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Inter Arma Silent Leges?
Applying Humanitarian and
Human Rights Law to the
Swedish Citizen at Guantanamo
Bay.

Master thesis
20 points

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Summary

Since January 2002, a Swedish citizen has been detained at the U.S. Naval Base at Guantanamo Bay in Cuba. He was captured in Pakistan during the post-September 11 war between Afghanistan and the United States and subsequently brought to Guantanamo, where he has now passed his two years imprisonment. The U.S. has pronounced that it cannot determine how dangerous he is because he is not answering questions and as a consequent of that he cannot be repatriated.

The war in Afghanistan is over but the “war against terrorism”, which the U.S. started, is still going on. The U.S. has determined that the laws of war or international humanitarian law is applicable to the “war on terrorism”. But even during armed conflicts, to which the humanitarian law is applicable, the fundamental provisions of international human rights law remain in force.

Despite the numerous criticisms from different human rights organisations, the U.S. has still not reviewed its position that the individuals at Guantanamo are not entitled to prisoner of war status and that they should continue to be detained. The U.S. opinion is that the Geneva Conventions are applicable to the Taliban detainees but that they do not fulfil the requirements of being prisoners of war. Regarding the al-Qaeda detainees the opinion is that the Geneva Conventions are not applicable because al-Qaeda is not a state party to the Conventions and as an international terrorist organisation they are not entitled to treatment as prisoners of war.

When going through the provisions enabling entitlement to POW status, it seems that it cannot be clearly said that the Taliban detainees do not fulfil the requirements. Neither can it be beyond doubt that al-Qaeda detainees fall outside the protection of the Geneva Conventions. The U.S. is nevertheless refusing to let a competent tribunal, as referred to in article 5 of the Third Geneva Convention, determine the status of the detainees. The U.S. claims that it has determined the status on an individual basis but ends the discussion by saying that most of the detainees are likely to lie.

This thesis looks at the U.S. detention and treatment of the Swedish citizen at Guantanamo in an international humanitarian and human rights law perspective. I would argue that the detention itself could be justified under either humanitarian law or human rights law, but the U.S. fails to treat the detainee according to those laws.

Preface

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Abbreviations

CESC	International Covenant on Economic, Social and Cultural Rights
EP	European Parliament
GC	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
GPW	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
HRC	Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
OAS	Organization of American States
POW	Prisoner of War
UNHCHR	UN High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights

1 Introduction

Since January 2002, a Swedish citizen is being held in a prison camp at Guantanamo Bay in Cuba. He was captured in Pakistan during the post-September 11 war between the United States and Afghanistan and was subsequently brought to the detention camps at Guantanamo Bay. It has not been established whether he is a Taliban or a member of al-Qaeda and he has now passed his two-year anniversary at the Naval Base. So far he has not been informed of the reason for his detention or of any charges against him. The U.S. is saying that as he is not answering questions, it cannot determine how dangerous he is and therefore he cannot be released. This thesis will have the detainees at Guantanamo Bay in focus. I have used the Swedish national to put a face on the situation there.

I would like to point out that I am not saying that the Swedish citizen could not have been engaged in terrorist activities. Neither am I saying that terrorists are not to be adjudicated. What is important is that the Swedish citizen has been imprisoned for over two years without knowing the grounds for his detention or if and when he will be prosecuted and the circumstances if so will be the case.

1.1 Aim and Purpose

The aim of this thesis is to examine the “Guantanamo Case”. In applying international humanitarian law as well as international human rights law to the case I will try to examine the U.S. arguments for keeping the Swedish citizen, along with the other detainees, at Guantanamo. While the U.S. is reluctant to address the rights afforded under international humanitarian law as well as human rights law to the detainees, it would be interesting to see what sources of law are applicable and what protection they might give. What are the U.S. arguments and what are the counter-arguments? The U.S. claims that it is following international law but a number of states and international organisations claim the opposite. How should one then deal with the subject? Who is right and who is wrong? Are there any clear answers?

1.2 Questions

Is the U.S. detention and treatment of the Swedish citizen justified by means of international humanitarian law?

Is the U.S. detention and treatment of the Swedish citizen justified by means of international human rights law?

1.3 Limitations

As this is an ongoing discussion and things are still evolving in the matter I have chosen to not take into consideration developments regarding the Swedish detainee, after January 1, 2004.

As neither the United States nor Afghanistan are states parties to the Protocols Additional¹ to the Geneva Conventions, the provisions of those protocols will not be examined, except for those who could be said to have a customary character.

As the U.S. Supreme Court is now going to consider the petitions for *habeas corpus* that have been filed in this matter, I will not go into any deeper discussion concerning those petitions.

It has not been determined whether the Swedish citizen belonged to the Taliban or al-Qaeda, so I will analyze his case from these two perspectives. Most of the information surrounding the Swede is classified or has not been established, such as how he is detained and treated at Guantanamo, and what he was doing in Afghanistan or Pakistan. In most parts of this thesis I will therefore relate to all the detainees, and not in particular the Swedish citizen.

For the purpose of this thesis, the term “war in Afghanistan” means the war against the Taliban regime in that country.

1.4 Methodology and Theory

My methodology is, through application of international humanitarian and human rights law, to find legal aspects of the Swedish citizen’s detention and to do an analysis of the use of international human rights and humanitarian law in this subject.

My theory is that the U.S. is misinterpreting the relevant laws to suit its own purposes, namely to be able to keep the prisoners at Guantanamo. In picking out the “best parts” of applicable laws it is trying to create a new legal system suitable for its operations.

My primary source has been the Internet. I have used what I consider to be reliable websites, among others the U.S. Government’s, the UN, the ICRC, and the Crimes of War- Project’s official websites.

I have also used relevant literature of international humanitarian and human rights law.

1.5 Disposition

The background will enlighten the process that led to the U.S. intervention in Afghanistan and how the situation in Afghanistan looked like prior to that

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

intervention. It will also describe how the Swedish national came to end up at Guantanamo and other facts related to him. The following chapter takes up the U.S. arguments and deals with them from a humanitarian and human rights law perspective. The last chapter consists of an analysis together with answers to the questions.

2 Background

2.1 From September 11 to the Intervention in Afghanistan

The news of the attacks of the World Trade Center and the Pentagon on September 11 2001, spread across the world causing fear and distress and left no one unaffected. President Bush referred to the attacks as “more than acts of terror. They were acts of war”.² On September 12, the UN Security Council adopted Resolution 1368(2001), in which it recognised the inherent right of individual or collective self-defence, condemned the attacks and stated that international terrorism constitutes a threat to international peace and security.³ The Security Council called on all states to work together to bring the perpetrators, organisers and sponsors of the attacks to justice; “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable”.⁴ On September 20, President Bush accused al-Qaeda and Osama bin Laden of being the perpetrators of the attacks. He said al-Qaeda had “great influence in Afghanistan” and supported “the Taliban regime in controlling most of that country”.⁵ President Bush condemned the Taliban regime and said that it had to cooperate in handing out members of al-Qaeda hiding in Afghanistan; “[t]he Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.”⁶ According to its alleged right to self-defence the U.S. intervened in Afghanistan on October 7 2001, in an operation called “Enduring Freedom”.

2.2 The Situation in Afghanistan Prior to the U.S. Intervention

At the time of the U.S. intervention, Afghanistan was in a state of civil war between the Taliban on the one hand and the United Front on the other. A brief summary of the Afghan history is needed to fully understand this war. In 1978, the communist party PDPA (People’s Democratic Party of Afghanistan) took power in a coup and its leader, Taraki, became president. This was followed by instability in the country, which led to the Soviet

² *Remarks by the President In Photo Opportunity with the National Security Team*, 12 September 2001, The White House, www.whitehouse.gov/news/releases/2001/09/20010912-4.html, 17 March 2004.

³ United Nations Security Council Resolution 1368 (2001), S/RES/1368 (2001), 12 September 2001.

⁴ *Ibid.*

⁵ *Address to a Joint Session of Congress and the American People*, 20 September 2001, The White House, www.whitehouse.gov/news/releases/2001/09/20010920-8.html 6 February 2004.

⁶ *Ibid.*

intervention, and later occupation in 1979. President Amin, who had succeeded Taraki, was assassinated and the Soviet Union appointed Babrak Karmal as new president. The resistance was made up by different Islamic organisations that became known as *mujahidin* (guerrilla) and had their bases in Pakistan and Iran. The resistance forces were composed of thousands of radical Muslims from a number of Muslim countries.⁷

Osama bin Laden joined the resistance in Pakistan in the beginning of the 1980s. He started training camps in Afghanistan for the foreign fighters, and created the al-Qaeda⁸ network in the late 1980s, whose purpose was to organise Arab volunteers who fought against the Soviet Union occupation in Afghanistan.⁹

With the Geneva Accords of 1988, a sort of peace treaty, the Soviet Union agreed to leave Afghanistan by February 1989, which it also did.¹⁰

In 1992 Tajiks, Uzbeks and Hazara factions formed the Northern Alliance.¹¹ In April 1992 an agreement was made on a government comprised of different parties except one whose leader was supported by Pakistan. The president would be Majadeddi for two months, who would be succeeded by Rabbani, leader of an Islamist party (Jamiat-I Islami-yi Afghanistan, established in the 1970s) for four months. Rabbani became president of the Islamic State of Afghanistan (ISA) in June 1992. The shura (council) that would elect the president to follow Rabbani, was boycotted by most of the parties which led to the re-election of Rabbani in December 1992.¹²

In 1994 the country was divided between different factions. Chaos ruled the country, which made some former mujahidin join together with Mullah Muhammad Omar, around Kandahar. They called themselves *Taliban*, students. They sought for stability in the country and enforcement of Islamic law. The Taliban received support from Pakistan. With the Taliban occupation of the town of Herat in 1995, the ISA forces were cut off from the land route to Iran.

The Taliban took control over Kabul in 1996 and the Northern Alliance now came to be in opposition to the Taliban. They subsequently renamed themselves the United National Islamic Front for the Salvation of Afghanistan, after they had gained the support from other factions than the original Northern Alliance's ones. The United Front supported the

⁷ *Backgrounder on Afghanistan: History of the War*, October 2001, Human Rights Watch, <www.hrw.org/backgrounder/asia/afghan-bck1023.htm>, 29 February 2004.

