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The United States' compliance  
with international law in the  
treatment of detainees captured  
in Afghanistan held at  
Guantanamo Bay

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# Summary

In pursuit of the suspected terrorists responsible for the 9/11-attack and as a response of self-defence, the US launched an attack, on the 7<sup>th</sup> of October 2001, on the Taliban regime and the Al-Qaeda network in Afghanistan. During that conflict, many Taliban and Al-Qaeda belligerents were captured and brought to the US naval base in Guantanamo bay Cuba.

As this thesis shows the laws of war codified within the Geneva Conventions of, 1949 is applicable to the detainees' situation based on the categorization of the situation in Afghanistan as an international armed conflict. It has now been over five years since the armed conflict in Afghanistan started. Over 400 detainees are still held at Guantanamo bay. They are determined to be unlawful combatants by the US government and thus are considered to fall outside the safeguards provided by the laws of war within the Geneva Conventions.

The purpose of this thesis has been to investigate whether, in their treatment of Guantanamo Bay detainees, the US can be criticized for violating any international law obligations owed to other states. As this thesis shows, concerns can be raised as to whether the detainees are granted the right to a proper status assessment, by a competent court, according to article 5 of the Third Geneva Convention relative to the treatment of prisoners of war. An investigation of the different requirements for prisoner of war status is conducted in order to determine if the Taliban forces and the Al-Qaeda members are to be considered prisoners of war, contrary to the US argument that they are not. This status determination is also necessary in order to determine what framework that is applicable to the detainees' situation and what rights that is to be afforded the detainees. This thesis tries to show that the detainees are all protected by the Geneva Conventions whether they are prisoners of war or protected persons.

Further, this thesis investigates the detainees' procedural rights, based on their status and whether these rights are compromised in any way by the new US military commissions, which are established in order to prosecute the detainees suspected of terrorism.

To complete my investigation a discussion as to whether human rights law is applicable in the situation is conducted, especially when it comes to the legality of prolonged detention. The complexity of international humanitarian law as *lex specialis* in times of armed conflicts is addressed. The possible influence of human rights law over international humanitarian law due to the provision of the Martens Clause, based on International Court of Justice opinion, is also considered.

# Preface

I would like to thank the Swedish Red Cross for the inspiration to write this thesis. I also wish to thank my wonderful partner in life Emil. Your support and encouragement help me reach my goals privately and professionally.

Lund 2007-05-08

Sara Rising

# Abbreviations

API	Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June, 1977
ARB	Administrative Review Boards
AUMF	Authorization for Use of Military Force September 18, 2001
CDDH	Conférence diplomatique sur la réaffirmation et le développement du droit international applicable dans les conflits armés (Diplomatic Conference on IHL)
CSRT	Combatant Status Review Tribunals
DOJ	US Department of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
MCA	Military Commissions Act 2006
POW	Prisoner of War
UN	United Nations
US	United States of America
U.N.T.S	United Nations Treaty Series
VCLT	Vienna Convention on the law of Treaties

# 1 Introduction

## 1.1 Subject and purpose

The 9/11 attack on US soil was the origin of a changing wave within the framework of international law. In response to the attack, President Bush declared an all-out war against terrorism and vowed to use all means necessary to destroy the global network of terrorism. In pursuit of the suspected terrorists responsible for the 9/11-attack and as a response of self-defence, the US launched an attack, on the 7<sup>th</sup> of October 2001, on the Taliban regime and the Al-Qaeda network in Afghanistan. During that conflict, many Taliban and Al-Qaeda belligerents were captured and brought to the US naval base in Guantanamo bay Cuba.

It has now been over five years since the armed conflict in Afghanistan started. Over 400 detainees are held at Guantanamo bay.<sup>1</sup> They are denied prisoner of war status; instead, they are referred to as unlawful combatants and thus are considered to fall outside the safeguards provided by the laws of war within the Geneva Conventions of 1949. They seem to exist in a legal vacuum. I find this to be a disquieting development of international humanitarian law. As this thesis will try to show, the very purpose of the Geneva Conventions is to grant all individuals affected by an armed conflict some kind of protection. The thesis will investigate if by referring to the detainees as unlawful combatants, the US government aim to exclude them from the protections within the Geneva Conventions and US national legislation. This notion is for me a real cause for concern and has lead me to base this essay on the question: Is the treatment of the detainees captured in Afghanistan held in Guantanamo bay consistent with international law?

My theory is that the detainees are deprived of their lawful rights according to the Geneva Conventions and international human rights law as defined in the International Covenant on Civil and Political Rights (ICCPR). A discussion, as to whether human rights law can be applicable in the situation due to the fact that international humanitarian law is considered *lex specialis* in times of armed conflict, will be conducted.

The purpose of this thesis is to investigate whether, in their treatment of Guantanamo Bay detainees, the US can be criticized for violating any international law obligations owed to other states. As this thesis will show, concerns can be raised as to whether the detainees are granted the right to a proper status assessment, by a competent court, according to article 5 of the Third Geneva Convention relative to the treatment of prisoners of war.

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<sup>1</sup> Benenson House, Peter, Amnesty International, International Secretariat, London United Kingdom, *Guantanamo in numbers*, AI Index: AMR 51/186/2006, 8 December 2006. Available at: <http://web.amnesty.org/library/Index/ENGAMR511862006> last visited on May 21<sup>st</sup> 2007 at 09:41.

Further, I will also investigate the detainees' procedural rights, based on their status, and whether these rights are compromised in any way by the new US military commissions, which are established to prosecute the detainees suspected of terrorism.

## 1.2 Methodology and material

In conducting this essay, I will primarily try to interpret the ordinary meaning of the Geneva Conventions in the light of their context, object and purpose in accordance with the Vienna Convention on the Law of Treaties (VCLT) article 31.<sup>2</sup> By context for the purpose of the interpretation of a treaty, I intend the text as a whole, including its preamble and annexes. I will investigate the effect Additional Protocol I (AP I) may have on the interpretation of the scope of Common article 3 as a contextual mean of interpretation according to VCLT article 31 (3). Since the relevant parties (the United States and Afghanistan) has not ratified AP I will rely more heavily on norms of customary law equivalent to the relevant provisions within AP I. I will also take into account subsequent practice in the application of the treaty and relevant rules of international law.

When determining applicable customary law I will use the extensive customary study made by Henckaerts and Doswald-Beck commissioned by the International Committee of the Red Cross. Said authors carried out the study with the assistance of a Steering Committee, which was composed of 12 experts of international repute and involved 100 eminent authors.<sup>3</sup> The study's aim was to assess customary international law examining the two relevant elements of state practice and *opinio juris*.<sup>4</sup> My reason for using this comprehensive study is the difficult and time-consuming work of accessing many of the national legislation documents recording state practice. Other indications of state practice such as treaties, judgments and official statements have been analysed in its original form to the best of my ability. I presuppose that the reader of this thesis understands the process that forms and determines customary law.

Official statements in form of memorandums from US government officials will be used when assessing the US policy and practice in the situation. I will also investigate US national law to the extent it is relevant for determining US compliance with international law. In additional US

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<sup>2</sup> Vienna Convention on the Law of Treaties opened for Signature on 23 March 1969, U.N.T.S., Vol. 1155, p. 331. While the VCLT was not in force when the Geneva Conventions were adopted in 1949, these articles can be used when interpreting the treaty today as these articles are thought to reflect customary law.

<sup>3</sup> Foreword by Dr. Jakob Kellenberger, President of the International Committee of the Red Cross in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, (Cambridge: Cambridge University Press, 2005) p. xi.

<sup>4</sup> As prescribed by the ICJ as the two elements governing customary law in the North Sea Continental Shelf Cases, Judgment, 3 June 1985, ICJ reports 1985, pp. 29-30, § 27 and by the ICJ statute article 38.



Supreme Court cases will be analysed to the extent the decisions refers to international law and for determining US compliance with the same.

When interpreting the different provisions within the Geneva Conventions, if necessary, I will use supplementary means of interpretation according to article 32 of the VCLT. The supplementary mean being the commentaries to the different conventions made by the International Committee of the Red Cross (ICRC) since these studies are based on the preparatory works during the Diplomatic Conferences leading to the adoption of the Geneva Conventions. I find it legitimate to base interpretations of the different provisions of the Geneva Conventions based on the commentaries to the Geneva Conventions, as they refer to state practice and *opinio juris* as express during the Diplomatic Conference in 1949, which lead to the adoption of the treaties in their present form. Seeing as subsequent practice may have changed the interpretation of the different articles, no fundamental importance will be given to the commentaries.

In interpreting the provisions within the International Covenant on Civil and Political Rights, I will use the comments of the Human Rights Committee, which is the UN body responsible for monitoring compliance with the treaty. A state that has ratified the Covenant is obliged to submit reports on its compliance with the treaty to the Human Rights Committee. The Human Rights Committee then studies the reports and when appropriate issues General Comments as to the interpretation of the different provisions. States are also allowed to submit observations to those General Comments.<sup>5</sup> I therefore find that I cautiously may use these General Comments as an expression of state practice.

In determining what importance a source should be given and in weighing the material against one other I will try to follow the order of the article 38 §1 of the International Court of Justice Statute.<sup>6</sup> That is to say that the text of the treaties will be given greater importance than that of judicial decisions. Although judicial decisions are to be used, according to article 38 of the ICJ Statute, as a subsidiary means of interpreting rules of law they still can have an impact on assessing existing customary law and thus I will use them as such.

State practice is searched for in resolutions adopted by international forum, such as the UN Security Council and the UN Human Rights Commission. To complement these sources I will consult literature on the subject, in form of books and articles published in legal journals.

In determining US compliance with applicable international law, I will look at the US' arguments for their actions and policy. I will then look at the relevant provisions within the applicable framework, which will then bring

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<sup>5</sup> International Covenant on Civil and Political Rights December 1966, entered into force 23 March 1976; U.N.T.S., Vol. 999 article 40.

<sup>6</sup> Statute of the International Court of Justice concluded at San Francisco, on 26 of June 1945.

me to investigate whether the US has fulfilled their obligations according to international law.

### 1.3 Delimitations and structure

In my thesis, I will limit myself to the detainees captured during the conflict in Afghanistan. I will not investigate the detainees', captured elsewhere, situation. Hence, the first question that needs to be addressed regards the legal qualification of the situation in Afghanistan. This determination is necessary in order to determine what international legal framework that is applicable to the detainees' situation. Hence, I will investigate this question in chapter two. In determining the applicable framework, I will also set my frame within which my thesis will be investigated with one complement, which will be discussed in chapter five.

Based on the answer to the previous question I will in chapter three investigate the legal status of the detainees, whether they are combatants or illegal combatants and therefore civilians or possibly fall within some other category like a spy or saboteur. I will also discuss how doubtful cases should be handled according to article 5 of the Geneva Convention III, providing a right to have one's status determined by a competent tribunal. I will also look at what arguments the US has for its actions and try to assess them based on the applicable legal provisions.

What rights do then detainees have based on their status? Chapter four will be dedicated to analysing the detainees' rights according to the applicable provisions within the IHL framework. I will also investigate whether in their treatment of the detainees the US has not complied with its obligation according to international law. In this assessment, I will delimit myself to the subject of judicial guarantees. For the purpose of this investigation, the new US Military Commissions Act instituting military courts who will try the alleged crimes committed by the detainees will be examined. There has been much talk in the media as to whether other types of violations such as coercion and inhuman treatment take place at Guantanamo Bay.<sup>7</sup> However, whether or not this is true I do not find it achievable to find ample evidence of such types of violations. I will therefore limit myself to investigate the detainees' procedural rights. This delimitation is also made based on time disposal.

