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**Unprivileged Combatants and the Hostilities in
Afghanistan: Their Status and Rights Under
International Humanitarian and Human Rights Law**

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INTRODUCTION

Perhaps no issue has stirred more controversy in connection with the U.S. military action in Afghanistan in the wake of the September 11 attacks than has the Bush Administration's decision to deny prisoner of war status to captured Taliban and al Qaeda fighters and to classify them instead as "unlawful" or "unprivileged" combatants. Apart from the Administration's justification for its decision, much of the controversy involves differing views as to whether customary and conventional international law rules prescribing conditions for entitlement to prisoner of war status apply to all or only specific categories of combatants. Because denial of prisoner of war status to combatants in international hostilities potentially entails life or death consequences for the person(s) concerned, such determinations merit very careful scrutiny to ensure that they were taken in conformity with applicable legal rules and procedures.

This paper traces, albeit not exhaustively, the historical development in modern treaty law of the rules applicable to combatant status and entitlement to prisoner of war status. It examines the important legal distinction between privileged and unprivileged combatants in customary and conventional international law and explains why the status of privileged combatant is strictly limited to international armed conflicts. It also analyzes the strict conditions in Hague and Geneva treaty provisions with which irregular combatants must comply in order to qualify for prisoner of war status as well as techniques a

* This paper addresses only the situation of those combatants who during or after October 2001 have been detained by or taken into the custody of US forces in Afghanistan in connection with the hostilities in that country and have been classified as unprivileged combatants and are being held either in that country or at Guantanamo Bay. It does not deal with those persons, whether US citizens or aliens, who have been detained by agents of the government in the United States or outside of Afghanistan and are being held as "enemy" or unprivileged combatants.

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Detaining power may employ to deny them that status. The paper briefly examines the new relaxed standards in the 1977 First Protocol¹ Additional to the Geneva Conventions of 1949² under which irregular combatants may qualify as well as forfeit their entitlement to prisoner of war status. It then assesses, in light of applicable law and by reference to U.S. actions in other international hostilities, the reasons advanced by the Bush Administration for denying captured Taliban and al Qaeda fighters prisoner of war status. The paper concludes with an examination of the legal protections that the United States is obliged under human rights and humanitarian law to accord persons detained as unprivileged combatants.

PRIVILEGED OR LAWFUL COMBATANTS

A combatant is a person who directly engages in hostilities, which in essence means participating in an attack intended to cause physical harm to enemy personnel or objects. Historically, such combatants, sometimes referred to as belligerents, have been classified in international hostilities as either “privileged,” i.e. “lawful”—or “unprivileged,” i.e., “unlawful” combatants. The so-called “privileged” or “lawful” combatant is a person authorized by a party to an armed conflict to engage in hostilities and, as such, is entitled to the protections encompassed in the “combatant’s privilege.”³ This privilege is in essence a license to kill or wound enemy combatants, destroy other enemy military objectives and cause incidental civilian casualties.⁴ A lawful combatant possessing this privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.

The concept and legal implications of privileged combatancy are deeply rooted in the customary

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II, (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

² The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3116, T.I.A.S. No.3362, at 3, 75 U.N.T.S. 31, 32 [First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3220, T.I.A.S. No.3363, at 4, 75 U.N.T.S. 85, 86 [Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364. at 3, 75 U.N.T.S. 135, 136 [Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518, T.I.A.S. No.3365, at 3, 75 U.N.T.S. 287, 288 [Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions].

³ See Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 59 (1983).

⁴ Such authorization is typically evidenced by inter alia, “commission, emolument, attestation, warrant, order, conscription or enlistment.” U.S. DEP’T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31, at 3.1 (1976) [hereinafter AFP 110-31].

law of armed conflict. They were reaffirmed, for example, in Articles 57 and 56 of The Lieber Instructions of 1863.⁵ Article 57 formulates the notion of the combatant's privilege as follows: “[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent: his killing, wounding, or other warlike acts are not individual crimes or offenses.”⁶ The immunity of captured combatants from prosecution is expressly recognized in Article 56. It states that “[a] prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.”⁷

This concept was similarly recognized and applied by various war crimes tribunals convened after World War II. For instance, in *U.S. v. List*, the U.S. Military Tribunal stated: “It cannot be questioned that acts done in times of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war.”⁸ Referring to privileged combatants, the tribunal added: “It is only this group that is entitled to treatment as prisoners of war and incurs no liability after capture or surrender.”⁹ Comparable statements can also be found in the municipal law of states.¹⁰

It should be noted that the 1949 Geneva Conventions and its two Additional Protocols¹¹ do not use the term “privileged” or “lawful” combatant and contain no provision that expressly recognizes the immunity of such combatants from prosecution for their legitimate acts performed in the line of duty. However, this immunity mandated by customary law is inferentially recognized in Article 87 of the Third Geneva Convention, which states, in pertinent part, that “[p]risoners of war may not be sentenced . . . to

⁵ U.S. DEPARTMENT OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100 (1863) (Lieber Instructions), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (D. Schindler & J. Toman eds., 2d rev. 1981) [hereinafter Lieber Instructions].

⁶ *Id.*

⁷ *Id.*

⁸ *United States v. List* (The Hostage Case), *reported in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 1228, 1238 (1950).

⁹ *Id.*

¹⁰ Such a formulation is that “[a] homicide committed in the proper performance of a legal duty is justifiable. Thus . . . killing in suppression of a mutiny or riot . . . killing an enemy in a battle . . . are cases of justifiable homicide.” UNITED STATES, MANUAL FOR COURTS-MARTIAL § 351 (1951).

¹¹ In addition to Protocol I, *supra* note 1, the Diplomatic Conference concluded the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I and II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

any penalties except those provided for in respect of members of the armed forces of the said power *who have committed the same acts.*” (Emphasis supplied). Since the detaining power would not prosecute its own soldiers for their legitimate acts of war, it cannot try prisoners of war for comparable acts. Thus, prisoners of war can be tried only for violations of the laws and customs of war and other pre-capture offenses for which the detaining power is obliged or permitted by the Conventions to punish its own personnel.

THE UNPRIVILEGED OR UNLAWFUL COMBATANT

An “unprivileged” or “unlawful” combatant refers to a person who does not have the combatant's privilege, but nevertheless directly or actively¹² participates in hostilities. Such unlawful combatants would include civilians,¹³ certain civilians accompanying the armed forces,¹⁴ as well as noncombatant members of the armed forces¹⁵ who, in violation of their protected status, actively engage in hostilities. These persons temporarily forfeit their immunity from direct individualized attack during such time as they assume the role of a combatant. Unlike privileged combatants, unlawful combatants upon capture can be tried and punished under municipal law for their unprivileged belligerency, even if their hostile acts complied with the laws of war.

The notion of unprivileged combatant also has been used to describe irregular or part-time combatants, such as guerrillas, partisans, and members of resistance movements, who either fail to distinguish themselves from the civilian population at all times while on active duty or otherwise do not fulfill the requirements for privileged combatant status. Others falling within this category are those privileged combatants who violate the requirements regarding mode of dress, such as regular military

¹² For a discussion of the distinction between active or direct as opposed to indirect participation in hostilities see Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 62-72 (1983).

¹³ But see the reference, *infra* note 28, to the privileged combatant status of members of a *levée en masse*. For an authoritative discussion of unprivileged combatancy, see Baxter, *So Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951).

¹⁴ Such persons, who are not combatants, include civilian members of military aircraft crews, supply contractor personnel, technical representatives of government contractors, war correspondents, and members of labor units or civilian services responsible for the welfare of armed forces. Unlike other civilians, these persons are subject to capture and treatment as prisoners of war under Article 4(A)2(4) of the Third Geneva Convention.

¹⁵ Such persons include doctors, other medical personnel and chaplains. These members of the armed forces are classified as noncombatants because they enjoy special protections under the 1949 Geneva Conventions. Unlike civilians accompanying the armed forces, they may not be made prisoners of war.

personnel who are caught spying while out of uniform.¹⁶

The term “unlawful” combatant is used only to denote the fact that the person lacks the combatant's privilege and is not entitled to participate in hostilities. Mere combatancy by such persons is not tantamount to a violation of the laws of armed conflict, although their *specific* hostile acts may qualify as such.¹⁷

NONAPPLICABILITY OF PRIVILEGED COMBATANCY IN NONINTERNATIONAL ARMED CONFLICTS

Since lawful combatant and prisoner of war status directly flow from the combatant's privilege, recognition of this privilege is limited under customary and conventional international law to situations of interstate, or international armed conflict, as defined in common Article 2¹⁸ of the Geneva Conventions, and a limited class of struggles for self-determination, recognized in Article 1(4)¹⁹ of Protocol I as international armed conflicts.

