law are described. The Fourth Geneva Convention is the Civilians Convention and it contains a number of rights which are applicable to unlawful combatants. It is undoubtedly applicable to the Taliban fighters but whether or not it applies to al-Qaeda is a more controversial issue and hence this point forms part of the introduction to this section. Should it be thought that the Fourth Geneva Convention does not apply to al-Qaeda, common article 3 of the Geneva Conventions will apply instead. Although it is important to determine which of these documents applies, the rights under them are fairly similar. Furthermore, article 75 of Additional Protocol I bestows minimum guarantees upon both the Taliban and al-Qaeda fighters.

It is commonly accepted that the Geneva Conventions are customary international law, so all States are bound by the provisions whether or not they have signed the

Conventions.²⁷¹ I attempted to establish if the Taliban or al-Qaeda had made any comments as to whether they believed the Geneva Conventions applied to them. However, I was unable to find any statements made by either group as to their intentions or beliefs regarding the Conventions. It is indisputable that the Taliban is bound by the Geneva Conventions. Afghanistan is a signatory to the Conventions and the Taliban was the *de facto* government of Afghanistan at the time of the conflict. Although it was not the Taliban government which signed the Conventions, a treaty binds successor states “by virtue of attaching to the territory itself and establishing a particular regime that transcends the treaty.”²⁷² Hence, the Taliban is bound, despite not having been the government which signed the Conventions.

However, al-Qaeda is not a State. This author contends that even a non-state-actor, provided it is sufficiently powerful and organised, is bound by the Geneva Conventions when it takes part in an international armed conflict. Al-Qaeda was acting in the international arena as a Party to an international armed conflict and hence the rights and obligations of the Conventions should be applicable to them. The Geneva Conventions and international humanitarian law are not intended to exclude non-state-actors simply by virtue of not having status as a State.

However, this assertion, that the Geneva Conventions apply to non-state-actors, is controversial and hence an alternative has been provided. If it is thought that the Geneva Conventions, in general, are not applicable to non-state actors then common article 3 of the Geneva Conventions must apply. This is explained in depth below.²⁷³

4.1.1 Martens Clause

The Martens Clause is found in the preamble to the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land. This clause gives a broad, overarching principle for cases not covered by other agreements. The ICJ in its 1996 advisory opinion on nuclear weapons referred to the clause, clearly

²⁷¹ Holmes, R *The Oxford Companion to military history* (2001) 353.

²⁷² Shaw, M *International law* (5th ed, 2003) 885.

²⁷³ *Infra* page 89.

deeming it to still be in force.²⁷⁴ Furthermore, a modern version of the Martens Clause, comparable in all material respects to the original, can be found in article 1 of the First Additional Protocol, which reads as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

The Martens Clause performs the function of a minimum guarantee, ensuring that there will be no situations when the principles of customary international law are inapplicable. Moreover, the principles of humanity and the dictates of public conscience are referred to. These concepts are impossible to define but they serve to emphasise the point that even during times of war there are some actions which are unacceptable and no legal black hole devoid of all rights can exist.

4.1.2 Geneva Convention IV

The first international humanitarian law document in which the rights of unlawful combatants can be found is the Fourth Geneva Convention. Unlawful combatants are not entitled to POW status and are therefore not covered by the Third Geneva Convention which is the Convention Relative to the Treatment of Prisoners of War. The Fourth Geneva Convention is the Convention Relative to the Protection of Civilian Persons in Time of War. Article 4 of this Convention explains that anyone who is detained during an armed conflict and is not covered by one of the other Geneva Conventions will be entitled to the rights of the Fourth Convention, provided certain conditions are met.

Article 4 of the Fourth Convention is an all-embracing definition of who is entitled to be a ‘protected person,’ with some exceptions. Everybody who is not protected by one of the other three Geneva Conventions is covered by the Fourth Convention provided they are not:

- Nationals of a State not party to the Convention;
- Nationals of the State in whose hands they are;
- In the hands of a party with which normal diplomatic representation exists.²⁷⁵

²⁷⁴ *Legality of the Threat or Use of Nuclear Weapons* [1996] 1 ICJ Reports 226, paras 78-9.

Those are the only exceptions. Unlawful participation in hostilities is not listed as an exception to the all-encompassing definition and is therefore not enough to remove a person from the protection scheme under the Fourth Geneva Convention.

It could be suggested that the first listed exception is irrelevant as the Geneva Conventions have reached the status of customary international law and are binding on all States whether or not they are a party to them.²⁷⁶ The second exception to protection under the Convention is for persons who are nationals of the detaining power. This exception upholds a recognised principle of international law – that international law does not interfere in a State's relations with its own nationals.²⁷⁷ Therefore, any US citizens detained by the US at Guantánamo Bay, or any other detention facility, are not entitled to the Convention's protections.²⁷⁸ Furthermore, the third exception excludes people who are from a State with which normal diplomatic representation exists. Clearly then, the Fourth Geneva Convention does not apply to nationals of a neutral or co-belligerent State because normal diplomatic relations will exist between this State and the detaining power. Therefore, al-Qaeda suspects held at Guantánamo Bay who are nationals of, for example, the UK, Pakistan, Australia²⁷⁹ or Algeria are

²⁷⁵ Geneva Convention IV, article 4.

²⁷⁶ Holmes, *supra* n 271.

²⁷⁷ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 4) (1958) 46.

²⁷⁸ The case of *Hamdi v Rumsfeld* (542 U.S. 507, 2004) dealt with a US citizen, raised in Saudi Arabia, who was captured in Afghanistan in 2001 and alleged to have been affiliated with a Taliban military unit. Hamdi was initially held at the Guantánamo Bay Naval Base but was later transferred to a detention centre on US soil when it was realised he was a US citizen. The judgement considered the process constitutionally due to a citizen disputing his or her enemy combatant status. This question could only be answered by balancing the individuals' interest to be protected from unjustified deprivation of liberty against the government's interest to detain those who have fought with the enemy without being restricted by undue burdens or complicated procedures. The Supreme Court did not accept the proposal of the government as the risk of erroneous deprivation of a detainee's liberty was unacceptably high; nor the proposal upheld by the district court, as the procedural safeguards suggested were unwarranted in light of the burdens they would impose on the military (p2648). The proper balance as outlined by Justice O'Connor requires that:

“a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. [...] At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict” (p2648).

The deliberate reference to a 'citizen-detainee' means that it is possible that this case will be distinguished from cases involving foreign enemy combatants due to the fact that it dealt with a US citizen.

²⁷⁹ David Hicks is an Australian citizen who was captured in Afghanistan, allegedly fighting for the Taliban, in December 2001 and has been held by the US government at Guantánamo Bay ever

excluded from most protections under the Convention. They would be entitled only to the more limited protection provided by Part II, as well as the human rights entitlements discussed below.

However, any Taliban or al-Qaeda members who are nationals of Afghanistan do fall under the article 4 definition – they are not entitled to protection under the other three Geneva Conventions and do not satisfy any of the exclusion clauses so must be ‘protected persons’ under the Fourth Convention. It is the rights of these people this thesis intends to uncover.

Article 5 of the Convention is entitled ‘Derogations’ and paragraph 1 reads as follows:

“Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.”²⁸⁰

Paragraph 3 requires that even individuals suspected of or engaged in activities hostile to the security of the State shall

“be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.”²⁸¹

Furthermore, they must be granted the full rights under the Fourth Convention “at the earliest date consistent with the security of the State”.

The authoritative ICRC commentary on the Geneva Conventions points out that the security of the State could not be a conceivable reason for denying protected persons the benefit of some provisions of the Fourth Convention.²⁸² The commentary only gives two examples – articles 37²⁸³ and 38²⁸⁴ – but there are

since. There has been much controversy about his status but his case will not be considered in this thesis. For more information see <<http://www.fairgofordavid.org/>>.

²⁸⁰ Geneva Convention IV, article 5(1).

²⁸¹ Ibid, article 5(3).

²⁸² Pictet, supra n 277 at 56.

²⁸³ Article 37 requires that protected persons who are detained be treated humanely.

²⁸⁴ Article 38 lists some rights which must be granted to protected persons:

- “(1) They shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.

many more articles which may be considered in the same category – as rights which would not affect the security of the State. For example, derogation from the following articles could not be justified with reference to the security of the detaining State: protected persons are entitled to respect for their person, honour and religious convictions and must be humanely treated;²⁸⁵ they may make application to the ICRC or other organisations;²⁸⁶ no physical coercion or punishment may be exercised against protected persons;²⁸⁷ protected persons shall receive adequate medical care;²⁸⁸ protected persons are entitled to practise their religion and receive spiritual guidance;²⁸⁹ detainee quarters must be hygienic, adequately heated, lighted and ventilated, sufficiently spacious and detainees must be allocated suitable bedding;²⁹⁰ detainees must receive sufficient daily food

(5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.”

²⁸⁵ Geneva Convention IV, article 27(1):

“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”

²⁸⁶ Ibid, article 30:

“(1) Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

(2) These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.”

²⁸⁷ Ibid, article 31:

“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”;

and article 32:

“The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.”

²⁸⁸ Ibid, article 38(2):

“they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned”;

article 81:

“Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health”;

and article 92:

“Medical inspections of internees shall be made at least once a month.”

²⁸⁹ Ibid, article 38(3):

“they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith”;

and article 86:

“The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.”

²⁹⁰ Ibid, article 85:

“(1) The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war...

rations and drinking water;²⁹¹ adequate clothing;²⁹² and when detainees are transferred such transfer must be effected humanely.²⁹³ Derogating from any of these articles could not be justified by asserting that upholding them would be prejudicial to the security of a State as fulfilling these rights does not in any way affect the security of the detaining State. Hence, all these rights must be accorded to the Guantánamo detainees.

Furthermore, article 136 imposes an obligation on the State to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks. A party cannot derogate from this article by citing article 5 as this is not a right or privilege held by the protected person, but an obligation placed on the Detaining Power.²⁹⁴

An argument could be made for derogation from the following articles with the justification that upholding them may prejudice the security of the detaining State: the right of protected persons to correspond with their families;²⁹⁵ the right to

(2) The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.”

²⁹¹ Geneva Convention IV, article 89:

“(1) Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees...

(3) Sufficient drinking water shall be supplied to internees.”

²⁹² *Ibid*, article 90:

“When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.”

²⁹³ *Ibid*, article 127:

“(1) The transfer of internees shall always be effected humanely...

(2) The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer...”

²⁹⁴ *Ibid*, article 136:

“(1) Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

(2) Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned.”

²⁹⁵ *Ibid*, article 25:

“(1) All persons in the territory of a Party to the conflict...shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them...

(3) If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month”;

receive visitors,²⁹⁶ and the right to be informed of their transfer to a new facility.²⁹⁷ However, the ICRC commentary emphasises “most strongly” that derogations from the protections of the Fourth Geneva Convention under article 5

“can only be applied in individual cases of an exceptional nature, where the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion.”²⁹⁸

There have been no such ‘specific charges’ made against most of the detainees at Guantánamo Bay and hence derogations under article 5 appear to be inappropriate at this stage.

In considering derogations under article 5 the majority of applicable rights under the Fourth Geneva Convention have already been mentioned. However, there are a few more which must be explicitly outlined. Article 79 of the Convention specifically relates to internment and requires that protected persons not be interned except in accordance with articles 41, 42, 43, 68 and 78. Articles 68 and 78 relate only to persons detained by an Occupying Power so are irrelevant here. Article 41 provides that measures of control more severe than assigned internment, in accordance with articles 42 and 43, must not be used.²⁹⁹ Articles 42 and 43 contain rights which are central to this thesis. Article 42 asserts that protected persons may only be interned “if the security of the Detaining Power makes it absolutely necessary”. This means that the detention of each individual Taliban or al-Qaeda member at Guantánamo Bay must be justified as ‘absolutely necessary’ to the security of the US for it to be lawful. Article 43 requires that a court be entitled to consider detention decisions and that they be periodically

and article 106:

“As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment...every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card...informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.”

²⁹⁶ Geneva Convention IV, article 116:

“Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.”

²⁹⁷ Ibid, article 128:

“In the event of transfer, internees shall be officially advised of their departure and of their new postal address.”

²⁹⁸ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 4) (1958) 58.

²⁹⁹ *Supra* n 296, article 41:

“Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.”

reviewed.³⁰⁰ Article 133 also relates to detention requirements and considers the cessation of detention. This article provides that detention must cease “as soon as possible after the close of hostilities.”³⁰¹

Article 143 of the Fourth Geneva Convention affirms the right of the ICRC to visit detainees protected by the Convention. ICRC delegates must be able to access detention facilities and interview detainees without witnesses.³⁰² These visits can only be prohibited for reasons of “imperative military necessity” and if they are prohibited it must be an “exceptional and temporary measure.”³⁰³ The overall rule has been stated as:

“In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families.”³⁰⁴

The recent ICRC textbook on customary international humanitarian law asserts that State practice has established this rule as a norm of customary international law.³⁰⁵ Furthermore, the UN Security Council has adopted a number of resolutions requesting or demanding that the ICRC be granted unimpeded and continued access to camps, prisons and detention centres. Examples of such resolutions include the former Yugoslavia (1992);³⁰⁶ Tajikistan (1994);³⁰⁷ and Bosnia and Herzegovina (1995).³⁰⁸ In two 1995 resolutions on the conflict in the former Yugoslavia the Security Council reiterated “its strong support for the efforts of the [ICRC] in seeking access to...persons detained” and condemned

“in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access.”³⁰⁹

These resolutions show that the Security Council considers providing access to the ICRC to be a rule of international law.

³⁰⁰ Geneva Convention IV, article 43:

“Any protected person who has been interned...shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment...is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.”

³⁰¹ *Ibid*, article 133.

³⁰² *Ibid*, article 143(2) and (5).

³⁰³ *Ibid*, article 143(3) and (5).

³⁰⁴ Henckaerts, J and Doswald-Beck, L *Customary international humanitarian law. Volume 1: Rules* (2005) 442.

³⁰⁵ *Ibid*.

³⁰⁶ Security Council Res. 771 [13 August 1992], section 4.

³⁰⁷ Security Council Res. 968 [16 December 1994], section 10.

³⁰⁸ Security Council Res. 1010 [10 August 1995], section 1.

³⁰⁹ Security Council Res. 1019 [9 November 1995], preamble and section 2; UNSC Res. 1034 [21 December 1995], preamble and sections 2-5.

The ICRC has been granted access to the detainees at Guantánamo Bay since January 2002.³¹⁰ However, the ICRC keeps the majority of its findings and observations about the conditions of detention and the treatment of detainees confidential. Findings are discussed directly with the authorities in charge but the ICRC generally does not comment publicly. The ICRC prefers to work outside the spotlight of media attention in order to ensure that it is able to obtain and maintain access to detainees around the world.³¹¹

It is clear that the Fourth Geneva Convention does apply to, at the very least, the Taliban and al-Qaeda detainees held at the Guantánamo Bay detention centre who are Afghani nationals. The main right safeguarded by the Convention for these people is a right to basic humane treatment during detention.³¹² Furthermore, the Convention requires that detention be ‘absolutely necessary’ and be periodically reviewed by an appropriate court. Many of the Taliban and al-Qaeda members detained at Guantánamo Bay have not had their detention considered by an appropriate court and it is certainly not being periodically reviewed. The Fourth Geneva Convention also contains provisions outlining an adequate standard of living during detention and that ICRC delegates have access to view conditions. As explained above³¹³ there have been many allegations of inhumane treatment of prisoners at Guantánamo Bay. Treatments such as sleep deprivation and exposure to extreme temperatures may not, by themselves, amount to torture, but they would certainly constitute inhumane treatment. It appears clear that the US authorities are not adequately upholding their obligations under the Fourth Geneva Convention.

4.1.3 Common article 3

It has been contended that the Geneva Conventions apply to all Parties taking part in an international armed conflict. They are not limited to State Parties and will apply to non-state-actors such as al-Qaeda. However, as this is a controversial

³¹⁰ ICRC, “US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC” [31 December 2006] <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/usa-detention-update-121205>>.

³¹¹ Ibid.

³¹² A consideration as to what forms of treatment are legal and what constitutes ‘basic humane treatment’ will be undertaken in section 4.2.3 on torture.

³¹³ Supra page 4.

line of reasoning an alternative has been included. In case the author's argument is disputed, and it is thought that the Geneva Conventions cannot apply to a non-state actor such as al-Qaeda, it shall be proved that al-Qaeda has the rights outlined under common article 3 instead. It should also be noted that it makes little difference which document is thought to apply as common article 3 accords very similar rights to those covered by the Fourth Geneva Convention.

The four Geneva Conventions and Additional Protocol II share the same article 3 and hence it is referred to as common article 3. The first sentence of the article reads as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions...”

This article is only to apply in cases which are not of an international character. At first glance this phrase appears to refer only to an armed conflict which is internal in character, such as a civil war. However, in the recent case of *Hamdan v Rumsfeld*,³¹⁴ heard by the US Supreme Court, it was determined that the phrase actually encompasses a much broader meaning.