As I stated above one complement to the laws of war will be discussed in chapter five and that is the applicability of the International Human Rights framework mainly codified in the International Covenant on Civil and Political Rights. I will investigate the complex relationship between Human rights law and International Humanitarian law in times of armed conflict

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<sup>7</sup> See for example, CNN web article *Government: Evidence gained by torture allowed Wednesday*, December 8, 2004 Posted: 3:42 AM EST (0842 GMT) available at: <http://www.cnn.com/2004/LAW/12/02/guantanamo.detainees/index.html>, last visited on 9<sup>th</sup> of May at 08:32.

due to the nature of *lex specialis*, which IHL attains in those situations. I will analyse the possible effect the human rights provisions might have on the interpretation of IHL. I will also limit myself to investigate the legality of prolonged detention according to human rights law and not whether the ICCPR guarantees specific fair trial rights since this will become redundant due to my findings in previous chapters.

Lastly, I will end my thesis with my conclusions and final analysis in chapter six. Here I will with try to put my conclusions in a broader perspective analysing its' possible consequences for the individual and for the international community as a whole.

## 2 The legal qualification of the Afghan conflict

In this chapter, I will examine the legal qualification of the conflict in Afghanistan in order to determine what international framework that is applicable to the detainees', held in Guantanamo bay, situation. The issue at hand is whether the military operations in Afghanistan are to be considered an armed conflict under international law. This qualification is necessary in order to determine the status of the individuals held in Guantanamo. Since the detainees were captured during the military operations, conducted by the US forces in Afghanistan, we can focus on the situation arising from the beginning of those operations. It is not enough to determine whether an armed conflict has occurred but one must also distinguish whether that conflict is of an international or internal character. This is imperative since the character of the conflict determines what legal framework that is to be used when establishing the detainees' status.

The four Geneva Conventions of 1949 declares in their common article 2 that an armed conflict exists when a declaration of war has been made, or de facto hostilities exists between two or more parties in this case the US and Afghanistan.<sup>8</sup> An "armed conflict", within the meaning of Article 2, can be categorized, according to the International Red Cross Committee (ICRC), as any difference arising between two States leading to the intervention of members of the armed forces. It makes no difference how long the conflict lasts, or the scale of the conflict as long as the armed forces of one Power have captured adversaries enumerated within the scope of Article 4 of the Third Geneva Convention (Geneva Convention III), relative to the treatment of prisoners of war, to make this legal framework applicable.<sup>9</sup>

Since there is no explicit definition, within the laws of war, the issue of the existence of an armed conflict has been raised before various international courts and tribunals. Although judicial decisions are to be used, according to article 38 of the International Court of Justice Statute,<sup>10</sup> as a subsidiary means of interpreting rules of law they still can have great significance in determining existing customary law.

In the Tadić case, the Appeal Chamber of the International Tribunal for War Crimes in former Yugoslavia (ICTY) stated in its decision on jurisdictional issues that:

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<sup>8</sup> See for example, Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>9</sup> Pictet, Jean S, International Committee of the Red Cross: *The Geneva conventions of 12 August 1949: commentary. 3, Geneva convention relative to the treatment of prisoners of war*, (Geneva: International Committee of the Red Cross, 1960) p. 23 art. 2.

<sup>10</sup> Statute of the International Court of Justice concluded at San Francisco, on 26 of June 1945.

... an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory or the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.<sup>11</sup>

The Appeals Chamber further noted in their decision on the merits that as to the classification of an armed conflict:

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.<sup>12</sup>

The US and its' allies characterized their use of force as an exercise of the right of self-defence against the Al-Qaeda and the Taliban regime.<sup>13</sup> The magnitude of force used and in responding to what the US and its allies considered an armed attack according to the provisions of self-defence within article 51 of the UN Charter,<sup>14</sup> the conflict can only be described as an armed conflict. Based on the definitions given above by the ICRC and the ICTY the conflict should be characterized as an international armed conflict since there were at least two states, the US and Afghanistan, involved and de facto hostilities took place.

There have been some questions raised as to whether the Taliban regime was the de facto government of the Afghanistan. However, this has no importance in determining the status of the combatants, especially the status of the Taliban forces as the regular forces of Afghanistan as will be investigated below.

The law applicable to international armed conflicts is codified principally in the Hague Convention of 1907, the annexed regulation and by the four Geneva Conventions of 1949. Additional Protocol I (AP I) of 1977 contains

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<sup>11</sup> Tadić Case No. IT-94-1-AR72; 105 ILR, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, pp 488.

<sup>12</sup> Tadić Case No. IT-94-1-AR72; 105 ILR, Judgment of 15 July 1999, para. 84.

<sup>13</sup> Letter from the US to the Security Council, UN Doc S/2001/496, 7 Oct. available at: <http://www.un.int/usa/s-2001-946.htm>, last visited on 5<sup>th</sup> of May 2007 at 11:14.

<sup>14</sup> United Nations Charter signed on 26 June 1945, in San Francisco, into force on 24 October 1945.

provisions developing the law in both of these areas.<sup>15</sup> Both the US and Afghanistan are parties to the Geneva Conventions, however neither the US nor Afghanistan are parties to the AP I, nevertheless some of the relevant provisions in this document may be customary law and therefore applicable in any case. Accordingly, the status of the individuals apprehended during the military operations in Afghanistan must be established having regard to the relevant provisions of the Geneva Conventions. In particular the Third Geneva Convention (Geneva Convention III),<sup>16</sup> relative to the treatment of prisoners of war, or of the Fourth Geneva Convention (Geneva Convention IV),<sup>17</sup> on the treatment of civilians.

In support of the application of the laws of war the United Nations Security Council had also recognized that the Geneva Conventions applied to the war in Afghanistan before and after the U.S. military intervention in that they expressly called “on all Afghan forces . . . to adhere strictly to their obligations under . . . international humanitarian law”.<sup>18</sup>

I have now established that the situation arising in Afghanistan on the 7<sup>th</sup> of October 2001 should be characterized as an international armed conflict. This notion makes the Geneva Conventions applicable to the situation. This is neither an uncomplicated nor an accepted definition, as we will learn in the following chapter. I will discuss the requirements for prisoner of war (POW) status according to art 4 of the Geneva Convention III. I will analyse the status of Taliban soldiers and the Al-Qaeda members where my conclusions will lead me to discuss the different rights connected with the detainees’ status in chapter 4.

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<sup>15</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), signed and adopted at Geneva on the 8<sup>th</sup> of June 1977, U.N.T.S. Vol. 1125.

<sup>16</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>17</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force for the U.S., Feb. 2, 1956).

<sup>18</sup> S.C. Res. 1378, U.N. SCOR, 55th Sess., 4415 mtg. para. 2, U.N. Doc. S/RES/1378 (2001). This resolution was adopted on November 14, 2001.

# 3 The legal status of the Guantanamo detainees

## 3.1 Requirements for POW status according to the Geneva Convention III

The protection and the treatment of captured combatants during an international armed conflict are detailed in Geneva Convention III.<sup>19</sup>

According to article 4A of Geneva Convention III, individuals in the following categories who have fallen into the power of the enemy are entitled to the status of prisoners of war:

- members of armed forces of a party to the conflict or of militias or volunteer corps forming part of such armed forces;
- members of other militias and members of other volunteer corps, including those of organized resistance movements;
- members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining power; and
- inhabitants of non-occupied territory who have spontaneously taken up arms to resist an invading force, if they carry arms openly and respect the laws and customs of war.

A textual interpretation of article 4A (1) leads to the definition that all members of a party to the conflict's armed forces should be granted POW status. Hence, the definition of armed forces includes all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command.

The Geneva Convention III thus considers all members of regular armed forces to be combatants. However, militia and volunteer corps, including organised resistance movements are required to comply with four conditions in order for them to be considered combatants and entitled to POW status. The idea that only members of other militias and members of other volunteer corps enumerated in 4A (2) Geneva Convention III are explicitly required to fulfil these four conditions seem to be that the regular armed forces fulfil them per se.<sup>20</sup> The four conditions are:

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<sup>19</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>20</sup> Rosas, Allan Rosas, Allan; *The legal status of prisoners of war* (Åbo: Institute for Human Rights, Åbo Academy University, 2005) p. 326 ff. A lengthier discussion as to how these requirements are met will be held below.

- to be commanded by a person responsible for his subordinates;
- to have a fixed distinctive emblem recognizable at a distance;
- to carry arms openly; and
- to conduct their operations in accordance with the laws and customs of war.<sup>21</sup>

For the purpose of POW status the combatants must comply with all of the above listed conditions. If they fail to do so they do not have the right to POW status.

These are the general definitions of combatants and POWs. I have now established that the requirements for POW status are different if you are a regular member of a party's armed forces or if you belong to a militia or volunteer corps. The Taliban are as established above to be considered as the regular armed forces of Afghanistan and could therefore be included in the article 4A (1) definition. Whether the Taliban regime was a recognized legal government or not has little or no impact on the status determination according to the Geneva system. Members of regular armed forces who profess allegiance to an authority not recognized by the Detaining Power is also a category of POWs according to the Geneva Conventions system since this is stipulated in article 4A(3) of the Geneva Convention III. A textual interpretation of the article allows for the conclusion that the conditions, required for the groups categorized in article 4A(2), do not explicitly need to be met by the members of regular armed forces who profess allegiance to an authority not recognized by the Detaining Power. The only provision different from the regular armed forces listed in article 4A(1), is that the regime who the POWs profess their allegiance to is not recognized by the detaining power. The Taliban detainees should hence be considered POWs within the meaning of article 4. However as straightforward as this may seem this is neither entirely accepted nor uncomplicated as I will demonstrate below.

The categorization of the members of Al-Qaeda is yet more difficult. Although they may seem at a first glance to be at least included in subparagraph 2 of article 4 as members of other militias and volunteer corps, they may not fulfil the required conditions, or based on other circumstances be denied POW status. I will now first try to describe the US arguments for not granting POW status to either one of these categories. I will then assess the arguments and make conclusions as to whether these both categories should be granted POW status or not.

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<sup>21</sup>Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956) article 4A (2).



## 3.2 US' arguments for not granting POW status

On 11 January 2002, the US government announced that it would not apply the Geneva Convention III in relation to the treatment and interment of those taken prisoner in Afghanistan by the US. The US explained that the prisoners were not actually POWs, but were in fact “unlawful combatants” and therefore not entitled to “any rights under the Geneva Conventions”.<sup>22</sup>

With respect to members of Al Qaeda in particular, the White House announced at that time that members of Al Qaeda “are not covered by the Geneva Convention” and will continue to be denied Geneva law protections, supposedly because Al Qaeda “cannot be considered a state party to the Geneva Conventions.”<sup>23</sup>

On February 7, 2002, the White House reversed itself and announced that the Geneva Conventions applied to the war in Afghanistan. The US authorities then began to distinguish between soldiers of the Taliban army, and the members of Al-Qaeda. The distinction is on the basis that, although Afghanistan is a party to the Geneva Conventions and the Taliban their armed force, Al-Qaeda is an international terrorist group and as such, its members are not entitled to POW status.<sup>24</sup> However, even though the Geneva Convention III covers the Taliban soldiers, the position of the US authorities is that they still do not qualify as POWs. The justification given for this determination is that they failed to meet the criteria for POW status by:

- failing to be organized in units with an identifiable chain of command;
- failing to wear uniforms that distinguish them from civilian population and;
- failing to conduct their operations in accordance with the laws and customs of war, since they knowingly adopted and provided support to the Al Qaeda.<sup>25</sup>

The viewpoint is that if the requirements in art 4A(2) applies to militias and volunteer corps then naturally it should apply to the regular armed forces as

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<sup>22</sup> Department of Defence briefing on January 11, 2002 2:10 PM, available at: <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031> last visited on 5<sup>th</sup> of May 2007, at 13:29.