⁸ Al-Qaeda means "the base".

⁹ *Al-Qaeda's origins and links*, 16 May 2003, BBC News, <http://news.bbc.co.uk/2/hi/world/south_asia/1670089.stm>, 3 June 2004.

¹⁰ *AFGHANISTAN, CIVIL CRISIS OF IMPUNITY, The Role of Pakistan, Russia, and Iran in Fueling the Civil War*, July 2001, Human Rights Watch, Publications, Part II, <www.hrw.org/reports/2001/afghan2/Afghan0701-01.htm#P181_37555>, 3 June 2004.

¹¹ *Supra* note 7.

¹² *Supra* note 10.

government of ISA and Rabbani. At this time the Taliban controlled most of the southern and western Afghanistan and the United Front the northern parts of the country.¹³

After leaving Afghanistan in 1990, Osama bin Laden returned in 1996 and he now became closely related to the Taliban.¹⁴ It is thought that al-Qaeda is operating in some 40 to 50 countries all over the world.¹⁵

Mullah Omar was head of the Taliban, and in 1997 Afghanistan was renamed the Islamic Emirate of Afghanistan by the Taliban. In 1997, when the Taliban marched on Mazar-I Sharif, Pakistan, Saudi Arabia and the United Arab Emirates recognised the Taliban as the legitimate government of Afghanistan.¹⁶

In August 1998, the U.S. attacked the training camps of bin Laden, who was said to have been behind the bombings of the U.S. embassies in Nairobi and Dar es Salaam.¹⁷

In October 1999, the UN sanctions demanded of the Taliban to hand over bin Laden, forbade aircraft controlled by the Taliban from taking off and landing and froze Taliban assets abroad. The Taliban failed to hand over bin Laden, which led to an arms embargo and a travel ban for Taliban officials outside Afghanistan. Offices belonging to the Taliban abroad were closed down.

The Taliban was only recognised as the legitimate government by three states¹⁸, and the ISA representatives held Afghanistan's seat in the UN. According to Human Rights Watch, both the Taliban and the United Front have carried out violations of international humanitarian law during the conflict.¹⁹

2.3 The Swedish Detainee

The first news about a Swedish citizen being involved in the hostilities in Afghanistan reached the Swedish Government on December 20 2001. According to an article in a Pakistani newspaper, a Swedish national had been arrested along the Afghan-Pakistan border when he and a group of al-

¹³ *Afghanistan & the United Nations, A Historical Perspective*, United Nations Assistance Mission in Afghanistan, <www.unama-afg.org/about/info.html> 7 May 2004.

¹⁴ *Supra* note 9.

¹⁵ *Supra* note 9.

¹⁶ *Supra* note 7.

¹⁷ *Supra* note 7.

¹⁸ Pakistan, Saudi Arabia and United Arab Emirates.

¹⁹ *Fueling Aghanistan's[sic!] War, Press Backgrounder*, 2001, HRW World Report 2001: Asia Overview, <www.hrw.org/backgrounder/asia/afghanistan/afghbk.htm> 1 June 2004.

Qaeda suspects tried to escape into Afghanistan from Pakistan.²⁰ He was arrested on Pakistani territory.²¹

On January 9 2002, the Swedish Embassy in Washington was informed by the U.S. State Department of the imprisonment of suspected al-Qaeda members.

On January 10 the Swedish Government, through the Embassy in Washington, informed the U.S. State Department that Sweden expected to be informed whether there was any Swedish citizen in American custody.²²

On January 11 the U.S. Embassy in Stockholm said that there was no Swedish citizen among the prisoners who would be transferred to Guantanamo Bay.²³

On January 18 2002, the U.S. State Department informed the Swedish Embassy in Washington that a Swedish national in American custody had been transported from Afghanistan to the U.S. Naval Base at Guantanamo Bay. This information contained the U.S. position that the individuals constituted a threat to the U.S. and to international peace and security. The prisoners would be treated humanely and the U.S. was considering the possibility of charging them in a U.S. forum or extraditing them to their home countries for trial there.²⁴

A Swedish note was sent to the U.S. State Department on January 20, with a request to meet with the prisoner immediately.²⁵ The first meeting with the prisoner took place February 15-17 2002.²⁶

The Swedish Department of Foreign Affairs has tried to gain information of the legal grounds for the detention and the accusations against the Swedish citizen. According to the Swedish authorities the U.S. has not been able to clarify what hostilities it refers to: the conflict in Afghanistan, the conflict with al-Qaeda, or the war on terrorism.

The Swedish view is that the Swedish citizen should be regarded either as a prisoner of war or as a civilian, captured in an armed conflict, and in both cases be treated in accordance with the Geneva Conventions.

If he is to be regarded as a civilian crime suspect, he should be treated in accordance with the legal system of international human rights, including the International Covenant on Civil and Political rights (ICCPR), which the U.S. has ratified.

²⁰ Swedish Embassy Islamabad to the Ministry of Foreign Affairs, 20 December 2001.

²¹ Correspondence through e-mail within the Foreign Ministry, "Den uppgift som fanns här och som gick tillbaka på en uppgift i en pakistansk tidning handlade om en person som uppenbarligen skulle befinna sig i Pakistan, inte i Afghanistan" (the information contained here that was based on the information in a Pakistani newspaper concerned a person who obviously would be situated in Pakistan, not in Afghanistan), 11 January 2002.

²² Regeringskansliet, Utrikesdepartementet, *Svar till KU I granskningsärendet 2002/03:22*, 4 March 2003.

²³ *Ibid.*

²⁴ Ambassador Bo Eriksson, the Swedish Embassy in Washington to the Ministry of Foreign Affairs 18 January 2002.

²⁵ *Supra* note 22.

²⁶ *Supra* note 22.

Sweden has requested his immediate release as it considers him being imprisoned in violation of international law. The Swedish citizen is not suspected of any crime in Sweden.²⁷

The U.S. view is that, as the Swedish citizen is not cooperating with the U.S. authorities in answering questions, it cannot determine how dangerous he is and hence he cannot be released. The U.S. wants him to answer questions on what he was doing in Afghanistan.²⁸

²⁷ *Supra* note 22.

²⁸ *Amerikanske ambassadören utfrågad om kubasvensken*, 28 januari 2004, <www.sr.se/cgi-bin/ekot/artikel.asp?artikel=359591>, 26 April 2004.

3 Treatment of the Guantanamo Detainees

The transferring of prisoners to Guantanamo Bay Naval Base started in January 2002.

The first statement on the detainees was that they were to “be handled not as prisoners of wars [...] but as unlawful combatants” who “do not have any rights under the Geneva Convention” but were to be treated “for the most part [...] in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate”.²⁹

The U.S. Secretary of Defence Donald Rumsfeld said on January 11 that the U.S.’s aim “is not simply to capture one or two or more terrorist leaders in Afghanistan or to put one terrorist network out of business. It is to tackle terrorism wherever it exists so that Americans can live in peace and free from fear”.³⁰

On January 27, Secretary Rumsfeld visited Guantanamo Bay and Camp X-Ray, where the detainees were first being held before they were brought to the more permanent Camp Delta. He repeated that the detainees were not to be treated as prisoners of war and said that they had been “captured on a battlefield”.³¹

In early February, the President declared that the U.S. would treat the detainees humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949”.³² The Geneva Conventions would apply to the Taliban detainees even though the U.S. had “never recognized the Taliban as the legitimate Afghan government”.³³ The Conventions would not apply to the al-Qaeda detainees because only states can be parties to the Conventions and al-Qaeda is not a state. Neither the Taliban nor the al-Qaeda prisoners would, however, be entitled to prisoner of war (POW) status. Al-Qaeda detainees: due to the fact that al-Qaeda is a terrorist group and “[a]s such, its members are not entitled to POW status”.³⁴ The Taliban detainees: because they fail to meet the requirements of the Geneva Conventions.³⁵

²⁹ *DoD News Briefing- Secretary Rumsfeld and Gen. Myers*, 11 January 2002, United States Department of Defense, www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html, 16 February 2004.

³⁰ *Ibid.*

³¹ *Secretary Rumsfeld Media Availability en route to Camp X-Ray*, 27 January 2002, United States Department of Defense, www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html, 18 March 2004.

³² *Fact Sheet, Status of Detainees at Guantanamo*, 7 February 2002, the White House, www.whitehouse.gov/news/releases/2002/02/20020207-13.html, 18 March 2004.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

This statement of President Bush caused a number of human rights organisations to react.

The UN High Commissioner for Human Rights (UNHCHR), recalled, on January 16 2002, that “[t]he legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention”.³⁶

Human Rights Watch stated, in early February, that “[t]his decision puts soldiers around the world at risk, [...] especially U.S. troops who might be captured in combat”.³⁷

The European Parliament, on February 2 2002, “agree[d] that the prisoners [...] [at] Guantanamo do not fall precisely within the definitions of the Geneva Convention” and therefore called on the UN and the Security Council “to pass a resolution establishing a tribunal to deal with Afghanistan, with the aim of clarifying the prisoners’ legal status”.³⁸

The Organization of American States’ (OAS) Inter-American Commission on Human Rights requested, on March 13 2002, “that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal”.³⁹

3.1 Applicable Law

International humanitarian law (IHL) together with international human rights law constitute a framework of protection for individual and collective rights. International human rights law is applicable at all times⁴⁰, whereas IHL is applicable only during armed conflicts. One could therefore say that these two bodies of law are complementary. Traditionally there has been a distinction between human rights and humanitarian law, where the latter regulates the relationship between states, and the former the relationship between the state and its citizens. According to article 2 (7) of the UN

³⁶ STATEMENT OF HIGH COMMISSIONER FOR HUMAN RIGHTS ON DETENTION OF TALIBAN AND AL QAIDA PRISONERS AT US BASE IN GUANTANAMO BAY, CUBA, 16 January 2002, United Nations High Commissioner for Human Rights, <www.unhcr.ch/hurricane/hurricane.nsf/view01/C537C6D4657C7928C1256B43003E7D0B?opendocument>, 19 April 2004.