Common article 2 refers to an armed conflict between two High Contracting Parties and the phrase “not of an international character” is used as a distinction to this idea of conflict between nations. In *Hamdan* the Supreme Court stated that:

“Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non signatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character, bears its literal meaning.’”³¹⁵

Thus, common article 3 applies both to internal armed conflicts and to conflicts occurring between Parties one or both of whom are not signatories to the Convention and who may not even be a State.

The Supreme Court explained that the term ‘international’ was being used as between nation and nation or to include mutual transactions between sovereigns. It accepted that the phrase “not of an international character” clearly refers to civil

³¹⁴ *Hamdan v Rumsfeld* 548 U.S. (2006).

³¹⁵ *Ibid*, 67.

wars but that language limiting common article 3 to only apply to civil wars was deliberately excluded from the Geneva Conventions.³¹⁶ In the Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949 it is asserted that a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other.³¹⁷ In an international armed conflict, as referred to in common article 2, the entities opposing each other are States. In a non-international armed conflict, to which common article 3 will apply, the entities opposing each other do not have to be sovereign States.

The commentary from the ICRC on the Geneva Conventions explains that the Conventions, while discussed, drafted, signed and applied by governments, are not actually underpinned by a concept of nations but by a concept of people – “the principle of respect for human personality”.³¹⁸ The article falls far short of upholding the ICRC’s original hope – which was that the Conventions would be applied, in their entirety, to armed conflicts not of an international character.³¹⁹ However, it at least “ensures the application of the rules of humanity which are recognised as essential by civilised nations”.³²⁰

Common article 3 and the rest of the Geneva Conventions can never apply to the same conflict. They are mutually exclusive as common article 3 can only apply to conflicts which are not covered by the other articles in the Geneva Conventions. As explained above the idea of a ‘non-international armed conflict’ is the opposite of an ‘international armed conflict’. The majority of the articles of the Conventions apply to international armed conflicts. Common article 3 applies to non-international armed conflicts. It is this author’s contention that the majority of the Geneva Conventions are applicable to both the Taliban and al-Qaeda. However, al-Qaeda is a non-state-actor and hence, suggesting the Conventions apply to this group is contentious. Should it be thought that, as a non-state-actor,

³¹⁶ Ibid, 68.

³¹⁷ Pilloud, C et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1351.

³¹⁸ Pictet, J (ed) *The Geneva Conventions of 12 August 1949. Commentary* (vol 4) (1958) 26.

³¹⁹ Ibid, 34.

³²⁰ Ibid.

al-Qaeda is not covered by the Conventions they will nevertheless, indisputably, be entitled to the rights under common article 3.

Having considered the situations in which common article 3 is applicable it is now necessary to look at the clauses in the article and discover how they apply to unlawful combatants. Common article 3 lays out some minimum provisions protecting, *inter alia*, “[p]ersons...placed *hors de combat*³²¹ by...detention”. Certain acts are listed as being prohibited in relation to these people, including:

- “(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;...
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”³²²

Common article 3 asserts some minimum guarantees for people who are detained (and others, but the other categories of persons are not relevant here). Parts (a) and (c) prohibit acts which “world opinion finds particularly revolting.”³²³ The meaning of the ambiguous terms used, such as torture and humiliating and degrading treatment, will be examined below in the section on torture. Part (d) clearly prohibits summary justice – common article 3 proclaims that even in times of war it is still necessary to surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. This prohibition does not, however, prevent a person from being arrested, prosecuted, sentenced and punished according to the law. The article does not specifically define what is meant by a “regularly constituted court” but other sources are helpful here. For example, the Fourth Geneva Convention speaks of a “properly constituted, non-political military court.”³²⁴ Furthermore, the ICRC commentary on this article asserts that the wording “definitely excludes all special tribunals” but would include “ordinary military courts” provided they were set up in accordance with the recognised principles governing the administration of justice.³²⁵ It is asserted in the recent ICRC customary international humanitarian law textbook that to be

³²¹ *Hors de combat* literally means ‘out of combat’. It refers to soldiers who are no longer capable of performing their military function which could be due to a variety of reasons such as being sick, wounded, detained or otherwise disabled.

³²² Common article 3(1).

³²³ Pictet, *supra* n 318 at 38.

³²⁴ Geneva Convention IV, article 66.

³²⁵ Pictet, *supra* n 318 at 340.

‘regularly constituted’ a court must have been “established and organised in accordance with the laws and procedures already in force in a country.”³²⁶

In the *Hamdan* case the Supreme Court acknowledged that common article 3 tolerates a great degree of flexibility in trying individuals captured during armed conflict and that the article’s requirements are general ones “crafted to accommodate a wide variety of legal systems.”³²⁷ However, the Court also emphasised the fact that, although they may be general, they are still *requirements* and must be upheld.³²⁸ In the Court’s view the commission convened by the US President to try Hamdan did not meet the requirements.

Overall, the most important rights for unlawful combatants protected by common article 3 are the prohibition on summary justice and the requirement of humane treatment. People cannot simply be detained or punished without a trial which upholds the ordinary concepts of justice. Unlawful combatants can be detained and punished, but they must first be prosecuted within the law. The vast majority of the detainees from the 2001 Afghan war have simply been imprisoned for an indefinite period of time without having their detention considered by an appropriate court. In order to comply with its obligations under international law the US government must either release the detainees or treat them properly under the judicial system.

4.1.4 Additional Protocol I – article 75

As previously explained the First Additional Protocol to the 1949 Geneva Conventions was never signed by the US. However, some parts of the Protocol have undeniably become customary international law. That article 75 of Additional Protocol I is customary international law and applies to all States is generally accepted³²⁹ and therefore, all States must take the guarantees under article 75 into consideration even if they are not a party to the Protocol.

³²⁶ Henckaerts and Doswald-Beck, *supra* n 304 at 355.

³²⁷ *Hamdan v Rumsfeld*, *supra* n 314 at 7.

³²⁸ *Ibid.*

³²⁹ See Dörmann, K “The legal situation of unlawful/unprivileged combatants” (2003) 85 IRRC 45, 71; Roberts, A “Counter-terrorism, armed force and the laws of war” (2002) 44 *Survival* 7, 23; Sands, P *Lawless world* (2006) 150. See also US Army, “Operational Law Handbook” JA 422 (1997), sections 18-20.

Article 75 outlines a range of fundamental guarantees that are intended to provide minimum rules of protection for all those who do not benefit from more favourable treatment under other rules. Hence, article 75 ensures that no person in the power of a Party to an armed conflict is situated in limbo, outside the protection of international humanitarian law – “no person can ever fall outside the scope of minimum legal protections. There can be no legal black holes.”³³⁰ If an unlawful combatant does not fulfil the nationality criteria of the Fourth Geneva Convention they will still be covered by article 75 of the First Additional Protocol. If they are covered by the Fourth Convention, article 75 extends their protection by defining the *minimum* guarantees.

“Any person who is captured by a party to a conflict must be treated humanely and is entitled to enjoy the minimum protection, without discrimination. The particular circumstances of any individual are irrelevant.”³³¹

Hence, it is clear that article 75 applies to all members of the Taliban and al-Qaeda detained at the Guantánamo Bay detention facility. Furthermore, article 75(7) further clarifies the principle from subsection (1) that article 75 contains minimum guarantees for everyone. Subsection (7) extends the guarantees provided for by article 75 to even those accused of war crimes or crimes against humanity. Even someone accused of grave breaches of the laws of war is entitled to the basic protections espoused by article 75.

Article 75 is entitled ‘Fundamental guarantees’ and subsection (1) gives the overarching requirement that persons

“in the power of a Party to a conflict...who do not benefit from more favourable treatment under the [Geneva] Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article...”³³²

Subsection (2) prohibits certain acts, including violence, murder, torture and outrages upon personal dignity, in particular humiliating and degrading treatment. Subsection (3) requires that people who are arrested, detained or interned for actions relating to an armed conflict be informed of the reasons why these measures have been taken. Furthermore, except in cases of arrest for penal offences, they must be released

“with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”³³³

³³⁰ Sands, P *Lawless world* (2006) 149.

³³¹ *Ibid*, 150.

³³² Additional Protocol I, article 75(1).

³³³ *Ibid*, article 75(3).

Article 75(4) covers the requirements for judicial proceedings for persons charged with a penal offence related to an armed conflict. The court must be impartial and regularly constituted and uphold the generally recognised principles of judicial procedure. Some of these principles of judicial procedure are laid out in the article, including the requirement that the accused be informed of the particulars of the offence; has the right to a defence; the right to examine witnesses; and the right to be presumed innocent until proven guilty.³³⁴ Article 75(6) espouses the important principle that protection under article 75 continues for detainees until their final release, repatriation or re-establishment, even after the end of the armed conflict.

To summarise, the minimum guarantees under article 75 are applicable to unlawful combatants. The guarantees primarily include protection from inhumane treatment; the requirement that people who are detained are released as soon as it is practicable to do so; and the requirement that legal due process guarantees be upheld. There have been many allegations of inhumane treatment of prisoners held at Guantánamo Bay³³⁵ and such treatment clearly breaches international humanitarian law applicable to the detainees. Furthermore, it seems likely that the continued detention of many of the Taliban and al-Qaeda fighters is no longer necessary and it is therefore required under article 75 that they be released if they are not going to be charged with a crime.

4.2 International Human Rights Law

Thus far the rights of unlawful combatants under international humanitarian law have been considered. The following section takes into account any rights applicable to unlawful combatants under international human rights law. Human rights are currently separated into three categories which follow the catchphrase of the French Revolution – *‘Liberté, égalité, fraternité’* (Liberty, equality, fraternity). First generation human rights deal essentially with liberty and preventing excesses of the State. They include rights such as freedom of speech,

³³⁴ Ibid, article 75(4).

³³⁵ Human Rights First, “Human Rights First condemns use of torture tactics at Guantánamo Bay” [30 November 2004] <http://www.humanrightsfirst.org/media/2004_alerts/usls_1130_icrc_gitmo.htm>.

freedom of religion and the right to a fair trial and are codified in the 1966 ICCPR. Second generation rights revolve around the idea of equality and are fundamentally social, economic and cultural in nature. They promise equal conditions and treatment to people in areas such as employment, housing and health care and require a more interventionist State to provide the rights. Second generation rights are codified in the 1966 International Covenant on Economic, Social and Cultural Rights.³³⁶ Third generation human rights are a more progressive and developing area of international human rights law and the term covers a broad spectrum of rights such as the right to self-determination, group and collective rights and the right to natural resources.

The Universal Declaration of Human Rights (UDHR)³³⁷ was adopted by the UN General Assembly in 1948 but was unable to garner the necessary international support and consensus needed to become a binding treaty because it contained both first and second generation rights. A political divide developed between mainly Western capitalist nations favouring first generation civil and political rights and communist nations favouring second generation economic, social and cultural rights. To solve this problem the two 1966 Covenants were drafted.³³⁸ These two documents, together with the UDHR, form the International Bill of Rights.

International humanitarian law vs international human rights law

The application of international humanitarian law and international human rights law are not mutually exclusive; they are in fact complementary. The Human Rights Committee (HRC) stated that the ICCPR

“applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purpose of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive.”³³⁹

³³⁶ International Covenant on Economic, Social and Cultural Rights 1966, online at <http://www.unhcr.ch/html/menu3/b/a_ceschr.htm>.

³³⁷ Universal Declaration of Human Rights 1948, online at <<http://www.un.org/Overview/rights.html>>.

³³⁸ Brems, E *Human rights: Universality and diversity* (2001) 21.

³³⁹ Human Rights Committee, General Comment No. 31 (2004), para 11.

This issue has also been addressed by the ICJ in its 1996 advisory opinion on the legality of the threat or use of nuclear weapons.³⁴⁰ In this opinion the ICJ clearly affirmed the applicability of the ICCPR during times of armed conflict. The Court stated that

“the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict.”³⁴¹

The ICJ further confirmed this view in its advisory opinion on the 2004 *Israeli Wall* case:

“the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR].”³⁴²

These statements from the ICJ make it clear that international human rights law does not cease to function during times of war. However, the court points out that international humanitarian law functions as *lex specialis*. This means that if international humanitarian law contains *different* rules to international human rights law, the relevant international humanitarian law will trump human rights law during times of armed conflict. Ergo, in the absence of special rules of warfare, or international humanitarian law, which derogate from human rights law, human rights law will continue to apply. It has been asserted that:

“[The] ICCPR sets the general standards for the treatment of prisoners whether they are detained on the basis of international humanitarian law, international law or national law.”³⁴³

Hence, international human rights law does apply to the Guantánamo detainees to the extent that it is not inconsistent with international humanitarian law.

4.2.1 The ICCPR

As explained above, the International Covenant on Civil and Political Rights (ICCPR) contains first generation rights such as freedom from arbitrary detention and freedom of expression. Part III of the ICCPR is comprised of a list of substantive human rights guarantees. Part II provides supporting guarantees, such

³⁴⁰ *Legality of the Threat or Use of Nuclear Weapons* [1996] 1 ICJ Reports 226.

³⁴¹ *Ibid.*

³⁴² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* [2004] ICJ Reports, para 106.

³⁴³ Müller, A “Legal issues arising from the armed conflict in Afghanistan” [2004] 4 Non-State Actors and International Law 239, 273.

as the necessary obligation on State Parties to provide domestic remedies for breaches of ICCPR rights. Part IV establishes the HRC as the treaty-monitoring body for the ICCPR and outlines some of its functions. The HRC was established in 1976 and is composed of eighteen independent experts chosen by the State parties to monitor implementation of the ICCPR and to consider complaints of States and of individuals, but the decisions it issues are not binding. The ICCPR has two Optional Protocols associated with it. The first of these creates an individual complaints mechanism which enables the HRC to consider communications from individuals alleging violations of their ICCPR rights by State Parties to the Optional Protocol.³⁴⁴ The second Optional Protocol prohibits the application of the death penalty.³⁴⁵ The US is not a party to either of the Optional Protocols so they will be considered no further.

Article 4 of the ICCPR allows that if there is a public emergency threatening the life of the nation State Parties to the Covenant

“may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation”.

However, article 4(2) delineates 7 articles from which no derogation is allowed. The rights under these articles must be upheld at all times, even times of public emergency. The non-derogable rights are articles 6 (the inherent right to life); 7 (prohibition on torture); 8 (prohibition on slavery); 11 (prohibition on imprisonment merely due to inability to fulfil a contractual obligation); 15 (prohibition on retrospective laws); 16 (right to recognition as a person before the law); and 18 (right to freedom of thought, conscience and religion). Only two of these articles (articles 6 and 7) will be discussed as they are the most relevant to this thesis. It is fairly well accepted that the list of non-derogable rights in article 4 are norms of customary international law and must be upheld in all situations.³⁴⁶

Derogation is allowed from the majority of the rights under the ICCPR in the event of a public emergency threatening the life of the nation. However, some derogable rights are relevant to the detainees held at the Guantánamo Bay

³⁴⁴ First Optional Protocol to the International Covenant on Civil and Political Rights, online at <http://www.unhchr.ch/html/menu3/b/a_opt.htm>.

³⁴⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, online at <http://www.unhchr.ch/html/menu3/b/a_opt2.htm>.

³⁴⁶ Joseph, S, Schultz, J and Castan, M *The International Covenant on Civil and Political Rights. Cases, Materials, and commentary* (2nd ed, 2004) 829.

detention facility: article 9, the right to liberty, and article 14, the right to a fair trial. In order for these two derogable articles to apply it must be shown that the US cannot claim that it is currently facing a state of public emergency; or that the articles are customary international law and apply at all times regardless of the ICCPR derogation provision. The issue of whether or not the US faces a public emergency remains controversial and is a highly-charged political issue. Hence, this issue will be disregarded in favour of proving that the right to liberty and the right to a fair trial have both gained customary international law status.

Does the ICCPR apply to the Guantánamo detainees?

Before considering the rights under the ICCPR it must be determined whether the US is obliged to uphold ICCPR rights and whether they must be extended to the detainees in Guantánamo Bay. The first part of this question is the more problematic one: Is the US obliged to uphold the rights under the ICCPR? The US is a State Party to the ICCPR but it does not follow from this that ICCPR rights are automatically enforceable in US courts. In order for international law to be directly enforceable by national courts it must either be incorporated into domestic law or have the status of customary international law.

When the US ratified the ICCPR in 1992 it was with the reservation that articles 1 through 26 were not to be self-executing. This reservation was reiterated in the case of *Sosa v Alvarez-Machain* where Justice Souter stated:

“although the [ICCPR] does bind the United States as a matter of international law the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”³⁴⁷

‘Not self-executing’ simply means that if the rights found in the ICCPR have not been specifically incorporated into domestic law they cannot be applied in US courts. The definitive text book on the ICCPR makes it clear that although the ICCPR does impose duties upon States in the “international plane of law”, “it is envisaged that the implementation of the rights therein is primarily a domestic matter.”³⁴⁸ This means that the incorporation of the rights into domestic law is left up to the discretion of the signatory States and their impact, in some instances, is more persuasive than legal.