<sup>23</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Hughes II, General Counsel, Dep’t of Defence ( Jan 22, 2002) p. 9.

<sup>24</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President ( Feb 7, 2002).

<sup>25</sup> See for example, Memorandum from William J. Haynes II, General Counsel of the Department of Defense to Members of the ASIL-CFR Roundtable on Dec 12, 2002, available at: <http://www.cfr.org/publication.html?id=5312> last visited on 6<sup>th</sup> of May 2007 at 14:04.

well. In conclusion, according to the US position, none of the two groups meets the criteria for POW status and could therefore be denied the same.

However, there is another requirement listed in article 5 of the Geneva Convention III, which compels that the status of the detainees, whether Taliban or Al-Qaeda members, should be determined by a competent tribunal. Nevertheless, the US Justice Department (DOJ) argued that there would be no need to determine the status of the detainees by the use of article 5 tribunals due to the textual interpretation of the article “should any doubt arise”. The DOJ’s view was that this doubt must arise in the mind of the detaining power. The President had after examining relevant applicable law, made the decision that there was no doubt that the Al Qaeda and Taliban personnel were not entitled to POW status.<sup>26</sup>

### **3.3 Assessments of the US’ arguments**

#### **3.3.1 The Taliban forces compliance with POW requirements**

The US argument that the Taliban failed to distinguish themselves by not wearing uniform and not carrying their arms openly cannot be easily dismissed solely because they supposedly met this requirements simply by belonging to the regular armed forces of a party to the conflict. According to article 4A (2) (b) of the Geneva Convention III independent forces should have a “fixed distinctive sign recognizable at a distance” and should carry their “arms openly”. Although these two criteria are not explicitly applied to regular forces, they are considered to fulfil them per se (see discussion above) and could possibly if they fail to distinguish themselves from the civilian population at least in some circumstances be deprived of their POW status. This conclusion could be drawn from the necessity to protect the civilian population from attack based on the principle of distinction.<sup>27</sup>

The question of what conditions, if any, regular forces have to fulfil in order to benefit from the POW status must be decided based on a comprehensive analysis of the Third Conventions as a whole and of customary law.

The requirement for all combatants whether regular or not to distinguish themselves from the civilian population seems to be accepted as a rule of customary law. This conclusion can be drawn from numerous military manuals and official statements,<sup>28</sup> supporting state practice and *opinio juris*

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<sup>26</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President ( Feb 7, 2002)

<sup>27</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, p. 226. para 78, 79. ICJ stated that the principle of distinction was international customary law.

<sup>28</sup> See for example the US Naval Handbook (1995) § 5.3 and the US statement at the CDDH, Official Records Vol. VI, CDDH/SR.41, 26 May 1977, p. 150, § 44 in Henckaerts,

and the purpose and context of the Geneva Convention III which 194 states has ratified. Additional Protocol I recognizes in article 44 (7) “the general accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”, although the protocol like the Geneva Convention III does not make this an explicit condition for POW status.<sup>29</sup> Several military manuals also recognize the obligation to distinguish oneself as customary. They also note that the obligation does not pose a problem since regular armed forces usually wear a uniform.<sup>30</sup> It therefore seems to be a customary requirement for regular combatants to distinguish themselves from the civilian population. However, the interpretation as to whether the regular forces of a state need to comply with this requirement is unclear. There seem to be an obligation for combatants to distinguish themselves from the civilian population but whether or not the failure to meet this obligation deprives them of POW status remains unclear.

In interpreting the meaning of the Geneva Convention III as a whole, one argument for POWs not to lose their status could be that according to article 85 of the Geneva Convention III, a POW guilty of war crimes and other violations of the laws of war shall retain his POW status. It could be considered illogical to make an exception for persons who have not distinguished themselves from the civilian population and therefore violated the laws of war. This would put a combatant who directly and deliberately, while wearing a uniform, attack civilians in a more favourable situation than someone who indirectly endangers civilians by disguising himself. This article also allows for the cautious interpretation that a POW's neglect to comply with the laws and customs of war does not deprive him of POW status. This interpretation makes the US argument to deprive the Taliban forces of POW status based on the idea that they have not conducted their operations in accordance with the laws of war not tenable. However, after the adoption of the Geneva Convention III many socialist states have made reservations to this article stating that persons convicted of war crimes lose their POW status. The West has criticized this.<sup>31</sup> Either way a person must then be convicted of a war crime in a court of law to lose his POW status.

The members of the Taliban Army apprehended during the military operation in Afghanistan belong either to the first or to the third category enlisted in Article 4 Geneva Convention III as previously established. With regard to the US argument that members of the Taliban did not meet the requirements of Geneva Convention III it is clear as above stated that these

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Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, (Cambridge: Cambridge University Press, 2005) p. 385.

<sup>29</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), signed and adopted at Geneva on the 8<sup>th</sup> of June 1977, U.N.T.S. Vol. 1125.

<sup>30</sup> See the military manuals of Australia, Belgium, Colombia, Germany etc. in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. I (Cambridge: Cambridge University Press, 2005) p. 385.

<sup>31</sup> Rosas, Allan Rosas, Allan; *The legal status of prisoners of war* (Åbo: Institute for Human Rights, Åbo Academy University, 2005) p. 360.

requirements are expressly for irregulars according to the Geneva Convention III but not for members of armed forces which are presumed to meet these requirements. This presumption nevertheless implicitly requires that even the regular forces distinguish themselves from the civilian population. If the Taliban have failed to do so, they might lose their POW status. However, the doctrine, based on the arguments made above, is not entirely clear as to whether regular troops could lose their POW status if failed to wear a distinctive sign and carry their arms openly. In any case, each individual accused of not meeting these requirements must nevertheless have their status determined in an individual proceeding according to article 5 of the Geneva Convention III (as will be discussed below).

### **3.3.2 The Al-Qaeda members compliance with POW requirements**

The members of Al-Qaeda do not qualify as regular POWs, according to article 4A(1), on that basis that they did not belong to the Taliban regular forces. However, there is much proof that they formed a hierarchically organised militia. At least the fact that they have committed organized attacks on a large scale as that of the September 11<sup>th</sup> testifies to this assumption. This militia took an active part in the hostilities in Afghanistan and had a connection with a state or a group that was Party to the conflict, at least according to the US and other involved parties,<sup>32</sup> and therefore would seem, at least prima facie to fall within the provisions of Article 4A(2) of Geneva Convention III.

However, the Al-Qaeda members did not seem to meet the requirements set forth in article 4A (2) (a-d) of the Geneva Convention III since they supposedly failed to be commanded by a person responsible for his subordinates, allegedly did not distinguishing themselves from the civilian population and hence did not conduct their operations in accordance with the laws of war. If this can be considered factual, then according to the Geneva Convention III they cannot be afforded POW status. I will analyse whether the Al-Qaeda detainees fulfilled these requirements and if so are entitled to POW status.

#### **3.3.2.1 being commanded by a person responsible for his subordinates**

Respect for this rule and the requirement of being organized is moreover in itself a guarantee of the discipline, and should therefore provide reasonable assurance that the other conditions for POW status referred to below will be

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<sup>32</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President ( Feb 7, 2002).

observed.<sup>33</sup> The reason for this requirement seems to be the ability to punish violations of IHL committed by individual combatants by forming an internal disciplinary system. This requirement seems therefore to be set up to ensure that the requirement to respect the laws and customs of war will be met.<sup>34</sup>

Considering this interpretation of article 4A(2)(a) the Al-Qaeda members do not seem to meet this requirement since they do not punish violations of the laws of war, but rather seem to encourage them, by not distinguishing themselves from the civilian population as will be discussed below. In conclusion, based on the interpretation of this article, the Al-Qaeda members cannot be granted combatant status. The idea of the IHL framework as a system of rules, which are implemented by the parties, makes it impossible for the Al-Qaeda members to be considered combatants since they do not apply nor abide by these rules as will be discussed in the next two sections.

### **3.3.2.2 having a fixed distinctive sign recognizable at a distance and carrying arms openly**

For irregular combatants a distinctive sign can replace a uniform according to the travaux préparatoires to the Geneva Conventions. It must be worn at all times, in all situations. In order for the sign to be distinctive, it must be the same for all the members of any partisan organization, and must only be used by that organization. In order for the sign to be recognizable at a distance, the ICRC's view is that, "the distinctive sign should be recognizable by a person at a distance not too great to permit a uniform to be recognized".<sup>35</sup>

In order to be entitled to POW status combatants must also carry their arms openly according to article 4A(2)(c) of the Geneva Convention III. The purpose with these regulations is, as already discussed, to distinguish combatants from the civilian population. This is crucial since civilians should be protected from attacks in times of conflict by the principle of distinction. The International Court of Justice stated in its advisory opinion in the Nuclear Weapons Case, that the principle of distinction was one of the "cardinal principles of international humanitarian law" and one of the "intransgressible principles of international customary law".<sup>36</sup>

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<sup>33</sup> Pictet, Jean S. International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary. 3, Geneva Convention relative to the Treatment of Prisoners of War*, (Geneva: International Committee of the Red Cross, 1960) p 59.

<sup>34</sup> Rosas, Allan Rosas, Allan; *The legal status of prisoners of war* (Åbo: Institute for Human Rights, Åbo Academy University, 2005) p. 340.

<sup>35</sup> Pictet, Jean S. International Committee of the Red Cross, *the Geneva Conventions of 12 August 1949: Commentary. 3, Geneva Convention relative to the Treatment of Prisoners of War*, (Geneva: International Committee of the Red Cross, 1960) p. 60.

<sup>36</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, p. 226. para 78, 79.

If Al-Qaeda as a group does not respect the requirement of wearing a distinguishable sign nor carrying their arms openly then they could lose the right to POW status. Since Al-Qaeda's modus operandi seem to be infiltration of the civilian population based on the attack of 9/11 they do not seem to meet this requirement and the use of such methods could disqualify the members from POW status. However, I have no evidence that show if the Al-Qaeda did wear a sign distinguishing them from the civilians during the armed conflict in Afghanistan. The same rule that applies to the Taliban forces to have their status determined by a competent tribunal, according to article 5 of the Geneva Convention III applies to Al-Qaeda individuals, suspected of not meeting the POW requirements.<sup>37</sup>

### **3.3.2.3 conducting their operations in accordance with the laws and customs of war**

This is an indispensable provision, which includes those just listed above. Militia and volunteer corps are compelled to respect the Geneva Conventions to the fullest extent possible when conducting their operations. In engaging in attacks, they must not cause violence and suffering disproportionate to the military result, which they hope to attain and they may not attack civilians or disarmed persons as already concluded since the principle of distinction is a norm of customary law (see argument above).<sup>38</sup>

Due to the fact that the Al-Qaeda does not seem to meet the requirement of distinguishing themselves from the civilian population as required by the Geneva Convention III and by the principle of distinction, as expressed constituting customary law, they also violate the requirement of conducting their operations in accordance with laws and customs of war. By infiltrating the civilian population, they jeopardize the safety of civilians since the opposite forces might have trouble distinguishing the two groups from one another. Based on evidence of this sort the members of Al-Qaeda could lose the right to POW status.