³⁷ U.S.: Bush Errs in Geneva Convention Rules, Fails to Grant POW Status to Detainees, 7 February 2002, Human Rights Watch, <www.hrw.org/press/2002/02/geneva0207.htm>, 6 June 2003.

³⁸ European Parliament resolution on detainees in Guantanamo Bay, 7 February 2002, European Parliament, <http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=020207&LANGUE=EN&TPV=DEF&LASTCHAP=26&SDOCTA=19&TXTLST=1&Type_Doc=FIRST&POS=1>, 13 May 2003.

³⁹ Request for Precautionary Measures, 13 March 2002, Inter-American Commission on Human Rights, <www.humanrightsnow.org/oasconventiononguantanamodetainees.htm>, 5 April 2004.

⁴⁰ At least those provisions that may not be subject to derogations.

Charter⁴¹, states may not interfere with the domestic affairs of another country.

In the case of the Guantanamo detainees, the U.S. has suggested that the Geneva Conventions do not contain applicable rules.⁴² But even if a state refuses to address international humanitarian law, the fundamental human rights, embodied in the International Covenant on Civil and Political Rights (ICCPR), among other treaties, are applicable.⁴³ It is therefore of importance to investigate the U.S. arguments from these two perspectives.

3.1.1 International Human Rights Law

One of the purposes of the UN, as spelled out in article 1(3) of the Charter, is to promote and encourage respect for human rights and fundamental freedoms for all without distinction.⁴⁴

The International Covenant on Civil and Political Rights (ICCPR) together with the International Covenant on Economic, Social and Cultural Rights (CESCR) were adopted in 1966 and codify the Universal Declaration of Human Rights into binding treaties. As subjects under international law, it is the state that is the guarantor and violator of human rights. It is the responsibility of the state to promote and respect human rights. All human rights are universal, indivisible, interdependent and interrelated.⁴⁵

The Human Rights Committee (HRC) is the treaty body established under the ICCPR⁴⁶, which the U.S. ratified in 1992. It monitors how states comply with the provisions of the Covenant. The HRC is not a court and does not render judgements. The Committee makes recommendations and non-binding decisions, which are, however, most often complied with. The HRC also adopts General Comments, that is a summary of practice of the HRC, its views and thoughts.

The ICCPR is a binding treaty and article 2 states that states parties must take the necessary steps to implement the rights into their own domestic legal systems. States parties are also bound to respect and ensure that the rights embodied in the Covenant are respected and ensured to all individuals

⁴¹ Article 2(7): Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

⁴² See below, 3.2.1 Armed Conflict of What Character?

⁴³ See below, 3.1.1 International Human Rights Law.

⁴⁴ Article 1(3) UN Charter: (The purposes of the United Nations are:) To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

⁴⁵ United Nations General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, <[www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>, 3 June 2004.

⁴⁶ Article 28, ICCPR.

within their territory and subject to its jurisdiction.⁴⁷ This means that not only the state party's own citizens are covered, but nationals from other states enjoy protection under the Covenant if they are within the territory or under the jurisdiction of the state party.⁴⁸ Individuals who find themselves in the power of a state party's armed forces operating outside its own territory, also enjoy protection under the Covenant and it does not matter in what way the individual came to end up under such power.⁴⁹

According to article 4, states may derogate from some of the provisions of the Covenant "[i]n time of public emergency which threatens the life of the nation".⁵⁰ The derogation must be "strictly required by the exigencies of the situation". Derogations can only be made from certain provisions, not all. Derogations may not be made from Article 6 (right to life), Article 7 (prohibition of torture), Article 8 para. 1) and 2) (prohibition of slavery and servitude), Article 11 (No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation), Article 15 (the prohibition of retroactive penal legislation), Article 16 (recognition before the law) and Article 18 (freedom of thought, conscience and religion).

The Human Rights Committee has stated that derogations must be "of an exceptional and temporary nature".⁵¹ There are two requirements for invoking Article 4: the state must be in a "public emergency which threatens the life of the nation" and that state of emergency must have been "officially proclaimed".⁵² The HRC monitors if the state is able to make such a proclamation under the domestic laws. The situation of public emergency must amount to a certain degree of seriousness. Even if a state has derogated from some of the provisions of the Covenant, there may be other legal sources available, and in the case of an armed conflict, international

⁴⁷ Article 2, ICCPR.

⁴⁸ *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 April 2004, Office of the High Commissioner for Human Rights, CCPR/C/74/CRP.4/Rev.6.

⁴⁹ *Ibid.*

⁵⁰ Article 4, ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law, and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation

⁵¹ *General Comment NO.29 States of Emergency (article 4)*, 31 August 2001, United Nations International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.11.

⁵² *Ibid.*

humanitarian law applies. The HRC, in its General Comment on article 4, has, however, stated that in cases of armed conflict derogations may only be made if that conflict amount to a threat to the life of the nation.⁵³ The Committee extended this view in its General Comment on article 2, in stating that the ICCPR is applicable in armed conflicts, together with international humanitarian law and that even if IHL may be *lex specialis* “both spheres of law are complementary, not mutually exclusive”.⁵⁴ The Inter-American Commission on Human Rights (IACHR) announced that

“in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.”⁵⁵

This statement is now a part of the Fundamental Standards of Humanity, elaborated by the Commission on Human Rights.⁵⁶

3.1.2 International Humanitarian Law

According to article 2 (4) of the UN Charter, the use of force is prohibited.⁵⁷ The only exceptions are: 1) the inherent right of individual or collective self-defence, provided for under Article 51 of the UN Charter⁵⁸, and; 2) authorisation by the Security Council according to Chapter VII⁵⁹ of the Charter.

⁵³ *Ibid.*

⁵⁴ *Supra* note 48.

⁵⁵ *Supra* note 39.

⁵⁶ *Promotion and Protection of Human Rights, Fundamental Standards of Humanity, Report of the Secretary-General, 25 February 2004, United Nations Economic and Social Council, E/CN.4/2004/90.*

⁵⁷ Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

⁵⁸ Article 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

⁵⁹ Especially articles 39-42. Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The prohibition of the use of force is considered to be customary international law.⁶⁰

Even if an armed conflict is prohibited in the sense that it is not justified by the two exceptions, there is a legal regime governing the way states and individuals act in wartime. This is called international humanitarian law (IHL) and is the law of warfare, applicable in armed conflicts. It does not deal with the question of whether a war is justified or not (*jus ad bellum*), but deals with the question of how a state acts in a state of war (*jus in bello*). The legality of the war is a separate question from that of state conduct during war. In the event of an armed conflict both states parties to the conflict have to fulfil their obligations under international law. IHL offers a two-front protection and consists of two branches of law; 1) the Geneva, and; 2) the Hague law. The latter relates to the rules of conduct, the means and methods of warfare, and the first to the protection of victims during armed conflict.

IHL is built up by basic principles. These are 1) the principle of *distinction* (between the civilian population and combatants, between civilian property, civilian objects and military objectives); 2) the principle of *proportionality* (to prevent excessive harm or injury); 3) the principle of *precaution* (constant care has to be taken to the civilian population as such and civilian objects); 4) the principle of *humanity* (to prevent unnecessary suffering. There is a duty to care for the wounded and sick), and; 5) the principle of *military necessity* (military demands may sometimes have priority over humanitarian law).⁶¹

According to the St. Petersburg Declaration “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.⁶²

The Regulations respecting the laws and customs of war on land (the Hague Regulations) of 1907 sets out *inter alia* the condition for belligerent status and is part of the Hague law.⁶³

The Geneva law concerns protection and consists, among other treaties, of the four Geneva Conventions of 1949 and their Additional Protocols of 1977. The objective of the Conventions is the protection of war victims in cases of armed conflicts and is thus applicable regardless of who started the conflict and why. The Conventions protect persons who are no longer participating in the hostilities; the *wounded and sick, prisoners of war and civilians*.

⁶⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986, International Court of Justice, Merits, *I.C.J. Reports 1986*, paragraph 190.

⁶¹ Marco Sassóli and Antoine A. Bouvier *et al.*, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, (International Committee of the Red Cross, Geneva, 1999), p. 68.

⁶² *Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight*, St. Petersburg, 29 November/ 11 December 1868.

⁶³ *Regulations respecting the laws and customs of war on land*, The Hague, 18 October 1907.

IHL distinguishes between two sets of armed conflicts; those of an international character and those not of an international character.

3.1.3 Customary International Law

The ICJ has stated in *Nicaragua Case* that customary international law has an existence of its own: “there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter ‘supervenes’ the former, so that the customary international law has no further existence of its own.”⁶⁴ It also held that customary international law exists separately from international treaty law: “customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.”⁶⁵

There are certain provisions in both human rights law as well as in humanitarian law that is now considered to have a customary character. For example the prohibition of torture, the principle of non-discrimination, slavery, genocide and the prohibition of the use of force, contained in article 2(4) of the UN Charter, is now a part of the customary international law.⁶⁶

3.2 The Law of War

3.2.1 Armed Conflict of What Character?

Common article 2 of the Geneva Conventions states that the Conventions apply in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” or in “all cases of partial or total occupation of the territory of a High Contracting Party”.

The term armed conflict was deliberately added since states after World War II became more and more reluctant to admit that they were actually in a formal state of war. An armed conflict is a wider concept and does not depend on a declaration of war.⁶⁷ According to the ICRC Commentary on article 2, an armed conflict is “[a]ny difference arising between two States and leading to the intervention of members of the armed forces [...] even if one of the Parties denies the existence of a state of war.”⁶⁸

⁶⁴ *Supra* note 60, paragraph 177.

⁶⁵ *Supra* note 60, paragraph 179.

⁶⁶ Malcolm N Shaw, *International Law*, (Cambridge University Press, Cambridge, 2003), Fifth Edition, pp. 257, 303 and 1018.

⁶⁷ Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, New York, 1995).

⁶⁸ Jean S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War*, (International Committee of the Red Cross, Geneva, 1960), pp. 22-23.

