

The Legal Status of the Guantanamo Bay Detainees – Ten Years Later

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The article aims at exploring the status of the Guantanamo detainees ten years after the first arrivals at the Guantanamo Bay Camp. The author will answer questions about whether the detainees are entitled to combatant and prisoner of war status, and what rights they have according to international humanitarian law and international human rights law. In this context the notion of the ‘war on terrorism’ will also be discussed. It will be argued that Guantanamo is not a legal ‘black hole’ and therefore the detainees should be accorded prisoner of war status according to the Third Geneva Convention on the Treatment of Prisoners of War, or alternatively, they should be treated as civilians protected by the Fourth Geneva Convention on Civilian Persons in Time of War. It will be shown that there is no intermediate status under international law and that particularly, international humanitarian law does not recognise the term ‘unlawful combatant’.

This article will also critically analyse whether the situation of the detainees has changed under the Obama administration. To this end some new developments regarding, inter alia, habeas corpus proceedings in the United States, which took place in 2009 and 2010, will be discussed.

Introduction and Factual Background

On 11 September 2001, a group of men belonging to a terrorist organisation known as Al Qaida carried out an armed attack upon the US that led to the loss of life of almost three thousand, mostly civil-

ian, people¹ from more than 90 different countries, as well as substantial material damages. Leaders of Al Qaida and a large part of its membership and facilities were located within Afghanistan, de facto governed by the Taliban, which controlled most of the country. Claiming that Afghanistan had refused to hand over Osama bin Laden, who claimed credit for the attacks, the US and its allies attacked the armed forces of the Taliban and Al Qaida in Afghanistan on 7 October 2001. The militaries of the US and the UK, working with the forces of Northern Alliance, a broader coalition of entities against the Taliban which included some members of the former government of Afghanistan which controlled about 22 percent of its territory, quickly established control over much of the country.

On 22 December 2001, an interim Afghan government led by Hamid Karzai was installed, and a permanent government (also led by Karzai) was chosen in June 2002. US forces remain in Afghanistan today with the consent of the country's authorities.

Since the hostilities began in October 2001, a considerable number of soldiers from all sides, including Al Qaida and the Taliban, have been killed or captured. Additionally, such persons captured in the course of international armed conflict have immediately given rise to questions concerning their legal status and the protection to which they are entitled, in accordance with international humanitarian law.

On 13 November 2001, US President George W Bush issued a *Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism* ('Military Order').² Bush di-

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¹ According to numbers compiled by the US National Commission on Terrorist Attacks Upon the United States (9-11 Commission), 2,973 people died in the immediate aftermath of the attacks. This number does not include the hijackers of the four aircraft. See: National Commission on Terrorist Attacks in the United States, *Complete 9/11 Commission Report* (WW Norton 2004), 311.

² Presidential Documents, 'Military Order of November 13, 2001, on the Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism' (*Federal*

rected that any non-US citizen of whom he had made a written determination that they had, inter alia, engaged in, or conspired to commit, acts of international terrorism against the US, be detained and tried for violations of the laws of war and other applicable laws by military tribunals. The Military Order established Military Commissions for the purpose of such trials.

On 11 January 2002, the first group of twenty persons captured in Afghanistan arrived at the US Camp X-Ray in Guantanamo Bay, Cuba. On that day, US Secretary for Defence Donald Rumsfeld announced that detainees in Guantanamo would be held as ‘unlawful combatants’ and not as prisoners of war.³ A week later, a further group of detainees arrived and their number quickly grew beyond 600.⁴ They included persons not captured on the battlefield such as six Algerians abducted in Bosnia and Herzegovina and later transferred to Guantanamo Bay under US custody, by reason of their alleged links with Al Qaida.

On 7 February 2002, Bush determined the status of the detainees. The White House Press Secretary announced that:

- The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely, and to the extent appropriate and consistent with military necessity in a manner consistent with the principles of the Third Geneva Convention of 1949.
- The Geneva Convention applies to Taliban detainees, but not Al Qaida detainees.

Register, 16 November 2001) <www.fas.org/irp/offdocs/eo/mo-111301.htm> accessed 30 August 2013.

³ US Department of Defense, ‘News Briefing - Secretary Rumsfeld and Gen. Myers’ (*US Department of Defense*, 11 January 2002) <www.defense.gov/transcripts/transcript.aspx?transcriptid=2031> accessed 30 August 2013.

⁴ As for 21 February 2013 the number of detainees was approximately 166, according to Human Rights First: Human Rights First, ‘Guantánamo by the Numbers’ (Fact Sheet, 9 April 2013) <www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf> accessed 30 August 2013.

- Being a 'foreign terrorist group', Al Qaida is not a state party to the Geneva Convention. As such, its members are not entitled to POW (prisoner of war) status.
- Although the Taliban was never recognized by the US to be the legitimate Afghan government, Afghanistan is a party to the Convention, and Bush determined that the Taliban are covered by the Convention. But under the terms of the Geneva Convention the Taliban detainees do not qualify as POWs.
- Therefore, neither the Taliban nor Al Qaida detainees are entitled to POW status.⁵

High-level administration officials referred to the detainees as 'the worst of the worst.' Bush also called them 'bad people,' and the Secretary for Defence labelled them as 'hard core, well-trained terrorists.'⁶ This came despite the fact that for two years, the detainees had not been charged with any crime or released, and there had been no hearings to determine their legal status.

In short, there was a legal black hole.⁷ The US government refused to comply with the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and made a blanket determination that all persons held at Guantanamo Bay were 'unlawful combatants' not entitled to POW status and protection under the Geneva Convention (GC).

⁵ The White House, 'Fact Sheet on Status of Detainees at Guantanamo' (*The American Presidency Project*, 7 February 2002) <www.presidency.ucsb.edu/ws/?pid=79402> accessed 20 July 2013.

⁶ Human Rights Watch, 'United States: Guantanamo Two Years On' (*Human Rights Watch*, 9 January 2004) <www.hrw.org/english/docs/2004/01/09/usdom6917_txt.htm> accessed 30 August 2013.

⁷ The term 'legal black hole' was coined by Johan Steyn. See Johan Steyn, 'Guantanamo Bay: Legal Black Hole' (2004) 54 *International & Comparative Law Quarterly* 1.

War on Terrorism

The War in Afghanistan was meant to be part of the so-called ‘war on terrorism,’ which has also been fought in Iraq (the war in Iraq is not within the scope of this article). As a result of the conflict between the US and Afghanistan, which was an international armed conflict, many Afghani soldiers were captured. Arguments were advanced that the international community was dealing with an entirely new kind of situation – a new kind of armed conflict that does not fit into the classical framework of international humanitarian law with its division of armed conflicts into those of international and non-international character.

International humanitarian law governs the conduct of states in warfare and protects the victims of war, including prisoners of war. It has been proposed that international humanitarian law needs to be reformed if it is to be capable of meeting such new challenges as those presented by the ‘war on terrorism.’ Doubts concerning the usefulness and strength of international humanitarian law had also been expressed before 11 September 2001; however, such doubts took on new meaning and gained in intensity and frequency post-9/11.