### **3.3.2.4 Mercenaries**

There is yet another category, under which some of the Al-Qaeda members could fall. That category is mercenaries. As defined in AP I art 47, mercenaries do not have the right to combatant or POW status.<sup>39</sup> However, they may not be convicted or sentenced without previous trial. Since the US and Afghanistan are not parties to AP I this rule must be considered customary law for it to be applicable to the situation. Based on the extensive

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<sup>37</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>38</sup> *Ibidem* para 78, 79.

<sup>39</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), signed and adopted at Geneva on the 8<sup>th</sup> of June 1977, U.N.T.S. Vol. 1125.

study of customary international law within the IHL field made by Henckaerts and Doswald-Beck, there are significant state practice manifested in military manuals and official statements made by various states that agrees with the definition with article 47 of AP I.<sup>40</sup> However, the US has stated that it does not consider the provisions of article 47 to be customary law. As the Legal Adviser of the US State Department stated:

Article 47 of Protocol I /.../ was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal and political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.<sup>41</sup>

The US makes an interesting point when one considers the object and purpose of the Geneva Conventions. If a mercenary fights in the same manner as regular combatant consistent with the provisions within the Geneva Conventions and belongs to the regular army of a state, he does seem to comply with the requirements of POW status. The only thing different is the motivation for engaging in combat. Should this be a criterion for disqualification? If the substantial state practice and *opinio juris* of states agree that mercenaries are disqualified from POW status then this could be a norm of customary law. However, the US protest to the contrary could have effect of the binding quality of the customary norm for the US. The ICJ decision in the Anglo-Norwegian Fisheries case suggests that a state may not be bound by a customary norm if it has always objected to its application.<sup>42</sup> The US Air Force Commander's Handbook states that the US has always regarded mercenaries as lawful combatants entitled to POW status.<sup>43</sup>

In conclusion even if one of the detainees are determined to be a mercenary the US can not disqualify them from POW status based on their own practice and statements.

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<sup>40</sup> See e.g. the military manuals of Australia, France, Sweden, UK etc. in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, (Cambridge: Cambridge University Press, 2005) p. 391.

<sup>41</sup> US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross- Washington Collage of Law Conference on International Humanitarian Law: A workshop on Customary International Law and the 1977 Protocols Additional to the Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

<sup>42</sup> Anglo-Norwegian Fisheries case 1951, ICJ Reports, 1951, p. 131.

<sup>43</sup> US, Air Force Commander's Handbook (1980), § 5-3. in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. II(Cambridge: Cambridge University Press, 2005) p. 2583.

### 3.3.3 Status determination by article 5 tribunals

Even if the requirements, relating to “voluntary militias” in Article 4A (2) Geneva Convention III, apply to regular combatants it is apparent from the text of Article 5 Geneva Convention III that in case of doubt, in order to deprive a prisoner of his POW status, it is necessary to prove that the individual combatant has personally failed to meet the requirements listed in article 4 of the Geneva Convention III by convening a “competent tribunal” to determine status.<sup>44</sup> The general determination, made by the US government as expressed in the February 7<sup>th</sup> memo,<sup>45</sup> that no Taliban prisoner is entitled to POW status due to their presumably collective failure to meet the POW criteria is thus based on a misinterpretation of Article 5, in particular when the executive makes such a determination.

Until this determination has been made the protections afforded the detainees within the Geneva Convention III applies according to article 5 para 2 Geneva Convention III. The continuingly denial of POW status to Taliban forces according to article 4 of the Geneva Convention III is based on the executive decision of the 7<sup>th</sup> of February 2002.<sup>46</sup> Thus, the article 5 requirement for a status determination is not fulfilled within the meaning of the article. Only a judicial finding on the part of a detaining party could deprive the captured Taliban combatants of POW status. Until that time, the Taliban detainees must be afforded POW status.

In *Hamdi v. Rumsfeld*, The Supreme Court reviewed the right for the executive to detain enemy combatants without art 5 Geneva Convention III assessment of combatant status, hence assessing the US compliance with international law.<sup>47</sup>

Eight of the nine justices of the Court agreed that the Executive Branch did not have the power to hold indefinitely a U.S. citizen without basic due process protections enforceable through judicial review. They referred to Geneva Convention III and held that “detention may last no longer than active hostilities”.<sup>48</sup>

Justice O'Connor wrote that although Congress had expressly authorized the detention of unlawful combatants in its Authorization for Use of Military Force (AUMF) passed after 9/11, due process required that Hamdi have a meaningful opportunity to challenge his detention.<sup>49</sup> O'Connor suggested the Department of Defense create fact-finding tribunals which would determine

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<sup>44</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>45</sup> Memorandum from George W Bush to the Vice President et al. dated the 7<sup>th</sup> of February 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> last visited 16 April 2007 15:45.

<sup>46</sup> *Ibidem*.

<sup>47</sup> *Hamdi v. Rumsfeld* Case No. 03—6696, Supreme Court opinion of June 28, 2004. United States Reports Vol. 540 p. 1099.

<sup>48</sup> *Ibidem*, p. 1111.

<sup>49</sup> Authorization of Military Force September 18, 2001, Public Law 107-40 [S. J. RES. 23].



whether a detainee merited continued detention as an enemy combatant. The United States Department of Defense created Combatant Status Review Tribunals (CSRT) in response.<sup>50</sup> The US had up until this point consequently violated article 5 of the Geneva Convention III.

When establishing CSRTs the US government maintained that the requirement of an article 5 assessment of status was fulfilled. The tribunals completed their work in March 2005. However, one can argue that these institutions did not meet the article 5 requirements since they were established to determine unlawful combatant status and not prisoner of war status. The purpose of the tribunals as expressed in the CSRTs procedure documents is to determine whether the detainees meet the criteria for enemy combatant status thus not POW status. The definition of an enemy combatant as prescribed by the CSRT document is “an individual who was part of or supporting Taliban or Al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partner”.<sup>51</sup> This statement explicitly refers to a process where a detainee can only be determined an enemy combatant. That is however not a criterion for the exclusion of POW status according to article 4 of the Geneva Convention III. Hence the purpose of the tribunals does not seem to meet the provisions of article 5 of the Geneva Convention III since this article requires a determination of POW status.<sup>52</sup>

Another supporting argument for this theory is the *Hamdan v. Rumsfeld* judgment, in which Judge Robertson from the District Court of Columbia held that detainees could only be denied POW status and treatment following a determination by a competent tribunal, and that the presidential and CSRT determinations were not sufficient for these purposes.<sup>53</sup>

In conclusion it appears as if the detainees have not had their status determined by a competent tribunal and should therefore whether Taliban or Al-Qaeda member be granted the protections afforded POWs by the Geneva Convention III until such a time that it is. The continued denial of POW status to both of these groups is thus a violation of article 5. Nevertheless, even if a determination were made that an individual is not entitled to POW status, he or she would still enjoy some protection under the Geneva system. Especially, detained enemy combatants who do not qualify for POW status could generally still qualify as “protected persons” under the Fourth Geneva Convention. This notion will now be investigated.

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<sup>50</sup> *Ibidem*, page 12.

<sup>51</sup> Memorandum from Gordon England Deputy Secretary of Defense for Secretaries of military dept., Chairman of the Joint Chiefs of Staff and Under Secretary of defence for policy. Subject: Implementation of Combatant Status Review Tribunal Procedures for enemy combatants detained at U.S. Naval Base Guantanamo Bay, Cuba, on Jul. 14 2006, Enclosure (1) p. 1, available at: [http://www.defenselink.mil/news/Combatant\\_Tribunals.html](http://www.defenselink.mil/news/Combatant_Tribunals.html), last visited on 6<sup>th</sup> May 2007 at 12:07.

<sup>52</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

<sup>53</sup> *Hamdan v. Rumsfeld* Case No. 05–184, Supreme Court opinion of June 29, 2006. Vol. 548.

## 3.4 The legal protection of unlawful combatants under Geneva Convention IV

Given that the Al-Qaeda members do not meet the conditions to qualify as prisoners of war and thus are not protected by Geneva Convention III, this analysis will investigate whether unlawful combatants fall within the scope of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War.<sup>54</sup>

If the detainees are entitled to “protected person” status under Geneva Convention IV this does not prohibit interrogation and detention as long as the conflict continues, provided that they remain a security risk.<sup>55</sup> Nor does it prohibit their prosecution and imprisonment after the conflict has ended if they are convicted of a crime.<sup>56</sup> They may even be subject to execution.<sup>57</sup>

### 3.4.1 Article 4 – protected persons

According to Article 4(1):

Persons protected by the Convention 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.<sup>58</sup>

According to Article 4 (4), Geneva Convention IV does not protect persons protected by Geneva Conventions I-III. A textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by Geneva Conventions I-III, thus also persons who do not respect the conditions which would entitle them to POW status/ treatment, are covered by Geneva Convention IV provided that they are not:

- nationals of a State which is not party to the Convention; (this definition is scarcely applicable today since 194 states have ratified the Convention)
- nationals of the Party/Power in which hands they are; or
- nationals of a neutral State (only if they are in the territory of a belligerent State) or co-belligerent State with normal diplomatic representation.

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<sup>54</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force for the U.S., Feb. 2, 1956).

<sup>55</sup> *Ibidem* article 42, 78.

<sup>56</sup> *Ibidem* article 64-68.

<sup>57</sup> *Ibidem* article 68.

<sup>58</sup> *Ibidem*.

According to this, any person would be protected once he/she finds himself/herself in the hands of a Party to a conflict or occupying Power. Only nationals of that Party/Power are excluded. The broad wording of the paragraph, read in isolation, would not only include civilians but even members of the armed forces.

The nationality limitation implies that civilian nationals of the US and of allied forces, detained by their own country's armed forces during the conflict are, excluded of protection according to article 4. The existence of diplomatic relations is the second nationality limitation. Such a provision may deprive for example Pakistani and British citizens from the protected person status as long as those states maintain diplomatic relations with the US. Provided that the detainees fall within these nationality limitations they are not entitled to the protection afforded by the Geneva Convention IV.

Turning to the US position that the Geneva Conventions do not apply to the members of Al-Qaeda captured in Afghanistan, because they are "a foreign terrorist group",<sup>59</sup> this notion could be considered to be inconsistent with the purpose of the Geneva Conventions, which extensive regulations seems to aim at ensuring that no one is left without protection as this thesis will investigate. The ICTY has explicitly affirmed the principle of the complementarity of the Geneva Conventions, stating,

there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war/.../ he or she necessarily falls within the ambit of [the Fourth Convention], provided that its art. 4 requirements [defining a protected person] are satisfied.<sup>60</sup>

Based on this principle even unlawful combatants might be considered protected persons within the ambit of the Geneva Convention IV if they are found to be not included in the Geneva Convention III as POWs. The mere fact that an individual has unlawfully participated in hostilities seems not to be a condition for excluding the application of Geneva Convention IV. The wording of Article 5 of Geneva Convention IV supports this argument in which while permitting some derogation from the safeguards comprised within Geneva Convention IV, uses the term "protected persons" even when it comes to individuals that are detained as spies, saboteurs or persons suspected of or engaged in hostile activities threatening the security of the occupying Power. The concepts of "activity hostile to the security of the State/Occupying Power" and of "sabotage" undoubtedly comprise of direct involvement in hostilities. Thus, this article would apply to Al-Qaeda detainees.

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<sup>59</sup> Memorandum from George W Bush to the Vice President et al. dated the 7<sup>th</sup> of February 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> last visited 16 April 2007 15:45

<sup>60</sup> Celebici Case IT-96-21, Trial Chamber, judgement of 16 November 1998, para 271.