³⁴⁷ *Sosa v Alvarez-Machain* 124 S.Ct. 2739 (2004), 2767.

³⁴⁸ Joseph, Schultz and Castan, *supra* n 346 at 13.

The outcome of the principle of non-self execution is that while the ICCPR is binding on the US as a matter of international law, only ICCPR rights which are specifically protected by US domestic law, or have reached the status of customary international law, can be enforced in US courts.

The second part of the question posed above asks whether the ICCPR rights which are binding on the US must be extended to the detainees in Cuba. In his argument to the US Supreme Court in a 2004 case the US Solicitor General bluntly stated that the ICCPR is “inapplicable to conduct by the United States outside its sovereign territory.”³⁴⁹ Under this view, rights under the ICCPR would not have to be granted to the detainees in Cuba. However, the declaration from the US Solicitor General does not follow the law. By signing the ICCPR, a State undertakes to

“respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”.³⁵⁰

The phrase “individuals within its territory and *subject to its jurisdiction*” (emphasis added) clearly includes the detainees being held at the US Naval Base at Guantánamo Bay, Cuba. The detainees are inarguably subject to the jurisdiction of the US as it is under US authority that they remain prisoners. The US Supreme Court has determined that although the US does not exercise “ultimate sovereignty” over Guantánamo Bay, the long term lease arrangement means the detention centre is under the “exclusive jurisdiction” of the US and therefore the individuals held there are “subject to its jurisdiction” as required by article 2 of the ICCPR.³⁵¹

In its General Comment No. 31, the HRC, which monitors implementation of the ICCPR, has clarified that

“a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³⁵²

Rights under the ICCPR are *not* limited to citizens but must be “available to all individuals...who may find themselves in the territory or subject to the

³⁴⁹ Olson, T et al. “*Rasul v Bush and Al Odah v USA* Brief for the Respondents” [2003] <http://www.ccr-ny.org/v2/legal/september_11th/docs/Brief_for_the_Respondents.pdf> 49.

³⁵⁰ ICCPR, article 2.

³⁵¹ *Rasul v Bush* 542 U.S. 466 (2004).

³⁵² Human Rights Committee, *supra* n 339 at para 10.

jurisdiction of the State Party.”³⁵³ Furthermore, the ICJ in its advisory opinion in the *Israeli Wall* case recognised that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory”.³⁵⁴ Accordingly, the particular status of the international lease agreement between the US and Cuba does not limit the obligations of the US under international human rights law towards the detainees. Rulings from the US Supreme Court, the Human Rights Committee, and the International Court of Justice all show that ICCPR rights must be extended to the detainees held under US jurisdiction in Cuba.

It is possible to conclude at this point that any rights under the ICCPR which are provided for under US domestic law or which have become customary international law and which do not clash with any international humanitarian laws must be bestowed upon the detainees being held at the Guantánamo Bay Naval Base.

The right to life

Article 6(1) of the ICCPR reads as follows:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

The right to life has been described by the HRC as the “supreme right”³⁵⁵ and it has two facets to it. The negative side is the right not to be arbitrarily or unlawfully deprived of life by the State or its agents; while the positive side requires States to adopt measures that are conducive to allowing one to live. The Special Rapporteur on Summary or Arbitrary Executions has referred to the right to life as

“the most important and basic of human rights. It is the fountain from which all human rights spring. If it is infringed the effects are irreversible...”³⁵⁶

In order for the right to life in article 6 of the ICCPR to be binding on the US it must either be shown to be a customary international law right or that it has been

³⁵³ Ibid.

³⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, supra n 342 at para 111.

³⁵⁵ Human Rights Committee, General Comment No. 6 (1982), para 1.

³⁵⁶ Wako, S “Summary or arbitrary executions: Report by the Special Rapporteur” [1983] E/CN.4/1983/16, para 22.

incorporated into US domestic law. Former UN Special Rapporteur on torture, Nigel Rodley, asserts that the right to life is a rule of customary international law and is binding on all States.³⁵⁷ This view could be challenged by the fact that a significant number of States have in fact practised mass murder or genocide, and the suggestion that, therefore, State practice cannot be said to prohibit such behaviour. Ergo, the rule cannot have reached customary international law status. However, this contention could only survive if States violating the right to life did not try to hide the atrocities but publicly asserted their right to commit them.³⁵⁸ By denying that genocides are happening, States committing such atrocities tacitly agree that they are against international law and hence their State practice shows that the right to life *is* a principle of customary international law.

Another problem with the suggestion that the right to life is customary international law is the legality of capital punishment. However, article 6 explicitly allows that the death penalty may be imposed

“for the most serious crimes in accordance with the law in force at the time of the commission of the crime”.³⁵⁹

States which assert their right to capital punishment do so openly – claiming that they are not violating international law by utilising the death penalty.³⁶⁰ This is a very different stance to the one taken with regard to government sanctioned murder. Countries which know they are breaching the right to life try to cover up their actions rather than denying or contesting that such a rule of international law exists – this is hardly the posture of a government asserting the contrary right to kill freely. With regards to the death penalty, governments which utilise it do so openly and do not try to deny their actions.³⁶¹ Clearly then, State rhetoric and State practice point towards the right to life, and its restrictions, being a rule of customary international law. Therefore, it is binding on the US and must be extended to the detainees at Guantánamo Bay.

In upholding the right to life, the State has a duty to protect detainees. In the case of *Dermot Barbato v Uruguay*³⁶² a Uruguayan student of medicine was arrested

³⁵⁷ Rodley, N *The treatment of prisoners under international law* (2nd ed, 1999) 178.

³⁵⁸ *Ibid*, 179.

³⁵⁹ ICCPR, article 6.

³⁶⁰ Rodley, *supra* n 357 at 180.

³⁶¹ *Ibid*.

³⁶² *Dermot Barbato v Uruguay* (1982) UN Doc. CCPR/C/17/D/84/1981.

and detained by the authorities and subsequently died in custody. The HRC could not arrive at a definite conclusion as to whether Hugo Dermitt committed suicide, was driven to suicide or was killed by others while in custody but held the “inescapable conclusion” to be that

“the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6(1) of the Covenant.”³⁶³

This shows quite clearly that States have a positive duty to take adequate measures to ensure that people do not die in custody.

In the case of *Lantsov v Russian Federation*³⁶⁴ Mr Lantsov was detained in a Russian prison where he fell ill due to the poor conditions – extreme overcrowding, poor ventilation, inadequate food and appalling hygiene. He received limited medical treatment despite repeated requests, and subsequently died. The HRC held that it was the refusal of the prison authorities to provide adequate medical care that led to Mr Lantsov’s death.³⁶⁵ It affirmed that

“it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection.”³⁶⁶

Furthermore,

“the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organising its detention facilities to know about the state of health of the detainees as far as may be reasonably expected.”³⁶⁷

As the State party had failed to take appropriate measures to protect Mr Lantsov’s life while he was in custody it had breached article 6(1) of the ICCPR. Evidently, there is a duty on the State to prevent the deaths of detainees in custody.

In 2005 at least 130 detainees undertook hunger strikes as a protest against their detention.³⁶⁸ The hunger strikes were often life-threatening and force feeding through nasal tubes was carried out to prevent the detainees dying of hunger. It has been alleged that the force feeding was carried out roughly, without effective

³⁶³ Ibid, para 9.2.

³⁶⁴ *Lantsova v Russian Federation* (2002) UN Doc. CCPR/C/74/D/763/1997.

³⁶⁵ Ibid, para 2.3.

³⁶⁶ Ibid, para 9.2.

³⁶⁷ Ibid.

³⁶⁸ Human Rights Watch, “Guantánamo Bay and military commissions” [18 January 2006] <<http://hrw.org/english/docs/2006/01/18/usdom12292.htm#Detainee%20Abuse>>.

medical care, and in such a way as to constitute torture or ill-treatment.³⁶⁹ What is at issue in this section is the extent of the international obligation on the US to prevent deaths in custody. If prisoners are refusing to eat and will die of starvation, what action does international law require the detaining country to take? The cases mentioned show that a State must take appropriate measures to protect prisoners. It seems likely that this would extend to force feeding prisoners who were attempting to harm themselves by refusing to eat. However, such force feeding would have to be done by medical personnel and with an adequate standard of health care.³⁷⁰

In June of 2006 three Guantánamo detainees committed suicide by hanging themselves with bed sheets and clothes in their cells.³⁷¹ In a bizarre statement issued by the commander of the Guantánamo Bay detention facility, the three men were accused of, not acting out of desperation, but in “an act of asymmetric warfare against us.”³⁷² The US has a positive duty to take adequate measures to protect the detainees being held under their authority and to ensure that prisoners do not die in custody. However, it seems to be stretching the obligation somewhat to say that by not preventing these suicides from occurring the US breached international law. The Taliban and al-Qaeda detainees have the inherent right to life and while they are detained it is the responsibility of the US government to uphold that right, but the obligation on the US is not unlimited. The US must take all reasonable measures to prevent such occurrences but cannot be said to have breached the right to life if all reasonable measures have been taken and detainees still manage to commit suicide. It has not been possible to access the official report on the suicides so it cannot be determined whether adequate measures had been taken to prevent suicides occurring.

The fact that the death penalty is legal under international law has been mentioned. Clearly the right to life is not unlimited and does not preclude the

³⁶⁹ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 ILM 673, 675.

³⁷⁰ Human Rights First, “Guantánamo Bay hunger strikes” [30 September 2005] <http://www.humanrightsfirst.org/media/2005_alerts/etn_0930_gitmo.htm>.

³⁷¹ White, J “Three detainees commit suicide at Guantánamo” *Washington Post*, 11 June 2006, A01.

³⁷² *Ibid.*

death penalty from being implemented. The Taliban and al-Qaeda detainees are protected by the inherent right to life but this does not prevent them being executed. However, an execution could only follow a fair trial and the death penalty would have to have been provided for in the law applicable to the trial. Apart from the exception of capital punishment the US has a positive duty to take adequate measures to ensure people do not die in custody.

Freedom from torture

The second applicable non-derogable right is the right to freedom from torture and other forms of ill-treatment. Article 7 asserts that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This is one of the few absolute rights in the ICCPR; no restrictions to this right are permitted. It is commonly accepted that, due to its universal status, the definition of torture from UNCAT is to be applied to the article 7 prohibition on torture also.³⁷³ The prohibition against torture is considered in depth below.³⁷⁴

The right to liberty

The right to liberty is enshrined in article 9 of the ICCPR but is not included in the article 4 list of non-derogable rights. However, any non-derogable rights which have reached customary international law status continue to apply even in the event of a public emergency threatening the life of the nation. The HRC has made it clear that the article 4 rights are not the only peremptory norms protected by the ICCPR.³⁷⁵ The HRC asserts that

“States parties may in no circumstances invoke article 4 of the [ICCPR] as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance...through arbitrary deprivations of liberty...”³⁷⁶

Claiming that a public emergency exists does not entitle a State to ignore all human rights. The HRC explains that arbitrarily depriving people of their liberty is never acceptable, even in the event of a public emergency, as this is a peremptory norm of international law.³⁷⁷

³⁷³ Joseph, S, Schultz, J and Castan, M *The International Covenant on Civil and Political Rights. Cases, Materials, and commentary* (2nd ed, 2004) 829.

³⁷⁴ *Infra* page 116.

³⁷⁵ Human Rights Committee, General Comment No. 29 (2001), para 11.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

State practice has established the prohibition on arbitrary deprivation of liberty as a norm of customary international law.³⁷⁸ Furthermore, the UN has adopted a number of resolutions condemning arbitrary detention. For example, in 2000 the UN General Assembly expressed its deep concern at continuing serious violations of human rights, in particular arbitrary detention, in Sudan.³⁷⁹ In 1995 the UN Security Council condemned human rights violations in Bosnia and Herzegovina, including overwhelming evidence of a consistent pattern of arbitrary and unlawful detentions.³⁸⁰ The decisions of judicial bodies also add weight to the proposition that the right to liberty is a norm of customary international law. For example, in its 1998 judgement in the *Delalić* case, the ICTY stated: “Clearly, internment is only permitted when absolutely necessary.”³⁸¹ Furthermore, it is a fundamental consideration that

“no civilian should be kept in...an internment camp for a longer time than the security of the detaining party absolutely demands.”³⁸²

The rhetoric of the HRC and the UN, State practice, and the decisions of judicial bodies all show that the right to liberty enshrined in article 9 of the ICCPR, while not a non-derogable provision, is a rule of customary international law and must be upheld in all circumstances.

Article 9 includes the right to liberty, the corresponding prohibition on arbitrary detention and a number of fair trial guarantees. As it is especially relevant to the situation of the detainees in Guantánamo Bay it is laid out in full:

Article 9

- (1) Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without

³⁷⁸ Henckaerts, J and Doswald-Beck, L *Customary international humanitarian law. Volume 1: Rules* (2005) 344.

³⁷⁹ UN General Assembly, Res. A/Res/55/116 [4 December 2000], sections 2(a)(ii) and 2(b)(i).

³⁸⁰ Security Council Res. 1019 [9 November 1995], preamble; Security Council Res. 1034 [21 December 1995], preamble and section 2.

³⁸¹ *Prosecutor v Delalić* ICTY [16 November 1998] (Case No. IT-96-21), section 576.

³⁸² *Ibid*, section 580.

delay on the lawfulness of his detention and order his release if the detention is not lawful.

- (5) Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

Clearly these articles preclude the possibility of detaining prisoners indefinitely without recourse to justice. Any deprivation of liberty must be in accordance with procedures established by law which means arrest and detention must be specifically authorised and circumscribed by the law. Furthermore, the law, and the enforcement of that law, must not be arbitrary. The situation at Guantánamo Bay is obviously not fulfilling these requirements. Many of the Taliban and al-Qaeda prisoners have been held for over five years without any recourse to justice. Their detention has not been authorised or circumscribed by the law as they have not had the opportunity to question their detention in any court.³⁸³

In the HRC case of *Spakmo v Norway*³⁸⁴ the Committee recalled that for an arrest to be in compliance with article 9(1) “it must not only be lawful, but also reasonable and necessary in all the circumstances.”³⁸⁵ In this case the Committee accepted that the *arrest* was reasonable and necessary. However, the State Party failed to show why it was necessary to detain Mr Spakmo for eight hours and the Committee held that the *detention* was unreasonable and breached article 9(1).³⁸⁶ This case demonstrates that even if the initial arrest is not arbitrary the subsequent period of detention may constitute a violation of article 9(1). Even if the US was justified in some of the initial arrests of Taliban and al-Qaeda fighters the subsequent five years of detention without recourse to justice most certainly violates article 9(1).

Article 9(2) contains a strict requirement that a detainee be informed of the reasons for their arrest and informed of the charges against him. In the case of *Drescher Caldas v Uruguay*³⁸⁷ the HRC held that it is not sufficient to be informed that one is being arrested “under prompt security measures without any indication of the substance” of the reasons for the arrest.

³⁸³ Amnesty International, “Guantánamo detainees: More than 4 years without justice” [2006] <<http://web.amnesty.org/pages/usa-100106-action-eng>>.

³⁸⁴ *Spakmo v Norway* (1999) UN Doc. CCPR/C/67/D/631/1995.

³⁸⁵ *Ibid.*, para 6.3.

³⁸⁶ *Ibid.*

³⁸⁷ *Drescher Caldas v Uruguay* (1983) UN Doc. CCPR/C/13/D/43/1979, para 13.2.

Article 9(3) necessitates a prompt trial for anyone arrested or detained on a criminal charge. One of the difficulties with the interpretation of article 9(3) is the meaning of the word ‘promptly’. HRC General Comment No. 8 specifies that in the view of the Committee “delays must not exceed a few days...”³⁸⁸ Although this may be thought to be quite a vague pronouncement, when applied to the situation in Guantánamo it is clear that the permissible ‘a few days’ has been massively exceeded. In the case of *Fillastre and Bizouarn v Bolivia*³⁸⁹ the claimants were held for ten days before being informed of the charges against them and it was three years before the case was adjudicated. The HRC held that both articles 9(2) and 9(3) had been breached and specifically stated that “considerations of evidence-gathering do not justify such prolonged detention.” If the HRC considers 10 days to be a breach of articles 9(2) and 9(3) then detention for over five years without a trial must certainly constitute a breach of those articles. In the case of *Raul v Bush* in the US Supreme Court, Justice Kennedy stated in his concurring judgment:

“Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”³⁹⁰

Article 9(4) requires a court to determine on a writ of habeas corpus – anyone who has been arrested or detained is entitled to challenge the lawfulness of his or her detention in a court without delay. In the case of *Berry v Jamaica*³⁹¹ the HRC clearly links the access to legal representation with the enjoyment of the right enshrined in article 9(4). There is a general theory that in practise it is virtually impossible for people to challenge their detention without legal representation.³⁹² Under article 9(4) the Guantánamo detainees are entitled not only to a court hearing on a writ of habeas corpus but also access to legal representation to help them assert that right.