The US announced that it was in a ‘state of war’ with terrorism in general, and Al Qaida in particular, the so-called ‘war on terrorism’ has been treated as an armed conflict, giving rise to a number of doubts concerning the character of the conflict and applicable law. This debate has contributed to the creation of a state of uncertainty and a lack of clarity relating to humanitarian law.⁸ The issue of the legal status of those captured in the course of the international

⁸ For example, see US Department of Defense News Briefing (n 3) where Donald Rumsfeld stated ‘When the Geneva Convention was signed in the mid-20th century, it was crafted by sovereign states to deal with conflicts between sovereign states. Today the war on terrorism, in which our country was attacked by and is defending itself against terrorist networks that operate in dozens of countries, was not contemplated by the framers of the convention’. For more details see: Steven R Ratner, ‘Revising the Geneva Conventions to Regulate Force by and Against Terrorists: Four Fallacies’ (2003) 1 *IDF Law Review* 7.

armed conflict in Afghanistan, and then transferred to Guantanamo Bay, Cuba has become one of the subject's most controversial questions, including whether they are prisoners of war (combatants captured on the battlefield) protected by Third Geneva Convention (GC III), or civilian persons protected by Fourth Geneva Convention (GC IV)?

One lesson to be learned from the case of Guantanamo detainees is that, despite accusations and doubts, international humanitarian law is still working, and continues to be capable of meeting new challenges. It is possible to locate the phenomenon of the so-called 'war on terrorism' within the existing framework of humanitarian law. In fact, such a phrase can be seen as a metaphor similar to the 'war on hunger', or the 'war on poverty' as declared by Lyndon Johnson, or even the 'war on drugs' declared by Ronald Reagan. All of them will probably be fought indefinitely.⁹ Some elements of the 'war on terrorism' understood in this way, constitute armed conflicts – international or non-international in their character. As such they are regulated by the international humanitarian law.

Many United Nations bodies have expressed their views on the 'war on terrorism.' The UN Security Council emphasised in its resolutions 1456 (2003) and 1624 (2005)¹⁰ that States must ensure that any measure taken to combat terrorism comply with all their obligations under international law. In addition measures in accordance with international law, such as international human rights, refugee, and

⁹ In this way see also: Allen S Weiner, 'Law, Just War, and the International Fight Against Terrorism: Is It War?' (2005) Sanford Institute on International Studies Working Paper 47/2005, 6
<http://fsi.stanford.edu/publications/law_just_war_and_the_international_fight_against_terrorism_is_it_war> accessed 29 September 2013; Peter Kooijmans, 'Is There a Change in the Ius ad Bellum and, if so, What Does it Mean for the Ius in Bello?' in Liesbeth Lijnzaad, Johanna van Sambeek, Bahja Tahzib-Lie (eds), *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands* (Brill Academic 2004) 232; Wolfgang S Heinz, Jan-Michael Arend, *The International Fight Against Terrorism and the Protection of Human Rights* (German Institute for Human Rights 2005) 30.

¹⁰ UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456, [6]; and UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, [4].

humanitarian law should be adopted and applied. Similarly, the General Assembly in its resolution 57/219 of 2003, titled *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, confirmed this obligation¹¹. In addition, the UN Secretary General at the time Kofi Annan emphasized that '[r]espect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension'.¹² The UN Commission on Human Rights in its resolution 2004/87, entitled *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, corroborates this in writing that, 'States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.'¹³ Respect for international human rights law and international humanitarian law is not a weakness in the fight against terrorism, but a weapon that can ensure broad international support for actions undertaken in the course of this fight.

Some authors have stated that the Geneva Conventions were never meant to regulate every form of war, citing internal wars as an example. Except for Common Article 3 this is indeed true. But in the case of Afghanistan (Operation Enduring Freedom), this has been an international armed conflict. On 7 October 2001, the US and its allies attacked terrorist training camps of Al Qaida and military installations of the Taliban regime in Afghanistan. By such action the US could be said to have decided to 'locate' the conflict and thus hold it in the legally defined framework of IHL (Art 2 (1) of the GC). In this particular situation, the US had a choice to either utilise the actions of executive forces such as the police, intelligence resources, or an armed reaction. It chose the latter, along with its consequences.

¹¹ UNGA Res 57/219 (27 February 2003) UN Doc A/RES/57/219.

¹² Kofi Annan, 'Secretary-General's Statement at the Special Meeting of the Counter-Terrorism Committee with Regional Organizations' (*United Nations*, 6 March 2003) <www.un.org/apps/sg/sgstats.asp?nid=275> accessed 29 August 2013.

¹³ *ibid.*

Prisoner of War Status under the Third Geneva Convention

Under Common Art 2(1) of the four Geneva Conventions, an international armed conflict exists when hostilities unfold between two or more contracting parties. It is irrelevant whether a war is declared, or whether the state of war is recognized by one of the parties. It is therefore crucial for the applicability of the provisions of the Third Geneva Convention Relative to the Treatment of Prisoners of War to determine the existence of international armed conflict. International armed conflict occurs when a war has been declared, or hostilities commence between two or more contracting parties, which are, in other words, states.¹⁴ International armed conflict is equated with an inter-state armed conflict. In the Afghan situation the declaration of war was not delivered, so the commencement of hostilities remains the deciding factor.

On 7 October 2001, the US attacked Al Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan.¹⁵ By doing so, as already noted, the US chose to territorialise the conflict, thus keeping it within the legal categories of Art 2 (1) of Geneva Conventions. The US response was directed against the Taliban, representing *de facto* Afghanistan. Al Qaida, acting under the control of the Taliban, became a party to the conflict. The nexus between the Taliban and Al Qaida will be explored below.

Although the US did not recognise the Taliban as a government of Afghanistan it did recognize that the Taliban regime was a party to the Conventions, whereas Al Qaida was treated as an international terrorist organisation. Furthermore, the recognition of a state or a

¹⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention 12 August 1949) (entered into force 21 October 1950) 75 UNTS 287, art 2.

¹⁵ See George W Bush, 'Presidential Address to the Nation' (*Office of the Press Secretary*, 7 October 2001) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>> accessed 30 August 2013.

government is irrelevant and has no bearing upon the existence of international armed conflict.¹⁶

The GC III regulates the prisoner of war status in Art 4, which reads as follows:

- A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
 - 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
 - 2. Members of other militias and members of other volunteer corps, including those organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:
 - a. That of being commanded by a person responsible for his subordinates;
 - b. That of having a fixed distinctive sign recognisable at a distance;
 - c. That of carrying arms openly;
 - d. That of conducting their operations in accordance with the laws and customs of war.
 - 3. Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.
 - 4. Persons who accompany the armed forces without actually being members thereof, such as civilian

¹⁶ Lawrence Azubuike, 'Status of Taliban and Al Qaeda Soldiers: Another Viewpoint' (2003) 19 Connecticut Journal of International Law 127, 133.

members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.¹⁷

Apart from the four conditions contained in Art 4 A(2), two further conditions can be inferred, namely:

1. Belonging to an organised group;
2. Belonging to a Party to the conflict.¹⁸

Art 5 of GC III contains a very important provision:

- (1) The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

¹⁷ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention 12 August 1949) (entered into force 21 October 1950) 75 UNTS 135.

¹⁸ In the same way see: Jiri Toman, 'The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions' (2002) 32 *Israel Yearbook on Human Rights* 271, 290; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 36.

(2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Do the Taliban armed forces and Al Qaida members qualify as prisoners of war? The Taliban fighters evidently qualify as POW's within the terms of Art 4 A (1) of GC III because they are 'members of the armed forces of a Party to the conflict.' But despite the US acknowledgment that the Taliban were a party to the conflict, POW status was denied to those captured. This denial was based on their failure to meet so called competency requirements, which are:

1. Being commanded by a person responsible for his subordinates;
2. Having a fixed distinctive sign recognisable at a distance;
3. Carrying arms openly;
4. Conducting their operations in accordance with the laws and customs of war.