### 3.4.2 Article 5 – derogations

According to art 5:

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

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.<sup>61</sup>

According to the ICRC commentary to the Geneva Convention IV some states hold the view that the Convention should be applicable to all individuals to whom it refers, without exception, while it to other states seem unreasonable that individuals under suspicion of having violated the laws of war could benefit from the Convention's protection.<sup>62</sup>

One can consider it unusual that a humanitarian Convention should protect spies, saboteurs or irregular combatants. Those individuals, who fail to meet the combatant requirements and engage in attacks violating the laws of war, should anticipate the risks of which they are endangering themselves. This would seem to be a reason for excluding them from the safeguards of the Convention. However, this line of argument is problematic since article 5 of the Geneva Convention IV refers to spies, saboteurs and other individuals engaged in hostile activity towards a state as protected persons.

The right for a detaining Power to derogate from the safeguards in article 4 requires that the suspicion of individual(s) engagement in activities hostile

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<sup>61</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>62</sup> Pictet, Jean S., International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary 4, Convention Relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1985) p. 52.

to the detaining state does not rest on a whole group of people. According to the wording of the text in article, 5 of the Geneva Convention IV collective measures cannot be taken. This conclusion is based on the text:

/when a party/ is satisfied that an *individual* protected person is /.../ suspected of or engaged in /hostile activity/ /.../, such *individual* shall not be entitled to claim such rights and privileges under the present Convention /.../ prejudicial to the security of such State.<sup>63</sup>

The ICRC commentary to the Geneva Convention IV indicates that the notion of activities prejudicial or hostile to the security of the State is very hard to identify. The probable meaning, according to the commentary, is particularly “espionage, sabotage and intelligence with the enemy Government or enemy nationals”. Political attitude towards the State may not be included within the definitions provided that the attitude does not render to action.<sup>64</sup> The rights referred to as being prejudicial to the security of a State consist to all intents and purposes of “the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross.”<sup>65</sup>

The right of detained individuals to a fair and regular trial prescribed by the Convention implies that Articles 64 to 76 will be applicable.<sup>66</sup>

If the detainees whether Taliban or Al-Qaeda members are determined not to be POWs according to article 5 of the Geneva Convention III then the safeguards within the Geneva Convention IV could apply to them. Based on the statement that there are no legal holes within the IHL framework then persons not considered POWs must then be protected persons according to article 4 of the Geneva Convention IV. This is not entirely true since at least mercenaries according to the customary norm as codified in article 47 of AP I falls outside of these provisions (see discussion above).<sup>67</sup> Nevertheless, mercenaries are not per se deprived of POW status by US policy and are by States parties to AP I protected by its’ article 75,<sup>68</sup> which in a way uphold the notion of no legal holes within the IHL framework. However, the derogations of article 5 appear to be applicable to terrorists who seem at

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<sup>63</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, article 5 para 1, author’s italic.

<sup>64</sup> Pictet, Jean S., International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary 4, Convention Relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1985) p. 55.

<sup>65</sup> *Ibidem* p. 56.

<sup>66</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>67</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), signed and adopted at Geneva on the 8<sup>th</sup> of June 1977, U.N.T.S. Vol. 1125.

<sup>68</sup> *Ibidem*.

least to fit the description of a “person /.../ definitely suspected of or engaged in activities hostile to the security of the State”. Nevertheless, the judicial guarantees set forth in the Geneva Convention IV still apply to such individuals. The only individuals left, of interest for the purpose of this thesis, not protected by the Geneva Convention III and Geneva Convention IV, are thus nationals of a neutral State (e.g. Pakistani and British citizens). However, I will below investigate if the Geneva Convention in some other way protects them. I will now continue with analysing the detainees’ rights according to the different frameworks.

# **4 The detainees' rights according to international humanitarian law**

## **4.1 POWs' rights according to the Geneva Convention III**

The determination of status under Article 5 of the Third Geneva Convention is not in any sense a criminal trial. The Article 5 tribunal's purpose is only, as already stated, to determine POW status. If charges are brought for any alleged criminal acts, including unauthorized participation in hostilities, the accused must be heard by a regular military or civilian judicial tribunal in accordance with the provisions relating to juridical and penal proceedings under either the Geneva Convention III, the Geneva Convention IV or under Article 75 of AP I, if the person in question is determined not to qualify for the protection under either one of the former two instruments.<sup>69</sup> I will here investigate what judicial guarantees that is to be granted to a POW according to the Geneva Convention III. In chapter 4.3, I will also discuss state practice, which regulates judicial guarantees.

The Taliban detainees, who, as above stated, qualify as POWs can be interned for the duration of the hostilities in Afghanistan. However as soon as the active hostilities cease, or at the end of criminal proceedings, or upon completion of punishment in case of indictable offences according to article 118 Geneva Convention III, they must be released and repatriated "without delay".

POW status can be no shield against personal liability for violations of the laws of war. According to article 85 of the Geneva Convention III POWs may be prosecuted "under the Detaining Power" for "acts committed prior to capture",<sup>70</sup> therefore, also for war crimes or other crimes according to US law should their involvement in the 9/11 attacks be proved or other crimes against the US forces during hostilities be alleged.

The Geneva Convention III also guarantees basic individual rights, including the right to humane treatment, the right to protection from

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<sup>69</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956), articles 82-108 and Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, articles 64-76.

<sup>70</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956).

violence, intimidation, insults, public curiosity, and coercive interrogation tactics etc.<sup>71</sup>

Furthermore, fair trial rights, for those detainees who are charged with a crime, are expressly guaranteed in arts. 84, 99, 103-07, 129. The right to be tried by the same courts, under the same procedures as those provided for the detaining power's own military personnel is ensured in article 102 along with the right of appeal in article 106. Other safeguards are the right to an impartial tribunal,<sup>72</sup> the right to be free from retroactive punishments,<sup>73</sup> protection against coerced interrogation and the use of coerced confessions,<sup>74</sup> the right to a speedy trial,<sup>75</sup> and the right to present an adequate defense.<sup>76</sup> These fair trial guarantees are considered so essential that "willfully depriving a prisoner of war of the rights of a fair and regular trial prescribed in th[e] [Third] Convention" is deemed a "grave breach" of the Convention, which makes the person responsible subject to criminal punishment.<sup>77</sup>

Article 84 establishes the competence of military courts. The general rule is that military courts should have jurisdiction over POWs. However if the safeguards within the Geneva Convention III as specified in article 105 are guaranteed, in some cases, civilian courts could also be accepted if the Detaining Power expressly permits this for their own armed forces.<sup>78</sup> Article 102 contains the principle of assimilation instituting that the POWs on trial should be in the same legal position as any of the detaining Powers own personnel.

The first sentence in article 99 prohibits retroactive punishment. The second sentence of article 99 guarantees that the detaining Power under any circumstances may not coerce an accused person to make statements. An interpretation of the article then allows for the conclusion that the accused is entitled to refrain from answering questions in order for him not to incriminate himself.

Article 103 contains the provision of a speedy trial in that it determines that "[a] trial shall take place as soon as possible". The principle contained in article 103 states that a detainee may only be held for three months. This provision gave rise to some discussion during the 1949 Diplomatic Conference. Some delegations even considered it possible to extend the confinement in the case of POWs being accused of offences against the laws and customs of war. The reason for this argument is that the right to a fair

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<sup>71</sup> *Ibidem*, articles 13, 17, 18, and 19, due process rights if the detainee is subject to disciplinary or punitive sanctions, arts. 99 – 108.

<sup>72</sup> *Ibidem*, articles 84.

<sup>73</sup> *Ibidem*, articles 99.

<sup>74</sup> *Ibidem*, articles 99.

<sup>75</sup> *Ibidem*, articles 103.

<sup>76</sup> *Ibidem*, articles 99 and 105.

<sup>77</sup> *Ibidem*, articles 130.

<sup>78</sup> *Ibidem*, articles 84 para 2.



trail will be more easily ensured after the end of hostilities.<sup>79</sup> According to the ICRC commentary there is no provisions within the Convention, which prevent from such an application. One must also consider the difference in detaining a POW for the purpose of criminal charges and for preventing the combatant to engage further in battle as is allowed according to article 118 of the Geneva Convention III. The purpose of article 103 seems to be as already stated to guarantee the prisoner a speedy trial and by that ensure that the special detention for criminal charges is not unduly prolonged. (The length and legality of prolonged detention will also be discussed in chapter 5).

Article 105 of the Geneva Convention III affords POWs the “right to defence by an advocate”. The advocate has the means to call witnesses and has the formal right to address the court. The POW has the right to a free choice of advocate.

Paragraph 3 of article 105 of the Geneva Convention III provides the “right to interview the accused in private”. According to the ICRC commentary this is a vital right, which indicates that the advocate must be allowed to visit the accused whenever he/she thinks fit, or upon request by the accused. The accused also has the right not to answer questions during interrogation without his advocate present.<sup>80</sup> The judicial guarantees set forth in article 105 of the Geneva Convention III also include the “right of the defending advocate or counsel to confer with witnesses for the defence”. This includes other POWs.

According to article 106 of the Geneva Convention III, prisoners of war have the right to appeal or petition “in the same manner as the members of the armed forces of the Detaining Power”.

## **4.2 Rights of protected persons according to Geneva Convention IV**

Similarly, the Fourth Geneva Convention affords all “protected persons,” including civilians subject to military detention, because they are suspected of criminal activity or of constituting a security threat, the rights to a “fair and regular trial,” “the right to present evidence,” “the right to be assisted by a qualified advocate or counsel of their own choice,” and “the right of appeal”.<sup>81</sup>

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<sup>79</sup> Pictet, Jean S. International Committee of the Red Cross, *the Geneva Conventions of 12 August 1949: Commentary. 3, Geneva Convention relative to the Treatment of Prisoners of War*, (Geneva: International Committee of the Red Cross, 1960) p. 478-479.

<sup>80</sup> *Ibidem*, p. 490.

<sup>81</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, articles 5, 72-73, 78, 147.

The penal procedure in the Geneva Convention IV follows the same principles as in the Geneva Convention III; the judicial guarantees afforded apply to individuals interned both in occupied territory and by analogy, in the territory of any Party to the conflict according to Article 126. Hence, it applies to the detainees at Guantanamo Bay.

Article 71 includes the rights to a fair and regular trial, which follows from the wording that no sentence may be pronounced by the competent courts of the Occupying Power except after a regular trial. In Article 147, the fact of wilfully depriving a protected person of “the rights of fair and regular trial prescribed in the present Convention” is included among the grave breaches of the Convention.

In order for a trial to be regular, the safeguards provided in the articles must be fulfilled. The reasons for the charge must be communicated to the accused without delay, in order for the accused to have ample time to prepare his defence. The accused is also entitled to a speedy trial.<sup>82</sup>

The rules in article 72 are based on the provisions of Article 105 of the Geneva Convention III. One of the main means of defence is the calling and examination of witnesses. The purpose of the article is also to allow the accused to use any kind of proof such as documents or other written evidence. The accused has the right to a defence counsel who must be given all provisions and liberty to act, which is essential for the preparation of the defence according to the wording that he shall enjoy “the necessary facilities for preparing the defence”.<sup>83</sup> This provision indicates that he must be allowed to “study the written evidence in the case, to visit the accused and interview him without witnesses and to get in touch with persons summoned as witnesses”.<sup>84</sup>

According to article 73 (a) of the Geneva Convention IV protected person within the safeguards of the Geneva Convention IV convicted of a crime must have the right to appeal.