In cases of conflicts not of an international character, common article 3 of the Geneva Conventions applies. It has been called a convention within the Conventions⁶⁹ and it sets up minimum rules for the parties in an internal armed conflict to apply. A non-international armed conflict takes place within the territory of a state, between “existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms” and “reaches the magnitude of an armed riot or a civil war.”⁷⁰

Article 3 states that all persons not taking an active part in the hostilities shall be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. It is prohibited to; use violence to life and person (including murder, mutilation, cruel treatment and torture); taking hostages: outrages upon personal dignity (especially humiliating and degrading treatment), and; pass sentences and carry out executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized people.

The ICJ in *Nicaragua Case* stated that article 3 constitutes “elementary considerations of humanity”.⁷¹

Both Afghanistan and the United States are parties to the Geneva Conventions of 1949.⁷² Neither of them has, however, ratified the Protocols Additional to the Conventions.

It appears to be two separate conflicts; one against the Taliban in Afghanistan and one against al-Qaeda and global terrorism, wherever it might be.⁷³

The conflict between the Taliban and the United Front meets the requirements of a non-international armed conflict within the meaning of Article 3. The Taliban had taken control of most of Afghanistan and acted as *de facto* government, even if the international community did not recognise them.⁷⁴ However, neither the Taliban nor the United Front seems to have respected the provisions of Article 3.⁷⁵

⁶⁹ Roy Gutman and David Rieff (eds.), *Crimes of War*, (W. W. Norton & Company, New York, 1999), p. 207.

⁷⁰ *Supra* note 67, p.47.

⁷¹ *Supra* note 60, paragraph 218.

⁷² The United States ratified the Conventions in 1955 and Afghanistan in 1956.

⁷³ George H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*,

[www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/C82A7582AE20DCD1C1256D34004AEA41/\\$File/George+Aldrich_3_final.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/C82A7582AE20DCD1C1256D34004AEA41/$File/George+Aldrich_3_final.pdf?OpenElement), 23 March 2004, stating that “I suggest that the decision to consider that there are two separate armed conflicts is correct. One is the conflict with al Qaeda that is not limited to the territory of Afghanistan. [...] The armed attack against the Taliban in Afghanistan analytically is a separate armed attack that was rendered necessary because the Taliban, as the effective government of Afghanistan, refused all requests to expel al Qaeda and instead gave sanctuary to it.”

⁷⁴ *Supra* note 18, only three states ever recognised the Taliban.

⁷⁵ *Supra* note 19. *stating that*: “Both the Taliban and the parties constituting the United Front have repeatedly committed serious violations of international humanitarian law,

When the U.S. intervened it was against the Taliban regime for its support of al-Qaeda, not against the people of Afghanistan. “The United States respects the people of Afghanistan [...] but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists”, President Bush said.⁷⁶ The UN Security Council stated as early as 1995 that the conflict between the various factions in Afghanistan would provide a “fertile ground for terrorism, arms transfers and drug trafficking”.⁷⁷ The conflict between the U.S and its allies and the Taliban must be seen as an international armed conflict. The U.S. decision to address international humanitarian law to the conflict supports this view.

The Bush administration did, however, not stop with the war against Afghanistan and the Taliban regime for its support of terrorists. It continued with the “war on terror” or the “war on terrorism”, announced by President Bush on September 20 2001. He said that the “war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated”.⁷⁸

The “war on terrorism” is a “different circumstance”, Secretary Rumsfeld said in January 2002. “It requires a different template in our thinking. All of the normal ways that we think about things simply don’t work. For example, there were no armies or navies or air forces for us to go after in Afghanistan. We’re going after terrorists.”⁷⁹ Secretary Rumsfeld was suggesting that the Geneva Conventions are obsolete. “When the Geneva Convention was signed in the mid-20th century, it was crafted by sovereign states to deal with conflicts between sovereign states. Today the war on terrorism [...] was not contemplated by the framers of the convention.”⁸⁰ U.S Ambassador Pierre-Richard Prosper⁸¹ stated on February 20 2002, “the war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed. A careful reading of the Prisoners of War Conventions clearly leads one to the conclusion that its provisions do not apply to terrorists who are engaged in an activity that is fundamentally at odds with the Conventions”.⁸²

including indiscriminate aerial bombardment and shelling, summary executions, and the use of antipersonnel landmines”.

⁷⁶ *Supra* note 5.

⁷⁷ *Supra* note 13.

⁷⁸ *Supra* note 5.

⁷⁹ *Secretary Rumsfeld Media Availability after visiting Camp X-Ray*, 27 January 2002, United States Department of Defense, www.defenselink.mil/news/Jan2002/t01282002_t0127sd3.html, 16 February 2004.

⁸⁰ *DoD News Briefing- Secretary Rumsfeld and Gen. Myers*, 8 February 2002, United States Department of Defence, www.defenselink.mil/news/feb2002/t02082002_t0208sd.html, 19 February 2004.

⁸¹ Ambassador-at-Large for War Crimes Issues.

⁸² *Status and Treatment of Taliban and al-Qaida Detainees*, 20 February 2002, United States Department of State, Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, www.state.gov/s/wci/rm/2002/8491_pf.htm, 7 May 2003.

There are numerous definitions of the term “terrorist” and “terrorism”, but none of them is, however, offered by international humanitarian law.⁸³ IHL and treaties on international crimes, such as the four Geneva Conventions, prohibit terrorism in the sense that acts that we refer to as terrorism are banned.⁸⁴ Individuals committing such acts, in time of armed conflict, may be tried and punished.

“Terrorism” may be described as a three party relationship, where the aggressor needs two victims; a primary and a secondary. The primary victim is the subject of the attack and the secondary should be “intimidated by what happened to the [primary] victim”.⁸⁵

There is an expression that one man’s terrorist is another man’s freedom fighter.

The UN Security Council stated in Resolution 1373(2001) that “act[s] of international terrorism, constitute a threat to international peace and security”⁸⁶

The ICRC prefers to refer to the *fight* against terrorism.⁸⁷

3.2.2 Protected Persons

The Geneva Conventions of 1949 aim to protect the victims of war. Not against the war itself but from the consequences of war. There are four categories of persons protected by the Conventions: 1) the wounded and sick on land, covered by the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 2) the wounded, sick and shipwrecked at sea, protected by the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 3) prisoner of war, covered by the Third Geneva Convention Relative to the Treatment of Prisoner of War (GPW), and; 4) civilians protected by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC). Conventions 1 to 3, all concerns combatants, and Convention 4 relates to the civilians. The first two Conventions are, however, not of interest for the purpose of this thesis.

3.2.2.1 Combatants and Prisoners of War

⁸³ *International humanitarian law and terrorism: questions and answers*, 5 May 2004, International Committee of the Red Cross, <www.icrc.org/Web/eng/siteeng0.nsf/iwpList199/0F32B7E3BB38DD26C1256E8A0055F83E>, 7 May 2004.

⁸⁴ *Supra* note 69, pp. 348-351.

⁸⁵ *Ibid.*

⁸⁶ United Nations Security Council Resolution 1373(2001), S/RES/1373 (2001), 28 September 2001.

⁸⁷ *Supra* note 83, *stating that*: “‘Terrorism’ is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted ‘fight against terrorism’ rather than a ‘war on terrorism’”.

A combatant is a person who may legally engage in the armed conflict. He may take up arms and take a direct part in the hostilities but he must distinguish himself from the civilian population.⁸⁸ If he falls into the hands of the adversary he should be regarded as a prisoner of war and cannot be punished for the mere fact of having participated in the conflict. When a combatant falls into the hands of the enemy he should be protected and the Geneva Conventions therefore talks about prisoner of war status. This status is afforded to combatants and persons with equal status as soon as they fall into the hands of the adversary.⁸⁹

Article 4A of the GPW sets out six categories of persons who, upon capture, shall be regarded as POWs: 1) *Members of the armed forces of a party to the conflict* as well as *militias and volunteer corps* forming part of the armed forces; 2) *Other militias and volunteer corps including those of organised resistance movements* that belong to a party provided they fulfil the requirements of

- having a responsible command
- having a fixed distinctive sign recognisable at a distance
- carrying their weapons openly; and
- following the laws and customs of war;

3) *Members of regular armed forces* who profess allegiance to a government not recognized by the detaining power; 4) *Persons who accompany the armed forces* without actually being members thereof, provided that they have received authorization from the armed forces which they accompany; 5) *Members of crews of the merchant marine and crews of civil aircraft* who do not benefit from more favourable treatment under any provisions of international law and; 6) *Inhabitants of a non-occupied territory* who 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.⁹⁰ If a person does not qualify for combatant status, he may not take an active part in the hostilities and may be tried if doing so.⁹¹

The first three categories relates to combatants, whereas the last two refers to civilians.

It is the Detaining Power that is responsible for the treatment of the POWs, not the individuals or military units who have captured them.⁹²

⁸⁸ *Supra* note 61, p.121.

⁸⁹ Persons with equal status, *see* GPW Article 4A (4), Article 4A (5), Article 4B (1): Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies [...]; and Article 4B (2): The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law [...].

⁹⁰ Article 4A (1)-(6), GPW.

⁹¹ *Supra* note 83.

⁹² Article 12, GPW

Prisoners of war must be given humane treatment from the time they fall into enemy hands.⁹³ All POWs must be equally treated without distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.⁹⁴

One reason for taking prisoners during war is intelligence gathering. A POW may thus be interrogated but he is only bound to give his name, rank, date of birth and personal or serial number, if questioned.⁹⁵ However, nothing in the Convention prevents the interrogators from asking more.⁹⁶

A person is entitled to POW status if he: 1) *belongs to one of the categories in Article 4*, and; 2) *has fallen into enemy hands*.