In contrast, a government engaged in a civil war or other kind of internal hostilities is not obliged to accord its armed opponents prisoner of war status since these armed dissidents do not have the combatant's privilege. One authority explains the reason for the nonapplicability of this privilege in such armed conflicts as follows:

Governments, particularly those that may be affected by an emerging dissident or

¹⁶ See U.S. AIR FORCE PAMPHLET, *supra* note 4, at 3.3a; see also *Bin Haji Mohammed Ali & Another v. Public Prosecutor*, [1969] A.C. 430 (P.C. 1968).

¹⁷ The U.S. Air Forces Manual correctly notes: “The question of whether there is a violation of the law of armed conflict, and criminal responsibility for such violation are *separate* questions apart from the issue of nonprivileged status under the laws of armed conflict. *Id.*, at 3.5, n.15. See also *Baxter*, *supra* note 12.

¹⁸ Common Article 2 of the Geneva Conventions, *supra* note 2, states: In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

¹⁹ Article 1(4) of Protocol I, *supra* note 1, reads: The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict.²⁰

Governments facing armed insurrection therefore are free to try captured dissidents for treason and all their other violent acts, even if those acts otherwise complied with applicable internal armed conflict rules.²¹

There is, however, no rule of international law that prohibits a government during internal armed conflicts from according members of dissident armed groups prisoner of war or equivalent status.²² For example, the U.S. Government during the Civil War gave limited prisoner of war treatment to captured rebel combatants without expressly according them immunity from prosecution for treason.²³

Comparable policies have been followed in recent years by other governments involved in civil wars. In quelling the attempted secession of Biafra, the central government of Nigeria, although it considered the hostilities to be noninternational, nevertheless, accorded Biafran combatants prisoner of war status. The Nigerian Army's code of conduct, issued in July 1967 stipulated in part: "Soldiers who surrender will not be killed, they are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honor."²⁴

CONVENTIONAL LAW APPLICABLE TO PRIVILEGED COMBATANCY

One eminent law of war scholar, the late Waldemar Solf, has correctly noted that "[t]he history of rules concerning the qualifications of combatant status and entitlement to be a prisoner of war has been a

²⁰ Solf, *supra* note 3, at 53.

²¹ Such trials must be conducted in accordance with the mandatory standards set forth in Article 3 common to the 1949 Geneva Conventions, as authoritatively interpreted by Article 6 of Protocol II. For a discussion of the application of these standards to trials of offenses arising from noninternational armed conflicts, see AMERICAS WATCH, VIOLATIONS OF FAIR TRIAL GUARANTEES BY THE FMLN'S AD HOC COURTS (1990).

²² In fact, paragraph 2 of common Article 3 envisions government and dissident forces making special agreements to apply all or part of the other provisions of the Geneva Conventions to the internal armed conflict. For a discussion of how such agreements are made, see Veuthey, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the ICRC*, 31 AM. U. L. REV. 83, 92-93 (1983).

²³ See Articles 152-54 of the Lieber Instructions, *supra* note 5, at 23.

²⁴ A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT 196-97, 277 (1977).

controversial subject at all lawmaking conferences, and has always resulted in compromise.”²⁵ The controversy has centered principally on the question of whether and under what conditions irregular combatants, not members of regular armed forces, would be entitled to privileged combatant and prisoner of war status. Solf characterizes the debate on this question as follows:

Historically, nations that view themselves as likely victims of aggression and enemy occupation have argued that guerrillas, partisans and members of resistance movements should be regarded as patriots and privileged combatants, while major military powers have argued that only regular, uniformed and disciplined combatants who distinguish themselves clearly from the civilian population should have the right to participate directly in hostilities.²⁶

These military powers also have maintained that such irregular combatants, by failing to wear a uniform and carry their arms openly, effectively feign protected civilian status in order to achieve unfair surprise in attacks. By so doing, these irregulars blur the mandatory distinction in all warfare between civilians and combatants, thereby placing the civilian population, particularly in occupied territory, at risk.

THE HAGUE REGULATIONS OF 1899 AND 1907

The Hague Conventions of 1899 and 1907²⁷ and their annexed Regulations, which updated and codified the laws and customs of land warfare, recognized three categories of lawful combatants: (1) armies or regular forces; (2) irregular forces; and (3) the *levée en masse*.²⁸

Article 1 of the Hague Regulations stipulates that the laws, rights, and duties of war apply to both regular and irregular combatants. The term “armies” in Article 1 refers to regular members of a

²⁵ Solf, *A Response to Douglas J. Feith’s Law in the Service of Terror* 34 *The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261, 269 (1986).

²⁶ *Id.*

²⁷ Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. 539 [hereinafter Hague Convention], and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295 [hereinafter Hague Regulations].

²⁸ Article 2 of the Hague Regulations defines the *levée en masse* as follows:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Id.

belligerent party's armed forces, which could include, or be entirely composed of, irregular forces, such as militia or volunteer corps.²⁹ Article 3 provides that members of the armed forces of a party to the conflict, if captured by the enemy, are entitled to be treated as prisoners of war.

However, in the case of militia not formally integrated into the armed forces, such as other militia with some other form of nexus to the government, Article 1 conditions recognition of their privileged combatant status and their entitlement to be prisoners of war on their meeting a series of requirements. In addition to being organized, such irregulars must: (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war.

To comply with these provisions, the irregular forces must have a commander who exercises effective control and discipline over them. The commander may obtain his authority through election by his troops or through his superior commander. In addition, the irregular forces must possess a fixed, distinctive sign that is recognizable from a distance. The forces may satisfy this requirement by wearing uniforms or even by wearing helmets or headdresses. This requirement, which ensures that combatants distinguish themselves from civilians, is designed to protect the civilian population. Members of such forces also must carry their arms openly. They may not conceal them on their persons or hide them upon approaching the enemy. Finally, the irregular forces must observe the laws of armed conflict. In particular, they must refrain from unnecessary violence and destruction.

IRREGULARS UNDER THE THIRD GENEVA CONVENTION

During World War II most members of organized resistance movements, such as the French Maquis, which operated in Axis occupied countries were routinely denied prisoner of war status and harshly treated as unlawful combatants. Despite their recognition of this problem, the members of the 1949 Diplomatic Conference, which elaborated the four Geneva Conventions, reaffirmed and incorporated with some changes the Hague Regulations' standards applicable to irregular combatants in Article 4 A(2) of the Third Geneva Convention.³⁰

²⁹ For example, Switzerland's regular army is composed almost entirely of militia corps.

³⁰ Article 4(A) Third Geneva Convention, *supra* note 2, states:

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.

One such change was to give explicit recognition to independent, i.e., irregular militias, volunteer corps and organized resistance movements, provided, however, that they are organized and belong to a party to the conflict. Another change was that such irregular forces were authorized to operate both within and outside their own territory, whether or not that territory is occupied.

However, Article 4A(2), as do the Hague Regulations, discriminates between members of regular armed forces and members of independent irregular groups, effectively holding the latter to higher standards. Specifically, Article 4A sub-paragraphs (1) and (3) indicate that members of regular armed forces, including those professing allegiance to a government or authority not recognized by the Detaining Power, are entitled to prisoner of war status. Neither sub-paragraph makes applicable to these regulars the express requirements enumerated in sub-paragraph (2), which members of irregular groups must, as a legal matter, comply with in order to obtain prisoner of war status upon capture. In this regard, the authoritative Commentary of the International Committee of the Red Cross (“ICRC”) on the Third Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 indicates that there was no need to specify these requirements for members of regular armed forces since they “wear uniforms,” have an “organized hierarchy” and “know and respect the laws and customs of war.”³¹ The

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

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

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

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received 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.

³¹ ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 63 (J. Pictet ed., 1960) [hereinafter ICRC COMMENTARY].