US Secretary of Defence Donald Rumsfeld stated that:

... the Taliban ... did not wear uniform, they did not have insignia, they did not carry their weapons openly and they were tied tightly at the waist to Al Qaida ... they would not rise to the standard of a prisoner of war.¹⁹

¹⁹ US Department of Defense, 'News Transcript: Secretary Rumsfeld Media Availability en Route to Camp X-Ray' (*US Department of Defense*, 27 January 2002) <www.defense.gov/transcripts/transcript.aspx?transcriptid=2338> accessed 30 August 2013.

But on the other hand, he characterised the detainees ‘as enemy combatants that we captured on the battlefield,’²⁰ so in other words – POWs (prisoners of war) protected by the GC III.

First of all, there is an obvious misunderstanding in such an interpretation of Art 4A(2) as those conditions apply only to ‘irregulars’, but not to the armed forces of a party to the conflict. However in the case at issue, competency requirements were met. That the leader of the Taliban, Mullah Omar, is a spiritual leader does not invalidate the condition of a responsible command as long as he is able to maintain the type of discipline generally found in the armed forces. And even if the Mullah Omar did not know that the September 11th attacks would take place or did not know the details of it, as the responsible commander he could be held criminally responsible for failing to prevent those attacks.²¹

Turning to the requirement of having a fixed distinctive sign recognisable at a distance, the Taliban wore black turbans, which could be regarded as a distinctive sign since it is fully accepted that a recognisable sign does not have to be a uniform.²² Indeed, the US Army

²⁰ US Department of Defense news briefing referred to in Amnesty International Memorandum, ‘United States of America: Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay’ (*Amnesty International*, 12 April 2002) <www.amnesty.org/en/library/info/AMR51/053/2002/en> accessed 30 August 2013.

²¹ In the same way see: Luisa Vierucci, ‘Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled’ (2003) 2 *Journal of International Criminal Justice* 284. In accordance with the doctrine of superior and command responsibility found in customary international humanitarian law and the Rome Statute of the International Criminal Court, the commander (here Mullah Omar) could be criminally responsible if he or she, having had an effective control over the troops, ‘should have known’ about those attacks and did not prevent them: as he might have not been able to do it at the time they were being committed or were about to be committed, or after their commitment failed to take steps to bring those responsible to justice (after those unlawful attacks have taken place). See the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 28.

²² ICRC, ‘Commentary of Article 4 Part 1: Convention (III) Relative to the Treatment of Prisoners of War’ (*ICRC*, 12 August 1949) <www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART>

Manual adopts the same position, ‘... less than the complete uniform will suffice. A helmet or headdress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement’.²³ Although those requirements are not relevant in relation to the armed forces of a party to the conflict, it is worth stating clearly that there were no grounds for the US administration to deny POW status to the Taliban armed forces.

Furthermore, in case of any lingering doubt, Art 5 applies; this will be analysed below. The establishment of armed forces is part of the exercise of sovereignty. Such armed forces are presumed to meet the competency conditions and, therefore, a State Party to the conflict should not be able to deny the armed forces of another party the protection of POW status by referring to Art 4A(1) conditions, which GC III did not put therein. The states are responsible for the use of force by their armed forces. When competency requirements appear unfulfilled, international law holds the state responsible. This, however, does not deny that the armed forces are indeed those of that state, which means that POW status cannot be denied to such forces.²⁴

The legal status of Al Qaida members as POWs is more difficult to establish. This is mainly due to the lack of certainty on the type of links existing between Al Qaida and the Taliban. If Al Qaida members formed part of the armed forces of the Taliban, a party to the conflict, they would be entitled to POW status in accordance with Art 4A(1) of GC III. It is generally true that the Taliban and Al Qaida complemented each other, as bin Laden provided resources to the Taliban while the latter provided a safe haven to the former, espe-

&articleUNID=2F681B08868538C2C12563CD0051AA8D> accessed 30 August 2013.

²³ Vierucci (n 21) 291.

²⁴ George H Aldrich, ‘The Taliban, Al Qaeda and the Determination of Illegal Combatants,’ (2002) 96 *American Journal of International Law* 891, 895.

cially given their previous activities (series of terrorist acts)²⁵ that made Al Qaida become increasingly troublesome to states.

In addition, despite demands made by the United Nations²⁶ and many states to hand over bin Laden, the Taliban refused, arguing that bin Laden was a guest and that it was contrary to its religion to hand over a guest. Even after the September 11 attacks, the Taliban still refused to extradite bin Laden without evidence of his guilt. The refusal of the Taliban government to hand over Osama bin Laden for trial in the US tends to indicate the existence of a control type of relationship in the sense that the Taliban knowingly harboured bin Laden. Al Qaida was so integrated into the Taliban that it was unclear which was controlling the other. The September 11 attacks, and by holding the Taliban responsible for the actions of Al Qaida, gave credence to the theory that they were, or were perceived to be, intertwined.

Such an equation of Al Qaida with the Taliban not only solves a practical problem concerning the POW status but also resolves the question whether the UN Charter provisions on the use of force apply to non-state entities.²⁷

Turning to Al Qaida members as POWs, it should be noted that the declared targets of the war were the Taliban and Al Qaida. For that reason, Al Qaida became a *de facto* party to the conflict. Although the GC III applies only to states, from the spirit of the Convention a conclusion can be drawn that in a situation where a non-state actor

²⁵ For example: the 1993 New York World Trade Center bombing, the 1998 bombing at US Embassies in Kenya and Tanzania, the 2000 bombing of the US ship USS Cole in Yemen, the 1996 bombing of the Khobar military complex in Saudi Arabia.

²⁶ UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; and UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333.

²⁷ Joshua S Clover, “Remember, We’re the Good Guys”: The Classification and Trial of the Guantanamo Bay Detainees’ (2004) 45 South Texas Law Review 351, 362; Ruth Abril-Stoffels, ‘From Guantanamo to Bagdad: Legal Statute and Treatment Given to the Detainees in the “War Against Terrorism”’ in Pablo Antonio Fernández-Sánchez (ed), *The New Challenges of Humanitarian Law in Armed Conflicts: In Honour of Professor Juan Antonio Carrillo-Salcedo* (Martinus Nijhoff 2005) 181.

is recognised as an enemy in a war, GC III would also grant its protection to such a party.²⁸ During the conflict in Afghanistan the Taliban and Al Qaida were so integrated that they could be treated as one and the same. They fought alongside each other making it difficult to distinguish between the Taliban and Al Qaida. In the spirit of GC III the nexus between the two was sufficient to subsume Al Qaida members into the armed forces of the Taliban. From the fact that the Taliban was the *de facto* government of Afghanistan and exercised control over 80% of the territory, we could deduce that Al Qaida operated under the control and protection of the Taliban. If the Taliban so desired, it could have taken a more adverse approach towards Al Qaida.

The consequence of that equation theory would be treating Al Qaida soldiers as members of militias and volunteer corps, forming part of armed forces of a party to the conflict and granting them POW status.²⁹ It must also be stressed that it is not international law that determines what kind of forces constitute a regular army, but national law. Every state has a right to determine the structure or composition of its armed forces. They may even consist entirely of militias or volunteer corps.