### 4.3 Fundamental guarantees

If a detainee does not meet the requirements of article 4 of the Geneva Convention III and article 4 of the Geneva Convention IV for example based on his nationality as established in chapter 3.4.2 he still have the right to certain fundamental guarantees. Common article 3 of the Geneva Conventions states that:

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<sup>82</sup> *Ibidem*, article 71 para 2.

<sup>83</sup> *Ibidem*, article 72 para 1.

<sup>84</sup> Pictet, Jean S. International Committee of the Red Cross, *the Geneva Conventions of 12 August 1949: Commentary. 3, Geneva Convention relative to the Treatment of Prisoners of War*, (Geneva: International Committee of the Red Cross, 1960) p. 356.

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, /.../ To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: /.../ (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

President Bush concluded in his February 7<sup>th</sup> memo that Common article 3 should not be applicable to neither Al Qaeda nor Taliban detainees due to the fact that the scope of the article implies application in internal conflicts only.<sup>85</sup>

Although the wording of Common Article 3 and the intent for which it was developed in 1949 only affords safeguards to certain persons during non-international conflicts, the article has come to reach customary law status providing minimum protection and obligations even throughout any international armed conflict. This declaration is supported by the ICJ's statement in the "*Nicaragua Case*" stating that:

Article 3, which is common to all four Geneva Conventions of 12 August 1949, defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.<sup>86</sup>

Common article 3 has thus become a baseline from which no departure, under any circumstances, is allowed. It applies to the treatment of all persons in enemy hands, regardless of their status. Whether the detainee is a POW, a terrorist or a non-combatant protected person Common Article 3 guarantees any person detained certain rights. Such rights comprise of the right to be "treated humanely;" freedom from "cruel treatment and torture;" freedom from "humiliating and degrading treatment;" basic fair trial rights.

In determining what those basic fair trial rights are, the context of the article and customary law can be used. According to article 75 of the AP I, a person has the right to be promptly informed of the reason for the detention. In case of trial for penal offences, related to the armed conflict, the detainee

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<sup>85</sup> Memorandum from President George W. Bush to the Vice President et al. dated the 7<sup>th</sup> of February 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> last visited 16 April 2007 at 15:45.

<sup>86</sup> *Nicaragua Case*, Judgment on the 27 June 1986, I.C.J. Reports 1986, p. 14, para. 218.

has the right to a hearing before an impartial regular court including judicial guarantees such as:

- all necessary rights and means of defence;
- freedom from retroactive punishment;
- the presumption of innocence until proven guilty;
- the right to be present at the trial;
- freedom from coerced confession;
- the right to examine witnesses and
- the right to appeal.

In determining, whether this article is customary law and could be used when interpreting the scope of article 3 one must consider the context of the Geneva Conventions as a whole and subsequent practice.

The *presumption of innocence* is included in statutes to the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).<sup>87</sup> It is also included in several military manuals and in most if not all national legal systems.<sup>88</sup> It is also set forth in the International Covenant on Civil and Political Rights.<sup>89</sup> It therefore seems to be enough practice to establish this norm as a fundamental judicial guarantee.

When it comes to the right of *all necessary means of defence*, this requirement is contained in all four Geneva Conventions.<sup>90</sup> It is also set forth in article 14(3) of the ICCPR. Hence, the context of the Geneva

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<sup>87</sup> Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998 entry into force on 1 July 2002, U.N.T.S. vol. 2187, p. 3. article 66; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) article 21(3) and International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 14-15 (1994) article 20(3).

<sup>88</sup> See for example Sweden's IHL manual expressing article 75 as customary law the US has also expressed the presumption of innocence to be their *opinio juris* in their report on US State practice in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. II (Cambridge: Cambridge University Press, 2005) p. 2418-2419.

<sup>89</sup> International Covenant on Civil and Political Rights December 1966, entered into force 23 March 1976; U.N.T.S., Vol. 999 article 14(2).

<sup>90</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, U.N.T.S. No. 970, vol. 75, pp.31-83 (1950), article 49, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, 75 U.N.T.S. 85, entered into force Oct. 21, 1950, article 50, Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135, article 84 and 96 and Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, article 72 and 123.

Conventions seems to indicate that this is also a fundamental guarantee within the scope of the Geneva Conventions Common article 3.

The right to *freedom from retroactive punishment* is included in both the Geneva Conventions III and IV.<sup>91</sup> It is also part of most military manuals and national legislation.<sup>92</sup> It is also specifically listed as a non-derogable right of the ICCPR article 4 (the relationship between IHL and Human Rights and its' possible influence will be discussed at length in chapter 5). The context of the provisions in the Geneva Conventions III and IV and the subsequent practice established by military manuals and national legislation seem to justify the conclusion that this provisions is a fair trial right within the meaning of common article 3.

*The right to be present at the trial* is not entirely accepted as a general norm since many countries has made a reservation to this rule when ratifying AP I. However, the subject of those reservations is the power of a judge to remove an accused from the courtroom in case of disturbance.<sup>93</sup> The ICCPR and the Statutes to ICC, ICTY and ICTR states the right for the accused to be present during trial.<sup>94</sup> However the scope of the right seem open to derogation.

*Freedom from coerced confession* is a right contained within article 99 of the Geneva Convention III. It is also contained in many military manuals and in most national legal system as well as in the Statutes to the ICC, ICTY and ICTR.<sup>95</sup> Article 14 (3) of the ICCPR also contains this provision. The UN Convention against torture also provides that statements, which have been made because of torture, may not be held as evidence in any proceeding.<sup>96</sup> Hence, this right seem also to be guaranteed by common article 3.

*The right to examine witnesses* is instituted in Geneva Conventions III and IV. It is also set forth in military manuals and national legislation as well as

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<sup>91</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 article 99 and Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, article 67.

<sup>92</sup> See military manuals of Argentina, Canada, Sweden, US etc. and US statement that derogations from this right will not be justified by military necessity in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. II (Cambridge: Cambridge University Press, 2005) p. 2496-2499.

<sup>93</sup> Reservations made by Austria, Germany, Ireland etc. available at <http://www.icrc.ch/ihl.nsf/WebSign?ReadForm&id=470&ps=P> last visited on 8<sup>th</sup> of May 2007 at 11:17.

<sup>94</sup> See e.g. military manuals of Argentina, Canada, Sweden US in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. II (Cambridge: Cambridge University Press, 2005) p. 2470-2473 and ICC Statute article 55(1)(a) and 67(1)(g); ICTY Statute article 21 (4) (g); ICTR Statute article 20(4)(g) *ibidem* n. 77.

<sup>95</sup> ICC Statute article 63(1) and 67(1)(d); ICTY Statute article 21 (4) (d); ICTR Statute article 20(4)(d), *ibidem* n. 77.

<sup>96</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1), U.N.T.S. vol. nr: 1465. p 85 article 15.

in the statute to the ICC, ICTY and ICTR.<sup>97</sup> It is also provided for by the ICCPR article 14 (3) and has been declared by the Inter-American Commission on Human rights to be an indispensable right.<sup>98</sup> This right seem therefore also to be within the scope of Common article 3.

*The right to appeal* is enshrined in article 106 of Geneva Convention III and article 73 of the Geneva Convention IV. Most national legislations provide for this right, the influence that human rights law has had on the issue and the context of the Geneva Conventions, provide that this does now seem to be an indispensable provision.<sup>99</sup>

By the provision in common article 3, all detainees are entitled to protection under the Geneva Conventions system. The individual who does not meet the requirements of protected person according to article 4 of Geneva Convention IV based on nationality is therefore protected by common article 3. I will now assess the US compliance with the various provisions regarding the detainees' judicial guarantees according to the different provisions with the Geneva Conventions system.

## **4.4 US compliance with Geneva Conventions afforded judicial guarantees**

On September 28 2006, the U.S. Congress passed the Military Commissions Act of 2006 (MCA).<sup>100</sup> The new legislation does more than authorize and establish procedures for military tribunals of foreign terrorist suspects. It affects the implementation of the Geneva Conventions under U.S. law.

In Sec. 948b (f) of the MCA a military commission is a regularly constituted court, affording all the necessary “judicial guarantees which are recognized as indispensable by civilized peoples” for purposes of common Article 3 of the Geneva Conventions. However, as this investigation of the provisions within the act will show, this statement’s accuracy may be challenged. The MCA claims jurisdiction over all alien unlawful combatants, even those who have not had their status determined by a competent tribunal.<sup>101</sup>

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<sup>97</sup> ICC Statute article 67(1)(de); ICTY Statute article 21 (4) (e); ICTR Statute article 20(4)(e).

<sup>98</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 Oct. 2002, §§ 245, 247. Available at <http://cidh.org/Terrorism/Eng/toc.htm>, last visited on 8<sup>th</sup> May 2007 at 12:05.

<sup>99</sup> See legislation of Colombia, Estonia, Hungary, US etc. in Henckaerts, Jean-Marie, Doswald-Beck, Louise; *Customary international humanitarian law*, vol. II (Cambridge: Cambridge University Press, 2005) p. 2482-2488, ICCPR art. 14(5) and UN Commission on Human Rights Res. 2002/37, 22 April 2002 § 7.

<sup>100</sup> The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

<sup>101</sup> *Ibidem*, sec 948(c).

No unlawful enemy combatant subject to trial by military commission may invoke the Geneva Conventions as a source of rights according to sec. 948b (g). This notion is contrary to the purpose of the Geneva Conventions since its' extensive provisions aim to ensure that no person shall be without protection, whether it is guaranteed by Geneva Convention III, Geneva Convention IV, or the customary equality to article 75 of the AP I. As the US do not grant POW status to either the Taliban army or the Al-Qaeda both of these groups can be tried according to the MCA, even though neither group has had their status determined according to article 5 of the Geneva Convention III (see discussion above). If they have had their status determined by a CSRT this in no way inhibits the application of the MCA since those rulings are dispositive for the purpose of MCA jurisdiction.<sup>102</sup> It appears that a cautious conclusion can be made that the jurisdiction of the MCA over unlawful combatants is derived from the executive determination made by President Bush in his memo on the 7<sup>th</sup> of February 2002.<sup>103</sup> This notion is as already established contrary to the purpose of article 5 of the Geneva Convention III.

The MCA have jurisdiction only over alien unlawful enemy combatants. This could contravene the provision of equality in treatment for enemy POWs as well as for a states own national POWs according to article 102 of the Geneva Convention III, since they are not tried by the same courts.

The MCA contains other troubling provisions. The rules allow for the use of all hearsay evidence as long as it is deemed "reliable" and "probative."<sup>104</sup> This could impede the accused's right to an adequate defense since there is little or no possibility to rebut hearsay evidence.<sup>105</sup> The right for the accused to prepare his defense, to hear witnesses and examine documented evidence against himself is also jeopardized in that the rules contained with the MCA allow the prosecution to withhold classified sources and methods of interrogations from both the defendant and his counsel.<sup>106</sup> The accused has no possibility to verify them if not given the right to hear the witnesses himself. Although defendants have a general right to the disclosure of any exculpatory evidence they are not allowed to see any classified evidence, even if it is exculpatory.<sup>107</sup>

Article, 99, on protection against coerced interrogation and the use of coerced confessions may also be violated by the allowance of coerced

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<sup>102</sup> *Ibidem*, sec. 948(d).

<sup>103</sup> Memorandum from President George W. Bush to the Vice President et al. dated the 7<sup>th</sup> of February 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> last visited 16 April 2007 at 15:45.

<sup>104</sup> *Ibidem*, sec. 949a.

<sup>105</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 article 105 and Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, article 75.

<sup>106</sup> The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), sec. 949d (f).