Commentary, in fact, makes the briefest of reference to only one such requirement with which members of regular forces are expected to comply—the wearing of a fixed sign, such as a uniform or insignia, which would readily distinguish them from civilians and enemy combatants.³² In its Commentary on the Additional Protocols, the ICRC notes that although the armed forces of party to an international armed conflict are under customary law “indissolubly bound” by the rules of international law applicable in armed conflicts, a member of its forces who does not respect those rules does not “... thereby lose his combatant status or his right to be treated as a prisoner of war (which does not mean that he cannot be punished)”³³

Some leading authorities, are, however, far more categorical in asserting that compliance by regular combatants with the conditions in Article 4A(2) is not a prerequisite for their obtaining prisoner of war status. For example, Colonel Draper states bluntly that “members of the armed forces who persistently violate the Law of War do not lose their POW status upon capture. The effect of Articles 4, 5 and 85 of the Geneva (POW) Convention, 1949, makes this clear.”³⁴ Under this view, while compliance with the law might reasonably be *expected* of members of regular armed forces, it is not *required* for their obtaining prisoner of war status. Draper’s position, which, it is submitted, is a correct statement of the law both currently and historically, thus casts considerable doubt on the argument that members of regular armed forces must comply with the conditions specified in Article 4A(2) in order to qualify as privileged combatants entitled to prisoner of war status on capture. Indeed, U.S. practice since the end of World War II tends to corroborate the view that the right to prisoner of war status for members of regular armed forces is unconditional, if not absolute, except in the case of regulars caught spying while out of uniform. For example, the United States granted prisoner of war status to captured members of Chinese Communist and North Korean armed forces during the Korean armed conflict, despite these forces’ rather questionable records of compliance with the law of war. In addition, the United States openly protested during the Vietnam conflict North Viet Nam’s denial of prisoner of war status to captured members of U.S. armed forces on the grounds that they were war criminals engaged in an aggressive war.³⁵ It would

³² *Id.*

³³ See ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 511 (Y. Sandoz et al. eds., 1987) [hereinafter ICRC PROTOCOLS COMMENTARY].

³⁴ Draper, *The Present Law as to Combatancy*, in REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE COLONEL G.I.A.C. DRAPER, OBE 197 (Myers & McCoubrey eds., 1998). Professor Levie states: “As long as members of regular armed forces are in uniform there should be no problem with respect to their entitlement to prisoner-of-war status,” citing the Swiss Military Manual, which states: “In case of capture, the uniform creates a presumption that the individual wearing it belongs to the armed forces.” H. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS 37, n.145 (1978).

³⁵ See LEVIE, *supra* note 34, at 37 (noting that there was “... no legal basis whatsoever for denying the

appear therefore that if not unconditionally entitled to prisoner of war status, members of regular armed forces, at the very least, are presumed to be privileged combatants and that if captured while in uniform or wearing other fixed sign they must be accorded prisoner of war status.

In contrast, members of irregular groups are not by law or custom accorded even this minimum presumptive status. Instead, in order to qualify as privileged combatants entitled to prisoner of war status, they must comply with the following stringent requirements set forth in sub-paragraph (2) of Article 4A:

- (1) they must belong to an organized group;
- (2) the group must belong to a Party to the conflict;
- (3) the group must be commanded by a person responsible for his subordinates;
- (4) the group must ensure that its members have a fixed, distinctive sign recognizable from a distance;
- (5) the group must ensure that its members carry their arms openly; and
- (6) the group must ensure that its members conduct their operations in accordance with the laws and customs of war.

With regard to the first condition, the ICRC Commentary notes that it was generally agreed at the Conference of Government Experts, which preceded the Diplomatic Conference that elaborated the 1949 treaties, that “the first condition preliminary to granting prisoner-of-war status to partisans was their forming a body having a military organization. The implication was that such an organization must have the principal characteristics generally found in armed forces throughout the world, particularly in regard to discipline, hierarchy, responsibility, and honor.”³⁶ One scholar in the field indicates that this requirement can be fulfilled by “... the most rudimentary elements of a military organization. Thus, a corporal’s squad on detached duty meets the requirement. In the same way, a few irregulars who were part of a larger military unit which has become broken through the exigencies of combat will qualify.”³⁷ This particular requirement is closely related to the additional condition that the irregulars be commanded by a person responsible for his subordinates.

The second requirement mandates that the members of irregular forces must be fighting on behalf of a State Party that is engaged in an international armed conflict within the meaning of Common Article

benefits and safeguards of the Convention to acknowledged members of regular armed forces on the ground that they are guilty of making ‘aggressive war’ and are, therefore, war criminals, as was done by the North Vietnamese during the hostilities in Vietnam (1965-1973)”.

³⁶ ICRC COMMENTARY, *supra* note 31, at 58.

³⁷ Mallison & Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT’L L. 39, 50 (1977).

2 of the 1949 Conventions. The ICRC Commentary states that the express or formalized authorization of that Party is not essential to establish the required nexus or connection with the irregular forces. It indicates that what is essential “... is a de facto relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient.”³⁸ Accordingly, such a relationship can be established by “tacit agreement,” such as by the delivery of war materiel and supplies by the warring Party to the irregulars.³⁹ It should be noted that this particular requirement can also be seen as upholding the customary law proscription against individuals or groups engaging in so-called “private warfare” against a State Party involved in armed conflict.

The remaining four conditions found in sub-paragraph (2) of Article 4A are virtually identical to those set forth in Article 1 of the Hague Regulations. Although the manner by which irregulars might comply with the Hague standards has already been briefly noted, further examination of compliance by such groups with the conditions in Article 4A(2)(a) to (d), particularly by reference to U.S. military manuals, is warranted because of its relevance to other issues discussed in this paper.

Commanded by a person responsible for his subordinates: As noted, this condition is a logical concomitant to the requirement that the irregular group be organized. Although requiring such a leader, Article 4A(2)(a) does not specify the leader’s qualifications or how he may obtain his authority. The ICRC Commentary, however, indicates that the group’s leader or commander could be an officer in the regular armed forces or a civilian.⁴⁰ The U.S. Army Field Manual: The Law of Land Warfare similarly indicates that this condition is fulfilled if the commander is “a commissioned officer of the armed forces or is a person of position or authority.”⁴¹ It notes, moreover, that “state recognition, however, is not essential and an organization may be formed spontaneously and elect its own officers.”⁴² As the ICRC Commentary emphasizes, what is important is that the leader be “responsible for action taken on his orders . . . [and] . . . his competence must be considered in the same way as that of a military commander.”⁴³ This in turn requires that the leader control and discipline the members of the irregular group to ensure their compliance with another specified condition, respect for the laws and customs of war.

³⁸ ICRC COMMENTARY, *supra* note 31, at 57.

³⁹ *Id.* at 59.

⁴⁰ *Id.*

⁴¹ U.S. DEP’T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, at 27, para. 64 (1956) [hereinafter FM 27-10].

⁴² *Id.*

Having a fixed distinctive sign recognizable at a distance: The ICRC Commentary and relevant U.S. Military manuals indicate that this condition is satisfied by the wearing of a uniform, but that something less than a uniform, such as a distinctive sign, will suffice so long as it is recognizable at a distance and clearly distinguishes the combatant from civilians. The U.S. Army manual states that such a sign could be a “helmet or headdress” and also suggests that irregulars also wear “a badge or brassard permanently affixed to [their] clothing.”⁴⁴ According to the ICRC Commentary, this distinctive sign may consist of a “cap ... coat, shirt, an emblem or coloured sign worn on the chest” and admonishes that it “... must be worn constantly, in all circumstances.”⁴⁵ This same issue was discussed by delegates to the 1974-1977 Diplomatic Conference in relation to a proposed new rule of distinction for combatants. The ICRC’s Commentary on the Protocols states pertinently:

What constitutes a uniform, and how can emblems of nationality be distinguished from each other? The Conference in no way intended to define what constitutes a uniform. In temperate climates it is customary for a uniform to consist of regulation headdress, jackets and trousers or equivalent clothing . . . However, this is not a rule, and “any customary uniform which clearly distinguished the member wearing it from a non-member should suffice.” Thus a cap or an armband etc. worn in a standard way is actually equivalent to a uniform.⁴⁶

An examination of these key materials clearly indicates that there is no agreed-to international standard as to what constitutes a distinctive sign, much less a uniform. Moreover, it is also abundantly clear that there is no treaty based or customary norm that requires that irregulars in order to distinguish themselves from civilians wear traditional military dress. A cap, armband or scarf will suffice for this purpose. What is decisive, therefore, for compliance with this condition is that the mode of dress or sign worn be such that it is visible during daylight and detectable at a distance by the naked eye.

Carrying arms openly: This condition is designed to ensure that irregular combatants do not get unfair surprise in attacks by concealing their weapons on approaching the enemy. As the ICRC Commentary explains, “the enemy must be able to recognize partisans as combatants in the same way as members of armed forces, whatever their weapons.”⁴⁷ Thus, carrying openly a machine gun, rifle or other such weapon will satisfy this requirement. In contrast, concealing a pistol or other weapon beneath one’s clothing would not.

⁴³ ICRC COMMENTARY, *supra* note 31, at 59.

⁴⁴ FM 27-10, *supra* note 38, at 27, para. 64 (b).