The UK courts have taken a stance on the Guantánamo issue which exemplifies the fact that arbitrary detention must be prevented and detainees must be entitled to challenge their incarceration. In the case of *Abbassi v Secretary of State for*

³⁸⁸ Human Rights Committee, General Comment No. 8 (1982), para 2.

³⁸⁹ *Fillastre, Bizouarn v Bolivia* (1991) UN Doc. CCPR/C/43/D/336/1988.

³⁹⁰ *Rasul v Bush* 542 U.S. 466 (2004) 491.

³⁹¹ *Berry v Jamaica* (1994) UN Doc. CCPR/C/50/D/330/1988.

³⁹² Joseph, Schultz and Castan, supra n 373 at 334.

*Foreign and Commonwealth Affairs*³⁹³ a British citizen held at Guantánamo Bay, Ferroz Abbasi, challenged the failure of Britain's Foreign Office to take adequate steps to protect the basic human rights of a British citizen. The court said that what it found objectionable was

“that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.”³⁹⁴

Similarly, the US Supreme Court has refused to accept the suggestion that the Guantánamo detainees are not entitled to question their detention before a court. In *Rasul v Bush* the Supreme Court affirmed that Guantánamo detainees are entitled to access the US courts as the Naval Base at Guantánamo Bay is functionally US territory to which the jurisdiction of the US courts should extend.³⁹⁵ The language used by Justice Stevens suggested an even more extensive jurisdiction – that alien enemy combatants held by US forces *anywhere* in the world could seek relief in US federal courts.³⁹⁶

It is important to note that the *Rasul* case was solely a jurisdiction case admitting that internees at Guantánamo Bay do have the right to have a habeas corpus claim heard in US federal courts. It did not address matters of wrongdoing, claims of innocence, or issues of interrogation but simply held that the federal courts did have the jurisdiction to determine the legality of the potentially indefinite detention of individuals being held in Guantánamo Bay. Put simply, US courts do have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay. Despite this announcement, by October 2005 nearly half of the Guantánamo detainees had not been given effective access to counsel or provided with a fair opportunity to pursue habeas corpus proceedings.³⁹⁷

³⁹³ *Abassi v Secretary of State for Foreign and Commonwealth Affairs* (2002). Reproduced in (2003) 42 ILM 358.

³⁹⁴ *Ibid.*

³⁹⁵ *Rasul v Bush* supra n 390.

³⁹⁶ Berkowitz, P “Introduction” in Berkowitz, P (ed) *Terrorism, the laws of war, and the constitution* (2005) xiii.

³⁹⁷ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 ILM 673, 677.

Although article 9 is not one of the non-derogable rights in the ICCPR, it encompasses a norm of customary international law and is therefore applicable to all countries regardless of states of public emergency or issues of incorporation. Through its imprisonment of Taliban and al-Qaeda members at the Guantánamo Bay detention facility the US has consistently breached all parts of article 9.

The right to a fair trial

*Every accused has a right to a fair trial, whatever the magnitude of the charge against them.*³⁹⁸

Malcolm Smart, Amnesty International

Article 14 of the ICCPR covers the right to a fair trial. Although this right, like article 9, is not included as one of the non-derogable provisions, it has nevertheless reached the status of customary international law.³⁹⁹ Hence, article 14 is applicable in all situations, including a public emergency threatening the life of the nation. That the HRC deems the right to a fair trial to be customary international law is clear from its statement that there is no justification for violating peremptory norms of international law “by deviating from fundamental principles of fair trial, including the presumption of innocence.”⁴⁰⁰ Furthermore, the HRC has asserted that, as “certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict,” there is no justification for derogation from these guarantees during other emergency situations.⁴⁰¹ War is obviously the greatest public emergency conceivable and if the principles of a fair trial are protected during times of war it cannot be justifiable to derogate from them during other public emergencies. According to the HRC,

“the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.”⁴⁰²

³⁹⁸ Amnesty International, “Amnesty International deplors death sentences in Saddam Hussein trial” [5 November 2006] <<http://web.amnesty.org/pages/irq-061106-news-eng>>.

³⁹⁹ Henckaerts, J and Doswald-Beck, L *Customary international humanitarian law. Volume 1: Rules* (2005) 352.

⁴⁰⁰ Human Rights Committee, General Comment No. 29 (2001), para 11.

⁴⁰¹ *Ibid.*, para 16.

⁴⁰² *Ibid.*

A State cannot diminish the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention.⁴⁰³ The Attorney General of England and Wales, Baron Goldsmith, has stated:

“there are certain principles on which there can be no compromise. Fair trial is one of these – which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantánamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.”⁴⁰⁴

Although article 14 is not a non-derogable provision of the ICCPR it has become a norm of customary international law and hence is applicable to the Guantánamo detainees regardless of issues of public emergency situations or incorporation into domestic law.

Article 14 encapsulates the right to a fair trial and sets out the requirements to ensure the proper administration of justice. Subparagraph (1) gives the general guarantee and subparagraphs (2)-(7) set out specific guarantees in relation to criminal trials and appeals. Article 14(1) states:

“...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....”

This is similar to article 9(3) in supporting the requirement that a person who has been arrested or detained has the right to a trial. Moreover, a person has the right to a *fair* trial. The meaning of an independent and impartial tribunal has been considered in case-law. In order to be independent, a court must be able to perform its functions independently of any other branch of the government, especially the executive:

“The [HRC] considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the [ICCPR].”⁴⁰⁵

In order to be impartial, the judges composing the court “must not harbour preconceptions about the matter put before them”, and they “must not act in ways that promote the interests of one of the parties.”⁴⁰⁶

Article 14(2) contains the obligation that everyone be presumed innocent until proved guilty according to the law. In the case of *Gridin v Russian Federation*⁴⁰⁷

⁴⁰³ Ibid.

⁴⁰⁴ Reynolds, P “Guantánamo: Britain says no” [25 June 2004] <http://news.bbc.co.uk/2/hi/uk_news/3839657.stm>.

⁴⁰⁵ *Oló Bahamonde v Equatorial Guinea* (1993) UN Doc. CCPR/C/49/D/468/1991, para 9.4.

⁴⁰⁶ *Karttunen v Finland* (1992) UN Doc. CCPR/C/46/D/387/1989, para 7.2.

public assertions of guilt had been made by high-ranking law enforcement officials prior to the trial. The head of police had announced that he was certain Grindin was the murderer and this assertion was broadcast on national television. Consequently, the HRC determined that a violation of article 14(2) had occurred.⁴⁰⁸ HRC General Comment No. 13 states that it is “a duty for all public authorities to refrain from prejudging the outcome of a trial.”⁴⁰⁹

Despite the fact that future trials must not be prejudiced by public comment on the guilt of defendants the Bush Administration has freely broadcast opinions on the detainees. Vice President Cheney stated in 2002 that the detainees “probably have information that we need to prosecute the war on terrorism”⁴¹⁰ and President Bush has announced that “the only thing we know for certain is that these are bad people.”⁴¹¹ Rumsfeld, as Secretary of Defence, stated that the Guantánamo detention facility should not be closed as:

“We have several hundred terrorists, bad people; people if they went back out on the field would try to kill Americans. That’s just a fact.”⁴¹²

Clearly the Bush Administration had decided long before any proceedings could be initiated against the detainees that they were terrorists and killers but this constitutes a breach of the fundamental right to be presumed innocent under article 14(2).

It has been shown that the Guantánamo detainees must not be arbitrarily deprived of their liberty and hence have the right to a trial before an impartial tribunal. Article 14 specifies some fundamental guarantees which ensure that when a trial takes place it will be fair. These include the right to be presumed innocent until proved guilty;⁴¹³ the right to be informed of the charge;⁴¹⁴ the right to be tried without undue delay;⁴¹⁵ the right to legal counsel;⁴¹⁶ the right to examine

⁴⁰⁷ *Gridin v Russian Federation* (2000) UN Doc. CCPR/C/69/D/770/1997.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Human Rights Committee, General Comment No. 13 (1984), para 7.

⁴¹⁰ Cheney, D “The Vice President appears on Fox News Sunday” [27 January 2002] <<http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20020127-1.html>>.

⁴¹¹ BBC News, “Britons’ terror hearings halted” [18 July 2003] <<http://news.bbc.co.uk/2/hi/americas/3078143.stm>>.

⁴¹² Rumsfeld, D “Secretary Rumsfeld remarks at Council on Foreign Relations” [17 February 2006] <<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=965>>.

⁴¹³ ICCPR, article 14(2).

⁴¹⁴ *Ibid.*, article 14(3)(a).

⁴¹⁵ *Ibid.*, article 14(3)(c).

⁴¹⁶ *Ibid.*, article 14(3)(b) and (d).

witnesses;⁴¹⁷ the right to an interpreter;⁴¹⁸ the right not to be compelled to testify against oneself;⁴¹⁹ and the right to an appeal.⁴²⁰

The US has sought to use military commissions as a forum for trying people suspected of terrorist offences.⁴²¹ In its General Comment on article 14 the HRC considered the phenomenon of military or special courts and noted the problems such tribunals could pose as far as the equitable, impartial and independent administration of justice is concerned.⁴²² The HRC asserted that such special tribunals should be exceptional and “take place under conditions which genuinely afford the full guarantees stipulated in article 14.”⁴²³ The US Supreme Court evidently feels that such fair trial guarantees have not been upheld by the US military commissions, as is shown by the case of *Hamdan v Rumsfeld*.⁴²⁴

Hamdan v Rumsfeld, the most recent case from the US Supreme Court in relation to Guantánamo Bay detainees, has been said to “undercut more than four years of White House policy.”⁴²⁵ Salim Ahmed Hamdan, Osama bin Laden’s personal driver, was captured in Afghanistan in 2002 and detained in the Guantánamo Bay Naval Base. In July 2004 he was charged with conspiracy to commit terrorism⁴²⁶ and designated for trial before a military commission, authorised under Military Commission Order No. 1 of March 2002.⁴²⁷ Hamdan filed a petition for a writ of habeas corpus challenging his confinement at Guantánamo Bay and arguing that he was being held without due process. The case eventually arrived before the Supreme Court which determined that the government did not have the authority to set up the special military commissions; and that the special military commissions were illegal under both the Uniform Military Code of Justice and the

⁴¹⁷ Ibid, article 14(3)(e).

⁴¹⁸ Ibid, article 14(3)(f).

⁴¹⁹ Ibid, article 14(3)(g).

⁴²⁰ Ibid, article 14(5).

⁴²¹ President George W. Bush, “President issues Military Order” [13 November 2001]

<<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>>.

⁴²² Human Rights Committee, *supra* n 409 at para 4.

⁴²³ Ibid.

⁴²⁴ *Hamdan v Rumsfeld* 548 U.S. (2006).

⁴²⁵ Shane, S and Liptak, A “Detainee bill lifts Bush’s power to new heights” *New York Times*, 30 September 2006, A6.

⁴²⁶ United States Department of Defence, “Charges Against Salim Ahmed Hamdan” [USA: Department of Defence, July 2004]

<<http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>>.

⁴²⁷ United States Department of Defence, “Military Commission Order No. 1” [21 March 2002]

<<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>.

Geneva Conventions.⁴²⁸ The illegal procedures included the fact that the accused person and their civilian counsel could be excluded from learning what evidence was presented during any part of the proceedings which were determined to be “closed” and could be denied access to classified information.⁴²⁹

The Supreme Court considered what is meant by a “regularly constituted” court and what fair trial guarantees must be upheld. The justices concluded that “ordinary military courts” are acceptable but all “special tribunals” cannot be considered to be “regularly constituted.”⁴³⁰ Hence, the proposed military commissions would breach the requirement in common article 3 to the Geneva Conventions of having a regularly constituted court. Therefore, the Supreme Court held the proposed military commissions to be illegal.⁴³¹ The Supreme Court did not discuss the ICCPR, although it was mentioned in passing as an international instrument to which the US is a signatory and which contains fair trial guarantees.⁴³² However, the fair trial guarantees enunciated under the ICCPR are those which are expected to be upheld by a regularly constituted court. Clearly, military commissions used thus far by the US do not fulfil the requirements of article 14 of the ICCPR.

The response of the Bush Administration to the decision in *Hamdan v Rumsfeld* was to create a new law on military commissions. The Military Commission Act was signed into law by President Bush on October 17, 2006 and gives a solid statutory foundation to some of the powers the Bush Administration has been asserting since September 11, 2001. It allows the President to step beyond the reach of full court reviews traditionally afforded to criminal defendants and ordinary prisoners and to identify enemies, imprison them indefinitely and interrogate them, although with a ban on the harshest treatment. The Act broadens the definition of an “unlawful enemy combatant” to include not only those who fight against the US, but also those who have “purposefully and materially supported hostilities against the United States” provided they are not a

⁴²⁸ *Hamdan v Rumsfeld*, supra n 424 at 6.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid* at 67.

⁴³¹ *Ibid* at 68.

⁴³² *Ibid* at 71.

lawful enemy combatant.⁴³³ As far as the right to a fair trial is concerned, the Act allows the Secretary of Defence, in consultation with the Attorney General, to determine pre-trial, trial and post-trial procedures which only need to apply the principles of law and the rules of evidence “so far as the Secretary considers practicable”.⁴³⁴ Moreover, the Act states that:

“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”⁴³⁵

Section 950j(b) of the act requires that the only basis of review of Military Commission procedures be those provided for in the act itself. Notwithstanding any other provision of law (for example traditional habeas corpus procedures),

“no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”⁴³⁶

In effect this section pre-emptively criminalises any challenge to the legality of the Military Commission Act in front of the Supreme Court.⁴³⁷ Overall, the act clearly reallocates power among the three branches of government – taking control away from the judiciary and bestowing it upon the President. Habeas corpus has long been the method through which suspects can challenge their incarceration. The Military Commission Act removes this longstanding traditional recourse to justice and attempts also to restrict the application of the Geneva Conventions.

The Act has recently been considered by the US Court of Appeals which ruled that the federal courts lack jurisdiction to hear any habeas corpus appeals from Guantánamo detainees.⁴³⁸ In a 2-1 opinion the Court held that the Military Commissions Act has retroactively stripped the courts of jurisdiction to hear all such petitions.⁴³⁹ It is possible that the Supreme Court may choose to hear the

⁴³³ The Military Commission Act 2006 (USA), section 948a(1)(A)(i).

⁴³⁴ *Ibid*, section 949a(a).

⁴³⁵ *Ibid*, section 948b(g).

⁴³⁶ *Ibid*, section 950j(b).

⁴³⁷ Shane and Liptak, *supra* n 425.

⁴³⁸ *Boumediene v Bush* and *Al Odah v USA*, US Court of Appeals for the District of Columbia Circuit (2007).

⁴³⁹ Amnesty International, “Guantánamo: Amnesty International regrets Court of Appeals decision on Military Commissions Act” [20 February 2007] <<http://web.amnesty.org/library/Index/ENGAMR510302007>>.

case but, like the Appeals Court, the Supreme Court will not lightly “defy the will of Congress.”⁴⁴⁰ While it may be considered that the very existence of this act threatens the rule of law it must also be remembered that it was accepted by both the House of Representatives and the Senate. In the 1952 case concerning the decision by President Truman to seize the nation’s steel mills during the Korean War, *Youngstown Sheet & Tube Co. v Sawyer*,⁴⁴¹ Justice Robert Jackson stated “congressional approval can cure many ills.” Legal and political commentators are forced to accept the fact that under existing constitutional doctrine, a

“show of explicit congressional support would be a key factor that the Supreme Court would consider in assessing the limits of presidential authority.”⁴⁴²

However, the Geneva Conventions are customary international law and cannot be overcome or circumscribed by domestic law. Similarly, fair trial guarantees are protected in international law by the ICCPR, have reached the status of customary international law, and must be upheld in all circumstances.

4.2.2 The UNCAT

The final right which will be discussed is the prohibition against torture. The main document forbidding torture and other forms of ill-treatment is the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). However, many other international treaties and conventions also prohibit torture and these will be briefly mentioned. The main articles of UNCAT will be examined to determine what the definition of torture is. Torture and the other forms of ill-treatment are extremely difficult to define and a great deal of controversy surrounds this area. Cases heard by the Committee Against Torture (CAT), the HRC and the European Court of Human Rights will be looked at in an attempt to determine what circumstances constitute torture. Two specific areas – sensory deprivation and conditions of detention – will be examined as these are particularly relevant to the situation at Guantánamo. Lastly, the relationship between the principle of non-refoulement and torture will be analysed.

⁴⁴⁰ *Boumediene v Bush* and *Al Odah v USA*, supra n 438 at 10.

⁴⁴¹ *Youngstown Sheet & Tube Co. v Sawyer* 343 U.S. 579 (1952).

⁴⁴² Ackerman, B “The White House warden” [28 September 2006] <<http://www.law.yale.edu/news/3531.htm>>.