According to the International Committee of the Red Cross (ICRC) Commentary on article 4 of the GPW, the Geneva Conventions did not abolish the 1907 Hague Regulations and the principles laid down in the Regulations could therefore be used to clear cases not covered by the Conventions.⁹⁷

Members of the armed forces, described in sub-paragraph (1), must belong to a party who is recognised by the adversary.⁹⁸ There is nothing in this paragraph about distinction of the armed forces from the civilian population. According to the ICRC Commentary on article 4 it is up to the parties to the conflict to make sure that their combatants can be distinguished from enemy combatants and from the civilian population.⁹⁹

Members of militia, volunteer corps and organised resistance movements, also known as irregulars or partisans, enjoy protection under article 4A (2) of the GPW. Irregulars are lawful combatants provided they fulfil the requirements of article 4A (2). If they fail to meet the requirements they may be punished for taking part in the conflict.¹⁰⁰ Guerrillas may also engage in combat, even though they use “unconventional methods of warfare, such as sabotage, ambushes, and sniping”, provided they fulfil the same requirements as those of irregulars.¹⁰¹

The requirement of having a responsible command is a guarantee that there is some sort of control over the forces and that the other obligations will be fulfilled.¹⁰²

Instead of wearing a uniform, irregulars have to have a fixed distinctive sign and in accordance with the principle of distinction the sign has to be identical for all fighters.¹⁰³ The article does not say anything about what the

⁹³ Article 13, GPW.

⁹⁴ Article 16, GPW.

⁹⁵ Article 17, GPW.

⁹⁶ *U.S. Officials Misstate Geneva Convention Requirements*, 28 January 2002, Human Rights Watch, <<http://hrw.org/press/2002/01/us012802.htm>>, 3 June 2003.

⁹⁷ *Supra* note 68, p.51.

⁹⁸ *Supra* note 68, p. 52.

⁹⁹ *Ibid.*

¹⁰⁰ *Supra* note 69, p. 216.

¹⁰¹ *Supra* note 69, pp. 159-161.

¹⁰² *Supra* note 68, p. 59.

¹⁰³ *Supra* note 68, p. 60.

sign should look like. The ICRC Commentary on article 4A (2) does, however, mention that a cap could constitute such a sign.¹⁰⁴

The carrying of arms “openly” does not mean that the weapons have to be visible.¹⁰⁵

Irregulars must follow the laws and customs of war. This includes the carrying out of operations in accordance with the fundamental principles of distinction, proportionality, precaution, humanity, and military necessity.¹⁰⁶

The category mentioned in sub-paragraph (3); members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power, differs from the one in sub-paragraph (1) in the way that the enemy does not recognise the authority of the former as a party to the conflict.¹⁰⁷ The composition of the armed forces, referred to in sub-paragraph (3), is, however, not different from that in sub-paragraph (1) and the unrecognised authority or government should have to believe that it is representing a high contracting party as stipulated in common article 2 of the Conventions.¹⁰⁸ The ICRC Commentary on article 4 further suggests that sub-paragraph (3) could apply to armed forces who are carrying on fighting in an internal armed conflict, under the command of an unrecognised authority, who has its headquarters in one part of the country and the occupying power has recognised an authority in another part of the country, where the occupying forces are situated.¹⁰⁹

Secretary Rumsfeld’s statement on January 22 2002, that the reason for detention is to stop future terrorist attacks suggests that the U.S. is applying international humanitarian law. “[H]aving those people back out on the street to engage in further terrorist attacks is not our first choice. They are being detained so that they don’t do that. That is what they were about. That is why they were captured, and that is why they’re detained.”¹¹⁰ As the purpose of taking prisoners in an armed conflict is to stop them from further participation in the conflict, this statement follows the laws of war. The U.S. refuses, however, to afford POW status to the prisoners, even though it relies on the notion of POW to be able to keep the prisoners detained. According to White House spokesman Ari Fleischer, the Taliban detainees fail to fulfil the requirements of Article 4 GPW and thereby qualify as POWs. He says that the Taliban detainees would have had to fulfil the four requirements of being under a responsible command, having a fixed distinctive sign, carrying weapons openly and following the laws and

¹⁰⁴ *Ibid.*

¹⁰⁵ *Supra* note 68, p. 61.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Supra* note 68, pp. 61-64.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *DoD News Briefing- Secretary Rumsfeld and Gen. Pace*, 22 January 2002, United States Department of Defense, www.defenselink.mil/transcripts/2002/t01222002_t0122sd.html, 13 February 2004.

customs of war.¹¹¹ Secretary Rumsfeld points at the same failure by the Taliban: “[t]hey were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.”¹¹²

Fleischer’s statement seems to put the Taliban detainees in the category where they would be *other militias and other volunteer corps* according to Article 4A (2) of the GPW. George Aldrich¹¹³ thinks that “[p]erhaps the United States might argue that Afghanistan has no armed forces within the meaning of sub-paragraph 1, but rather only armies of competing warlords; but that would [...] not be fully convincing given the general perception that, when the attacks began, the Taliban was the government in effective control of most of Afghanistan”.¹¹⁴ He continues and speculates whether the U.S. could mean, “that no armed forces in Afghanistan ‘belong[ed] to’ Afghanistan, which is the ‘Party to the conflict’ and that only armed forces belonging to a Party to the conflict are entitled to POW status [...]”. Certainly the protections of the Convention would erode if it were accepted that they need not be accorded to the armed forces of a government in effective control of the territory of a State by another State that declines to recognize the legitimacy of that government”¹¹⁵. Aldrich also takes up the question if the four conditions could be said to be “inherent in the nature of armed forces of States”. Especially the fourth condition- that militia or other volunteer corps must conduct their operations in accordance with the laws and customs of war- “can easily be abused, as it was by North Korea and by North Vietnam, to deny POW treatment to all members of a State’s armed forces on the ground that some of its members allegedly committed war crimes”.¹¹⁶ One has to remember that even POWs can be prosecuted for violating the laws of war.¹¹⁷ To deprive a whole group of captured persons of the protected status as POWs, based on some individuals’ conduct is a dangerous thing.

Al-Qaeda detainees shall not be entitled to POW status, according to the U.S., since they belong to a terrorist group and “[a]s such, its members are not entitled to POW status”.¹¹⁸ The U.S. argues that the Geneva Conventions do not apply to al-Qaeda detainees because only states can be parties to the Conventions and al-Qaeda is not a state.¹¹⁹ Aldrich is stating that members of al-Qaeda should be “subject to trial and punishment under national criminal laws for any crimes that they commit”.¹²⁰ According to

¹¹¹ *Bush Says Geneva Convention Applies To Taliban, Not al-Qaida*, 8 February 2002, United States Department of State, <<http://usembassy.state.gov/posts/pk1/www02020803.html>>, 9 June 2003.

¹¹² *Supra* note 80.

¹¹³ Judge at the Iran-US Claims Tribunal.

¹¹⁴ *Supra* note 73.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Article 99, GPW.

¹¹⁸ *Supra* note 32.

¹¹⁹ *Ibid.*

¹²⁰ *Supra* note 73.

Human Rights Watch, al-Qaeda fighters may not seem to be entitled to POW status. If they can't show that they made up parts of the Taliban forces, they must show that they meet the requirements of irregular forces.¹²¹

If a person fails to meet the requirements for POW status he is protected under the Fourth Geneva Convention. According to the ICRC Commentary on article 4 of the GC

“[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, a such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law”.¹²²

Therefore; a person in the hands of the enemy has to have a status determination and is protected by either the First, Third or Fourth Convention.¹²³

3.2.2.2 Non-Combatants

A non-combatant is a person who belongs to the armed forces but may not take an active part in the conflict. This also means that he is not to be subject of attack.¹²⁴ Medical and religious personnel fit into this category, as well as “judges [and] government officials”¹²⁵. If they fall into the hands of the enemy they will, however, be entitled to POW status. If they do take up arms, they may be lawfully attacked and also be punished for doing so.¹²⁶

3.2.2.3 Civilians

According to article 4 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), civilians are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

The ICRC Commentary on article 4, states that the “definition of protected persons in paragraph 1 is a very broad one which includes members of the

¹²¹ *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, 29 January 2002, Human Rights Watch, <<http://hrw.org/backgrounder/usa/pow-bck.htm>>, 3 June 2003.

¹²² Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (International Committee of the Red Cross, Geneva, 1958), p. 51.

¹²³ *Supra* note 121.

¹²⁴ *Supra* note 69, p. 97.

¹²⁵ *Supra* note 67, p.84.

¹²⁶ Jennifer Elsea *et al*, *Treatment of “Battlefield Detainees” in the War on Terrorism*, 11 April 2002, CRS Report for Congress, <<http://fpc.state.gov/documents/organization/9655.pdf>>, 4 June 2004, p. 14.

armed forces –fit for service, wounded, sick and shipwrecked- who fall into enemy hands”. These persons are covered by special Conventions, “[b]ut if, for some reason, prisoner of war status- to take one example- were denied to them, they would become protected persons under the [Fourth] Convention”.¹²⁷ The Commentary takes up the case of article 4 A (2) of GPW; “[m]embers of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the [Fourth] Convention.”¹²⁸ The Commentary points out that such persons may be tried for their conducts, but this has to be in accordance with the Fourth Convention.¹²⁹

Nationals of a neutral state, whose diplomatic relations with the detaining power continue to function, do not, however, enjoy the protection of the Fourth Convention. The reason for this is that the prisoners can benefit from the protection given through the diplomatic channels.¹³⁰

If the security of a state makes it necessary, an individual within the territory of the state may be deprived of the protection of the Convention, but only if he is engaged in hostile acts or definitely suspected of such engagement.¹³¹

Protected persons under the Fourth Convention must at all times be treated humanely.¹³²

In cases of trial, protected persons shall have the right to a fair and regular trial prescribed by the Convention.¹³³ The principle of individual criminal responsibility is laid down in article 33.

The General Assembly has stated, in Resolution 2675 (XXV), that “for the protection of civilian population [...] [f]undamental human rights [...] continue to apply fully in situations of armed conflict”.¹³⁴

3.2.2.4 “Unprivileged” or “Unlawful” Belligerents

¹²⁷ *Supra* note 122, p.50.

¹²⁸ *Ibid.*

¹²⁹ *Inter alia* articles 5 and 33.

¹³⁰ *Supra* note 122, pp. 48-49.

¹³¹ Article 5, GC.

¹³² Article 27, GC.

¹³³ Article 5, GC.

¹³⁴ United Nations General Assembly Resolution 2675 (XXV), *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, <<http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/349/40/IMG/NR034940.pdf?OpenElement>>, 15 May 2004.