⁴⁵ ICRC COMMENTARY, *supra* note 31, at 60.

⁴⁶ ICRC, PROTOCOLS COMMENTARY, *supra* note 33, at 468.

⁴⁷ ICRC COMMENTARY, *supra* note 31, at 61.

Conducting operations in accordance with the laws and customs of war: This condition merely reaffirms the most basic of notions that combatants in no armed conflict can lawfully engage in acts of violence against the adversary free of the restraints and prohibitions found in the laws and customs of war. The ICRC Commentary indicates that irregulars must, in particular, observe treaties prohibiting certain weapons, must not directly attack civilians or cause disproportionate civilian casualties, or otherwise cause unnecessary suffering and destruction.⁴⁸

ABUSES IN THE APPLICATION OF THESE CONDITIONS

Leading authorities, as discussed *infra*, generally agree that the first three conditions noted above are applicable to the irregular group collectively. However, the final three conditions are applicable to both the group collectively and its individual members. Moreover, the overwhelming majority of the individual members must meet conditions (4), (5), and (6), continuously and not intermittently. If the members, generally, meet all six conditions all the time, then an individual member who fails to observe any of the last three conditions will not lose his privileged combatant status or prisoner of war status upon capture.

However, as one commentator notes, these conditions “permit an occupying power to deny POW [prisoner of war] treatment to captured guerrillas who meet all the requirements of distinction through several escape clauses not applicable with respect to regular soldiers.”⁴⁹ For example, it would be virtually impossible for the captured, single member of a resistance group to prove that his group complied with conditions (1) and (3) without endangering the security of his group. Indeed, a captured combatant who is compelled to prove that he is a member of an organized resistance movement with a responsible commander would be forced to reveal the identities and whereabouts of his comrades. To do so would be the end of the resistance movement.⁵⁰

Moreover, condition (2), that the group belong to a party to the conflict, is also subject to abuse by the detaining power. A member of such a group, who otherwise observes all the conditions, can be denied prisoner of war status simply because his captors do not recognize the party to the conflict to which he belongs. This result is likely if that party is a government in exile. In contrast, Article 4A(3) of the Third Geneva Convention, as previously noted, accords prisoner of war status to members of regular

⁴⁸ *Id.*

⁴⁹ Aldrich, *Guerrilla Combatants and Prisoner of War Status*, 31 AM. U. L. REV. 871, 872 (1982).

⁵⁰ *Id.*

armed forces, even if they belong to a Party not recognized by their captors.⁵¹

In addition, it is both improbable and unrealistic to expect that members of irregular groups, particularly resistance movements in occupied territory, can comply with condition (4) that requires them always to wear a distinctive sign recognizable at a distance.⁵² Since such fighters are generally only part-time combatants, their compliance with this condition would be suicidal.⁵³ Nevertheless, failure to do so precludes privileged combatant and, hence, prisoner of war status upon capture.

Commander W. J. Fenrick maintains that since condition (4), as well as (5) and (6), apply both to the group collectively and to its individual members, if a *majority* of the members of the group fail to meet, for whatever reason, *all* or *any* of these three conditions at *any* time, then all members of the group will not qualify as privileged combatants.⁵⁴ Thus, despite his own compliance with these conditions, an individual belonging to such a group, as well as all other members thereof, will be denied upon capture prisoner of war status and may be tried and punished as unprivileged combatants by the detaining power.⁵⁵

With regard to condition (6), it is uncertain whether the captured individual irregular has the burden of proving that his group or unit conducted their operations in accordance with the laws and customs of war. The detaining power could use this requirement to deny the single combatant prisoner of war status and therefore treat all captured members of this group or unit as unprivileged combatants on the ground that some of them may have committed war crimes. Members of regular armed forces, in contrast, do not have to prove their compliance with the laws of war. As noted, in the event they commit

⁵¹ “This would have covered the Free French Forces [under General De Gaulle], for example, but not the Maquis.” *Id.*

⁵² Although Article 4A(2)(b) does not explicitly state that such a distinctive sign be worn at all times, Solf notes that it “was nevertheless understood that it must be worn continuously in all circumstances.” He states: “[T]his requirement was, of course, incompatible with privileged combatant status for part-time combatants.” Solf, *supra* note 25, at 272.

⁵³ See Baxter, *supra* note 13, at 327-28; ROSAS, *supra* note 24, at 351; Aldrich, *supra* note 49, at 872 (stating that “[a] rule that requires him [the guerrilla fighter] to distinguish himself at all times from the civilian population will simply make him an outlaw; he cannot respect it and hope to survive”).

⁵⁴ See lecture delivered by W. J. Fenrick on Combatant and Prisoner of War Status delivered at New York University Law School—International Committee of the Red Cross and American Red Cross Seminar on International Humanitarian Law (July 1988) [hereinafter Fenrick lecture].

⁵⁵ Professor Levie states: “Inasmuch as compliance with all four conditions is ‘constitutive’ in nature, the failure of the organized resistance movement as a whole to meet the fourth condition [compliance with the laws and customs of war] makes it impossible for any of its members to qualify for prisoner of war status.” LEVIE, *supra* note 34, at 53. Other authorities indicate that it is unclear whether failure by *one* or *several* members of the group disqualifies *all* the members as privileged combatants. See ROSAS, *supra* note 24, at 334. Fenrick indicates that part of the evidence of the irregular group’s failure to meet conditions (1), (2) and (3) will lie in the failure of most of its members to comply with conditions (4), (5) and (6) on any occasion. Fenrick lecture, *supra* note 54.

war crimes, they do not forfeit their privileged combatant status and right to be prisoners of war, although they may be tried and punished for these and other pre-capture offenses.

Most of the requirements of Article 4A(2) of the Third Convention have proved over time to be extremely difficult if not, in fact, impossible for irregulars to comply with without jeopardizing their military operations. If such groups could not reasonably expect to qualify for prisoner of war status upon capture, they had little or no real incentive to observe these mandatory requirements. And, in practice, they generally have not done so. Ambassador Aldrich writes in this connection:

. . . it seems clear that the 1949 rules, which were designed to protect civilians, have in fact endangered the civilian population in occupied territory. By adopting standards of distinction that are impossible to respect and by providing escape clauses through which the occupying power can deny POW status to captured guerrillas, the 1949 Convention virtually assures that guerrillas in occupied territory will disguise themselves as civilians and that the civilian population will suffer as a result.⁵⁶

In a similar vein, Colonel Solf has written:

Realization of the inadequacy of these provisions to provide privileged combatant status for those who fight regular military forces in colonial wars, occupied territory and in struggles for self-determination, gave rise to strong initiatives to relax or abolish the 1949 convention standards for “freedom fighters,” frequently coupled with measures to release them from an obligation to comply with the law of armed conflict in their relation with unjust oppressors. Western states generally opposed these initiatives in U.N. Forums, but West European states, who had experienced Axis occupation during World War II or considered that they might again be subject to occupation, strove for some relaxation of the standard for resistance movements in occupied territory.⁵⁷

NEW RULES FOR IRREGULARS UNDER PROTOCOL I

Accordingly, one of the principal goals of the 1974-1977 Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflict, which elaborated the two Protocols of 1977 Additional to the 1949 Geneva Conventions,⁵⁸ was to fashion new rules applicable to irregular forces that would strike a compromise between these disparate positions. The compromise, reflected in Articles 43 to 47⁵⁹ of Protocol I, was essentially “[to] relax the rigid requirements of the Hague and Geneva Standards

⁵⁶ Aldrich, *supra* note 49, at 873.

⁵⁷ Solf, *supra* note 25, at 272.

⁵⁸ Protocol I, *supra* note 1; Protocol II, *supra* note 11.

⁵⁹ These articles form a section entitled “Combatant and Prisoner of War Status.”

sufficiently to provide guerrillas a possibility of attaining privileged combatant status without exposing the forces fighting them to the danger inherent in the use of civilian disguise in order to achieve surprise.”⁶⁰ By so doing, the delegates to the Conference sought to strengthen the protection of the civilian population, particularly in occupied territory, from the effects of hostilities.

Ambassador Aldrich, who was the principal drafter of this compromise, notes that these articles

. . . create a single and non-discriminatory set of rules applicable to all combatants, regular and irregular alike, and . . . prescribe necessary, limited exceptions for spies, mercenaries, and those guerrillas in occupied territory who take advantage of their apparent civilian status and conceal their weapons while moving into position for an attack. The aim of the article in each case is to make the exception as narrow as possible and to provide presumptions and procedures to prevent abuse of the exceptions.⁶¹

Article 43(1) of Protocol I provides the following new definition of armed forces:

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

Paragraph (2) of that Article stipulates that all members of the armed forces, other than medical personnel and chaplains, are combatants having the right to directly participate in hostilities. Article 44(1), in turn, states that “any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.”