Since the end of WWII, torture and other cruel and inhuman treatment has been formally internationally outlawed. The 1948 UDHR states in article 5 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁴³ This declaration allows for no exceptions although the UDHR is not a legally binding document. The Third Geneva Convention prohibits physical or mental torture and any other form of coercion against a POW in article 17. Furthermore, such acts are designated as ‘grave breaches’ in article 130.⁴⁴⁴ The Fourth Geneva Convention prohibits the torture of protected persons by an occupying power (article 32) as well as other “measures of brutality” (article 283). Common article 3 to the Geneva Conventions makes it clear that “violence to life and person, in particular murder or all kinds, mutilation, cruel treatment and torture” in addition to “outrages upon personal dignity, in particular humiliating and degrading treatment” are banned under any circumstances.

Language similar to that of the UDHR can be found in article 7 of the ICCPR and article 5(2) of the American Convention on Human Rights.⁴⁴⁵ Article 75(2) of the First Additional Protocol prohibits torture of all kinds, whether physical or mental, at any time and in any place, whether committed by civilian or by military agents. The 1998 Rome Statute of the International Criminal Court⁴⁴⁶ includes torture and other inhuman treatment as a war crime and a crime against humanity and, although the US has not ratified the Rome Statute, it has not objected to these particular parts of it.

UNCAT was the codification of the general obligation against torture into more specific rules. 144 States are party to UNCAT (including the US) with a further 8 having signed but not yet ratified.⁴⁴⁷ However, it is commonly accepted that the prohibition on torture has developed into a rule of customary international law and

⁴⁴³ UDHR, article 5.

⁴⁴⁴ Grave breaches of the laws of war are defined in article 130 of the Third Geneva Convention 1949 which states:

“Grave breaches...shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by this Convention.”

⁴⁴⁵ American Convention on Human Rights 1978 online at <<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>>.

⁴⁴⁶ The Rome Statute of the ICC online at <un.org/icc/>.

⁴⁴⁷ The status of ratifications of UNCAT can be found online at <http://www.unhchr.ch/html/menu3/b/h_cat39.htm>.

therefore applies equally to all States regardless of whether they are party to the various torture conventions or not.⁴⁴⁸

Furthermore, the prohibition against torture occupies an even higher position in international law than simply having the status of customary international law – it is in fact a *jus cogens* norm.⁴⁴⁹ In 1998 the International Criminal Tribunal for the former Yugoslavia held in the *Furundžija*⁴⁵⁰ case that the prohibition against torture constitutes a peremptory norm of customary international law – *jus cogens*. The fact that freedom from torture is an example of a norm which has reached this elevated status is uncontroversial.⁴⁵¹ An individual cannot be prosecuted for an action which was not prohibited by domestic law at the time that the action occurred. However, a State is bound by customary international law and *jus cogens* norms regardless of whether the State has incorporated them into domestic law. Hence, regardless of whether the US has incorporated torture provisions into domestic law, it is bound by the prohibition against torture.

Important articles

As demonstrated, the prohibition on torture is detailed in a large number of international law documents. In discussing international law on torture the focus will be on UNCAT as this is the most specific and detailed document. The definitions it contains are applied to the other treaties and conventions which mention torture.⁴⁵² There is an Additional Protocol to UNCAT which was opened for signature, ratification and accession in 2003.⁴⁵³ However, it has not been signed or ratified by the US so will not be considered in detail.

The following section will introduce and examine the most important articles in the Torture Convention. There are three elements required by the definition of torture as found in article 1 of UNCAT. Torture is:

⁴⁴⁸ Burgers, J and Danelius, H *The United Nations Convention against Torture. A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 12.

⁴⁴⁹ Ibid.

⁴⁵⁰ *Prosecutor v Furundžija* ICTY [10 December 1998] (Case No. IT-95-17/1-T).

⁴⁵¹ Dinstein, Y *The conduct of hostilities under the law of international armed conflict* (2004) 7.

⁴⁵² Joseph, S, Schultz, J and Castan, M *The International Covenant on Civil and Political Rights. Cases, Materials, and commentary* (2nd ed, 2004) 196.

⁴⁵³ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2002, online at <<http://www.ohchr.org/english/law/cat-one.htm>>.

- (1) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person;
- (2) for such purposes as obtaining information or a confession, punishment, intimidation, or for any reason based on discrimination; and
- (3) by or with the consent or acquiescence of a public official or other person acting in an official capacity.

To summarise, torture must involve a prohibited action, done for a specific purpose, by an official person. The pain or suffering inflicted must be ‘severe’ which conveys the idea that only acts of a certain gravity will be considered to constitute torture. Article 1 requires that torture be inflicted for a purpose but the examples given are simply the most common ones and the list is by no means exhaustive. The list is preceded by the words “such purposes as” which clearly implies there can be other purposes. However, this cannot be understood to mean ‘any other purpose’ as “such purposes as” expresses the idea that any purposes must be similar to, or have something in common with, the enumerated purposes.⁴⁵⁴ In their handbook on UNCAT, Burgers and Danelius⁴⁵⁵ assert that

“the primary objective of the *Convention* is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions. Precisely because the public interest is sometimes seen in such cases as a justification, the authorities may be reluctant to suppress these practises. The provisions of the *Convention* are intended to ensure that torture does not occur in such cases or that, if it occurs, action is taken against the offender.”

In order to constitute torture under the article 1 definition, severe pain or suffering must have been inflicted with the consent or acquiescence of a public official.⁴⁵⁶ There was some discussion during the drafting of UNCAT as to whether such acts could constitute torture irrespective of who had committed the act. However, it was determined that such acts committed in the private sphere, without any involvement of the authorities, would be prosecuted and punished under the normal conditions of the domestic legal system.⁴⁵⁷ UNCAT was intended to deal with a situation where the authorities of a country were involved in torture and hence the machinery of investigation and prosecution might not function

⁴⁵⁴ Burgers and Danelius, supra n 448 at 118.

⁴⁵⁵ Ibid, 119.

⁴⁵⁶ UNCAT, article 1.

⁴⁵⁷ Burgers and Danelius, supra n 448 at 120.

normally. If the public officials of a country are engaged in torturous activities the government of that country is unable to claim as a defence that it was unaware of the act or disapproved of it once it was informed.⁴⁵⁸

The UNCAT definition of torture gives no mention of the categories of persons who may be the ‘victims’ of torture. However, this does not mean the category of victims is indefinite. The history of the UDHR and UNCAT make it clear that in order to be a victim of torture a person must have been deprived of their liberty or at least be under the factual power or control of the person inflicting the pain or suffering.⁴⁵⁹

Finally, it must be noted that calling article 1 a ‘definition’ of torture is perhaps somewhat misleading. Rather than being a *definition* of torture in the strict penal law sense, article 1 is a *description* of torture for the purpose of understanding and implementing UNCAT.⁴⁶⁰ This explains how the non-exhaustive, open ended list of purposes in article 1 does not breach the principle of *nullum crimen sine lege* (the principle that the law must be clear and ascertainable prior to the commission of a prohibited act). Furthermore, despite appearing to clarify what torture is, one of the fundamental concepts article 1 contains is ill-defined – exactly what is required to constitute “severe pain or suffering” remains unclear and is discussed further below.

Article 16 of UNCAT prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” provided such acts are committed with the acquiescence of a public official. Unlike in the article 1 definition of torture, cruel, inhuman or degrading treatment does not have to be committed for a specified purpose. Hence, it seems justified to conclude that the purpose of the act is irrelevant in determining whether it constitutes cruel, inhuman, or degrading treatment or punishment. In 1977 The UN General Assembly instructed the Commission on Human Rights to create a draft convention prohibiting torture and other cruel, inhuman or degrading treatment or

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid, 122.

punishment.⁴⁶¹ The Working Group set up by the Commission on Human Rights found that while it was possible to create, to some extent, a concise definition or description of torture the same was not true for other forms of ill-treatment.⁴⁶² Hence, the concept of cruel, inhuman or degrading treatment or punishment must be extrapolated from the decisions of the HRC and the CAT, discussed below.

The US ratified UNCAT with an express reservation to article 16 – rather than applying the article 16 meaning of cruel, inhuman or degrading treatment or punishment the US would instead defer to the standard articulated in the 8th Amendment to the US Constitution entitled ‘Cruel and unusual punishment’. The 8th Amendment reads as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁴⁶³ This appears to be less strict than UNCAT article 16, but as UNCAT is customary international law the US cannot side-step its obligations by invoking the Constitution.

Article 2 of UNCAT is particularly relevant to the issue under consideration in this thesis. Article 2(2) reads as follows:

“no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

This article makes it clear that, whatever the circumstances, torture is never justifiable. The idea of the ‘ticking bomb’ case refers to a scenario in which a suspect who possesses critical knowledge, such as the location of a time bomb that would soon explode and cause great loss of life, is in custody, but refuses to inform the authorities of the whereabouts of the bomb. In this situation would the police be allowed to use torture in order to save thousands of people whose lives may be under threat? A utilitarian argument would say ‘yes’, but the Torture Convention answers this question with an unequivocal ‘no’. Torture is never justifiable, whatever the circumstances.⁴⁶⁴ To relate this to the current situation in Guantánamo Bay: the US cannot claim that it is necessary to torture the detainees in order to gain information to prevent potential terrorist attacks. The absolute prohibition on torture is one area in which the rules of international law are clear:

⁴⁶¹ UN General Assembly Res. A/Res/32/62 [8 December 1977].

⁴⁶² Burgers and Danelius, *supra* n 448 at 149.

⁴⁶³ 8th Amendment to the US Constitution, online at <<http://www.usconstitution.net/const.html>>.

⁴⁶⁴ Burgers and Danelius, *supra* n 448.

“It does not matter whether a person is a criminal, or a warrior combatant, or a lawful combatant or an unlawful combatant, or an al-Qaeda militant, or a private American contractor. He may not be tortured. He may not be subjected to other cruel, inhuman or degrading treatment. If he is, then the perpetrator of such acts must be punished under the criminal law.”⁴⁶⁵

In 1978 the European Court of Human Rights considered the question of whether torture could ever be justifiable in the case of *Ireland v United Kingdom*.⁴⁶⁶ The Court considered the ticking bomb scenario and gave a very unambiguous response: the responsibility of a State for acts of torture and inhuman treatment remains, even in the ticking bomb case. The European Court of Human Rights firmly excluded the concept of justification on utilitarian grounds.

Article 15 of UNCAT prohibits statements which were made as a result of torture being invoked as evidence in any proceedings.⁴⁶⁷ This prohibition appears to be based on two considerations. Firstly, statements made under torture cannot be held to be reliable and invoking statements of such inherent unreliability would be contrary to the principle of a fair trial. Secondly, torture is often aimed at ensuring evidence in judicial proceedings. If statements made under torture cannot be invoked in such proceedings an important reason for using torturous tactics is removed.⁴⁶⁸

The 2002 Optional Protocol to UNCAT entered into force in June 2006 and currently has 54 signatories and 32 State Parties.⁴⁶⁹ The US has not signed or ratified the Protocol and hence it will only be considered briefly. The objective of the Protocol is:

“to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”⁴⁷⁰

⁴⁶⁵ Sands, P *Lawless world* (2006) 208.

⁴⁶⁶ *Ireland v The United Kingdom* 5310/71 [1978] ECHR 1 (1978).

⁴⁶⁷ Article 15 has the necessary exception that statements made under torture can be used in proceedings against a person accused of torture as evidence that the statement was made.

⁴⁶⁸ Burgers, J and Danelius, H *The United Nations Convention against Torture. A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 149.

⁴⁶⁹ UNHCHR “UNCAT Optional Protocol: Status of ratifications” [15 February 2007]

<http://www.ohchr.org/english/countries/ratification/9_b.htm>.

⁴⁷⁰ Optional Protocol to UNCAT 2002, article 1.

The Protocol introduces procedures for the establishment of a subcommittee designated to achieve this objective.⁴⁷¹ State Parties to the Protocol are required to allow the subcommittee unrestricted access to, *inter alia*, places of detention,⁴⁷² and information on detainees.⁴⁷³ This Protocol could play an effective role in increasing the transparency of conditions and treatment at detention facilities.

The right to be treated with humanity and respect is a corollary to the prohibition on torture. Article 10(1) of the ICCPR contains the requirement that

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

According to the HRC this is a right that cannot be derogated from despite the fact that it is not included in the article 4 list of non-derogable rights. In the Committee’s opinion, article 10 expresses a norm of general international law and is not subject to derogation.⁴⁷⁴ Furthermore, there can be no reason to derogate from this principle as treating people inhumanly or disrespecting their inherent dignity would not help to prevent or conclude a public emergency and nor would it protect the life of the nation during a public emergency.

HRC General Comment No. 21 comments on article 10 of the ICCPR. Paragraph 3 contains the general principle:

“not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 [the prohibition on torture], including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”⁴⁷⁵

The detainees at Guantánamo Bay, and in fact all detainees wherever held, have the inherent right to be treated with humanity and respect.

⁴⁷¹ Ibid, article 2.

⁴⁷² Ibid, articles 12(a) and 14(c).

⁴⁷³ Ibid, article 14(a).

⁴⁷⁴ Human Rights Committee, General Comment No. 29 (2001), para 13(a).

⁴⁷⁵ Human Rights Committee, General Comment No. 21 (1992), para 3.

Cases concerning torture and cruel, inhuman or degrading treatment

It is quite clear that torture and other forms of inhuman treatment are prohibited under international law but determining whether an action constitutes torture is not a straightforward matter. Where is the dividing line between legal interrogation and torture? In order to constitute torture, pain or suffering must be *severe* but how does one define this term or create an objective scale for determining the severity of pain? Maybe the scale is not in fact required to be objective: is there an element of subjectivity in determining whether torture or inhuman treatment has occurred? Cases concerning torture, cruel, inhuman or degrading treatment will be examined. Furthermore, the specific situations of whether sensory deprivation or inadequate detention conditions can constitute torture or ill-treatment will be considered. Finally, the state of affairs at the Guantánamo detention facility will be applied to the stated law to determine whether torture or other ill-treatment is being committed.

The HRC has considered the following acts to constitute *torture*: systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersions in a mixture of blood, urine, vomit and excrement ('submarino'), standing for great lengths of time, simulated executions and amputations.⁴⁷⁶ Furthermore, various combinations of the following acts also constituted *torture*: beatings, electric shocks to the genitals, mock executions, deprivation of food and water, and thumb presses.⁴⁷⁷

According to the HRC the treatment in the following cases was deemed to be *cruel and inhuman*. In *Hylton v Jamaica*⁴⁷⁸ a prisoner was severely beaten by, and received repeated death threats from, prison warders. In *Linton v Jamaica*⁴⁷⁹ a detainee was beaten unconscious, subjected to a mock execution and denied appropriate medical care. Similarly, in *Bailey v Jamaica*⁴⁸⁰ a prisoner was severely beaten with clubs, iron pipes and batons, and denied medical treatment for the consequent injuries.

⁴⁷⁶ Joseph, S, Schultz, J and Castan, M *The International Covenant on Civil and Political Rights. Cases, Materials, and commentary* (2nd ed, 2004) 214.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Hylton v Jamaica* (1994) UN Doc. CCPR/C/51/D/407/1990.

⁴⁷⁹ *Linton v Jamaica* (1992) UN Doc. CCPR/C/46/D/255/1987.

⁴⁸⁰ *Bailey v Jamaica* (1993) UN Doc. CCPR/C/47/D/334/1988.

The HRC found *degrading treatment* to have occurred in the following cases: in *Francis v Jamaica*⁴⁸¹ the prisoner was assaulted by warders who beat him, emptied a urine bucket over his head, and threw his food and water on the floor and his mattress out of the cell; in *Young v Jamaica*⁴⁸² the detainee was held in a tiny cell, allowed few visitors, assaulted by wardens, had his effects stolen and his bed repeatedly soaked; in *Polay Campos v Peru*⁴⁸³ the prisoner was displayed to the press in a cage.

In the *Vuolanne v Finland*⁴⁸⁴ decision the HRC expressed the view that

“for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.”

This decision also confirmed that the determination of whether torture, cruel, inhuman or degrading treatment has occurred is, at least in part, a subjective evaluation. Factors such as the victim’s age and mental health can aggravate the effect of certain treatment so as to bring it under the definition whereas similar treatment on someone else might not constitute torture.

In many other HRC cases the Committee has refrained from specifying which limb of torture, cruel, inhuman or degrading treatment has been breached and has just referred to a combination of actions as constituting a breach.⁴⁸⁵

Sensory deprivation

There are some actions which are undoubtedly torture – applying electricity to the genitals; tearing out fingernails; systematic beatings. However, there are many actions which inhabit a grey area between what is clearly torture and what is clearly not. For example, it is unclear whether sensory deprivation – the deliberate reduction or removal of stimuli from one or more of the senses – constitutes torture. Deprivation of food and drink; subjection to noise; deprivation of sleep; hooding; and standing against a wall for prolonged periods of time are all examples of sensory deprivation and their legality is controversial.

⁴⁸¹ *Francis v Jamaica* (1993) UN Doc. CCPR/C/47/D/320/1988.

⁴⁸² *Young v Jamaica* (1997) UN Doc. CCPR/C/62/D/615/1995.

⁴⁸³ *Polay Campos v Peru* (1998) UN Doc. CCPR/C/61/D/577/1994.