<sup>107</sup> *Ibidem*, sec. 949j (d).

testimonies and hearsay evidence.<sup>108</sup> If determined to be protected persons within the Geneva Convention IV and not POWs then the Al-Qaeda detainees are also deprived of their fair trial guarantees based on the Geneva Convention IV art 72 and Geneva Conventions common article 3.

I have now concluded that the detainees' rights, regardless of what legal basis they originate from, may possibly be violated by the different provisions within the MCA. Especially their procedural rights are jeopardized. Whether these troubling provisions will be put to use by the military commission is still to see. Nevertheless, I find it disquieting that they exist in that they do open up for the possibility of violations of the detainees' rights. I will now continue with analyzing whether legal framework such as international human rights may be applicable to the detainees' situations and afford rights in addition to IHL. Once I have done that I will evolve the analysis and discussion of the detainees' situation in my final analysis and conclusions.

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<sup>108</sup> *Ibidem* sec. 984r.



# 5 Applicability of international human rights law during armed conflict

## 5.1 The complementarity of international humanitarian law and human rights law

The applicability of international human rights law is not confined to times of peace, and the existence of a state of armed conflict does not justify the suspension of fundamental human rights guarantees. This principle, affirmed by the ICJ in the Nuclear Weapons Advisory Opinion in 1996,<sup>109</sup> has been restated by the Court in “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion on the 9 July 2004” in the following terms:

The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights [ICCPR].<sup>[110]</sup> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>111</sup>

Humanitarian law is thus generally *lex specialis* in relation to human rights law during times of conflict. Such an approach might lead to the conclusion that humanitarian law en bloc overrides human rights law as a whole.

Humanitarian law could be considered generally to be more specific than human rights law, since it aims to protect individuals under the specific conditions of armed conflict. Could the conclusion that humanitarian law regularly overrides human rights be drawn from that notion?

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<sup>109</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, para 25.

<sup>110</sup> International Covenant on Civil and Political Rights December 1966, entered into force 23 March 1976; U.N.T.S., Vol. 999.

<sup>111</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106.

The ICJ opinion seems to be, based on its statements in the Nuclear Weapons Legal opinion and the opinion on the Consequences of the Construction of a Wall in the Occupied Palestinian Territory, that the relationship between a norm of humanitarian law and human rights law must always be determined in each particular case assessing the particular norms in question. Consequently, in the Nuclear Weapons Advisory Opinion, the Court restricted its statement to the specific question of the deprivation of life. Human rights law does not, based on the above stated, seem to be en bloc overridden by the application of international humanitarian law.

The ICJ in its Advisory Opinions therefore supports the need to regard the protection granted by international humanitarian law and human rights law as a single entity. Such argumentation inevitably raises the *lex specialis derogate legis generalis* objection. If IHL is considered *lex specialis* then all situations governed by IHL should be solved by applying these rules and not any other type of more general law. However, the ICJ seems to be of the opinion that some situations are special and that human rights law sometimes may complement IHL. The provision within the Martens Clause, which is accepted as international customary law, also supports this interpretation.<sup>112</sup> This clause opens up for the possibility of supplementing the rules of armed conflicts with human rights law protection.

The Martens Clause has formed a part of the laws of armed conflict since it first appeared in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land.<sup>113</sup> The meaning of the clause is that belligerents and civilians should in situations and cases that are not covered by IHL be protected by international law at large.

In the Nuclear Weapons Advisory Opinion ICJ determined the Martens Clause to be a customary rule and is therefore of normative status.<sup>114</sup> However, this gives little guidance as to how the clause should be interpreted in practice. The ICJ Opinion made considerable reference to the Martens Clause, revealing a number of possible interpretations but did not provide a clear understanding of the Clause. Hence, the ICJ did not clarify the extent to which the Martens Clause permits notions of natural law to influence the development of the laws of armed conflict. Consequently, its correct interpretation remains unclear.

The conclusion that is to be drawn from this discussion can only be that the scope of human rights law application in the situation remains unclear. There seem to be a need for an individual determination of each applicable

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<sup>112</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, para 78.

<sup>113</sup> Convention (II) with respect to Laws and Customs of War and Land, signed at the Hague on 29 Jul. 1899, entry into force on 4 Sep. 1900, UKTS 1 (1901).

<sup>114</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, para 78.

provision as to whether it is a matter of international humanitarian law, human rights law or both of these international frameworks.

I have reached the conclusion that the rules governing judicial guarantees within the Geneva Conventions are largely specific enough to make them *lex specialis* in relation to human rights law. The notion that the Geneva Conventions' judicial guarantees are *lex specialis* in relation to the ICCPR rules is supported by article 4 of the ICCPR, which determines that those categories of rights within the Covenant are derogable in times of public emergency. An investigation of the judicial guarantees contained within the ICCPR shows that they to all extent and purposes mirror the rules within the Geneva Conventions.<sup>115</sup> Hence, the protection afforded by the different frameworks is equal in this intention and therefore I draw the conclusion that only IHL regulates this type of protection.

However, there is one more aspect of the detainees' protection according to the IHL that I have chosen to investigate and that is the legality of prolonged detention. In previous chapters, I have established that the detainees may be detained for the duration of the conflict. Nevertheless, there seem to be a difference in detention whether the POW is charged with a crime or not. Criminal detention awaiting trial must not exceed 3 months according to article 103 of the Geneva Convention III. Hence, I find the legality of the form of the detention to remain somewhat unclear in this situation, since in my opinion, the detainees are detained as suspected criminals rather than POWs based on the notion that they are denied POW status. I therefore, based on the Martens Clause argument and the ICJ statements in its Advisory Opinions as referred to above; find it interesting to investigate whether human rights law as codified within the ICCPR might shed some light on the situation.

I will therefore first investigate whether the US are bound by human rights law as codified within the ICCPR after which I will analyse the legality of prolonged detention according to the *lex specialis* rule and the influence human rights law might have on that notion. This provision will be investigated due to its' relevance in the situation since the detainees have been held for a long time. I will not as previously stated investigate whether the detainees are entitled to judicial guarantees based on the ICCPR since I have already determined that the different provisions within the Geneva Conventions III and IV protect them.

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<sup>115</sup> Compare art. 9 and 14 of the ICCPR with art. 99, 103, 105 of the Geneva Convention III, art. 64-76 of Geneva Convention IV and art. 75 AP I.

## 5.2 US obligations under international human rights law

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that state parties should guarantee all persons within its territory and or jurisdiction the rights afforded within the ICCPR.<sup>116</sup>

The UN Human Rights Committee extended this provision in clarifying that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”.<sup>117</sup> This notion is also supported by ICJ’s advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, which acknowledged that, although the jurisdiction of States is primarily territorial, the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory”.<sup>118</sup>

The US has in the past both denied the extraterritorial application of human rights and its application in time of armed conflict especially when it comes to detainees at Guantanamo Bay.<sup>119</sup> However, according to the above stated, the lease agreement between the US and Cuba concerning Guantanamo Bay Naval Base in no way inhibit the application of International Human Rights law. In conclusion, the US is obligated to guarantee human rights to those detained at Guantanamo Bay.<sup>120</sup>

The US has made several reservations to the ICCPR. However, I have not found that those reservations have any implications for the application of the provision, which will be investigated here forth.

## 5.3 The legality of detention – *lex specialis*?

Deprivation of liberty as preserved by article 9 of ICCPR seems to be one of the provisions within the ICCPR that is exclusively dealt with as *lex specialis* by IHL. This conclusion may be drawn from the fact that combatants and other persons who have committed belligerent acts may be

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<sup>116</sup> International Covenant on Civil and Political Rights December 1966, entered into force 23 March 1976; U.N.T.S., Vol. 999.

<sup>117</sup> CCPR General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13, para. 10.

<sup>118</sup> ICJ Reports 2004 (9 July 2004) para 111.

<sup>119</sup> Borelli, Silvia; Casting light on the legal black hole: International law and detentions abroad in the “war on terror”, (*International Review of the Red Cross*, Volume 87 Number 857 March 2005).

<sup>120</sup> Economic and Social Council, Distr. General, doc. E/CN.4/2006/120, 15 February 2006 Commission on Human Rights, Sixty-second session Items 10 and 11 of the provisional agenda, at <http://daccess-ods.un.org/TMP/3931225.html>, last visited on 14 April 2007, p. 8.

held for the length of hostilities, as long as the detention is for averting combatants to continue battle against the adverse Party.<sup>121</sup> Article 4 of the ICCPR also allows for derogation of article 9 in times of public emergency. The Human Rights Commission in its Sixty-second session also drew this conclusion reflecting the *lex specialis* classification of the norm justifying deprivation of liberty, which would otherwise, under human rights law constitute a violation of the right to personal liberty.<sup>122</sup>

The UN Human Rights Committee has also declared that humanitarian law is *lex specialis* in times of armed conflict and that in addition the provisions in article 4 and article 5, paragraph 1, of the ICCPR, helps prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.<sup>123</sup>

This opinion has lead the Human Rights Committee to state in its' jurisprudence as to the legality of prolonged detention due to security reasons that detention which may be initially legal due to security reasons may become "arbitrary" if it is unduly prolonged or not subject to periodic review.<sup>124</sup>

This is then a situation in which IHL regulates the length of the detention and human rights law could, as a complementary mean, regulate the review of it. This seems at least to be the view of the UN Human Rights Committee. This requirement, whether intentional or not, was also met by the US government in the establishment of Combatant Status Review Tribunals (CSRT), which would examine the legality of detentions. Administrative Review Boards (ARBs) were also instituted to provide an annual review of the detention of each detainee.<sup>125</sup> The CSRT does not seem to meet the requirements of article 5 of the Geneva Convention III in that it does not determine POW status. However if status had been properly

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<sup>121</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956) article 118.

<sup>122</sup> Economic and Social Council, Distr. General, doc. E/CN.4/2006/120, 15 February 2006, Commission on Human Rights, Sixty-second session Items 10 and 11 of the provisional agenda, at <http://daccess-ods.un.org/TMP/3931225.html>, last visited on 14 April 2007.

<sup>123</sup> CCPR General Comment No. 29 2001, States of Emergency (article 4); 31/08/2001 para. 3. Available at: <http://www.ohchr.org/english/bodies/hrc/comments.htm>. Last visited on 8<sup>th</sup> of May 2007 at 09:53.

<sup>124</sup> CCPR General Comment No 8, Right to liberty and security of persons (art 9); 30/06/82.

<sup>125</sup> Memorandum from Gordon England Deputy Secretary of Defense for Secretaries of military dept., Chairman of the Joint Chiefs of Staff and Under Secretary of defence for policy. Subject: Implementation of Combatant Status Review Tribunal Procedures for enemy combatants detained at U.S. Naval Base Guantanamo Bay, Cuba, on Jul. 14 2006 and Memorandum from Gordon England Deputy Secretary of Defense for Secretaries of military dept., Chairman of the Joint Chiefs of Staff and Under Secretary of defence for policy. Subject: Revised Implementation of Administrative Review Procedures for enemy combatants detained at U.S. Naval Base Guantanamo Bay, Cuba, on Jul. 14 2006, both available at: [http://www.defenselink.mil/news/Combatant\\_Tribunals.html](http://www.defenselink.mil/news/Combatant_Tribunals.html), last visited on 6<sup>th</sup> May 2007 at 12:07.

determined then, according an e contrario conclusion of article 118 of the Geneva Convention III, the POW could be held for the duration of the hostilities. Nevertheless, the CSRTs could be interpreted to fulfil the requirements in UN Human Rights Committee General Comment 8 in that it does review the legality of the detention, that is to say, whether the detainees pose a continuingly threat to the public security of the State. As such, the CSRT has served a purpose for the right of the detainees not to be arbitrarily detained.