Article 43 thus eliminates the distinction found in the Hague Regulations and the Third Geneva Convention between regular armed forces and irregular voluntary corps, militias, and other organized resistance movements. All components of a party’s armed forces are thereby put on an equal legal footing. Moreover, the requirement in Article 43(1) of a responsible command link between a party to the conflict and its armed forces is not made a condition for irregulars to enjoy lawful combatant status, but a condition applicable to all combatants.⁶² This provision also “makes applicable to regulars and irregulars

⁶⁰ Solf, *supra* note 25, at 273.

⁶¹ Aldrich, *supra* note 49, at 874.

⁶² Aldrich notes, however, that “the absence of either the required command link to a party to the conflict or the internal disciplinary system to enforce compliance with the law would justify a refusal to consider the force,

alike the exception from recognition of a government or authority presently applicable only to regulars under Article 4 of the [Third] Convention.”⁶³ Aldrich states in this regard: “Thus, the key issue for determining whether a person is a member of armed forces under this article is a factual issue, command link, rather than a political issue, recognition.”⁶⁴

Subject to one important exception, Article 44(2) mandates that a combatant who fails to comply with the laws of war does not forfeit his combatant or prisoner of war status. This article provides:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violation of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of the adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Article 45(1) establishes a presumption that a person who participates in hostilities is entitled upon capture to prisoner of war status if he claims that status, appears entitled thereto, or his Party claims it for him.⁶⁵ The second paragraph of that Article provides that anyone who is held not as a prisoner of

group or unit in question no covered by Article 43. The absence would also justify a consequent refusal to accord the personnel of such a unit the right to be combatants or, if captured, to be prisoners of war.” Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 1,8 85 AM. J. INT’L L. (1991).

⁶³ Aldrich, *supra* note 49, at 874.

⁶⁴ *Id.* at 875.

⁶⁵ Article 45 states:

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offense arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offense. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.
3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of

war and is to be tried for an offense connected with the hostilities can assert a right to prisoner of war status before a judicial tribunal and have that issue adjudicated. These provisions effectively shift the burden of proof to the detaining power on the question of a combatant's noncompliance with the laws of war. The individual combatant will not have to prove that his group complied with applicable rules in order to qualify for prisoner of war status. Upon proof of guilt, the individual will be responsible for any war crimes he may have committed, but not his group collectively.⁶⁶ Aldrich notes in this connection:

These procedures and clarifications of the burden of proof are probably essential changes in the law, if the captured guerrilla is not to be placed in the position of having to reveal information about the structure of his armed forces and the identity of his colleagues in order to demonstrate his entitlement to POW status and his right to have engaged in combat. Although the Protocol is silent on this point, it was not intended to change the Geneva Conventions rule that prohibits his captor from compelling the captured soldier to reveal more information than the minimum required for his identification.⁶⁷

THE NEW RULE OF DISTINCTION

The first sentence of Article 44(3) prescribes the new rule of distinction applicable to all combatants by stating:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

Unlike other treaty law, Article 44(3) does not specify how combatants are required to distinguish themselves. One authoritative commentary on the Protocols states in this regard: “Presumably a distinctive sign, which need not be fixed, or carrying arms openly would satisfy the requirement. The second sentence suggests that the open carrying of arms is the minimum requirement.”⁶⁸

A combatant who failed to distinguish himself, as required by preexisting conventional and customary law, did not violate a rule of international law (unless his conduct involved treachery), but rather disqualified himself as a privileged combatant. He was, therefore, upon capture not entitled to

communication under that Convention.

⁶⁶ *Id.* at 874-75.

⁶⁷ *Id.* at 875-76.

⁶⁸ M. BOTHE, K. J. PARTSCH, W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 253 (1982) [hereinafter *NEW RULES*].

prisoner of war status and could be tried as a common criminal for his unprivileged combatancy.

The language of this new relaxed rule makes clear, however, that the sanction for a combatant who fails to distinguish himself when so required is trial and punishment for a breach of the laws of war, but not loss of combatant and prisoner of war status.⁶⁹ Furthermore, commanders who do not enforce this new rule of distinction are similarly amenable to punishment for violating Articles 86⁷⁰ and 87⁷¹ of Protocol I. By extending liability up the chain of command, the Article provides a considerable incentive to superiors to enforce compliance with this new rule.

Significantly, this new rule of distinction implicitly recognizes for the first time the legitimacy of “part-time” combatancy. Thus, the part-time combatant who is captured while pursuing his civilian vocation or participating in a military operation *not* preparatory to an attack must be accorded prisoner of war status.⁷² However, it is clear that even while pursuing their “civilian” vocations, such persons remain

⁶⁹ Aldrich states that “the captor will have to decide whether to prosecute captured irregulars for violation of that first sentence of paragraph 3, and the military courts of the captor will have to decide whether anyone prosecuted is guilty of a violation.” Aldrich, *supra* note 62, at 9.

⁷⁰ Article 86 (failure to act) provides:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

⁷¹ Article 87 (Duty of Commanders) states:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

⁷² In this regard, paragraph 5 of Article 44 prohibits denial of prisoner of war status based on past activities. It states: “Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.” This provision, however, does not immunize the prisoner from prosecution for pre-capture offenses

combatants and as such may be lawfully attacked prior to capture.

Article 44 does not, however, give examples of such permissible military operations. The commentary of Bothe, Partsch, and Solf on the 1977 Additional Protocols suggests that the following kinds of activities would qualify as such: gathering intelligence without deception, recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda.⁷³ But this commentary does state that the meaning of “military operations preparatory to an attack” should be “broadly construed” to include “administrative and logistical activities preparatory to an attack.”⁷⁴ It notes in this regard: “As such activities are more likely to be conducted in a civilian environment, the civilian population is in greater risk of failure to distinguish in such preparatory activities, than in the ambush attack which is frequently conducted in a remote defile.”⁷⁵

FORFEITURE OF COMBATANT AND POW STATUS

The second sentence of Article 44(3) sets forth the only situations that entail forfeiture of combatant and prisoner of war status. It states:

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Art. 37, para. 1(c).⁷⁶

This sentence, which effectively relaxes the requirements of the new rule of distinction set forth in the previous sentence, is both limited in time and circumstances. If there are situations in which an armed combatant cannot distinguish himself from the civilian population by carrying his arms openly, he

that violate the laws of armed conflict, including failure to distinguish himself (Art. 44(3)) or perfidy (Art. 37).

⁷³ NEW RULES, *supra* note 68, at 252.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Aldrich admits that “the phrase ‘military operations preparatory to an attack’ is imprecise and will have to be interpreted in practice in the light of concrete situations, but the irregulars are the ones who run the risk that flows from this lack of precision, not their adversaries.” Aldrich, *supra* note 62, at 9.

cannot be obliged to do so. The question, therefore, is when and where do such situations occur?

The answer, according to the New Rules, is that such situations are “very exceptional and can exist only in occupied territory and in conflicts described in Article 1(4)” [of Protocol I, i.e., struggles against colonial domination, alien occupation and against racist regimes].⁷⁷ Both Aldrich⁷⁸ and Solf⁷⁹ concur in this interpretation. But, even in such situations, an armed combatant must distinguish himself by carrying his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

A captured combatant in this category who fails to meet these relaxed standards of distinction forfeits his combatant status and hence entitlement to be a prisoner of war. Accordingly, he can be tried by the detaining power for all his hostile acts, although those acts fully complied with the laws and customs of war. Moreover, if his acts involved killing, wounding, or capturing an enemy combatant, he could also be tried for perfidy, made a breach of the law of armed conflict under paragraph 1(c) of Article 37⁸⁰ of Protocol I. Conversely, combatants who comply with these standards in these specified situations do not lose their right to combatant or, upon capture, prisoner of war status. However, they can be tried and punished by their captor for violating the basic rule of distinction set forth in the first sentence of Article 44(3).

⁷⁷ NEW RULES, *supra* note 68, at 253.

⁷⁸ See Aldrich, *supra* note 49, at 877-78 (noting that combatants operating behind enemy lines in non-occupied territory “cannot expect to benefit from this provision and will certainly be vulnerable to loss of POW status unless they carry their arms openly or otherwise distinguish themselves at all times during their military operations preparatory to an attack”); Aldrich, *supra* note 62, at 9-10 (stating that Italy, Belgium, and New Zealand, among others, have filed on ratification of Protocol I understandings to this effect).

⁷⁹ Solf, *supra* note 25, at 276.