⁴⁸⁴ *Vuolanne v Finland* (1989) UN Doc. CCPR/C/35/D/265/1987.

⁴⁸⁵ Joseph, Schultz and Castan, *supra* n 476 at 216.

International decisions, although not legally binding on the US, can prove of some value in assessing what conduct may be considered to meet the threshold of torture. In the 1978 case between Ireland and the United Kingdom⁴⁸⁶ heard by the European Court of Human Rights five particular techniques were considered and were referred to as “disorientation” or “sensory deprivation” techniques. They consisted of the following:

- (1) wall-standing: forcing the detainees to remain for periods of some hours in a ‘stress position’, described by those who underwent it as being ‘spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers’;
- (2) hooding: putting a dark bag over the detainees’ heads and keeping it there except during interrogation;
- (3) subjection to noise: holding detainees in a room with a continuous loud and hissing noise prior to interrogation;
- (4) deprivation of sleep: depriving the detainees of sleep prior to interrogation; and
- (5) deprivation of food and drink prior to interrogation.⁴⁸⁷

The Court held that the five techniques “undoubtedly amounted to inhuman and degrading treatment” but that “they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood”.⁴⁸⁸

Although this case is from the European Court of Human Rights it does have relevance to a discussion of international law as it shows the stance a supranational body has taken on the classification of sensory deprivation. The Court used the European Convention on Human Rights (ECHR) as its main source of law, article 3 of which simply states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The ECHR does not give the three UNCAT requirements for torture and hence may be thought to have a wider realm of application for the meaning of ‘torture or inhuman or

⁴⁸⁶ *Ireland v The United Kingdom* 5310/71 [1978] ECHR 1 (1978).

⁴⁸⁷ *Ibid*, para 96.

⁴⁸⁸ *Ibid*, para 167.

degrading treatment'. Under the ECHR the Court found that sensory deprivation did not constitute torture but did amount to inhuman or degrading treatment.

In another case of sensory deprivation, *Cariboni v Uruguay*,⁴⁸⁹ a detainee was blindfolded (the eyes became inflamed and purulent), hooded, forced to sit up straight, day and night, for a week, in the presence of piercing shrieks apparently coming from others being tortured, and threatened with torture himself. The HRC determined that this treatment amounted to torture.⁴⁹⁰

In 1997 Israel asserted that interrogation, including the use of 'moderate physical pressure' where it is thought that interrogatees have information of imminent attacks against the State which may involve deaths of innocent citizens, is lawful if conducted in accordance with the 'Landau rules', which permit 'moderate physical pressure' to be used in strictly defined interrogation circumstances. The methods the CAT found had been applied systematically were the standard methods of sensory deprivation previously mentioned: the restraining of detainees in painful positions; hooding; sounding of loud music for prolonged periods; sleep deprivation for prolonged periods; threats, including death threats; violent shaking; and using cold air to chill.⁴⁹¹ In its concluding observations on the special report from Israel, the CAT stated that these methods breached article 16 prohibiting inhuman, cruel or degrading treatment and also constituted torture as defined in article 1 of UNCAT. The CAT also stated that the conclusion was "particularly evident where such methods of interrogation are used in combination, which appears to be the standard case."⁴⁹² In reference to this situation the Special Rapporteur submitted that the techniques, particularly if used in combination could be

"expected to induce pain or suffering, especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end. Under those circumstances, they can only be described as torture..."⁴⁹³

⁴⁸⁹ *Cariboni v Uruguay* (1990) UN Doc. CCPR/C/OP/2/159/1983.

⁴⁹⁰ *Ibid*, para 10.

⁴⁹¹ *Concluding observations of the Committee against Torture: Israel* (1997) A/52/44, para 257.

⁴⁹² *Ibid*

⁴⁹³ Rodley, N "Question of the Human Rights of all persons subjected to any form of detention or imprisonment, in particular: Torture and other cruel, inhuman or degrading treatment or punishment. Report of the Special Rapporteur" [10 January 1997]
<<http://domino.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/d015226692b7c5cb85256cf500750681!OpenDocument>>.

It seems clear that techniques of sensory deprivation will amount to torture or at the very least to cruel, inhuman or degrading treatment particularly if such techniques are used in combination and for prolonged periods of time.

Conditions of detention

The HRC has adjudicated on a number of cases involving the conditions of detention. These are particularly relevant to the question of the rights of the detainees in Guantánamo Bay as many of them have been held there in less than adequate conditions for extreme lengths of time. Conditions of detention can amount to torture, or at least to the other forms of ill-treatment. Amnesty International condemns the detention facility at Guantánamo Bay, designating it a “human rights scandal” and stating:

“[t]he totality of the detention regime in Guantánamo – harsh, indefinite, isolating and punitive – can in itself amount to cruel, inhuman or degrading treatment in violation of international law.”⁴⁹⁴

In *Portorreal v Dominican Republic*⁴⁹⁵ the claimant was arrested and detained in a cell measuring 20 metres by 5 metres holding approximately 125 other persons, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day and was released after 50 hours of detention.⁴⁹⁶ At no time during the detention was he informed of the reasons for his arrest. The HRC held that this constituted subjection to inhuman and degrading treatment and to lack of respect for his inherent human dignity.⁴⁹⁷

In making its decision in the case of *Mukong v Cameroon*,⁴⁹⁸ the HRC considered minimum standards of conditions of detention. It asserted the requirements for minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which was to be in no manner degrading or humiliating, the provision of a separate bed, and the provision of food of nutritional value adequate for health and strength.⁴⁹⁹ The Committee further noted that total

⁴⁹⁴ Amnesty International, “Guantánamo detainees: More than 4 years without justice” [2006] <<http://web.amnesty.org/pages/usa-100106-action-eng>>.

⁴⁹⁵ *Portorreal v Dominican Republic* (1990) UN Doc. CCPR/C/OP/2/188/84.

⁴⁹⁶ *Ibid.*, para 9.2.

⁴⁹⁷ *Ibid.*, para 11.

⁴⁹⁸ *Mukong v Cameroon* (1994) UN Doc. CCPR/C/51/D/458/1991.

⁴⁹⁹ *Ibid.*, para 9.3.

isolation of a detained or imprisoned person could amount to acts of cruel, inhuman or degrading treatment.⁵⁰⁰

In *Edwards v Jamaica*⁵⁰¹ a man was detained for 10 years alone in a cell measuring 6 feet by 14 feet, let out for three and a half hours a day, and was provided with no recreational facilities. The HRC held that, as well as violating his right to be treated with humanity and respect, this treatment also constituted a violation of the prohibition on torture.

In its General Comment No. 20 the HRC not only censures prolonged solitary confinement⁵⁰² but it also condemns ‘incommunicado detention.’⁵⁰³ Detention incommunicado is an aggravated form of detention where a prisoner is not necessarily in solitary confinement, but is denied access to family, friends, and others (for example lawyers). The HRC has considered a few cases in which detention incommunicado was determined to breach the ICCPR article 7 prohibition on torture, cruel, inhuman or degrading treatment. Detention incommunicado for a year constituted ‘inhuman treatment’ in *Polay Campos v Peru*⁵⁰⁴ and continued solitary confinement for over three years was held to be a breach of the prohibition against torture in *Marais v Madagascar*⁵⁰⁵ and *El-Megreisi v Libyan Arab Jamahiriya*.⁵⁰⁶ In *Shaw v Jamaica*⁵⁰⁷ eight months’ detention incommunicado in overcrowded, damp conditions constituted ‘inhuman and degrading treatment.’

In summary, case law shows that conditions of detention can amount to ill-treatment or torture. Furthermore, the HRC clearly deems that a State holding prisoners incommunicado is a breach of the prohibition against torture and other forms of ill-treatment.

⁵⁰⁰ Ibid, para 9.4.

⁵⁰¹ *Edwards v Jamaica* (1993) UN Doc. CCPR/C/60/D/529/1993.

⁵⁰² Human Rights Committee, General Comment No. 20 (1992), para 6.

⁵⁰³ Ibid, para 11.

⁵⁰⁴ *Polay Campos v Peru* (1998) UN Doc. CCPR/C/61/D/577/1994.

⁵⁰⁵ *Marais v Madagascar* (1983) UN Doc. A/38/40/49/1979.

⁵⁰⁶ *El-Megreisi v Libyan Arab Jamahiriya* (1994) UN Doc. CCPR/C/50/D/440/1990.

⁵⁰⁷ *Shaw v Jamaica* (1998) UN Doc. CCPR/C/62/D/704/1996.

Torture at Guantánamo

*Despite our best efforts, some detainees have tenaciously resisted our current interrogation methods.*⁵⁰⁸

General James T. Hill (US Army)

International law relating to torture has been comprehensively examined above. Now it is necessary to consider the treatment of the Guantánamo detainees by the US authorities and determine whether international law is being maintained. In a 2002 memo to the Chairman of the Joint Chiefs of Staff, Washington, on counter-resistance techniques General James T. Hill of the US Army requested a review of certain interrogation techniques under US law as the methods in use were not obtaining the desired information.⁵⁰⁹ The methods which were being used were Category I techniques (yelling at the detainees, using multiple interrogators, and the use of deception), and Category II techniques (the use of stress positions such as standing for four hours, the use of isolation for up to 30 days, interrogation in environments other than the standard interrogation booths, deprivation of light and auditory stimuli, hooding, 20 hour interrogations, and removal of clothing).⁵¹⁰ All these techniques were determined by the US Department of Defence to be legally permissible provided that they be used only when there is an important governmental objective (such as to obtain information necessary for the protection of the national security of the US, its citizens, and allies), and not for the “very malicious and sadistic purpose” of causing harm or with the intent to cause prolonged mental suffering.⁵¹¹

In April 2003 a memo from then Secretary of Defence, Rumsfeld, authorised the use of interrogation techniques such as sleep adjustment, dietary manipulation, prolonged isolation and extreme environmental manipulation.⁵¹² Human Rights

⁵⁰⁸ Hill, J “Memorandum for Chairman of the Joint Chiefs of Staff, Washington DC: Counter-resistance techniques” [25 October 2002]

<<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

⁵⁰⁹ Ibid.

⁵¹⁰ Phifer, J “Memorandum for Commander, Joint Task Force 170: Request for approval of counter-resistance strategies” [11 October 2002]

<<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

⁵¹¹ Reaver, D “Memorandum for Commander, Joint Task Force 170: Legal brief on proposed counter-resistance strategies” [11 October 2002]

<<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

⁵¹² Rumsfeld, D “Memorandum for the Commander, US Southern Command: Counter-resistance techniques in the war on terrorism” [16 April 2003]

First asserts that either alone or in combination these techniques may well amount to torture or other cruel, inhuman or degrading treatment.⁵¹³ Furthermore, an investigation into FBI allegations of detainee abuse led to a report which confirmed the authorisation of techniques that included sexual humiliation, the use of dogs, isolation for periods of up to 160 days, forced nudity and tying a detainee to a leash.⁵¹⁴

In a joint statement issued on May 13, 2004, Britons Shafiq Rasul and Asif Iqbal described interrogation practices, including ‘short shackling’:

“Our interrogations in Guantánamo...were conducted with us chained to the floor for hours on end in circumstances so prolonged that it was practice to have plastic chairs...that could be easily hosed off because prisoners would be forced to urinate during the course of them and were not allowed to go to the toilet. One practice...was ‘short shackling’ where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in this position for hours before an interrogation, during the interrogations (which could last as long as twelve hours), and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music played that was itself a form of torture. Sometimes dogs were brought in to frighten us... Sometimes detainees would be taken to the interrogation room day after day and kept short-shackled without interrogation ever happening, sometimes for weeks on end.”⁵¹⁵

Tarek Dergoul, a British citizen, born and brought up in London was detained in Guantánamo and released in March 2004. He made the following statement to a reporter from *The Observer*:

“I heard a guard talking into his radio, ‘ERF, ERF, ERF,’ and I knew what was coming – the Extreme Reaction Force. The five cowards, I called them – five guys running in with riot gear. They pepper-sprayed me in the face and I started vomiting.... They pinned me down and attacked me, poking their fingers in my eyes, and forced my head into the toilet pan and flushed. They tied me up like a beast and then they were kneeling on me, kicking and punching.”⁵¹⁶

<http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/mem_20030416_Rum_IntTec.pdf>.

⁵¹³ Human Rights First, “Guantánamo Bay hunger strikes” [30 September 2005]

<http://www.humanrightsfirst.org/media/2005_alerts/etn_0930_gitmo.htm>.

⁵¹⁴ Furlow, J and Schmidt, R “Investigation into FBI allegations of detainee abuse at Guantánamo Bay, Cuba detention facility” [1 April 2005]

<http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf>.

⁵¹⁵ Rasul, S and Iqbal, A “Letter to the Honourable Chair and Members of the United States Senate Armed Services Committee” [13 May 2004] <<http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04v2.pdf>>.

⁵¹⁶ Rose, D “They tied me up like a beast and began kicking me” *The Observer*, 16 May 2004, <<http://observer.guardian.co.uk/international/story/0,6903,1217969,00.html>>.

In June 2004 the ICRC made a confidential report to the US Government on the conditions at Guantánamo Bay, parts of which were leaked to the press. In the report the ICRC found that US detention and interrogation operations at Guantánamo Bay “cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.”⁵¹⁷ Among the report’s findings, the ICRC describes the participation of physicians and other medical staff in providing information about detainees’ mental health and weaknesses to interrogators, as well as the use of humiliating acts, solitary confinement, temperature extremes, use of forced positions, exposure to loud and continuous noise, and beatings.⁵¹⁸

The US President and the Department of Defence claimed in 2005 that the US “remains committed to complying with its obligations” under UNCAT, “denies any allegations of torture at Guantánamo and restates its commitment to treating detainees humanely.”⁵¹⁹ Furthermore, they stated that any allegations of detainee abuse are investigated and if any wrongdoing is found then it is punished – as of December 2004,

“major independent investigations at Guantánamo have documented eight instances of infractions which have resulted in action ranging from admonishment to court-martial.”⁵²⁰

It is troublesome that the Department of Defence, the very institution alleged to be responsible for the instances of abuse, is the institution to undertake internal investigations into the allegations. This calls into question the impartiality of the measures taken.

As of October 2006 official interrogation policy permits interrogation techniques including dietary manipulation, exposure to extreme temperatures, sleep deprivation and isolation.⁵²¹ It must be emphasised that these are the *officially sanctioned* interrogation techniques and many others may, in actuality, be in use.

⁵¹⁷ Human Rights First, “Human Rights First condemns use of torture tactics at Guantánamo Bay” [30 November 2004]

<http://www.humanrightsfirst.org/media/2004_alerts/usls_1130_icrc_gitmo.htm>.

⁵¹⁸ Ibid.

⁵¹⁹ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 ILM 673, 674.

⁵²⁰ Ibid.

⁵²¹ Human Rights First, “Guantánamo Bay” [October 2006]

<http://www.humanrightsfirst.org/us_law/etn/det_fac/Guantánamo.htm>.

So-called ‘alternative’ methods of interrogation at Guantánamo have included forcing prisoners to stand for 40 hours, depriving them of sleep and use of the ‘cold cell,’ in which the prisoner is left naked in a cell kept near 10 degrees Celsius and doused with cold water.⁵²² President Bush insisted that these techniques did not amount to torture.⁵²³ HRW reports the use of sleep deprivation, isolation and sexual humiliation.⁵²⁴

There are obvious similarities between the treatment in the CAT and HRC cases discussed above – which was deemed to be torture or cruel, inhuman or degrading treatment – and the summary of the treatment of the detainees at Guantánamo Bay. It is difficult to determine exactly what treatment amounts to torture but it is certain that some of the methods outlined which are used at Guantánamo Bay amount, at least, to cruel, inhuman or degrading treatment. Furthermore, some of the treatments mentioned, particularly if used in conjunction, would almost certainly be held to constitute torture under international law. The torture definition requires that torture be an act by which severe pain or suffering is inflicted; for the purposes of obtaining information, for punishment, or for intimidation; and that the act be inflicted by or with the consent or acquiescence of a person acting in an official capacity. There can be no doubt that the prison wardens and interrogators at Guantánamo Bay are acting in their official capacity. That the actions mentioned above were and are committed to obtain information has been explicitly stated by the US Department of Defence.⁵²⁵ The hardest part of the definition to prove is that *severe* pain or suffering is being inflicted. As previously mentioned, exactly what constitutes *severe* pain or suffering is open to interpretation. However, it is evident that the methods mentioned above such as beating, short-shackling, exposure to extreme temperatures and partial drowning would cause *severe* pain or suffering, made more extreme when used in combination.

⁵²² Malinowski, T “Call cruelty what it is” [18 September 2006]

<<http://hrw.org/english/docs/2006/09/25/usdom14255.htm>>.

⁵²³ Ibid.

⁵²⁴ Human Rights Watch, “US: Bush should close Guantánamo now” [9 May 2006]

<<http://hrw.org/english/docs/2006/05/09/usdom13332.htm>>.