The extension of POW status to Al Qaida soldiers would not diminish their criminal responsibility for previous terrorist acts, up to and including September 11. It would only insulate them from prosecution for the mere fact of fighting in Afghanistan, but not for their alleged criminal responsibility for crimes under international law that were committed during the conflict. Those who committed war crimes should be punished, but their crimes should not be used as an excuse to deprive others of the protection due to POWs. The only unfavourable implication, in terms of what might be seen from the US government, would be that those Al Qaida members who were not involved in prior terrorist actions would be entitled to release

²⁸ ICRC, 'Commentary on Convention (III)' (n 22).

²⁹ See Azubuike (n16); also NGO's like Amnesty International, Human Rights Watch.

upon cessation of hostilities in Afghanistan. Such a measure, however, might arguably be not too high a price to pay for complying with the principle of humanitarianism.

The US administration has, however, refused to grant POW status to Al Qaida members. Justifying its position, it argued that Al Qaida soldiers could only be entitled to POW status within the scope of Art 4A(2),³⁰ provided that they fulfil so called competency requirements, mentioned above. The US Secretary of Defence summarised the position of Al Qaida members involved in the conflict in Afghanistan in the following way:

The Al Qaida is not a country. They did not behave as an army. They did not wear uniforms. They did not have insignia. They did not carry their weapons openly. They are a terrorist network. It would be a total misunderstanding of the Geneva Convention if one considers Al Qaida, a terrorist network, to be an army.³¹

The US should follow its own example from the Vietnam War when POW status was granted to as many captured as possible, fully in conformity with the principle of humanitarianism and values embodied in GC III.³²

Assuming that the competency requirements were applicable to Al Qaida soldiers, in the US view they would only meet two of them. The position taken by the US can be summarised as follows: concerning the first condition of being commanded by a person responsible for his subordinates, there seems to be no doubt that Al Qaida is an organised group with a responsible command structure. The solid cell structure enables mobilisation of a high number of mem-

³⁰ Article 4A(2) states: 'Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied ...'

³¹ Vierucci (n 21) 295.

³² Aldrich (n 24) 896.

bers and huge resources. The attacks of September 11 imply a strong organisational capability.³³

The US administration, however, claims that Al Qaida fails to meet the further three *expressis verbis* provided requirements. These conditions were not fulfilled by the persons who carried out the attacks on 11 September 2001. They did not carry their arms openly, while they also deliberately aimed to blend in with civilian persons. The principle of their action was to act by surprise. The Al Qaida members had no distinctive sign as they operated clandestinely. Use of such methods of combat would deprive the Al Qaida members of POW status because it also contravenes the requirement of conducting its operations in accordance with the laws and customs of war.

Turning to the conditions not explicitly expressed but inferred from Art 4 (belonging to an organised group and belonging to a Party to the conflict), it must be stated that to belong to a Party to the conflict, a factual link is required.³⁴ According to the US it would be rather difficult to furnish evidence for existence of the factual link, mentioned above. That means that the condition of belonging to a Party to the conflict was not met. Concerning the condition of belonging to an organised group, there seems to be no doubt about it being fulfilled as Al Qaida operates on a high level of organisation. Although the units are independent of each other there is also a leading authority above these groups.

In short, the US position is that the conditions of belonging to an organised group and being commanded by a person responsible for their subordinates were met by Al Qaida members, unlike the other requirements, which would mean that they are not entitled to POW status.

Are there any grounds that undermine some of the US arguments? Of course there are. Although the US claimed that Al Qaida soldiers did not have a distinctive sign, during the conflict in Afghanistan it

³³ For more details on Al Qaida's structure see Toman (n 18) 287-288.

³⁴ Vierucci (n 21) 292.

did not prevent US soldiers from fighting against Al Qaida by reason of not being able to distinguish between Al Qaida members and civilians. It means that the former did, in fact, distinguish themselves from the latter. It would also imply that Al Qaida fighters carried their weapons openly and in this way contributed to being distinguishable.

Referring to the condition of belonging to a Party to the conflict, I refer to the earlier remarks where I tried to prove that there is evidence for existence of a nexus between Al Qaida and the Taliban, representing *de facto* Afghanistan, sufficient to make Al Qaida a party to the conflict. However, if competency requirements were applicable to Al Qaida soldiers these would still not meet the condition of conducting operations in accordance with the laws and customs of war. The failure to even meet one condition strongly reinforces calls for treating Al Qaida in a similar way to captured Taliban soldiers (who were granted POW status). In no way would this hinder the prosecution of those responsible for crimes under international law.³⁵

At this point we have come to the term ‘unlawful combatants,’ which was used by Rumsfeld to determine the position of the Guantanamo detainees. The term is not used as such by the Geneva Conventions or other humanitarian law treaties. It was created by the US Supreme Court’s controversial 1942 decision in the *Ex Parte Quirin case*, which defined the status of eight German soldiers that landed and committed acts of war in civilian clothes on the US territory.³⁶ The Court stated that:

... lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by

³⁵ Yoram Dinstein, ‘Unlawful Combatancy’ (2002) 32 *Israel Yearbook on Human Rights* 266, 268.

³⁶ *Ex Parte Quirin* 314 US 1 (1942).

military tribunals for acts which render their belligerency unlawful.³⁷

It should be stressed, however, that when the concept of ‘unlawful combatants’ was used by the US Supreme Court in *Ex Parte Quirin*, GC III did not yet exist. The issue of ‘unlawful combatants’ may be explained as follows: if the Taliban and Al Qaida members are regarded as ‘unlawful combatants’ then they are simply civilian persons who illegally participated in armed hostilities. Thus the Geneva Convention IV relative to the protection of civilian persons in time of war applies. They can be punished for participation in armed hostilities. Through distinguishing ‘lawful’ and ‘unlawful’ combatants the US is attempting to avoid application of the conventions. For reasons explored above, the term ‘unlawful combatant’ has no place in international humanitarian law and the detainees should be accorded protection under the Third or the Fourth Geneva Convention. There is no intermediate status.

Article 5 Tribunals

According to Art 5 of the GC III:

- (1) The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
- (2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

This is an important provision that creates a temporary protection for all persons who have committed a belligerent act and consequently captured, equal to that enjoyed by prisoners of war. This is

³⁷ Vierucci (n 22) 295.

especially true in case of doubt as to their categorisation according to one of the classes enumerated in Art 4 of GC III.

GC III gives no indication concerning the type of tribunal or the rules that should apply in the process of status determination. As we read in the ICRC Commentary to the Geneva Conventions:

... at Geneva in 1949, it was first proposed that for the sake of precision the term 'responsible authority' should be replaced by 'military tribunal.' This amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank. The matter should be taken to a court, as persons taking part in the fight without the right to do so are liable to be prosecuted for murder or attempted murder, and might even be sentenced to capital punishment. This suggestion was not unanimously accepted, however, as it was felt, that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention. A further amendment was therefore made ... stipulating that a decision regarding persons whose status was in doubt would be taken by a 'competent tribunal,' and not specifically military tribunal.³⁸

The composition of the tribunal, in terms of its functioning and the rules it will apply, are left to the discretion of each High Contracting Party to GC III. The tribunal may be military, civil or administrative in nature (even a military commission) as long as the internationally accepted judicial standards are respected. Most of all, however, such requirements mean that a 'competent tribunal' should be independent, fair and impartial and established by law.