Secretary Rumsfeld refers to the detainees as unlawful combatants. “An unlawful combatant is a person who tries to look like a civilian and puts in jeopardy civilians. And a lawful combatant is one that functions as I described, in a uniform, in an organized operation, showing their weapons”.¹³⁵ “The characteristics of the individuals that have been captured is [sic!] that they are unlawful combatants, not lawful combatants. That is why they are characterized as detainees and not prisoners of war.”¹³⁶

The Council of Europe’s Parliamentary Assembly Resolution 1340 (2003) stated that the term “unlawful combatant” “is not contemplated by international law”.¹³⁷

Also Knut Dörmann¹³⁸ notes that international humanitarian law treaties do not define the term. He offers, however, what he considers to be the most accepted definition: “‘unlawful/unprivileged combatant/belligerent’ is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy”.¹³⁹

The view of the ICRC is that the Fourth Convention is applicable to civilians who have been engaged in combat, and to combatants who fail to meet the requirements for POW status.¹⁴⁰

3.2.3 Detentions During War

A state may intern prisoners of war.¹⁴¹ It may also intern civilians but only under certain conditions.¹⁴² Persons in the territory of a party to the conflict may only be interned if 1) the measures of control are considered to be inadequate,¹⁴³ and, 2) if the security of the detaining power makes it

¹³⁵ *Supra* note 31.

¹³⁶ *Supra* note 79.

¹³⁷ Council of Europe, Parliamentary Assembly, Resolution 1340 (2003), *Rights of persons held in custody of the United States in Afghanistan or Guantanamo Bay*, 26 June 2003, <<http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta03%2FERES1340.htm>>, 22 April 2004.

¹³⁸ Knut Dörmann is a Legal Advisor at the Legal Division of the ICRC.

¹³⁹ Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants”*, March 2003, International Committee of the Red Cross, <[www.ircr.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/\\$File/irrc_849_Dorman.pdf](http://www.ircr.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf)>, 21 May 2004.

¹⁴⁰ *Supra* note 83.

¹⁴¹ Article 21, GPW: The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

¹⁴² Article 79, GC: The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

¹⁴³ Article 41, GC.

absolutely necessary.¹⁴⁴ For protected persons in occupied territory internment is possible 1) if such a person has committed an offence which is solely intended to harm the occupying power,¹⁴⁵ or 2) the occupying power considers it necessary, for imperative reasons of security.¹⁴⁶

The purpose of taking prisoners of war is to stop them from taking any further part in the hostilities. It is not a punishment.¹⁴⁷ A prisoner that no longer can participate in the conflict must be repatriated. Accordingly, wounded and sick prisoners of war shall be repatriated directly¹⁴⁸ and after the cessation of active combat prisoners of war shall be repatriated without delay.¹⁴⁹ Secretary Rumsfeld said on March 29 2002, that “[t]he way I would characterize the end of the conflict is when we feel that there are not effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities”.¹⁵⁰ After the cessation of active hostilities captives may be detained only if they are charged and waiting for trial.¹⁵¹

Civilians must be repatriated as soon as the reasons for detention no longer exist.¹⁵² After the cessation of hostilities a civilian must be released as soon as possible.¹⁵³

3.2.4 Article 5 Tribunal

The U.S. seems to blur the distinction between Taliban members and members of al-Qaeda. Secretary Rumsfeld puts both categories together and calls them “detainees” and “unlawful combatants”. “What we’ve said from the beginning is that these are unlawful combatants in our view, and we’re detaining them. We call them detainees, not prisoners of war. We call them detainees.”¹⁵⁴ Secretary Rumsfeld has been asked if the status of the detainees has been determined individually and if he knows who belongs to what category- the Taliban or al-Qaeda. Secretary Rumsfeld answered that he didn’t know who is who. The reason for this was that a lot of the detainees were not telling the truth during interrogation: “[w]hether they say they’re al Qaeda, whether they say they were Taliban, what units –activities they were doing, where they were trained- those types of things. There’s a

¹⁴⁴ Article 42, GC.

¹⁴⁵ Article 68, GC.

¹⁴⁶ Article 78, GC.

¹⁴⁷ Yasmin Naqvi, *Doubtful prisoner-of-war status*, September 2002, <www.icrc.org/Web/Eng/siteeng0.nsf/iwplList405/2DC8556AEBA60C2541256C68002E8396>, 4 April 2003.

¹⁴⁸ Article 110 GPW.

¹⁴⁹ Article 118 GPW.

¹⁵⁰ *US Administration Defends Its Rules for Treatment of Afghan Captives*, 29 March 2002, Crimes of War, <www.crimesofwar.org/onnews/news-captive.html>, 11 November 2003.

¹⁵¹ Article 119, para. 5, GPW.

¹⁵² Article 132, GC.

¹⁵³ Article 133, GC

¹⁵⁴ *Supra* note 29.

form that they fill out that's the preliminary information. Whether it's true or not –there's a lot of them who don't tell quite the truth."¹⁵⁵ If they are not telling the truth, it seems hard for the U.S. to say that there is no doubt about their status.

Additionally, Secretary Rumsfeld has suggested that there might be persons at Guantanamo that should not be there. When questioned about the importance of interrogation, Secretary Rumsfeld said that one aspect of interrogation is "to decide how you want to handle people". He continued; "[w]ere they picked up inaccurately or improperly or –not improperly or inaccurately –unintentionally? Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there".¹⁵⁶

Secretary Rumsfeld is hence suggesting that mistakes could have been made, so the question remains why the U.S. has not had their status determined.

If there is any doubt about whether a person belongs to one of the categories in Article 4, he should be entitled to POW status until a competent tribunal has determined otherwise.¹⁵⁷ The article does not specify how the competent tribunal should be composed or who shall be in doubt for the application of the provision. A person who does not have the right to take an active part in the hostilities, may face prosecution for murder. In countries where capital punishment forms part of the national legislation, a determination as POW is of great importance. According to the Commentary on article 5, "some responsible authority", rather than a "single person, who might often be of subordinate rank", should therefore determine the status of a prisoner.¹⁵⁸ The doubt must arise as to whether the person, who has committed a belligerent act and having fallen into the hands of the enemy, belongs to any of the categories of Article 4.¹⁵⁹ The Commentary on article 5, states that "[t]he clarification contained in Article 4 should, of course, reduce the number of doubtful cases in any future conflict. It therefore seems to us that this provision should not be interpreted too restrictively".¹⁶⁰ A state should not be able to pronounce on its own that there is no doubt about a person's status.¹⁶¹ The Inter-American Commission on Human Rights has requested that the U.S. let a competent tribunal determine the legal status of the detainees. The Commission states that "it is [...] well known that doubts exists as to the legal status of the detainees" and therefore "requests that the

¹⁵⁵ *Supra* note 80.

¹⁵⁶ *Supra* note 31.

¹⁵⁷ Article 5, GPW: "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 person shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

¹⁵⁸ *Supra* note 68, p. 77.

¹⁵⁹ Article 5, GPW.

¹⁶⁰ *Supra* note 68, pp. 77-78.

¹⁶¹ *Supra* note 147.

United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal”¹⁶².

According to Secretary Rumsfeld there is no need for a competent tribunal as provided for in Article 5 GC III, to determine the status of the detainees. “There are not ambiguities in this case,” he said. “The al-Qaeda is not a country. They did not behave as an army. They did not wear uniforms. They did not have insignia. They did not carry their weapons openly. They are a terrorist network. [...] With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their weapons openly, and they were tied tightly at the waist to al-Qaeda.”¹⁶³ Secretary Rumsfeld claims that the status of the detainees has been determined on an individual basis, but when asked if he knows which belong to al-Qaeda and which belong to the Taliban he says “‘determined’ is a tough word. We have determined as much as one can determine when you’re dealing with people who may or may not tell the truth [...]. So yes, we’ve done the best we can”¹⁶⁴.

History shows that the U.S. has interpreted the GPW broadly before. One example is the Korean War (1950-1953). Although the UN or the U.S. did not recognise the People’s Republic of China as the legitimate government, the prisoners taken in that conflict by the U.S. were entitled to POW status.¹⁶⁵

Article 5 tribunals were established for the purpose of status determination both during the Vietnam¹⁶⁶ and the Gulf War¹⁶⁷.

In the 1997 United States Army Regulation 190-8 captured persons are divided into four groups; Enemy Prisoners of War (EWP), Retained Personnel (RP), Civilian Internees (CI) and Other Detainees (OD).¹⁶⁸ “Other Detainees” are referred to as “[p]ersons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC)” and these persons “shall be treated as EPWs until a legal status is ascertained by competent authority”.¹⁶⁹ Chapter 1, Section 1-6 (a) states that a tribunal be set up in accordance with Article 5 of the GPW. Paragraph (b) states that such a tribunal should also be set up to determine the status of “any person not appearing to be entitled to prisoner of war status who has committed a

¹⁶² *Supra* note 39.

¹⁶³ *Supra* note 31.

¹⁶⁴ *Supra* note 80.

¹⁶⁵ *Supra* note 121.

¹⁶⁶ *Supra* note 147.

¹⁶⁷ *U.S.: Growing Problem Of Guantanamo Detainees, Human Rights Watch Letter to Donald Rumsfeld*, 29 May 2002, Human Rights Watch, <<http://hrw.org/press/2002/05/pentagon-ltr.htm>>, 3 June 2003.

¹⁶⁸ Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Headquarters Department of the Army, the Navy, the Air Force, and the Marine Corps, 1 October 1997, <www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>, 5 April 2004.

¹⁶⁹ *Ibid*, Glossary, Section II, Terms.

belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists”.¹⁷⁰ Accordingly, if a detained person asserts that he is entitled to POW status, the U.S. would have to have that question determined by a tribunal.

3.2.5 Penal Sanctions of POWs and Military Commissions

On a question on when the U.S. was going to accuse the detainees for something, Secretary Rumsfeld answered; “the reality is that they [the detainees] have been charged with something. They have been found to be engaging in battle on behalf of al Qaeda or the Taliban, and have been captured”¹⁷¹.