⁵²⁵ Reaver, supra n 511.

The most controversial interrogation method discussed is the use of sensory deprivation. As proved above, sensory deprivation, despite the opinion of President Bush to the contrary,⁵²⁶ is not a lawful interrogation technique, and while it may not necessarily amount to torture it has been deemed, by the European Court of Human Rights, the CAT and the HRC to at least amount to cruel, inhuman or degrading treatment. In severe cases sensory deprivation can constitute torture.

Overall, it is evident that some of the interrogation methods used at Guantánamo Bay amount to torture or at least to cruel, inhuman or degrading treatment under international law. The international prohibition against torture is absolute and cannot legally be breached in any circumstances. Therefore, the actions of the US are most certainly breaching international law.

Torture at Abu Ghraib

In April 2004 photographs depicting US military personnel “humiliating, torturing, and otherwise mistreating”⁵²⁷ prisoners at Abu Ghraib prison in Iraq were published across the world. President Bush and then Secretary of Defence Donald Rumsfeld repeatedly referred to the publicised abuse as “an exceptional, isolated” case, and condemned the “disgraceful conduct by a few American troops who dishonoured our country and disregarded our values”.⁵²⁸ The ‘interrogation techniques’ employed in Iraq included hooding, subjecting detainees to extremes of heat, cold, noise and light, beatings, prolonged sleep and sensory deprivation, stripping detainees naked, and being held in painful stress positions.⁵²⁹

The allegations of detainee abuse became the subject of a series of comprehensive investigations conducted by the US Department of Defence. These investigations culminated in the convictions for “maltreatment of prisoners” and “dereliction of duty” of a number of the soldiers involved.⁵³⁰ The abuse committed at Abu Ghraib was openly admitted to have been unlawful and was due to the

⁵²⁶ Malinowski, supra n 522.

⁵²⁷ Brody, R “The road to Abu Ghraib” [June 2004] <<http://hrw.org/reports/2004/usa0604/>>.

⁵²⁸ Ibid.

⁵²⁹ Human Rights Watch, “US torture and abuse of detainees” [2006] <<http://www.hrw.org/campaigns/torture.htm>>.

⁵³⁰ Associated Press, “Abu Ghraib convictions” [27 September 2005] <<http://www.foxnews.com/story/0,2933,170603,00.html>>.

“misconduct...by a small group of morally corrupt soldiers and civilians” and a failure or lack of leadership.⁵³¹ The actions of the Bush Administration and Department of Defence in condemning the actions at Abu Ghraib and charging those involved are commendable. However, it is now necessary for these two bodies to accept that sensory deprivation and conditions of detention can amount to torture and, with this in mind, a comprehensive investigation needs to be made into interrogation techniques at Guantánamo Bay.

Principle of non-refoulement

Article 3 UNCAT states:

“no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁵³²

The principle of non-refoulement means that detainees must not be returned to countries where they would face a real risk of torture. It is necessary to consider this principle as a number of Guantánamo detainees have been returned to countries where they may face torture.⁵³³ Article 3(2) requires that in making a determination on whether a person can be returned, the competent authorities must take into account:

“all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁵³⁴

Returning people to States which are known to violate fundamental human rights and, in particular, the Torture Convention requires careful examination of the circumstances of the individual, their relationship with the government and whether they may face violations of their human rights on return.

Legal advisor to Amnesty International, Boris Wijkström,⁵³⁵ uses strong language in discussing the prohibition on refoulement:

“International law absolutely prohibits States from returning persons to a country where they face a real risk of torture, or other cruel, inhuman or degrading treatment. The prohibition is now recognised to be a part of the general and

⁵³¹ Fay, G and Jones, A “The Fay Jones Report: Investigation of intelligence activities at Abu Ghraib” [August 2004]. Reproduced in Greenberg, K and Dratel, J (eds) *The torture papers: the road to Abu Ghraib* (2005) 987.

⁵³² UNCAT, article 3.

⁵³³ Inter-American Commission on Human Rights, *supra* n 519 at 675-676.

⁵³⁴ UNCAT, article 3(2).

⁵³⁵ Wijkström, B “Amnesty International reprieve conference: Non-refoulement and outsourcing torture” [29 November 2005] <<http://news.amnesty.org/index/ENGPOL300402005>>.

absolute prohibition of torture and as part of this general prohibition it is binding on all States at all times regardless of whether the State in question has or has not ratified a treaty which specifically prohibits it.”

It is important to realise that the non-refoulement rule acts in all cases when an individual can show that there are substantial grounds for believing he or she faces a real risk of torture if returned. The prohibition does not permit any countervailing considerations or exceptions such as ‘for reasons of national security’ to negate the principle of non-refoulement. This has been made quite clear by the CAT in its decision in *Tapia Paez v Sweden*.⁵³⁶ In this case the CAT stated that the article 3 prohibition on torture is absolute:

“Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under an obligation not to return the person concerned to that State. The nature of the activities in which the person engaged cannot be a material consideration when making a determination under article 3 of the Convention.”⁵³⁷

The European Court of Human Rights has ruled similarly on this issue of possible exceptions to the prohibition on non-refoulement. In the *Chahal*⁵³⁸ case an Indian man, his wife, and two children were ordered to be deported to India from the UK on national security grounds. Chahal was a Sikh activist suspected by the UK authorities of involvement in terrorist activities. The majority of the Court agreed that the evidence suggested that if Mr Chahal was to be deported he would face a real risk of torture or ill-treatment.⁵³⁹ The legal issue was whether, as the government and Court’s minority argued, the risk to the individual could be balanced against the risk to national security. Under international refugee law, national security can trump the individual’s right not to be exposed to torture or other ill-treatment.⁵⁴⁰ However, the majority of the court pointed to the absolute nature of the article 3 ECHR prohibition on torture and ill-treatment, with no exceptions or derogations permitted even in the event of a public emergency

⁵³⁶ *Tapia Paez v Sweden* (1997) UN Doc. CAT/C/18/D/39/1996.

⁵³⁷ *Ibid.*

⁵³⁸ *Chahal v United Kingdom* ECtHR 70/1995/576/662 (15 November 1996).

⁵³⁹ *Ibid.*

⁵⁴⁰ Article 33 of the 1951 Convention Relating to the Status of Refugees reads as follows:

“(1) No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

threatening the life of the nation.⁵⁴¹ Therefore, the UK was unable to return Mr Chahal and his family to India, despite the risk he posed to national security.

Article 3 of UNCAT expressly applies only to cases where a person foreseeably faces torture on return to another State. It does not apply to cases where a person may face cruel, inhuman or degrading treatment or punishment. This was confirmed by the CAT in the case of *B.S. v Canada*.⁵⁴² In contrast, in General Comment No. 20, the HRC makes it clear that the prohibition on refoulement applies also to the lesser forms of bad treatment:

“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁵⁴³

However, this is simply a comment or recommendation from the HRC and does not amount to law. Under international law the prohibition of non-refoulement appears to currently only cover cases of torture, not the lesser forms of ill-treatment.

It is incontrovertible that refoulement is illegal under international law.⁵⁴⁴ However, the Inter-American Commission on Human Rights claims that 247 detainees once held at Guantánamo have been transferred to other countries, including Egypt, Iran, Yemen and Tajikistan, in circumstances that do not adequately protect against the possibility that the transferees may be subjected to torture or other inhuman treatment.⁵⁴⁵ Despite attempts by the US government to negotiate transfer agreements

“great concerns remain that many of those transferred will be subjected to indefinite detention without trial, torture and other abuse.”⁵⁴⁶

Returning a person to a country where they would be in danger of being subjected to torture is illegal and hence, the US may well have breached its international obligations concerning non-refoulement.

⁵⁴¹ ECHR 1950, article 15.

⁵⁴² Joseph, S, Schultz, J and Castan, M *The International Covenant on Civil and Political Rights. Cases, Materials, and commentary* (2nd ed, 2004) 231.

⁵⁴³ Human Rights Committee, General Comment No. 20 (1992), para 9.

⁵⁴⁴ Rodley, N *The treatment of prisoners under international law* (2nd ed, 1999) 119.

⁵⁴⁵ Inter-American Commission on Human Rights, “Pertinent parts of October 28, 2005 reiteration and further amplification of precautionary measures (detainees in Guantánamo Bay, Cuba)” (2006) 45 ILM 673, 675-676.

⁵⁴⁶ *Ibid*, 676.

Diplomatic assurances

Many countries have come to rely on diplomatic assurances when transferring alleged terrorists or national security suspects to countries where they are at risk of torture or ill-treatment.⁵⁴⁷ A diplomatic assurance gives a government a justification or an excuse for an action which would otherwise be considered to breach the absolute prohibition on refoulement. It is a formal guarantee from the government of the country of return that the returned person will not be subject to torture or other ill-treatment upon return. As discussed above there is an absolute prohibition in international law against returning a person – no matter what the alleged crime or status – to a place where he or she would be at risk of torture. By securing a governmental assurance that a person will not be tortured or ill-treated on return, States are able to claim they are complying with this absolute prohibition.

Wijkström,⁵⁴⁸ legal advisor to Amnesty International, observes that

“diplomatic assurances are used by States to refoule persons to other States where there is a real risk of torture, because in the absence of such a clear risk diplomatic assurance would not be necessary.”

Clearly, diplomatic assurances are only sought in cases in which torture is suspected or expected. HRW claims, with good reason, that by seeking diplomatic assurances against abusive conduct, governments are tacitly acknowledging that a risk of torture or ill-treatment exists in that country. HRW states that

“Once a sending government acknowledges that a risk of torture exists in a specific country, it is incumbent upon its authorities to refuse to transfer a person to that country.”⁵⁴⁹

Returning a person to such a country clearly breaches the ‘real risk of torture’ threshold and the very practice of employing diplomatic assurances undermines international human rights law. Furthermore, HRW indicates that the use of diplomatic assurances has proved not to be an adequate safeguard against torture as there have been reports of widespread or systematic torture in many of the countries to which people have been returned, despite such assurances.⁵⁵⁰

⁵⁴⁷ Human Rights Watch, “Empty promises: Diplomatic assurances no safeguard against torture” [April 2004] <<http://hrw.org/reports/2004/un0404/>>.

⁵⁴⁸ Wijkström, supra n 535.

⁵⁴⁹ Human Rights Watch, “Developments regarding diplomatic assurances since April 2004” [April 2005] <<http://hrw.org/reports/2005/eca0405/5.htm>>.

⁵⁵⁰ Human Rights Watch, supra n 547.

US law permits the use of diplomatic assurances in immigration cases,⁵⁵¹ and HRW asserts that

“authorities have disclosed that it is US policy to seek them as well in so-called ‘extraordinary rendition’ cases and to effect transfers of detainees from custody at Guantánamo Bay.”⁵⁵²

HRW perceives problems with the US law due to the discretionary nature of measures to verify the reliability of diplomatic assurances. The affected person has no procedural guarantees, including no opportunity to challenge the credibility or reliability of the diplomatic assurances before an independent judicial body.⁵⁵³ In some cases, the US State Department may choose to put a monitoring or review mechanism in place to ensure the assuring State complies with its assurances, but monitoring is discretionary rather than obligatory. Furthermore, HRW is concerned by the fact that there is no requirement for the Secretary of State to take into account the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in the requesting State, in conformity with UNCAT article 3(2).⁵⁵⁴ HRW is also perturbed by the possibility that diplomatic assurances may be used to return persons suspected of having information about terrorism-related activities to countries where torture is routinely used, specifically to extract such information.⁵⁵⁵ Such practise is known as ‘outsourcing’ torture.

The *Chahal* case, mentioned above,⁵⁵⁶ also involved the use of diplomatic assurances. The European Court of Human Rights ruled that the return to India of a Sikh activist would violate the obligations of the UK under article 3 of the ECHR, despite the fact that diplomatic assurances had been received from the government of India asserting that Mr Chahal would not suffer mistreatment at the

⁵⁵¹ United States Code, Title 8, Chapter 1, Part 208, Subpart A, section 208.18(c) – *Diplomatic assurances against torture obtained by the Secretary of State*:

“(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the Convention Against Torture....

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien’s claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.”

⁵⁵² Human Rights Watch, *supra* n 549.

⁵⁵³ Human Rights Watch, *supra* n 547.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Supra* page 136.

hands of the Indian authorities. The statements of the Court established that, at least within the jurisdiction of the European Court of Human Rights, diplomatic assurances are an inadequate guarantee where torture is “endemic,” or a “recalcitrant and enduring problem,” that results, in some cases, in fatalities.⁵⁵⁷ The Court took into account the credibility of the requesting government (India) and whether this government had effective control over the forces responsible for acts of torture.

The US has indicated that it takes the principle of non-refoulement seriously:

“It states in this respect that its policy is to obtain specific assurances from a receiving country that it will not torture the individual being transferred to that country, that it would take steps to investigate credible allegations of torture and take appropriate action if there were reasons to believe that those assurances were not being honoured, and that it would not transfer a detainee where those assurances are not sufficient when balanced against an individual’s specific claim.”⁵⁵⁸

Accepting diplomatic assurances acknowledges the fact that there are doubts about the returned person’s safety in the country to which they have been returned. Despite these doubts about their safety on return, the person is nevertheless returned. This breaches the international prohibition against refoulement. The US openly admits that it accepts diplomatic assurances which is tantamount to admitting that it breaches international law.

4.3 The rights of unlawful combatants summarised

Despite not being entitled to POW status, unlawful combatants have a number of important rights under international law. From a detention perspective, the most important of these rights is the right to liberty. The right to liberty is the right not to be arbitrarily detained and is a norm of customary international law. Deprivation of liberty can only be justified when there is a valid reason for both the initial detention and the continuance of such detention. Any deprivation of liberty which continues beyond that provided for by law amounts to arbitrary detention. The right to liberty is supported by the ICCPR which gives the fundamental requirement that no-one may be subjected to arbitrary arrest or

⁵⁵⁷ *Chahal v United Kingdom* supra n 538 at para 105.

⁵⁵⁸ Inter-American Commission on Human Rights, supra n 545 at 674.

detention.⁵⁵⁹ Furthermore, to prevent an arrest being arbitrary a person must be advised of the reasons for the arrest.⁵⁶⁰ A detained person must be brought promptly before a judge and be entitled to question the lawfulness of the detention without delay.⁵⁶¹ The Fourth Geneva Convention holds that detention is only legitimate if it is absolutely necessary to the security of the Detaining Power.⁵⁶² Furthermore, the decision to detain must be considered by an appropriate court and if detention is maintained it must be reviewed twice yearly.⁵⁶³ Finally, unlawful combatants who have been detained must be released as soon as the circumstances justifying the arrest cease to exist,⁵⁶⁴ or as soon as possible after the close of hostilities.⁵⁶⁵

Another important right which unlawful combatants are entitled to under international law is the right to a fair trial. The right to a fair trial means that summary justice or execution is prohibited. Unlawful combatants can be tried and punished, and even executed if it is permitted under the laws of the prosecuting State. However, any trial must uphold the normal concepts of justice. A trial must be undertaken by a regularly constituted court, which is a court established in accordance with the laws already in force in the country.⁵⁶⁶ A court must be independent and impartial⁵⁶⁷ and trials must uphold judicial guarantees which are generally recognised by civilised peoples.⁵⁶⁸ The most important of these judicial guarantees are the right to be tried without undue delay;⁵⁶⁹ the presumption of innocence;⁵⁷⁰ the right to a defence, to legal counsel, and to examine witnesses;⁵⁷¹ the right to an interpreter;⁵⁷² and the right to an appeal.⁵⁷³

⁵⁵⁹ ICCPR, article 9(1).

⁵⁶⁰ *Ibid*, article 9(2); Additional Protocol I, article 75(3).

⁵⁶¹ ICCPR, articles 9(3) and 9(4).

⁵⁶² Geneva Convention IV, article 42.

⁵⁶³ *Ibid*, article 43.

⁵⁶⁴ Additional Protocol I, article 75(3).

⁵⁶⁵ Geneva Convention IV, article 133.

⁵⁶⁶ Geneva Conventions, common article 3(d); Additional Protocol I, article 75(4).

⁵⁶⁷ ICCPR, article 14(1); Additional Protocol I, article 75(4).

⁵⁶⁸ *Supra* n 566.

⁵⁶⁹ ICCPR, article 14(3).

⁵⁷⁰ *Ibid*, article 14(2); Additional Protocol I, article 75(4)(d).

⁵⁷¹ ICCPR, article 14(3)(b), (d) and (e); Additional Protocol I, article 74(4).

⁵⁷² ICCPR, article 14(3)(f).

⁵⁷³ *Ibid*, article 14(3)(g).