In conclusion, the US is obliged to respect human rights law and guarantee the detainees the safeguards provided by the ICCPR. The ICCPR rights applies to anyone despite status since it is guaranteed all persons within the US jurisdiction, hence both Al-Qaeda and Taliban detainees are protected. However, the *lex specialis* rule of the IHL might open up for prolonged detention in case of national security. Nevertheless, this detention may in no way be arbitrary and must be subject to a judicial review. These requirements seem to have been met by the establishment of CSRTs and ARBs.

## 6 Analysis and conclusions

The increasing concern for terrorism requires a response from the international community. Capturing and prosecuting terrorist suspects is therefore crucial when fighting terrorism. However this must not be done at any cost. The norms, values and obligations which international humanitarian law and international human rights law are based upon must not be compromised.

My purpose in this thesis have been to investigate whether in their treatment of the Guantanamo Bay detainees the US can be criticized for violating any international law obligation owed to other states. In my opinion the core of the problem analyzed in this thesis is not that the US has determined those captured in Afghanistan unlawful combatants, since this is only a term. The issue at stake is rather the policy not to apply international humanitarian law to the detainees' situation. As this thesis has established the conflict in Afghanistan can be classified as an international armed conflict subject to the laws of war as codified within the Geneva Conventions of 1949. I therefore consider the US' first argument that the Geneva Conventions was not applicable to the situation to be incorrect. However, the US reversed itself in stating that the Geneva Conventions was applicable to the conflict but not to the detainees' situation since they presumably did not meet the requirements for protection under those Conventions.<sup>126</sup>

The US have only focused on the protections and the status granted by the Geneva Convention III relative to POWs, they have not argued as to whether the detainees are or are not entitled to protections according to some other applicable framework such as the Geneva Convention IV.<sup>127</sup> I have found in my investigation that there are possibilities for a combatant not to be granted POW status if he does not fulfill the necessary requirements enlisted in article 4(2) of the Geneva Convention III especially if he belongs to a militia or a volunteer corps as the Al-Qaeda members seems to have done. Regular armed forces may also have an obligation to comply with these requirements. However, whether failure to comply with these requirements deprives the regular combat of POW status remains unanswered since the interpretation of the article seem to be unclear. The probable interpretation, based on the provisions within article 85 of the Geneva Convention III, is that a POW does not loose his status if he fails to comply with the laws of war, since war criminals attain their POW status even when convicted of violations thereof.<sup>128</sup> Based on this argumentation the result of the US policy not to grant the detainees POW status may be

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<sup>126</sup> Memorandum from George W Bush to the Vice President et al. dated the 7<sup>th</sup> of February 2002, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> last visited 16 April 2007 15:45.

<sup>127</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force for the U.S., Feb. 2, 1956).

<sup>128</sup> See discussion in chapter 3.3.1.

correct for some of the detainees. However the way in which this is done is not in accordance with the Geneva Conventions.

Whatever interpretation one might apply, the detainees' status should according to article 5 of the Geneva Convention III be established by a competent tribunal. The US first decision not to apply this provision due to the fact that in their mind there was no doubt that the detainees did not meet the POW requirements, seem to be a misinterpretation of the article. The executive determination that both the Taliban forces and the Al-Qaeda did not, as a group, comply with the POW requirements is not enough to satisfy the provisions within article 5 which prescribes an individual determination of status. Be that the US has not determined the detainees' status in accordance with the Geneva Convention III they also ignore the provision within the IHL framework which allows a combatant to be considered a POW until legally determined not to be one.<sup>129</sup> The Supreme Court's decision in the Hamdi case, which provided for review procedures in instituting the CSRT, was seemingly in coherence with international law, but did not appear to live up to the standards or the purpose of article 5 of the Geneva Convention III since they could only determine unlawful combatant status and not POW status. However the decision was important in that it limited the executive's power to classify the combatant group as a whole.<sup>130</sup>

The US argument that the Geneva Conventions should not apply to the suspected Al-Qaeda detainees, due to the fact that it is not a state but a terrorist organization, is a misinterpretation of the Geneva Conventions system since article 4 of the Geneva Convention IV protects civilians.<sup>131</sup> This conclusion can be drawn from the fact that according to Geneva Convention IV article 5 even spies, saboteurs and other person engaged in hostile activity to the state is considered to be protected persons entitled to at least the procedural safeguards within the convention.<sup>132</sup> The persons who fall outside of the Geneva Convention IV based on their nationality are at least protected by the minimum safeguards within common article 3 of the Geneva Conventions. Hence, I find the notion that the IHL framework does not allow for any individuals to be left unprotected to be true.

It seems like the Bush administration considers the Geneva Conventions to be an obstacle rather than a grounds for support in the fight against terrorism since they do not apply it to the situation. Has the IHL framework them become obsolete? My assessment of the situation is that IHL does not in anyway impede bringing terrorists, spies, saboteurs, war criminals etc. to justice and prosecution for their crimes according to for example article 82

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<sup>129</sup> Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 76 U.N.T.S. 135 (entered into force for the U.S., Feb. 2, 1956) article 5.

<sup>130</sup> Hamdi v. Rumsfeld Case No. 03—6696, Supreme Court opinion of June 28, 2004. United States Reports Vol. 540 p. 1099.

<sup>131</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force for the U.S., Feb. 2, 1956).

<sup>132</sup> *Ibidem*.



of the Geneva Convention III. Hence the IHL framework is not an obstacle when fighting terrorism.

The post 9/11 world is argued to be much different from the world we knew before. The enemy is no longer a state but an organization which is far more difficult to fight. The rules of international law are primarily designed to govern inter State relations.<sup>133</sup> The IHL framework as such does not regulate this type of new asymmetrical conflicts taking place between a state and a terrorist network situated in different parts of the world. However, one must separate the *war on terror* from the armed conflict in Afghanistan which the Geneva Conventions does regulate. IHL also allows for derogations and limitations of the detainees' rights in the interest of State security.<sup>134</sup> Since IHL is *lex specialis* in times of armed conflict as determined by the ICJ it allows for certain measures that would not be acceptable in times of peace.<sup>135</sup> It is therefore designed to regulate those types of situation ensuring that human dignity, life and health are preserved while protecting state security.

Regarding the question as to whether US policy lives up to their obligations owed to them according to international law, it must be said, based on my findings, that the treatment of the detainees fails considerably to meet the standards required under the Geneva Conventions.

Although the MCA guarantees that the requirements of common article 3 will be met no unlawful enemy combatant subject to trial by military commission may invoke the Geneva Conventions as a source of rights according to sec. 948b (g).<sup>136</sup> This notion is contrary to the purpose of the Geneva Conventions system since no person shall be without protection, whether its guaranteed by Geneva Convention III, Geneva Convention IV, common article 3 or article 75 of the AP I. Depriving a POW or a civilian of his fair trial rights according to the Geneva Conventions III and IV is also considered to be a grave breach according article 130 of the Geneva Convention III and article 147 of the Geneva Convention IV, which states that "wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention" is a grave breach of the Convention. Criticisms can therefore be directed against this US policy.

I also find it very disquieting that the US has established military commissions which allow the use of coerced testimonies and hearsay evidence as long as it is deemed "reliable" and "probative".<sup>137</sup> This violates the right to an adequate defense according to the Geneva Conventions III

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<sup>133</sup> See common article 1 and 2 of the Geneva Conventions 1949.

<sup>134</sup> Article 5 of Geneva Convention IV.

<sup>135</sup> See for example Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106.

<sup>136</sup> The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

<sup>137</sup> *Ibidem*, sec. 949a.

and IV.<sup>138</sup> Not only is this an alarming violation of the individual on trial's rights but also indicates that these types of coercive interrogation techniques are used in Guantanamo bay.

Although the MCA was instituted in, 2006 only one case has so far been tried by the new Military Commissions.<sup>139</sup> More than 400 detainees, some who have been incarcerated since 2001, have not had their day in court.<sup>140</sup> There has been no indication as to how long the remaining detainees are going to be held detained or if they will be charged with a crime and brought to trial. If the State's security is at stake then a balancing of rights must take place and legitimate objectives for the prolonged detention must be revealed according to article 9 of the ICCPR which could be used in interpreting the relevant provisions within the Geneva Conventions based on the Martens clause.<sup>141</sup> This requirement seems to have been met by the CSRTs, in that it has reviewed the possible threat the individual detainee poses to the security of the State.<sup>142</sup>

The US line of action which appears not to comply with its obligation according to international law may not only damaged the reputation of the US as a law compliant state but could have consequences for the respect of international humanitarian law throughout the world. If the US, which could be characterized as a hegemony holding great influence on the international community, permits this form of interpretation of IHL, what is there to say that others will not follow? Could states opinio juris and practice eventual result in a new customary norm, denying IHL protection to certain individuals captured during armed conflicts?<sup>143</sup> This would go against the

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<sup>138</sup> Article 75 Geneva Convention IV and 105 Geneva Convention III.

<sup>139</sup> Australian Guantanamo Bay detainee David Hicks was the first prisoner charged under the new Military Commissions. Hicks, was held since 2002 at Guantanamo Bay (Memorandum for David M. Hicks 0002 Guantanamo Bay, Cuba, available at <http://news.findlaw.com/hdocs/docs/terrorism/hicks20207chrgs.html>, visited last on 19 April 2007 at 19:29). A US military commission at Guantanamo Bay recommended sentencing David Hicks to seven years in prison but that was effectively suspended by a military judge under the terms of a plea agreement (Sung, Michael, Guantanamo detainee Hicks to serve most of 9-month sentence in Australia. (*Jurist Legal News and Research* on March 31, 2007, at 10:07 AM ET) available at, <http://jurist.law.pitt.edu/paperchase/2007/03/guantanamo-detainee-hicks-to-serve-most.php> last visited on visited last on 19 April 2007 at 19:29).

<sup>140</sup> Benenson House, Peter, Amnesty International, International Secretariat, London United Kingdom, *Guantanamo in numbers*, AI Index: AMR 51/186/2006, 8 December 2006. Available at: <http://web.amnesty.org/library/Index/ENGAMR511862006> last visited on May 21<sup>st</sup> 2007 at 09:41.

<sup>141</sup> See discussion in chapter 5.1.

<sup>142</sup> Memorandum from Gordon England Deputy Secretary of Defense for Secretaries of military dept., Chairman of the Joint Chiefs of Staff and Under Secretary of defence for policy. Subject: Implementation of Combatant Status Review Tribunal Procedures for enemy combatants detained at U.S. Naval Base Guantanamo Bay, Cuba, on Jul. 14 2006 available at: [http://www.defenselink.mil/news/Combatant\\_Tribunals.html](http://www.defenselink.mil/news/Combatant_Tribunals.html), last visited on 6<sup>th</sup> May 2007 at 12:07.

<sup>143</sup> State practice and opinio juris was established to be the two elements of international customary law by the ICJ in the North Sea Continental Shelf Cases, Judgment, 3 June 1985, ICJ reports 1985, pp. 29-30, § 27 and also by the ICJ statute article 38.

entire purpose of the IHL framework which is designed to protect anyone affected by war. However, I do not find this to be a likely development of international law since extensive and established state practice even the US' up until now and other areas of international law such as human rights respects the Geneva Conventions and the fundamental guarantees therein especially many of the judicial guarantees which in most cases seem to have reach customary law status.<sup>144</sup>

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<sup>144</sup> See discussion in chapter 4.3.

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