Prisoners of war are subject to the same laws as the armed forces of the detaining power. If a POW has violated these laws he may be subject to judicial or disciplinary measures.¹⁷² Article 83 states that some “competent authorities” should determine whether judicial or disciplinary measures should be implied. If tried, a POW is subject to military courts only, unless the existing laws of the Detaining Power expressly permit civil courts and in that case, members of the armed forces of the detaining power should also be subject to the same courts.¹⁷³ The court has to offer the essential guarantees of independence and impartiality as generally recognised.¹⁷⁴ POWs may be prosecuted for acts committed before they were captured and in that case they shall remain protected by the Third Convention, even if they are convicted.¹⁷⁵ Article 99 points out the important prohibition of retroactive penal legislation.¹⁷⁶ POWs may be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power.¹⁷⁷ POW status renders only protection from prosecution for taking up part in the hostilities. POWs may be charged and tried for violating the laws of war or the domestic laws of the Detaining Power.¹⁷⁸ Article 103, GPW, states that a POW may not be confined while awaiting trial, if that would not be the case for members of the armed forces of the detaining power. The only exception is that of national security, but even then, the

¹⁷⁰ *Ibid*, Chapter 1, Section 1-6 (b)

¹⁷¹ *Supra* note 110.

¹⁷² Article 82, GPW

¹⁷³ Article 84, GPW.

¹⁷⁴ Article 84, GPW, paragraph 2: In no circumstance whatever shall a [POW] be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

¹⁷⁵ Article 85, GPW.

¹⁷⁶ Article 99, GPW; No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

¹⁷⁷ Article 102, GPW.

¹⁷⁸ *Supra* note 66, p. 1060.

confinement may not exceed three months.¹⁷⁹ If tried, a POW has the right to choose his own qualified counsel or advocate and to call witnesses.¹⁸⁰

On November 13 2001, President Bush issued a military order concerning the detention, treatment and trial of certain non-U.S. citizens in the war against terrorism. The President has determined that there is an “extraordinary emergency” for the purpose of national defence and the order was published to meet the new threats against the U.S.¹⁸¹

The order finds that al-Qaeda and international terrorists were the perpetrators of the 9/11 attacks and that these attacks together with other attacks abroad¹⁸² amounted to an armed conflict to which the U.S had to respond with the use of its armed forces. Persons who are subject to the provisions of the order are: non-U.S. citizens, suspected of being a member of al-Qaeda or have been engaged in international terrorism, either by acting himself or by harbouring, aiding or otherwise helping others, or: persons who the U.S. finds in its interests to be determined to be under the order. Individuals subject to the order shall be detained. International humanitarian law shall be applicable in the military commissions, which are the forum for trial of such individuals. The President does not, however, find it practical that the “principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” are applicable in those courts.¹⁸³ Individuals subject to the order shall be tried only by military commissions and they “shall not be privileged to seek any remedy or maintain any proceeding [...], or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”.¹⁸⁴ Evidence may only be provided if they do not fall under any of the laws of protection of classified material.

The outcome of the trial shall be reviewed by the President or by the Secretary of Defense for final decision, if the President finds it appropriate.

Human Rights Watch calls the commissions “a discredit to American traditions of justice” and points to a number of problems that could arise if the commissions are used.¹⁸⁵

3.3 Detentions and Fair Trials in a Human

¹⁷⁹ Article 103, GPW.

¹⁸⁰ Article 105, GPW.

¹⁸¹ *President Issues Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 13 November 2001, The White House, <www.whitehouse.gov/news/releases/2001/11/20011113-27.html>, 19 February 2004. For full text, see Supplement A.

¹⁸² The attacks on the U.S. embassies in Kenya and Tanzania and the attacks on the USS Cole, *the author’s note*.

¹⁸³ *Supra* note 181.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Military Commissions Shouldn’t Be Used, Pentagon Rules Shortchange Justice*, Human Rights Watch, 25 June 2003, <<http://hrw.org/press/2003/06/us062503.htm>>, 5 May 2004.

Rights Perspective

Article 9 of the ICCPR regulates the right to liberty and security of person. Paragraph 1 states that no one shall be subject to arbitrary arrest or detention and that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. The Human Rights Committee (HRC) has stated in its General Comment on article 9 that this applies to all deprivations of liberty “whether in criminal cases or in other cases”.¹⁸⁶ Paragraph 3 and part of paragraph 2 refers to criminal charges only. Paragraph 2 establishes the right to be informed, upon arrest, of the reason for such arrest and to be promptly informed of the charges. Paragraph 3 concerns the right of arrested or detained persons to be brought promptly before a judge or other officer authorized by law to exercise judicial power. They shall be entitled to trial within a reasonable time or they should be released. The HRC considers that this time limit “must not exceed a few days” and that “[p]re-trial detention should be an exception and as short as possible”.¹⁸⁷

The provision of *habeas corpus*¹⁸⁸ in paragraph 4¹⁸⁹ is applicable to “all persons deprived of their liberty by arrest or detention”.¹⁹⁰

The HRC takes up the case of “preventive detentions”:

“if so-called preventive detention is used, for reasons of public security[...], it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”¹⁹¹

Article 14 talks about equality before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁹² The HRC in its General Comment on Article 14, states that “[t]he provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized”.¹⁹³ Whereas military tribunals are known for trying civilians, the HRC notes that such tribunals often are established to “enable exceptional procedures to be applied which do not comply with normal

¹⁸⁶ *General Comment No. 08: Right to liberty and security of persons (Art. 9)*, 30 June 1982, United Nations Office of the High Commissioner for Human Rights.

¹⁸⁷ *Ibid.*

¹⁸⁸ A petition for a writ of *habeas corpus* means that a court decides on the lawfulness of a persons detention.

¹⁸⁹ Article 9(4), ICCPR: 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 delay on the lawfulness of his detention and order his release if the detention is not lawful.

¹⁹⁰ *Supra* note 186.

¹⁹¹ *Ibid.*

¹⁹² Article 14, ICCPR.

¹⁹³ *General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 13 April 1984, United Nations Office of the High Commissioner on Human Rights.

standards of justice”¹⁹⁴. The Committee continues, stating that “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14”. About the provision of publicity, in paragraph 1, the HRC states that even if the public is not allowed to be present at the hearing, “the judgement must, with certain strictly defined exceptions, be made public”.¹⁹⁵

The presumption of innocence, stipulated in paragraph 2, means that “the charge has [to be proved] beyond reasonable doubt”. The Committee states that it is “a duty for all public authorities to refrain from prejudging the outcome of a trial”.¹⁹⁶

The provisions of article 14, paragraph 3 are minimum guarantees.

The right to be tried without undue delay, in paragraph 3, “relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place ‘without undue delay’. To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without undue delay’, both in first instance and on appeal”.¹⁹⁷

It should be noted, once again, that the General Assembly Resolution 2675 (XXV), affirms that the fundamental human rights are fully applicable to the civilian population in situations of armed conflict.

Article 2 of the Covenant imposes an obligation for the states parties to implement the provisions of the Covenant in their own domestic legal system. Accordingly, the Fifth Amendment of the U.S. Constitution states that no person shall be deprived of his liberty without due process of law. Amendment VI protects the right, in criminal cases, to a prompt and public trial along with the right to be informed of the charges and to have access to a counsel.

Petitions for writs of *habeas corpus* have been filed and rejected on the grounds that the U.S. courts do not have jurisdiction to try such cases, as the detainees are not held on U.S. sovereign territory.¹⁹⁸ The Supreme Court is currently hearing the cases of *Rasul* and *Odah*, which have been consolidated. Human Rights First has stated that the decision of the Supreme Court “provides an important opportunity to apply legal standards to a place the Bush Administration argues operates outside the rule of law.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *See Coalition of Clergy v. Bush*. It has to be noted, however, that this case was rejected on the ground that the petitioners did not have standings to bring the case on behalf of the prisoners. The District Court did, however, discuss the territorial question. See also the *Rasul* and *Odah* cases, were the families of British, Australian and Kuwaiti detainees brought cases before the court.

The Justices should use these cases to assert that the Guantanamo detainees have legal rights, and a means to seek enforcement of those rights”.¹⁹⁹

¹⁹⁹ *Detentions at Guantanamo Bay [Al Odah v. United States, Rasul v. Bush]*, Human Rights First, <www.humanrightsfirst.org/us_law/inthecourts/supreme_court_gitmo2.htm>, 21 April 2004.

4 Analysis and Conclusions

The analysis has to begin with what type of conflict the U.S. was/is involved in. The conflict in Afghanistan is over, but the “war on terrorism” is still waging. The President’s statement that the U.S. respects the people of Afghanistan but condemns the Taliban regime cannot be seen as a reason for not identifying the intervention as a war against Afghanistan. Traditional wars do not break out because of the conduct of the population, but rather because of the conduct of the government. I don’t think that one could separate the government from the state and say that we go to war against the government but not the state itself, as the government is the representative of the state. In the case of Afghanistan, however, the Taliban regime was not considered by the international community as the legitimate Afghan government. Could one therefore say that the U.S. did not wage war against Afghanistan, but rather supported the United Front in the internal armed conflict with the Taliban? The Taliban was, however, the government in effective control of most of Afghanistan and the fact that the U.S. is applying the Geneva Conventions to the Taliban prisoners, because Afghanistan is a party to the Conventions, supports the view that the U.S. also considered itself to be at war with Afghanistan. I would hence argue that the U.S. did go to war against the state of Afghanistan and that this war constituted an international armed conflict.

The “war on terrorism” is indeed a “different circumstance”, as Secretary Rumsfeld said.²⁰⁰ What is surprising, in my point of view, is that the U.S. addresses the laws of war rather than law enforcement means to this “new type of war”.²⁰¹ As the attacks on the U.S. were not carried out by a state, the question remains whether international humanitarian law is applicable at all.

The U.S. has, nevertheless, decided to address international humanitarian law to this “war”.