Unlawful combatants also have the protection of a number of rights while they are incarcerated. Firstly, they have the right to not be arbitrarily deprived of life.⁵⁷⁴ The HRC has determined that this places a positive duty on States to take adequate measures to ensure people do not die in custody.⁵⁷⁵ Secondly, the detainees are protected by the fundamental prohibition on torture.⁵⁷⁶ The prohibition on torture is a *jus cogens* norm of international law from which no derogation is permitted. Torture is the infliction of severe mental or physical pain or suffering, for a specific prohibited purpose (such as obtaining information), committed by or with the consent of a public official.⁵⁷⁷ The prohibition is absolute and torture is not justifiable under any circumstances. Other forms of ill-treatment are also prohibited, such as cruel, inhuman or degrading treatment or punishment.⁵⁷⁸ It has been shown that techniques of sensory deprivation, particularly if used in conjunction, can breach the prohibition on torture or the other forms of ill-treatment. Furthermore, conditions of detention can also amount to torture or ill-treatment. Thirdly, while detained, unlawful combatants have a number of rights which ensure conditions of detention are acceptable. They are entitled to adequate health care;⁵⁷⁹ adequate food and water;⁵⁸⁰ adequate clothing;⁵⁸¹ hygienic quarters;⁵⁸² to respect for their religious practices and convictions;⁵⁸³ and to receive visits from the ICRC.⁵⁸⁴

Finally, unlawful combatants benefit from the principle of non-refoulement. The principle of non-refoulement prohibits people being returned to countries where they will face a real risk of torture.⁵⁸⁵ This rule is absolute and must be upheld in all circumstances.

⁵⁷⁴ ICCPR, article 6.

⁵⁷⁵ *Dermitt Barbato v Uruguay* (1982) UN Doc. CCPR/C/17/D/84/1981, para 9.2.

⁵⁷⁶ Geneva Convention IV, articles 31 and 32; Geneva Conventions, common article 3; ICCPR, article 7; Additional Protocol I, article 75(2)(a)(ii).

⁵⁷⁷ UNCAT, article 1.

⁵⁷⁸ Geneva Conventions, common article 3; ICCPR, article 7; Additional Protocol I, article 75(2)(b); UNCAT, article 16.

⁵⁷⁹ Geneva Convention IV, article 38(2).

⁵⁸⁰ *Ibid*, article 89.

⁵⁸¹ *Ibid*, article 90.

⁵⁸² *Ibid*, article 85.

⁵⁸³ *Ibid*, articles 27(1) and 38(3); Additional Protocol I, article 75(1).

⁵⁸⁴ Geneva Convention IV, article 143.

⁵⁸⁵ UNCAT, article 3.

To summarise, unlawful combatants have the right to liberty and must not be arbitrarily detained. If detained, unlawful combatants have the right to a fair trial and the corresponding judicial guarantees. While incarcerated, detainees must not be tortured or ill-treated; their right to life must be protected; and conditions of detention must be adequate. Detention must cease when the circumstances justifying arrest no longer exist and detainees must not be returned to a country where they would face a real risk of torture. These protections for unlawful combatants continue until their final release or repatriation, even after the close of hostilities.⁵⁸⁶

As has been shown, the US may have breached many of these rights. The majority of the detainees have not been given the opportunity to contest their detention. They have been held in inadequate conditions for a period of over five years with no charges being laid against them. Allegations of torture have been made repeatedly during the last five years, and the US openly admits to using some methods which it has been shown do amount to, at the very least, cruel, inhuman or degrading treatment under international law.

Rights: POWs vs unlawful combatants

That all al-Qaeda prisoners held at the Guantánamo Bay detention facility are unlawful combatants and therefore not entitled to POW status has been accepted. Furthermore, it has been shown that it is likely that the majority of Taliban members held there are also, most likely, unlawful combatants. The rights owed to unlawful combatants have been extrapolated from the various international law documents and summarised. It will be interesting now to consider what differences there are between the rights of unlawful combatants and the rights of lawful combatants. Lawful combatants fulfil the combatancy criteria in article 4A of the Third Geneva Convention and must consequently be treated as POWs. Fundamental international law on the capture, internment, treatment and repatriation of POWs is contained in the Third Geneva Convention – the Convention relative to the Treatment of Prisoners of War.

⁵⁸⁶ Additional Protocol I, article 75(6).

This Convention contains very specific provisions on a wide range of diverse issues relating to POWs in captivity such as labour,⁵⁸⁷ financial resources⁵⁸⁸ and penal and disciplinary sanctions.⁵⁸⁹ The majority of these are not relevant to the current discussion. However, it must be emphasised that there is one comprehensive document explicitly delineating the rights and obligations of POWs. This automatically puts POWs in a much more secure position than that of unlawful combatants. The rights of unlawful combatants have to be searched for and drawn out of a number of different documents. My research has allowed a clear comparison of the rights of POWs and unlawful combatants. The following is a summary of the rights they have in common: the right to a fair trial;⁵⁹⁰ to be treated humanely;⁵⁹¹ to practise their religion;⁵⁹² and to respect for their persons and honour.⁵⁹³ No physical or mental torture or coercion may be used to secure information of any kind;⁵⁹⁴ the Detaining Power is prohibited from causing death or seriously endangering the health of a detainee due to an unlawful act or omission;⁵⁹⁵ and any transfer of detainees must be effected humanely.⁵⁹⁶ Detainee quarters must be adequately heated, lighted and protected from dampness;⁵⁹⁷ and the cleanliness of camps must be ensured.⁵⁹⁸ Detainees must be allocated sufficient clothing and footwear;⁵⁹⁹ sufficient daily food and drinking water rations;⁶⁰⁰ and provided with adequate medical attention.⁶⁰¹ Finally, detainees must be released as soon as possible after the cessation of hostilities.⁶⁰²

⁵⁸⁷ Geneva Convention III, section III.

⁵⁸⁸ *Ibid*, section IV.

⁵⁸⁹ *Ibid*, section VI.

⁵⁹⁰ *Ibid*, section VI, Chapter III. The corresponding right for unlawful combatants can be found in Geneva Convention IV, article 43; Geneva Conventions, common article 3; ICCPR, article 14.

⁵⁹¹ Geneva Convention III, article 13. Unlawful combatants: Geneva Convention IV, article 37; ICCPR, article 10; Additional Protocol I, article 75.

⁵⁹² Geneva Convention III, article 34. Unlawful combatants: Geneva Convention IV, articles 38 and 86.

⁵⁹³ Geneva Convention III, article 14. Unlawful combatants: Geneva Convention IV, article 27.

⁵⁹⁴ Geneva Convention III, article 17. Unlawful combatants: Geneva Convention IV, article 31; Geneva Conventions, common article 3; ICCPR, article 7; UNCAT, article 1.

⁵⁹⁵ Geneva Convention III, article 13. Unlawful combatants: 'the right to life' in ICCPR, article 6.

⁵⁹⁶ Geneva Convention III, article 46. Unlawful combatants: Geneva Convention IV, article 127.

⁵⁹⁷ Geneva Convention III, article 25. Unlawful combatants: Geneva Convention IV, article 85.

⁵⁹⁸ Geneva Convention III, article 29. Unlawful combatants: Geneva Convention IV, article 85.

⁵⁹⁹ Geneva Convention III, article 27. Unlawful combatants: Geneva Convention IV, article 90.

⁶⁰⁰ Geneva Convention III, article 26. Unlawful combatants: Geneva Convention IV, article 89.

⁶⁰¹ Geneva Convention III, article 30. Unlawful combatants: Geneva Convention IV, article 38.

⁶⁰² Geneva Convention III, article 118. Unlawful combatants: Geneva Convention IV, article 42; Additional Protocol I, article 75.

Clearly, these rights are all to do with conditions essential to humane treatment. Due to their special status POWs have some other rights which unlawful combatants do not share. The most significant is that POWs cannot be prosecuted simply for taking part in hostilities whereas unlawful combatants can. When non-combatants take part in hostilities they are acting unlawfully and hence can be prosecuted for their unlawful actions. Furthermore, following a trial, unlawful combatants can be sentenced to execution, if such a punishment is provided for in the law used at the trial. POWs can also be executed but there are more strict requirements surrounding such a sentence. The death sentence cannot be pronounced on a POW unless the court has been made aware of the fact that the POW is not a national of the Detaining Power and owes no duty of allegiance to that Detaining Power.⁶⁰³ Moreover, the execution cannot be carried out until six months after the Protecting Power receives notice of the sentence.⁶⁰⁴

The second significant difference is that POWs must be released and repatriated without delay on the close of hostilities.⁶⁰⁵ This obligation is contained in article 118 of the Third Geneva Convention and has been commented on by the US Supreme Court in the case of *Hamdi v Rumsfeld*.⁶⁰⁶ Justice O'Connor stated that it is a clearly established principle of the law of war that the detention of enemy combatants is limited to the duration of the particular conflict in which the detainees participated.⁶⁰⁷ Detention during an armed-conflict is for the purpose of holding the detainees off the battlefield – once the armed-conflict is over their continued detention is not justifiable.⁶⁰⁸ Conversely, non-POWs may be held beyond the end of hostilities but must be charged with a crime and given a fair trial.

POWs are only required to give “surname, first names and rank, date of birth, and army, regimental, personal or serial number”⁶⁰⁹ whereas no such restriction is placed on information from unlawful combatants. POWs must be able to inform

⁶⁰³ Geneva Convention III, article 100.

⁶⁰⁴ *Ibid*, article 101.

⁶⁰⁵ *Ibid*, article 118.

⁶⁰⁶ *Hamdi v Rumsfeld* 542 U.S. 507 (2004).

⁶⁰⁷ *Ibid*, 521.

⁶⁰⁸ *Ibid*, 519.

⁶⁰⁹ Geneva Convention III, article 17.

their family and the Central Prisoners of War Agency of their whereabouts⁶¹⁰ and are allowed to send and receive letters and cards (not less than two letters and four cards monthly).⁶¹¹ Unlawful combatants are only entitled to communicate with the outside world if reasons of security do not prevent it.⁶¹² POWs can only be tried by military courts unless the law of the Detaining Power permits civil courts to try a member of the armed forces in respect of the particular offence under consideration.⁶¹³ On the other hand, unlawful combatants are, in many cases, civilians so can be tried under civilian law. Many other rights held by POWs but not by unlawful combatants are found in the comprehensive Convention. However, it is the essential human rights that are the focus of this thesis – the rights which deal with physical treatment and conditions of detention and it is these life and health preserving rights which are virtually identical regardless of combatancy status.

The classification of lawful or unlawful combatant is important as only lawful combatants are entitled to POW status. POWs do possess many more protections under international law than unlawful combatants. However, the fundamental rights and protections of POWs and unlawful combatants are very similar. People in either group must be treated humanely, have the right to a fair trial, must be released as soon as the reasons for incarceration have ended, and must not be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

⁶¹⁰ Geneva Convention III, article 70.

⁶¹¹ Ibid, article 71.

⁶¹² Geneva Convention IV, article 25 read in conjunction with article 5.

⁶¹³ Geneva Convention III, article 84.

Chapter Five

Conclusion

The problem under investigation was the incarceration since 2001 of hundreds of men allegedly involved in the conflict in Afghanistan. These men had been detained for over five years without recourse to justice, and allegations from well respected international human rights groups of ill-treatment and torture were frequent. Despite international outrage that the rights of the prisoners had been ignored, the Bush Administration continued to not bring charges or accord trials to the detainees. It was the hypothesis of the author that there are certain rights under international law which must be granted to everyone, regardless of the crimes it is thought they may have committed. Hence, I set out to discover exactly what these rights were.

As explained in the introduction, it was decided to focus the thesis on a detailed investigation of the rights of unlawful combatants. The detention centre at the US Naval Base in Guantánamo Bay, Cuba, was chosen as a current high-profile prison where unlawful combatants are held. It is appreciated that this is not the only facility in which rights are being denied to detainees. Nor are Taliban and al-Qaeda members the only detainees in these facilities. However, using the Taliban and al-Qaeda detainees at Guantánamo Bay as an example, provided an opportunity to research and present a thesis that synthesises relevant human rights and international law in a manageable way. The rights which pertain to the Taliban and al-Qaeda are minimum guarantees under international law. Therefore, they will apply to other detainees the world over.

To establish the rights of members of the Taliban and al-Qaeda who fought in the 2001 Afghanistan conflict and are currently detained at the Guantánamo Bay detention facility, a determination as to their combatancy status had to be made. Lawful combatants are entitled to POW status on capture whereas unlawful

combatants are not. The rights of POWs are clearly laid out in the Third Geneva Convention and are uncontroversial. In order to be a lawful combatant, and therefore entitled to POW status, a fighter must satisfy a number of conditions. These conditions are found in article 4A(2) of the Third Geneva Convention. To be a lawful combatant a fighter must:

- (1) be commanded by a person responsible for his subordinates;
- (2) wear a fixed distinctive sign recognisable at a distance;
- (3) carry arms openly; and
- (4) conduct operations in accordance with the laws of war.

All participants of an armed conflict, including members of regular armed forces, must fulfil the conditions in order to be a lawful combatant.

Having defined the law on combatancy, the next task was to apply these conditions to the Taliban and al-Qaeda fighters in order to determine whether it was possible for them to qualify as lawful combatants. It was difficult to gather evidence regarding the actions of Taliban and al-Qaeda fighters in the field but some conclusions can be drawn from the information available. It is possible that some members of the Taliban did satisfy the four conditions. As regards the first criterion it has been suggested that the Taliban was structured under a number of local leaders rather than having an overall command organisation. However, it has also been suggested that the warlord structure of the Taliban, while not a Western style of military leadership, still fulfils the condition of being commanded by a person responsible for his subordinates. The other three criteria must be considered on an individual, rather than a collective, basis. The black turban was a fixed distinctive sign which was known to be worn by Taliban members; many Taliban fighters did carry their weapons openly; and there is no proof that every Taliban fighter breached the laws of war. Therefore, it is possible that individual Taliban members may have satisfied all four required conditions and hence have fulfilled the lawful combatancy requirements. As a result, the blanket decision made by the US that no Taliban members were entitled to POW status is illegitimate and must be revisited. The US needs to carry out an evaluation (under article 5 of the Third Geneva Convention) for each individual Taliban member detained at Guantánamo Bay to determine whether they are a lawful combatant and therefore entitled to POW status. Until this article 5 determination has been performed, all Taliban detainees should be treated as POWs as there is doubt as to their status. It is even possible that an article 5

determination will find some of the detainees do not belong to the Taliban and were not involved with the war in Afghanistan.

The four criteria also had to be applied to the actions of al-Qaeda during the armed conflict in Afghanistan to establish whether any al-Qaeda members could be entitled to lawful combatant status. As a terrorist network al-Qaeda did not set out to distinguish themselves from the civilian population. To the contrary, they cultivated the anonymity which blending in with civilians could give them. The requirement to wear a fixed distinctive sign is an individual requirement. However, it is clear that as there was no sign or uniform recognised as showing membership of al-Qaeda, it is not possible for any al-Qaeda members to have satisfied the second combatancy requirement. As no al-Qaeda member could have satisfied this second requirement individual determinations as to status are not required. All members of al-Qaeda who fought in the 2001 Afghanistan conflict and are detained at Guantánamo Bay are unlawful combatants and consequently not entitled to POW status.

The conclusion at the end of Chapter Three was that some Taliban members may be entitled to POW status but no al-Qaeda members would be. Therefore, the next step was to determine what rights, if any, these unlawful combatants were entitled to.

A comprehensive look at a number of international humanitarian law and international human rights documents shows that unlawful combatants do not exist in legal limbo and do in fact have several significant rights that are intended to provide protection to them. The right to liberty can be found in the Fourth Geneva Convention, Additional Protocol I and the ICCPR. The Fourth Geneva Convention requires that people only be incarcerated if it is absolutely necessary. Similarly, the First Additional Protocol requires that detainees be released as soon as the reasons for detention have ended. Under the ICCPR arbitrary arrest or detention is unlawful.

The right to a fair trial is espoused by the Fourth Geneva Convention, common article 3 of the Geneva Conventions, Article 75 of Additional Protocol I and the

International Covenant on Civil and Political Rights. The right to a fair trial covers the right to have a court consider the fact of detention. It also includes fundamental principles such as the right to be presumed innocent until proven guilty and the right to be informed of the reasons for arrest. The right to a fair trial means that summary justice is unlawful. Punishment or detention may not occur until a fair trial has been held.

The third essential right which unlawful combatants have the benefit of is the prohibition against torture and cruel, inhuman or degrading treatment. This *jus cogens* norm of international law can be found in the Universal Declaration on Human Rights, the Geneva Conventions, the ICCPR, the American Convention on Human Rights, the European Convention on Human Rights and the Rome Statute of the International Criminal Court. The prohibition against torture and the other forms of ill-treatment is absolute. There are no circumstances under which torture is justifiable.

Finally, unlawful combatants have the right to humane treatment and adequate conditions of detention. In particular, detention facilities must be hygienic and adequately heated and lighted; and adequate food, water and medical treatment must be provided.

These essential rights are the minimum rights owed to unlawful combatants and yet the available evidence shows that they are not being upheld for the Taliban and al-Qaeda detainees at Guantánamo Bay. Some of the prisoners have been incarcerated for more than five years with no access to justice and allegations of torture and other forms of ill-treatment have been convincing. The facility at Guantánamo Bay should be closed and the detainees released or charged with a crime, and moved to a detention centre on US soil for a fair trial.

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