⁸⁰ Article 37 provides:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

It should be noted that although the United States signed Protocol I on December 12, 1977, President Reagan on January 28, 1987 in a message to the Senate indicated that the United States could not ratify the Protocol because it was “fundamentally flawed.”⁸¹ Among the flaws he cited were the new definition of combatants and the relaxation of the Third Geneva Convention’s requirements concerning prisoner of war status for irregular combatants set forth in Articles 43 and 44, respectively, of Protocol I. As the United States is not a party to this treaty and Articles 43 and 44 are new legal prescription expressly rejected by the United States, Article 4 of the Third Geneva Convention continues to be the applicable standard concerning entitlement to prisoner of war status in the case of international armed conflicts involving the United States and another state, even if that state has ratified Protocol I.

APPLICATION OF ARTICLE 4 TO CAPTURED TALIBAN AND AL QAEDA COMBATANTS

Before examining the Bush Administration’s reasons for denying Taliban and al Qaeda fighters prisoner of war status, it is useful to understand the nature of the hostilities that existed in Afghanistan prior to and after the U.S. intervention in October 2001.

The withdrawal of Soviet armed forces from Afghanistan in 1988 marked the beginning of a protracted and bloody internal armed conflict between various warring factions, including the Taliban and the Northern Alliance. It would appear that as of October 2001 the Taliban, while not at all widely recognized, was that state’s de facto government, having at least nominal control over no less than eighty percent of national territory, despite ongoing hostilities with the Northern Alliance.

The U.S. intervention on the side of the Northern Alliance against the Taliban effectively “internationalized” the conflict and fundamentally changed the nature of the ensuing hostilities. That intervention satisfied the conditions in common Article 2⁸² of the 1949 Geneva Conventions for existence

⁸¹ See Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, concluded in Geneva on June 10, 1977, 100th Cong., First Sess. (1987), *reprinted in* 26 INT’L L.; *see also* Matheson, *The United States’ Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

⁸² Under Common Article 2, an international armed conflict must involve, at the very least, a declared war, or, in its absence, any other armed conflict between two or more states. The ICRC Commentary broadly defines armed conflict as any difference between two states leading to the intervention of armed forces. *See* ICRC COMMENTARY, *supra* note 30, at 23. Internationalized civil wars are hybrid conflicts in that they are not governed entirely by either international or internal armed conflict rules. Because the Geneva Conventions contain no provisions applicable to these kinds of conflicts, the solution followed by most international lawyers has been to break down the armed conflict into its international and domestic components and, based on this differentiation, to identify the humanitarian law rules governing relations between the various warring parties. Applying this approach to the hostilities in Afghanistan, the following distinct relationships can be identified. As noted above, international armed conflict rules, including the Third Geneva Convention, apply as between U.S. and Taliban armed forces.

of an international armed conflict as between the United States and Afghanistan. As both states are Parties to the 1949 Geneva Conventions, these instruments, as well as the customary laws of war, became fully and immediately applicable as between the U.S. and Taliban armed forces in their mutual dealings.

Yet, for nearly four months the U.S. government made no official pronouncement concerning its understanding of the nature of the hostilities, the applicable law or the legal status of “battlefield detainees” it had captured or were in its custody. On February 7, 2002, the government broke its silence with the issuance of a statement by President Bush concerning the application of the Third Geneva Convention to the hostilities in Afghanistan. While affirming the United States’ “enduring commitment to the important principles of the [Third] Geneva Convention,” the statement indicates that “the war on terrorism is a war not envisioned when the Geneva Convention was signed in 1949” and that in this war “the [Third] Convention simply does not cover every situation in which people may be captured or detained, as we see in Afghanistan today.”⁸³

More particularly, the statement declares that “[a]lthough the United States does not recognize the Taliban as the legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the convention.”⁸⁴ By acknowledging the

However, as between the original parties to the civil war, the Taliban and Northern Alliance, the armed conflict, despite the United State’s intervention, remains noninternational in character. Relations between Taliban and Northern Alliances armed forces are governed by Common Article 3 and customary law rules applicable to internal hostilities. However, it is certainly arguable that the Taliban’s status as a de facto government collapsed with their abandonment of Kabul on November 12, 2001 and the capture of Kandahar on December 12, 2001. More particularly, as soon as Hamid Karzai displaced the Taliban as Afghanistan’s new interim government, the ongoing hostilities became noninternational in nature as among all the parties, including the United States. The fact that U.S. military forces were now fighting on the side of the Afghani government’s forces against Taliban dissident forces would not make the hostilities international in nature as between the United States and the Taliban. Under this scenario, as the Third Geneva Convention would no longer apply, combatants captured by the various warring parties after the installation of the Karzai government would not be entitled to prisoner of war status. For an excellent treatment of legal problems posed by these hybrid conflicts, see Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AM. U. L. REV. 145 (1983); see also Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 INT’L REV. RED CROSS 255 (1982).

⁸³ See Fact Sheet, White House Press Office, Feb. 7, 2002, available at www.whitehouse.gov/news/releases/2002/02/2002027 [hereinafter BUSH STATEMENT].

⁸⁴ *Id.* It is possible that the Administration did not even regard the Taliban as Afghanistan’s de facto government, but rather merely as one faction engaged in an ongoing civil war within a “failed” state. Despite its control over substantial portions of national territory, the Taliban exercised few, if any, of the traditional activities of government. As of October 2001, the Taliban was recognized only by Saudi Arabia, Pakistan, and Yemen. Moreover, the Taliban did not hold Afghanistan’s seat in the United Nations and was not recognized by the League of Islamic States. It is also possible that the Administration believed that the Taliban’s fighting force did not constitute Afghanistan’s armed forces, but were a self-proclaimed militia that was organized around tribes, rather than as military units, and which recruited other tribes or personnel from other tribes through temporary allegiances, defections, bribery and conscription, while also relying on foreign volunteers, including al Qaeda members, who functioned as a kind of “Praetorian Guard” for the Taliban leadership. If these were indeed material facts or considerations that the Administration believed justified the President’s decision to deny Taliban combatants

applicability of the Third Convention, the United States tacitly recognized that its armed forces were involved in an international armed conflict in Afghanistan. However, the President found that Taliban detainees are not entitled to prisoner of war status because they did not comply with the four conditions specified in Article 4A(2) of the Third Convention. To support this finding, the statement affirms that the Taliban have not “effectively distinguished themselves”⁸⁵ from the civilian population in Afghanistan, nor have they conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

As for captured al Qaeda fighters, the President’s statement merely notes that since al Qaeda is an international terrorist group and not a State Party to the Third Geneva Convention, its members are not covered by that treaty and thus are not entitled to prisoner of war status themselves.⁸⁶

To its credit, apparently after consulting with career law of war experts within the government, as well as law professors with law of war experience, the Administration altered its position to reflect longstanding U.S. practice, namely, even if captured individuals were not accorded prisoner of war status, they nonetheless would be provided the fundamental protections of the Third Geneva Convention. Thus, the Third Convention has served as a useful template for the care and treatment of captured Taliban and al Qaeda fighters. In addition, delegates of the International Committee of the Red Cross have had regular access to all persons who were detained by the U.S. military in Afghanistan and are being held at Guantanamo Bay.

On February 8, 2002, Secretary of Defense Rumsfeld, at a news conference at the Pentagon, elaborated on the reasons for the President’s decision to deny Taliban and al Qaeda detainees prisoner of war status. The Secretary noted that the Third Geneva Convention “requires soldiers to wear uniforms that distinguished them from the civilian population.”⁸⁷ The Taliban, he asserted, “did not wear distinctive signs, insignias, symbols, or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with the civilian non-combatants, hiding in mosques and populated areas.”⁸⁸ The Secretary also indicated that the Taliban “were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces make up portions of

prisoner of war status, then one is left to wonder why only some of them were explicitly noted in the President’s February 7, 2002 statement.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Press Conference, Dep’t of Defense, Secretary Rumsfeld & General Myers, Feb. 8, 2002, available at www.defenselink.mil/news/Feb.2002/t02082002_t02085d.html [hereinafter RUMSFELD STATEMENT].

⁸⁸ On January 11, 2002, Secretary Rumsfeld referred to battlefield detainees as “unlawful combatants,” stating that “unlawful combatants do not have any rights under the [Third] Geneva Convention.”

their forces.”⁸⁹

With regard to al Qaeda, he noted that it is “a non-state, terrorist network” that is not a state party to the Third Convention and “through its actions has demonstrated contempt for the principles of the Geneva Convention.”⁹⁰

President Bush’s decision clearly signaled that the United States regarded all Taliban and al Qaeda fighters as unprivileged combatants who, unlike lawful combatants under the Third Convention, would not be entitled to release at the close of hostilities and were potentially subject to trial and punishment by military commission for their unlawful combatancy.