The laws of war state that prisoners taken in an armed conflict shall have some sort of protection. This protection is offered by the Geneva Conventions. According to the ICRC, captured persons are either protected under the First, Third or Fourth Convention.²⁰² It is important to distinguish between the Taliban and the al-Qaeda prisoners, as they represent two different subjects under international law. Al-Qaeda is a global network of individuals and is as such a non-state actor. The Taliban was in effective control of around 90-95 per cent of Afghanistan, and could hence be called to act on behalf of a state. The distinction is also important in another sense. If one could say that there are two conflicts, one against the Taliban in

²⁰⁰ *Supra* note 79.

²⁰¹ *Supra* note 82.

²⁰² *Supra* note 122, pp.50-51.

Afghanistan, and one against al-Qaeda and terrorism, the prisoners at Guantanamo were not captured during the same conflict.

The U.S. has stated that the Geneva Conventions are applicable to the Taliban detainees, because Afghanistan as a country is a state party to the Conventions, as is the U.S. According to the U.S. the Taliban fail, however, to qualify for POW status since they do not meet the criteria of 1) having a responsible command; 2) having a fixed distinctive sign; 3) carrying their weapons openly, and; 4) following the laws of war.²⁰³

The Taliban could fit in three possible categories of article 4 GPW.

The first is that of belonging to the armed forces, including being members of militias or volunteer corps forming part of such armed forces, of a party to the conflict.²⁰⁴

The second category refers to other militia and other volunteer corps as well as organised resistance movements, belonging to a party to the conflict, provided they fulfil the four requirements mentioned above.²⁰⁵

The last suitable category is that of being members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power.²⁰⁶

According to the ICRC Commentary on article 4, to be able to benefit from the category enumerated in article 4A (1), the party has to be recognised by the adversary. The problem here is that virtually no state had recognised the Taliban as the legitimate government, and the ISA representatives held Afghanistan's seat in the UN.

Is it possible to say that the U.S. decision to apply the Conventions to the Taliban detainees, because Afghanistan is a party to those Conventions, has made the Taliban a recognised party to the conflict? The U.S. stated, however, that it had never recognised the Taliban as the legitimate government.²⁰⁷

The only difference between the armed forces in sub-paragraph (1) and those in sub-paragraph (3) is that the authority of the latter is not recognised by the adversary. The ICRC Commentary on article 4 points out that the scope of sub-paragraph (3) also covers armed forces who fight in an internal armed conflict, under the command of an unrecognised authority who has its headquarter in one part of the country, but the occupying power have recognised an authority in another part of the country which is the same as where the occupying forces are situated. This statement refers to occupying powers, but could it not be analogically applicable to the situation in Afghanistan? The Taliban was in effective control of most parts of Afghanistan and the United Front controlled only the Northern parts. The

²⁰³ *Supra* note 32, together with, *supra* note 111.

²⁰⁴ Article 4A (1), GPW.

²⁰⁵ Article 4A (2), GPW.

²⁰⁶ Article 4A (3), GPW.

²⁰⁷ *Supra* note 32.

U.S. did not recognise the Taliban; instead it acted in support of the United Front.

The second category in article 4 spells out the four criteria.

As the Taliban controlled around 95 per cent of Afghanistan I would argue that they could not have been troops operating on their own initiative, accordingly they must have been under some sort of command.

The criteria of having a fixed distinctive sign could, according to the ICRC, be fulfilled with a cap. The Taliban used to wear a black turban. Could this meet the requirement of distinctive sign? One has to remember that turbans are a very common clothing in these parts of the world.

Weapons do not have to be visible, only carried openly. During surprise attacks the meaning of the whole operation would be lost if the arms were to be carried openly.

Numerous reports have been made about the violations of humanitarian law conducted by the Taliban soldiers.

The Taliban could maybe fulfil some of the requirements of sub-paragraph (2), but they would probably fail to meet the last.

If the Taliban would not fit into one of the above-mentioned categories the ICRC has stated that, where a person fails to be entitled to POW status, he should be protected by the Fourth Convention.²⁰⁸ If the Swedish citizen could be said to be a Taliban, and if it could be said that he do not fulfil the requirements for POW status, he should thus be protected by that Convention. Article 4 GC, could, however, deprive him of this protection, if he could be said to be a citizen of a neutral state, which has maintained its diplomatic representation in the state in whose hands he is.

I would argue that Sweden must be seen as a neutral country to the war against Afghanistan and, as we have maintained our diplomatic representation in the United States, the Swedish citizen could loose his protection under the Fourth Convention.

I would argue that there are no clear cases here. I wouldn't say that the Taliban do not qualify for any of the categories. It seems therefore hard for the U.S. to say that there are no ambiguities. The U.S. would hence establish the tribunals provided for under article 5 of the GPW. It does not seem satisfactory that the detaining power unilaterally can determine that no doubt exists. And if there are any doubts about a persons status such person shall be entitled to treatment as POW until determined otherwise by the competent tribunal provided for in article 5 GPW.

The U.S. has determined that the Geneva Conventions do not apply to the al-Qaeda detainees. It seems to me that President Bush means all the Conventions and not just the GPW. The members of al-Qaeda could have problems showing that they belong to one of the categories of article 4 of the GPW. They do not represent the armed forces of a state according to article 4A (1). They fail also to fulfil the provision of article 4A (3). The

²⁰⁸ *Supra* note 122, pp.50-51.

question remains if they could be said to make up parts of the Taliban regular forces, and in that case provide protection under the above-mentioned articles.

It would also seem hard for al-Qaeda members to show that they fulfil the criteria for irregulars, in any way, it is quite obvious that they do not operate in accordance with the laws and customs of war and they do not wear any distinctive sign. But if they do fail to be entitled to POW status under article 4 GPW, they should be protected by the Fourth Convention, according to the ICRC Commentary on article 4 GC. Here, again, the Swedish citizen might fall through because of his citizenship of a neutral state that upholds its diplomatic representation in the state in whose hands he is.

The Conventions speak about individual protection based on citizenship of a state party to the Conventions. It seems therefore that the U.S. cannot treat all of al-Qaeda the same. It has to determine on an individual basis what protection might be offered.

The military commissions include provisions on detention, treatment and trial of non-U.S. citizens.

If some of the detainees at Guantanamo were entitled to POW status the commissions would be in violation of the rights provided for under GPW. The GPW states that a POW may be validly sentenced only if he is tried by the same courts as the members of the armed forces of the detaining power would be tried by. Members of the U.S. armed forces are not subjects to the military commissions.

The right to appeal is withdrawn from persons subject to the commissions, the openness of the trials is limited, and President Bush himself has the final word.

According to article 84 GPW, the court has to offer the fundamental guarantees of independence and impartiality. The fact that President Bush has the final review of any sentences by the military commissions constitutes a threat to the fairness and impartiality of the trial. In any event, POWs awaiting trial must not be detained for more than three months.²⁰⁹

If some of the detainees would not qualify for POW status the commissions would, nevertheless, be in violation of the Fourth Geneva Convention, as it also requires a fair and regular trial. However, civil courts and not military commissions should try civilians, according to the Human Rights Committee. If military courts are trying civilians the HRC has stated that this has to be very exceptional and that the guarantees of article 14, ICCPR, has to be respected.

Both the GPW²¹⁰ and the ICCPR²¹¹ stipulate the important prohibition of retroactive penal legislation. In the case of the ICCPR this provision is not subject to derogation under article 4.

²⁰⁹ Article 103, GPW.

²¹⁰ Article 99, GPW.

²¹¹ Article 15, ICCPR.

If the laws of war do not offer any satisfying protection one has to turn to international human rights law, and in particular the International Covenant on Civil and Political Rights.

The ICCPR, which the U.S. has ratified, provides protection from arbitrary arrests and detentions, along with safeguards in case of trial. Some of these provisions may be subject to derogations, but the U.S. has made no such statement. Provisions for *habeas corpus* have been rejected and even if it seems that the Supreme Court will change the verdicts, it is, at the time of writing, still uncertain.

According to both the ICCPR and Amendments V and VI of the U.S. Constitution, no person shall be deprived of his liberty without due process of law, and in such cases the person has the right to be informed of any charges against him and have the right to access to a counsel.

These provisions have not been observed. According to the Human Rights Committee's General Comment on article 2 of the Covenant, the provisions of the ICCPR must be applied to individuals who find themselves in the hands of the armed forces of a state party to the Covenant, even if the armed forces at the time are operating outside their own territory. The HRC makes it clear that being under the power of the armed forces of a state is the same as being under the jurisdiction of that state.

Could the statement in the military order, that "an extraordinary emergency exists for national defense purposes" be seen as a statement under article 4 of the ICCPR? I would argue that it could not. No such indications have been made from neither the U.S nor its critics.

I would, based on the discussion above, argue that: 1) the detention itself of the Swedish citizen may be justified under international humanitarian law, but his treatment under the same law is not and 2) the detention itself under international human rights law could be justified, but the treatment of him, according to this set of law, falls short.

As most of the information about his detention and treatment at Guantanamo is classified and as it has not been established what he was doing in Afghanistan or Pakistan, I am unable to determine whether his actual detention is justified or not. Nevertheless, according to the laws of war he should at least be subject to a tribunal, as provided for under article 5 GPW, to have his status properly determined and, according to human rights law, he should by now have been informed of the charges against him and have been brought to trial.

The U.S. is determined to apply international humanitarian law to the detainees. It does not, however, seem satisfying that it on the one hand uses the laws of war to describe the attacks of September 11²¹² and to transfer

²¹² The President referred to the attacks as "acts of war" (*See Supra* note 2).

and detain individuals at Guantanamo²¹³, but on the other hand denies those individuals the rights afforded to them under the same laws. It seems to me that the U.S. is picking out the provisions of international law suitable for their purposes.

²¹³ *Supra* note 110, *Secretary Rumsfeld saying*: “having those people back out on the street to engage in further terrorist attacks is not our first choice. They are being detained so that they don’t do that.”

Supplement A Military Order

President Issues Military Order

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

- (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.
- (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
- (c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --
 - (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
 - (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
 - (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
 - (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected

by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense. Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any

court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH
THE WHITE HOUSE,
November 13, 2001.

This article may be found at

www.whitehouse.gov/news/releases/2001/11/20011113-27.html, (on April 30 2004).

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