Why was Art 5 adopted if the provisions of Art 4 appear to have been adequate? While it is true that the status of the majority will be

³⁸ ICRC 'Commentary on Convention (III)' (n 22) 77.

decided by the application of Art 4, some cases of doubt concerning persons falling into the hands of the enemy will nevertheless remain. Again, the commentary to the Geneva Conventions provides useful guidance. The aim of Art 5 was to address situations where doubt arises as to whether a person belongs to one of the categories in Art 4 and to prevent such determination decisions being made by a single person, one who might often be of subordinate rank. It is clear that the reason for the adoption of Art 5 relates to individual cases and that status determinations should be made on a case by case basis.³⁹

As has already been stated, the US government denied POW status to the Guantanamo detainees without judicial determination, on the basis that no doubt existed. At first, it was stated that GC III was not applicable to all of the detainees, and then on 7 February 2002 the US government determined that the GC applied only to members of the Taliban (while POW status was still denied). This suggests that there existed clear evidence of doubt, despite Richard Boucher, a spokesman of the US Department of State, stating:

... the Geneva Convention says that if there is any doubt, then a competent tribunal should be convened to review these things. We don't think there is any doubt in this situation. The White House, in their announcements yesterday, I think, made quite clear why there is no doubt about Taliban people involved. All of these people have been screened several times before they were taken, and after they were taken to Guantanamo, and we don't think there is any doubt in these cases ... I think ... if there is any factual or reasonable basis for doubt, then of course we would be willing to review this. But at this point, we're not aware of anything in all these interviews that raises any doubt about these people ... There was nothing in that examination of the facts of the situation that raises any doubts that would lead us to believe that they might qualify, and therefore we believe firmly that they don't. Now,

³⁹ *ibid.*

should something come up that would change that, I'm sure we would review it.⁴⁰

It must be stressed, however, that there is nothing in the wording of Art 5 of the GC III or in the official ICRC Commentary that would suggest that the doubt is limited to the one entertained by the Detaining Power. The ICRC in its commentary makes clear that the Conventions should be interpreted broadly, including Art 5. There are some indicators in favour of strong doubt existing among numerous international bodies and scholars.

For example, the UN High Commissioner for Human Rights stated on 16 January 2002 that:

All persons detained in this context are entitled to the protection of international human rights law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949. The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention. All detainees must at all times be treated humanely, consistent with the provisions of ICCPR and the Third Geneva Convention. Any possible trials should be guided by the principle of a fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.⁴¹

The Inter-American Commission on Human Rights' *Decision on Request for Precautionary Measures* adopts the same line of reasoning. The Commission came to the conclusion that:

... precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that

⁴⁰ See Toman (n 18) 303.

⁴¹ Amnesty International (n 20).

they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights. On this basis, the Commission hereby requests that the United States take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.⁴²

In addition, the International Commission of Jurists⁴³ stated that the 7 February 2002 decision of the US President to apply Geneva Convention to the conflict in Afghanistan, but to deny POW status to the detainees, was ‘incorrect in law.’⁴⁴

Another example of existing doubts was a survey conducted among leading experts in international humanitarian law by the War Crimes Project on 21 February 2012. Its results showed that:

... most of the experts ... believe that the Taliban should be granted POW status, citing Article 4 of the Third Geneva Convention, which defines prisoners of war as ‘members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces’. Although there was disagreement about the legal status of Al Qaida who have been captured, most agreed that the Administration had not taken necessary steps under international law to determine their status ...⁴⁵

⁴² Juan E Méndez, ‘Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)’ (*Inter-American Commission on Human Rights*, March 13 2002) <www1.umn.edu/humanrts/cases/guantanamo-2003.html> accessed 30 August 2013.

⁴³ The International Commission of Jurists is an international non-governmental organization consisting of judges and lawyers from all regions and legal systems of the world working to uphold the rule of law and the legal protection of human rights.

⁴⁴ Amnesty International (n 20) 32-33.

⁴⁵ *ibid* 33.

Arguably, the authoritative body on the provisions of the Geneva Conventions, the International Committee of the Red Cross, added that there were 'divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.'⁴⁶

In conclusion, from the opinions expressed by bodies such as the ICRC, the UNHCHR, as well as the international humanitarian law experts surveyed by the War Crimes Project and the International Commission of Jurists, there appears to be strong and clear evidence of substantial doubt. Furthermore, many non-governmental organisations, such as Amnesty International or Human Rights Watch, believe that the Guantanamo detainees should be granted POW status (the Taliban as well as Al Qaida members). At the same time, any dispute about their status must be determined by a competent tribunal that respects due process rights.

Consequently, until such time the detainees must be presumed to be prisoners of war.⁴⁷ Through the arguments so far presented, I am convinced that Al Qaida fighters should be granted POW status, which would in no way hinder the possibility of holding responsible those who committed war crimes, or crimes against humanity. But despite this belief, in the present situation, doubts and uncertainties should be clarified in accordance with Art 5 of GC III. It is a far better, just, and most of all lawful, determination, compared to the blatantly wrong status determination decision made by Bush.

The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

In this part of the article, I will analyse the applicability of GC IV. There seem to be no doubt that members of the Taliban qualify as prisoners of war. However, controversies exist concerning the status of Al Qaida fighters. For the reasons mentioned above, I believe they

⁴⁶ *ibid* 34.

⁴⁷ Amnesty International (n 20).

should also be granted POW status. However, let us assume that Al Qaida members do not qualify as POWs. Does this mean that they are deprived of any protection? Does a legal vacuum exist? The answer is, of course, negative.

In accordance with Art 4 of GC IV, persons protected by the Convention are those who, at a given moment, and in any manner whatsoever, find themselves in the hands of a party to a conflict, or occupying power of which they are not nationals. Nationals of a state which is not bound by the Convention are not protected by it. Nationals of a neutral state, who find themselves in the territory of a belligerent state, and nationals of a co-belligerent State, shall not be regarded as protected persons, while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are. Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, or the Geneva Convention Relative to the Treatment of Prisoners of War shall not be considered protected persons within the meaning of the present Convention.⁴⁸

According to the ICRC Commentary:

... the definition of protected persons ... is a very broad one which includes members of the armed forces – fit for service, wounded, sick or shipwrecked – who fall into enemy hands. The treatment which such persons are to receive is laid down in special Conventions to which the provision refers. They must be treated as prescribed in the texts which concern them. But if, for some reason, prisoner of war status – to take one example – were denied to them, they would become protected persons under the present Convention.⁴⁹

⁴⁸ Fourth Geneva Convention (n 14).

⁴⁹ ICRC, 'Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War' (ICRC, 12 August 1949)

Protected persons must also fulfil certain nationality requirements. The person must not be a national of the party to the conflict under whose control they find themselves. This nationality limitation implies those civilians, US citizens, or allied forces that fall into the hands of their country's armed forces during the conflict in Afghanistan; do not enjoy the full set of rights enumerated in GC IV.

A second nationality limitation is based on the existence of diplomatic relations. Pursuant to Art 4(2) of the GC IV, nationals of a neutral state who find themselves in the territory of a belligerent state, and nationals of a co-belligerent state, are not regarded as protected persons as long as the state of their nationality maintains normal diplomatic relations with the state in whose hands they are being held. This provision may deprive, for example, Pakistani and British citizens in Afghanistan of the status of protected persons as long as those states maintain diplomatic relations with the US. In both exceptions those persons are subject to general protection of Part II of the GC IV entitled, 'General Protection of Populations against Certain Consequences of War.'⁵⁰

Civilians may not participate in hostilities with the exception of *levée en masse*. In this context it is important to stress that during unlawful participation in hostilities, the civilian forfeits their protection and exposes themselves to attacks, and consequently, may no longer claim to be immune from such attacks. Still, such an individual retains their status as a protected person and does not become a combatant. It is *expressis verbis* stated in Art 51 (3) of Additional Protocol I of 1977, which reads as follows: 'civilians shall enjoy the pro-

<www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument> accessed 30 August 2013.