In assessing the legal arguments advanced for denying Taliban and al Qaeda fighters prisoner of war status, it must be emphasized that one must rely exclusively on the President’s February 7, 2002 statements and the Defense Secretary’s subsequent remarks since the government has not made public any memorandum or paper that provides detailed legal arguments explaining the President’s decision.

It would appear from the President’s statement that the United States implicitly recognizes that Taliban combatants were members of Afghanistan’s regular armed forces. However, he clearly took the position that compliance by members of regular armed forces with the requirements of Article 4A(2) of the Third Convention was a legal prerequisite for their entitlement to prisoner of war status. Finding no such compliance, the President, with the stroke of his pen and citing essentially anecdotal evidence, decided to disqualify all Taliban fighters as privileged combatants, thereby precluding them prisoner of war status.

It is important to note at the outset that the fact that foreigners, including some members of al Qaeda, may have been members of the Taliban’s armed forces is, in principle, legally insufficient to deny them or all other members of these regular forces, prisoner of war status. Entitlement to such status has long been recognized as not being dependent on the nationality of the combatant. The U.S. Air Force Pamphlet specifically notes in this regard: “members of regular armed forces are lawful combatants whether they are ... nationals of the state ... [or] foreigners (including neutrals who have joined the armed forces of a Party to a conflict).”⁹¹ Moreover, antipathy for the adversary or his policies cannot

⁸⁹ See RUMSFELD STATEMENT, *supra* note 87.

⁹⁰ *Id.*

⁹¹ See AFP 110-31, *supra* note 4, at 1-5, 6; see also LEVIE, *supra* note 34, at 75 n.299, citing German Regulations No. 32, para. 513, which states: “U.S. prisoners of war in British uniforms. Prisoners of war of U.S. nationality captured as members of Canadian armed forces are considered British prisoners of war regardless of whether they joined the Canadian services before or after the entry of the United States into the war.” Levie notes that this order “systematically followed the principle that the nationality of the individual for prisoner-of-war purposes was decided by the uniform he was wearing at the time of capture.” He notes moreover that this was the position of the U.S. government.

justify noncompliance with the law of war. The law applies equally to all parties to an armed conflict and its application is not conditional on the causes or origin of the hostilities. This customary law principle is expressly recognized in the U.S. Air Force Pamphlet, which states that it is “unacceptable” to make the legal protections of victims of conflict, including prisoners of war, “contingent on the causes of the conflict.”⁹²

As noted in a previous section of this paper, the proposition that members of regular armed forces are ineligible for prisoner of war status because some or all of its members have violated the laws of war or other conditions specified in Article 4A(2) is dubious at best and most certainly at odds with U.S. practice in other recent international armed conflicts. It is worth repeating, in this regard, that the United States accorded prisoner of war status during the Korean and Vietnam armed conflicts to captured members of the regular armed forces of the Peoples Republic of China, North Korea, and North Vietnam, respectively, despite these armies’ poor record of compliance with the laws of war. In addition, U.S. and British military tribunals convened after World War II held that denial of prisoner of war status to captured Allied troops in uniform was a war crime.⁹³

To assert today that all members of regular armed forces must scrupulously comply with the conditions in Article 4A(2) might well work to the detriment of members of U.S. armed forces who are captured in future armed conflicts. If the United States can insist on such compliance as a material condition for granting prisoner of war status, so too can its adversaries. Thus, for example, if members of a platoon allegedly committed war crimes, the adversary could invoke *their* specific violations as a justification for denying prisoner of war status to *all other members* of U.S. armed forces involved in the hostilities. Simply put, the Bush Administration’s position on this point may well prove to be as unwise in terms of policy as it is flawed in law.

Accordingly, consistent with the law and past U.S. practice, members of the Taliban’s armed forces should either have been unconditionally granted prisoner of war status, or, at a minimum, been presumed to be prisoners of war unless and until subsequently determined otherwise as required by the Third Geneva Convention. It is important to point out that the granting of such status to Taliban combatants in no way would have impeded interrogating them for the purpose of gathering intelligence⁹⁴

However, international practice suggests that the detaining power at its discretion may grant or deny prisoner of war status to its nationals who are captured while serving in the armed forces of the enemy. *See In re Territo*, 156 F.2d 1942 (1946); *see also Koi v. Public Prosecutor*, 9 BILC 250 (1968) (Judicial Committee of the Privy Council).

⁹² *See* AFP 110-31, *supra* note 4, at 1-5.

⁹³ *See In re Dosler*, I LAW REPORTS OF TRIALS OF WAR CRIMINALS 22-34 (1945); *In re Falkenhorst*, VI WAR CRIMES REPORTS 39-44 (1946).

or precluded the right of the United States to prosecute any prisoner suspected of having committed a criminal offense either during or prior to the outbreak of the hostilities, including crimes related to the September 11 attacks and other terrorist attacks against U.S. property and persons overseas.

Even assuming the applicability of the conditions specified in Article 4A(2) to Taliban combatants, the violations of these standards cited by the President and Defense Secretary are somewhat suspect both on the facts and the law. For example, both officials charge that the Taliban did not effectively distinguish themselves from civilians by wearing uniforms or other distinctive sign. As has been noted, members of regular armed forces, as well as irregular combatants, are not legally required to wear traditional uniforms in order to qualify for prisoner of war status. Indeed, they may permissibly dress in civilian clothing so long as they *also* wear some distinctive sign, which can be a cap or even an armband, that visibly distinguishes them from the civilian population.

It is not too far fetched to assume that the Taliban and Northern Alliance in the course of their long civil strife came to be able to recognize each other's combatants on sight. It is known that the Taliban customarily wear distinctive dark turbans, while combatants of the Northern Alliance wear scarves or other distinguishing apparel. Both modes of dress, while perhaps not ideal, are, nonetheless, sufficient to satisfy the principle of distinction under current law. It is also somewhat disingenuous for the Administration to press this particular point because if the Northern Alliance clearly knew how to identify the enemy, then so too did their U.S. allies in the field.

The fact that some Taliban combatants may have hidden in mosques or otherwise sought to blend in with the civilian population certainly placed those civilians at greater incidental risk and arguably deprived those buildings of their presumptive status as civilian objects. But, such "shielding" activities by regular combatants, while punishable, simply do not entail forfeiture of entitlement to prisoner of war status.

Furthermore, Secretary Rumsfeld's claims that Taliban forces were not organized into military units with an identifiable chain of command is neither persuasive, nor does it apparently comport with the facts on the ground. In the first place, it is not for the adversary, but for the other party to the conflict to determine how to organize its forces and effectuate its command structure. The enemy's command and control facilities and networks are particularly rich strategic military objectives and normally will be accorded priority in the selection of targets for attack. Thus it is expected that the adversary will use all means necessary to conceal from, confuse and mislead the enemy as to their nature and location and might seek impermissibly to "shield" them from attack. The fact that command and control links may be

⁹⁴ Article 17 of the Third Convention obliges a prisoner of war, when questioned, to give only his name, rank, date of birth, and serial number or equivalent. The Detaining Power cannot punish or threaten him for refusing to respond or to provide additional information. Under no circumstances can he be tortured or subject to other forms of coercion to elicit information.

destroyed or disrupted, resulting in fragmentation of fighting forces in the field, does not mean that those forces are, as such, unorganized or without responsible command. In the second place, it is difficult to comprehend how the Taliban could have utterly defeated the Northern Alliance (at least until the United States's intervention) and gained control over very nearly all of Afghanistan's territory without a minimally cohesive fighting force having a basic command structure. Indeed, Secretary Rumsfeld, in response to a reporter's question, was unable to reconcile his claim with reports that the U.S. military had attacked the Taliban's "command and control" networks.⁹⁵

In contrast, the President and Defense Secretary are unquestionably correct in their depiction of al Qaeda as an international terrorist organization. As a quintessential nonstate actor, it is legally incompetent to ratify the 1949 Geneva Conventions, and, at least before and at the time of the September 11 attacks, its members had not been authorized by any state to engage in hostilities or commit hostile acts on its behalf against the United States, nor can they be said at those relevant times to have belonged to, or been members of the armed forces of any state that was or considered itself at war with the United States. In perpetrating the September 11 attacks and other terrorist acts against U.S. persons and property, al Qaeda members were thus engaged in private hostilities against the United States for which each and every one of its members could be punished. In this sense, the Bush Administration is also correct in stating that its global "war" against al Qaeda is not the kind of armed conflict that was envisioned by the framers of the 1949 Geneva Conventions since this new "war" lacks the necessary parties and other requisites to qualify as either an international or noninternational armed conflict as defined in those treaties.