⁵⁰ *Inter alia* the establishment of hospitals and safety zones and neutralized zones, the protection of civilian hospitals, protection of medical personnel, protection of transports of sick and wounded civilians and other especially vulnerable categories of persons on land, by sea or by air, free passage of aid consignments, the special protection of children, permission to exchange family news.

tection afforded by this section, unless and for such time as they take a direct part in hostilities.⁵¹

Although the US is not a party to the Protocol, this provision may be a helpful guidance in this case. It must be stressed that the fact that civilians have at some time taken direct part in the hostilities does not make them lose their immunity from attacks indefinitely. If civilians laid down their arms, or surrendered having no other means of defence, they must not be attacked.⁵²

What should also be underlined is the possibility to punish civilians for unlawful participation in hostilities. The ICRC Commentary once again proves to be useful. In the context of punishment for unlawful participation in hostilities, it reads:

... there are certain cases about which some hesitation may be felt. We may mention, first, the case of partisans, to which Art 4 A (2) of the Third Convention refers. Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present Convention. *That does not mean that they cannot be punished for their acts*, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it.⁵³

In the case of qualifying Al Qaida members as protected persons, the US would be responsible for unlawfully detaining civilians outside an

⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

⁵² ICRC, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (adopted 26 February 2009) (2008) 90(872) IRR 991, 996.

⁵³ ICRC 'Commentary on Convention (IV)' (n 49). Article 64 and the ones that follow it refer to fair trial rights (emphasis added).

occupied territory after their capture. According to Arts 49 and 76 of the GC IV:

(49) individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive;

(76) Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein ...⁵⁴

In accordance with the said provision in our case, civilians who fall into US hands in Afghanistan may not be held in Guantanamo, but only in Afghanistan. Whereas prisoners of war may be held in every corner of the earth, civilians should remain in an occupied country.

In conclusion, all persons held in Guantanamo Bay must be either combatants (POWs when in enemy hands) or civilians. Such a statement is emphasised in the ICRC Commentary to Art 4 of GC IV, where we read:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.⁵⁵

⁵⁴ Fourth Geneva Convention (n 14).

⁵⁵ *ibid* 51. This position was confirmed by the International Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Delalić & Delić* (Judgement) ICTY-96-21-T (16 November 1998), in which the Tribunal stated: 'It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protection

The Applicability of Human Rights Law

What should be stressed is that, contrary to the position of the US government, human rights law does not cease to apply in the course of an armed conflict, and that no legal vacuum has been shown in which people can be deprived of their liberty on this basis. There are various provisions of international law and standards applicable which contain rights to which the detainees are entitled. Those provisions are included most of all in the Universal Declaration of Human Rights of 1948, International Covenant on Civil and Political Rights of 1966, Inter-American Declaration on the Rights and Duties of Men of 1948, American Convention on Human Rights (1969), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), and the Basic Principles on the Role of Lawyers (1990) – all of which are often considered to be customary international law.

International humanitarian law and human rights law mutually complement and support each other. They have much in common, especially in the sphere of their goals and stipulations. The common goals of those two branches of law are the protection of life, health, and human dignity. This is mirrored by the content of particular norms. The detainees are protected by such international humanitarian and human rights instruments; this protection includes among others the fundamental right to a fair trial and *habeas corpus*.⁵⁶

As a result, it appears daunting that the US – which considers itself a beacon of justice, human rights and the rule of law – arbitrarily and illegally deprived the detainees of liberty. The aim of the detention has not been to prevent the return of the POWs to the battlefield (as

of the Third Convention as a prisoner of war (or the First or Second Convention) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied' [271].

⁵⁶ On the relationship between international humanitarian law and human rights law and their applicability to the situation of an armed conflict see: Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86(856) IRRIC 789.

it should be, and which would be legal) but, rather, extracting from them intelligence information and, as such, is contrary to the Geneva Conventions. Moreover many of the interrogation techniques, such as the use of dogs, exposure to extreme temperatures, and the deprivation of sleep or isolation, cause severe suffering – with reasonable grounds to believe that torture has been used in Guantanamo Bay.⁵⁷ A question that one might ask is, is there any justification for using torture? Should the US torture one person in order to potentially save the lives of thousands of people?⁵⁸

The next abuse by the US concerns the right to use force. This took place mainly during the transfer of the detainees to Guantanamo Bay and during the force-feeding of the detainees. The conduct of the latter was torture. During the transfer prisoners of war were chained, hooded, forced to wear goggles, making it impossible to see anything, and ear-muffs, making it impossible to hear anything. American soldiers in Guantanamo Bay beat the detainees, kicked them, stripped them naked and forcefully groomed them. These are but a few examples. Such treatment also reaches the level of torture as it causes

⁵⁷ The term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions. See: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 16 June 1987) 1465 UNTS 85, art 1 (CAT).

⁵⁸ For more details see: Alan M Dershowitz, ‘Is It Necessary To Apply “Physical Pressure” To Terrorists – And To Lie About It?’ (1989) 23 *Israel Law Review* 192; Alan M Dershowitz, ‘The Torture Warrant: A Response To Professor Strauss’ (2003) 48 *New York School of Law Review* 275; Ben Saul, ‘Torture Degrades Us All’ (*Essays & Articles*, 12 September 2005) <<http://essayus.blogspot.com/2005/12/torture-degrades-us-all.html>> accessed 29 August 2013.

severe pain or suffering to the victims in order to inhibit or punish them.⁵⁹

What is also very disturbing is the fact that the conditions of internment negatively affected the mental health of the detainees; granting medical care depended on the detainees' cooperation with the interrogators. Furthermore, this care was commonly refused, delayed without justification, or deemed improper. Detainees were subject to medical treatment without their consent including being sedated with drugs and force-feeding, while doctors systematically violated the rules of medical ethics.⁶⁰ In a few cases the conditions of internment led to mental illness, self-injurious acts, and both individual and collective suicide attempts (in June 2006 three such attempts succeeded and in May 2007 one), as well as long lasting hunger strikes.

Such evidence has been presented by the UN Committee Against Torture from 2006 (May).⁶¹ The Committee stated that indefinite detention of people in Guantanamo Bay without charge is in itself an infringement of the Convention Against Torture (1984), calling the US to close the Guantanamo Bay camp, respect and implement the rights of the detainees to a fair trial and their release with the reservation that they cannot be sent to States where they may be tortured.

What to Do with the Detainees – 10 Years Later

On 22 January 2009, newly inaugurated US President Barack Obama signed Executive Order 13492, committing his administration to resolving the cases of the detainees held at Guantanamo as promptly as possible, closing the detention facility 'no later than one

⁵⁹ See UN Commission on Human Rights (UNCHR), 'Situation of Detainees at Guantanamo Bay' (15 February 2006) UN Doc E/CN.4/2006/120.

⁶⁰ *ibid.*

⁶¹ UN Committee Against Torture (UNCAT), 'Conclusions and recommendations of the Committee against Torture - United States of America' (18 May 2006) UN Doc CAT/C/US/CO/2.

year from the date of this order.⁶² Unfortunately, hopes for an end to the Guantanamo detentions have receded over subsequent months and years. This has been partly due to the fact that members of US Congress sought to block the closure of the facility.⁶³ At the same time, diplomatic efforts to find solutions for detainees who cannot be returned to their home countries for fear of the human rights violations they would face there have been undermined by the refusal of the US authorities to release any of them within mainland US.⁶⁴

Unfortunately, while the Obama Administration undertook some initial steps to close Guantanamo, it was eventually determined that some detainees were too dangerous to be released, but cannot be tried because of insufficient evidence. Consequently, they continue to be detained indefinitely.⁶⁵ As K M Rotunda noted:

... the class of detainees who have the least protection are those detainees who have the least amount of evidence against them. The government announces that they are dangerous, but the government does not have sufficient evidence to persuade a neutral fact-finder of that belief. The detention for this class of detainees is also indefinite. An

⁶² Barack Obama, 'Executive Order - Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities' (*The White House*, 22 January 2009) <www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities> accessed 29 August 2013. See also: Frederico Rojas, 'Obama's Pledge to International Law: A Look at the First Sixteen Months in Office' (2010) 2 *Amsterdam Law Forum* 23, 27-28.

⁶³ Erin B Corcoran, 'Obama's Failed Attempt to Close Gitmo: Why Executive Orders Can't Bring About Systemic Change?' (2011) 9 *University of New Hampshire Law Review* 207, 209.

⁶⁴ Amnesty International, 'Future of Guantánamo detainees must be resolved' (*Amnesty International News*, 18 November 2009) <www.amnesty.org/en/news-and-updates/news/future-guantanamo-detainees-must-resolved-20091118> accessed 5 August 2013.

⁶⁵ See Barack Obama, 'Remarks on National Security' (*White House Office of the Press Secretary*, 21 May 2009) <www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> accessed 30 August 2013.

administrative decision – not a trial – imposes indefinite imprisonment.⁶⁶

Despite pre-electoral promises, the Obama administration has adopted the global ‘war’ framework devised under the Bush administration. The administration asserted in January 2010 that four dozen of the Guantanamo detainees could neither be prosecuted nor released, but should remain in indefinite military detention without charge or criminal trial under the unilateral interpretation of the law of war.⁶⁷ Although Obama, in his Remarks on National Security (2009), said that Al Qaida terrorists and their affiliates are at war with the United States, and those that we capture - like other prisoners of war - must be prevented from attacking us, this does not mean that they should be granted prisoner of war status.

It should be mentioned here that on 20 November 2008, the US District Court for the District of Columbia, in the case of *Boumediene et al v G W Bush*, issued its crucial verdict. It was the result of the 12 June 2008 judgment of the US Supreme Court, holding that the prisoners had a right to *habeas corpus* under the United States Constitution, and that the Military Commissions Act of 2006 was an unconstitutional suspension of that right.⁶⁸ This case concerned the Bosnian-Algerians who were abducted from Sarajevo despite two judgments in their favour ordering their release by the Bosnia and Herzegovina courts.

The district court’s verdict concerned the government’s allegation that the men had ‘planned to travel to Afghanistan to take up arms against US and allied forces,’ and that this constituted ‘support’ of Al Qaida under the definition of an ‘enemy combatant’. The court, un-

⁶⁶ Kyndra Miller Rotunda, ‘A Short Comment on Current Detainee Policy: One Step Forward and Two Steps Back’ (2011-2012) 3 Akron Journal of Constitutional Law & Policy 41, 48.

⁶⁷ Amnesty International, ‘Guantánamo: A Decade of Damage to Human Rights’ (*Amnesty International News*, 11 January 2012) <www.amnesty.org/en/news/guantanamo-decade-damage-human-rights-2012-01-11> accessed 30 August 2013.

⁶⁸ *Boumediene v Bush* 533 US 723 (2008).

der Judge Richard Leon, had decided earlier that the term ‘enemy combatant’ was a sign of the chaotic imprecision of the government’s detention policies that no single definition existed until the court ruled that an ‘enemy combatant’ was someone ‘who was part of, or supporting, Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the US or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.’

The petitioners had also contended that the government had ‘not shown by a preponderance of the evidence that any of the petitioners planned to travel to Afghanistan to engage US forces, and, even if the government had shown that petitioners had such a plan, a mere plan, unaccompanied by any concrete acts, is not — as a matter of law — “supporting” al-Qaeda within the meaning of the Court’s definition of “enemy combatant”.’ Judge Leon declared that the government had ‘failed to show by a preponderance of the evidence that any of the petitioners, except for one, either had, or committed to, such a plan.’ He explained that the government had relied ‘exclusively on the information contained in a classified document from an unnamed source,’ but stressed that this information — ‘the only evidence in the record directly supporting each detainee’s alleged knowledge of, or commitment to, this supposed plan’ — was inadequate, because, although the government had ‘provided some information about the source’s credibility and reliability,’ it had not ‘provided the Court with enough information to adequately evaluate the credibility and reliability of this source’s information.’

Judge Leon also noted that, although the source’s information was ‘undoubtedly sufficient for the intelligence purposes for which it was prepared,’ it was manifestly ‘not sufficient’ as the basis for detaining the men as ‘enemy combatants.’ Referring to *Hamdi v Rumsfeld* (a case dealing with the detention on the US mainland of a US citizen initially held at Guantanamo Bay, which was decided by the Supreme Court in June 2004, at the same time as *Rasul v Bush*, which granted the prisoners *habeas* rights), he concluded, ‘To allow enemy competency to rest on so thin a reed would be inconsistent with this

Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention.'

Finally, Judge Leon declared that, 'because the government has failed to establish by a preponderance of the evidence the plan that is the exclusive basis for the government's claim that petitioners are enemy combatants, the Court must, and will, grant their petitions and order their release.'⁶⁹

Consequently, in 2009 a number of the petitioners (the so called Bosnia-Algerian group: Hajj Boudella, Lakhdar Boumediene, Mustafa Ait Idr, Mohammad Nechle, Saber Lahmar, and Bensayah Belkacem) were released from Guantánamo and reunited with their wives and children. Three were flown to Bosnia to reunite in 'protective custody' with their families. Boumediene had to wait until 2009 to find a refuge in France, as the US refused to let him return to Bosnia and he feared returning to Algeria because of the risk of torture or the death penalty. He has been joined in France by his wife and children.

District Judge Leon nevertheless recommended the continued detention of one of the petitioners, Bensayah Belkacem, but his attorneys appealed his case. In 2010, a three-judge panel of the United States Court of Appeals overturned Leon's decision, determining that Belkacem was not a member of Al Qaida and should be released. Unfortunately, however, Belkacem continues to be detained at Guantanamo.⁷⁰

⁶⁹ The judgment of the US District Court for the District of Columbia is available at: <www.scotusblog.com/wp-content/uploads/2008/11/leon-boumediene-order-11-20-2008.pdf> accessed 29 August 2013. See also: Andy Worthington, 'After 7 Years, Judge Orders Release of Guantánamo Kidnap Victims' (*Andy Worthington*, 25 November 2008) <www.andyworthington.co.uk/2008/11/25/after-7-years-judge-orders-release-of-guantanamo-kidnap-victims/> accessed 29 August 2013.

⁷⁰ See Seema Jillani, 'Algerians, Freed from Guantanamo, Still Paying the Price' (*McClatchy Newspapers*, 9 September 2009) <www.mcclatchydc.com/2009/09/09/75134/algerians-freed-from-guantanamo.html> accessed 29 August 2013.

Currently there are more than 150 men still held at Guantanamo;⁷¹ with many having claimed they were subjected to torture and other ill-treatment while in US custody. There has been little accountability for these human rights violations and the US administration has systematically blocked attempts by former detainees to seek redress for such violations. Only one of the 779 detainees held at the base since January 2002 has been transferred to the mainland US for prosecution in an ordinary federal court.⁷² Others have faced prosecution in military commissions, proceedings that do not meet international fair trial standards.

Furthermore, as previously noted, some detainees, who have been cleared for transfer from Guantanamo Bay, cannot be sent back to their home countries because they might face further abuse. However, because the US authorities refuse to allow any released detainee into the mainland US, they remain at Guantanamo until a third country solution can be found, a process which can take years. It is my firm belief that the Guantanamo Bay detention centre should be closed as quickly as possible and those that are allowed to be released should either be transferred to their home country, and where this is not possible due to persecution they might experience there, they should be transferred to a third country, or in the end, allowed to the US mainland.

The US should take responsibility for the detainees, and if there are no third States willing to take them, the US itself is obliged to do this. Those detainees charged with crimes should be prosecuted and tried in accordance with human rights standards of fair trial. It should be stressed that all States and the international community as a whole should help close the Guantanamo Bay by offering humanitarian protection to detainees who risk torture or persecution at home as a moral obligation. As Julia Hall, expert on counterterrorism at Amnesty International, said:

⁷¹ Human Rights First (n 4).

⁷² Michael B Mukasey, 'The Obama Administration and the War on Terror', (2010) 33 *Harvard Journal of Law & Public Policy* 953, 959.

Offering safe haven to some of the most vulnerable detainees would be a significant humanitarian gesture. Europe could help the new administration shut down the unlawful detention facility, a major goal, and be a force in re-establishing the rule of law.⁷³

A number of states have decided to allow the released detainees into their territory. For example, five Uighurs (a Muslim minority in Xinjiang, China, who are persecuted there) were transferred to Albania and some to Bermuda to find their new home there. Also Ireland, Switzerland, Palau and El Salvador decided to allow some of the detainees to take up residence in their territory.⁷⁴ In this context, it should be emphasised that it is of high importance that the governments in Europe and elsewhere play a vital role in providing humanitarian protection in the form of a safe place for released detainees who cannot be returned to their home countries to get on with their lives.

The involvement of European governments can contribute to Obama's stated aim of closing Guantanamo 'as soon as practicable.'⁷⁵ On the other hand, it is quite understandable that third states are unwilling to accept on their territory detainees that were previ-

⁷³ Amnesty International, 'Press Release: Europe: Help Close Guantanamo: Offer Humanitarian Protection to Detainees Who Risk Torture or Persecution at Home' (*Amnesty International*, 22 January 2009) <www.amnesty.org/en/for-media/press-releases/europe-help-close-guant-namo-offer-humanitarian-protection-detainees-who> accessed 29 August 2013.

⁷⁴ See: Corcoran (n 65) 55, 215; Emily Heil, 'Former Gitmo Detainee Finds Slice of Freedom at Albanian Pizza Shop' *The Washington Post* (Washington DC, 22 August 2012) <www.washingtonpost.com/blogs/in-the-loop/post/former-gitmo-detainee-finds-slice-of-freedom-at-albanian-pizza-shop/2012/08/22/441af3bc-ec67-11e1-aca7-272630dfd152_blog.html> accessed 30 August 2013; Associated Press, 'Guantanamo Bay Prison Releases First Prisoners in a Year with Resettlement of Chinese Ethnic Uighurs' (*CBS News*, 20 April 2012) <www.cbsnews.com/8301-202_162-57417494/guantanamo-bay-prison-releases-first-prisoners-in-a-year-with-resettlement-of-chinese-ethnic-uighurs/> accessed 30 August 2013.

⁷⁵ Amnesty International, 'Ireland's Offer to Accept Guantánamo Detainees Must Be Matched' (*Amnesty International*, 20 March 2009) <www.amnesty.org/en/news-and-updates/news/irelands-offer-accept-guant%C3%A1namo-detainees-must-be-matched-20090320> accessed 30 August 2013.

ously labelled the worst of the worst and hard-core terrorists. They are afraid of giving them shelter often because to do so may meet social resistance. Societies in those states often do not wish to have people who have been labelled as terrorists as their neighbours, despite the reality that the detainees ready for release have been cleared of all the criminal charges.

Still, indefinite detention without fair trial cannot continue as this is a flagrant and continuous violation of human rights law and standards. Consequently, it is the responsibility of the US to find a safe place for those detainees that are allowed to be released – either in a third State or in the US. There is no third option. As the US Senator Feinstein rightly argued: ‘Our system of justice is more than capable of prosecuting terrorists and housing detainees before, during, and after the trial.’⁷⁶

Conclusion

In conclusion, it should be stressed once again that international humanitarian law did not stop being useful and is still applicable to conflicts such as the one in Afghanistan. In cases where there is no armed conflict it is not applicable; nothing less, nothing more. But this does not yet mean that this branch of law is no longer of any use nor that it is unimportant or incapable of meeting new challenges and should therefore be neglected.⁷⁷

What should also be stressed is that before demanding changes to the law, all efforts should be undertaken in order to comply in good faith with the law, even in situations not envisaged at the time of the

⁷⁶ Corcoran (n 65) 224.

⁷⁷ In this way see also the ICRC, ‘The Relevance of IHL in the Context of Terrorism’ (ICRC, 1 January 2011) [1], <www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm> accessed 29 September 2013; Emanuela-Chiara Gillard, ‘The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law’ in Michael N Schmitt and Gian Luca Beruto (eds), *Terrorism and International Law: Challenges and Responses* (International Institute of Humanitarian Law 2003) 55.

adoption of that law. The main problem is not the lack of regulation but rather the lack of proper implementation of the law in force which, in turn, is a result of the lack of political will.⁷⁸

Of no less importance is the fact that laws protecting human rights do not cease to apply in the course of an armed conflict. International humanitarian law and human rights law mutually complement and support each other. The common goal of those two branches of law is the protection of life, health, and human dignity. Accordingly, Guantanamo Bay detainees remain protected by both international humanitarian law and human rights instruments.

Finally, it is high time for the Guantanamo Bay detention facility to be closed. And the victory of Obama in the 2012 elections may mean that the US finally begins to respect its international obligations. In his recent speech *The Future of our Fight against Terrorism* of May 23, 2013, Obama called on Congress to lift the restrictions on detainee transfers from Guantanamo. He added that he would appoint a new, senior envoy at the State Department and Defence Department whose sole responsibility would be to achieve the transfer of detainees to third-party countries.

He also decided to lift the moratorium on detainee transfers to Yemen, with cases to be reviewed on a case by case basis. To the greatest extent possible, detainees who have been cleared should be transferred to other countries. Where appropriate, potential terrorists should be brought justice in the American courts and military justice system.⁷⁹

⁷⁸ Jean-Phillipe Lavoyer, 'International Humanitarian Law and Terrorism' in Liebesth Lijnzaad, Johanna van Sambeek, Bahia Tahzib-Lie (eds) *Making the Voice of Humanity Heard* (n 10) 265-266.

⁷⁹ Barack Obama, 'The Future of our Fight Against Terrorism: Remarks of President Barack Obama' (*Lieber Code*, 23 May 2013) <www.liebercode.org/2013/05/text-of-obamas-speech.html> accessed 29 September 2013.

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