Thus, for example, had members of al Qaeda launched the September 11 attacks from a platform on the high seas and subsequently been captured on that structure by U.S. military personnel, they would manifestly not be privileged combatants entitled to prisoner of war status and therefore could be tried as common criminals for their unprivileged combatancy. But, the members of al Qaeda with whom this paper is concerned were not detained or captured on any such structure while engaging in purely private hostilities, but rather while fighting in an international armed conflict on the side of a state party to the Geneva Conventions against the United States. This factual circumstance is both critical and material to a proper determination of their status and rights upon capture under the Third Geneva Convention.

Some al Qaeda combatants apparently were part of the Taliban's regular forces, while others fought independently in groups alongside the Taliban. As noted, Article 4A(1) and (3) of the Third Convention confers prisoner of war status on members of a state Party's regular armed forces, irrespective of the nationality of the combatant(s). These particular al Qaeda combatants should not have been denied

⁹⁵ See RUMSFELD STATEMENT, *supra* note 87.

prisoner of war status on the grounds that they or other members of al Qaeda committed violations of U.S. or international law prior to or coincident with the September 11 attacks. Conferral of prisoner of war status on these combatants, as has been previously explained, would not have immunized them from prosecution for their involvement in pre-capture offenses punishable under U.S. law, including the September 11 attacks, the attack against the U.S.S. Cole, and the 1998 attacks against the U.S. embassies in Kenya and Tanzania.

The legal situation, however, of those al Qaeda fighters who fought in brigades or other units alongside, but without being part of the Taliban's armed forces is quite different. They are irregular combatants and thus in order to qualify for prisoner of war status, they must comply, as previously explained, with the specific requirements specified in Article 4A(2) of the Third Geneva Convention. In this regard, since the members of such irregular groups must continuously comply with these rigid requirements, it is difficult to imagine how any members of these groups could qualify for that status if some of their members committed war crimes or did not distinguish themselves from civilians in the course of the hostilities in Afghanistan. Moreover, al Qaeda's responsibility for the September 11 attacks, which antedated the initiation of hostilities between the United States and Afghanistan, could be highly probative evidence as to that group's unwillingness to comply with the most basic rules applicable in any armed conflict.

The Bush Administration's decision to deny Taliban and al Qaeda combatants prisoners of war status also raises questions concerning its compliance with the procedure specified in Article 5 of the Third Geneva Convention. Article 5 states in pertinent part:

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.⁹⁶

The Administration's actions clearly indicate that it believes that no such "doubt" arose in the case of these combatants and hence there was no need to convene tribunals to determine their status. The Bush Administration's critics contend that Article 5 creates a presumption that a captured combatant is a prisoner of war unless a competent tribunal, and not the Executive branch, determines otherwise on an individualized basis. These critics cite U.S. military manuals, as well as the U.S. military's use of these tribunals in the past, in support of their position. A review of these and other relevant sources and materials tends to support their argument.

⁹⁶ See Third Geneva Convention, *supra* note 2, Art. 5.

In this regard, the U.S. Army Field Manual states that Article 5 of the Third Convention “applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in aid of the armed forces and who asserts he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.”⁹⁷ The U.S. Air Force Pamphlet similarly provides: “[U]pon capture any person, who does not appear to be entitled to PW status, but who had committed a belligerent act is required to be treated as a PW until his status is properly determined.”⁹⁸

Article 5 of the Third Convention does not specify the precise nature of this “competent tribunal” or the procedures that it should follow. However, the U.S. Army Field Manual states that a competent tribunal for this purpose is “a board of not less than three officers acting according to such procedures as may be prescribed for tribunals of this nature.”⁹⁹

It was not until the Vietnam armed conflict that the United States issued directives on the subject and established operational Article 5 tribunals.¹⁰⁰ Professor Howard Levie notes in this regard, “As early as May 1966, the United States Army reacted to the problem of the need to have a formalized procedure for deciding the doubtful cases of entitlement to prisoner-of-war status of individuals captured by its forces.”¹⁰¹ He observes, moreover, that these directives were “probably the first one[s] issued by any armed forces fully implementing the provisions of the second paragraph of Article 5.”¹⁰² Under MACV Directive 381-46 an Article 5 tribunal would be convened only when the detained person had committed a belligerent act and there was doubt as to his entitlement to prisoner of war status or a previous determination denying him prisoner of war status had been made and the detainee or someone on his behalf claimed his entitlement to that status.¹⁰³

Moreover, the U.S. Military Judge Advocate General Handbook is rather categorical on the need for such tribunals when it declares “when doubt exists as to whether captured enemy personnel warrant POW status, Art. 5 [Third Geneva] Tribunals must be convened.”¹⁰⁴ This publication notes that similar

⁹⁷ FM 27-10, *supra* note at 41, para. 71(b).

⁹⁸ AFP 110-31, *supra* note 4, at 3-3(2).

⁹⁹ FM 27-10, *supra* note 41, at 30, para. 71(c).

¹⁰⁰ See U.S. Military Assistance Command, Vietnam (MACV) Directive 20-5, May 17, 1966; MACV DIRECTIVE 27-5, Nov. 2, 1967; MACV DIRECTIVE 381-46, Dec. 27, 1967, annex A, *reprinted in* 62 AM. J. INT’L L. (1968) [hereinafter MACV DIRECTIVE 381-46].

¹⁰¹ LEVIE, *supra* note 34, at 57.

¹⁰² *Id.*

¹⁰³ See MACV DIRECTIVE 381-46, *supra* note 100, at para. 5f.

tribunals were used during the Gulf War in 1992, stating “In the Gulf War, Operation Desert Storm netted a large number of persons thought to be [prisoners of war], who were actually displaced civilians Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to refugee camps. Whether the tribunals were necessary as a matter of law is open to debate—the civilians had not ‘committed a ‘belligerent act,’ nor was their status ‘in doubt.’”¹⁰⁵

Perhaps the most telling, if not damning, disagreement with the Bush Administration’s position on this matter came from the headquarters of the ICRC in Geneva. In a press release issued a day after President Bush’s statement indicating that Taliban and al Qaeda fighters would be denied prisoner of war status, the ICRC stated, in part “International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are 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.”¹⁰⁶

It is arguable that the Bush Administration could have saved itself from much criticism had it permitted the military to convene Article 5 tribunals to independently determine whether Taliban and al Qaeda fighters were not entitled to prisoner of war status. Determinations by such tribunals most probably would have been perceived at home and abroad as far more just and impartial than a conclusive pronouncement by the Executive branch.¹⁰⁷ Moreover, these determinations, unlike the President’s decision, could not be attacked for not having complied with the law. The sharp criticism generated by the Executive’s decision can be seen largely as a self-inflicted wound that was as avoidable as it was foreseeable.

It should be pointed out that because Taliban and al Qaeda fighters have been denied prisoner of war status and are being held as unprivileged combatants¹⁰⁸ does not mean that they are thereby without

¹⁰⁴ U.S. MILITARY JUDGE ADVOCATE GENERAL OPERATIONAL HANDBOOK ch. 5, at 7 (M. Lacey & B. Bill eds., 2000).

¹⁰⁵ *Id.*

¹⁰⁶ *See* ICRC, COMMUNICATION TO THE PRESS No. 02/11 (Feb. 8, 2002).

¹⁰⁷ As noted in the text, any Article 5 tribunal would have been convened by the military, which is part of the Executive branch. It is indeed possible that some critics would not have been satisfied even with this procedure, arguing that Article 5 tribunals would have done the Administration’s bidding.

¹⁰⁸ It has been suggested that since they were denied prisoner of war status, Taliban and al Qaeda fighters should nonetheless be deemed protected persons under the 1949 Fourth (Civilian) Geneva Convention based on a statement in the ICRC’s Commentary on that instrument. *See* ICRC, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 51 (J. Pictet, ed., 1958), stating that

rights and protections under certain basic rules of international human rights and humanitarian law. The next section of this paper examines this important subject.

RIGHTS AND PROTECTIONS OF UNPRIVILEGED COMBATANTS UNDER INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

That the United States must afford certain minimum human rights protections to unprivileged enemy combatants who fall into its hands in the course of an international armed conflict is dictated by treaty and customary norms to which it is bound under international human rights and humanitarian law. These are separate bodies of law with distinct origins, fields of application and supervisory mechanisms.¹⁰⁹ In many instances, however, they provide overlapping and mutually reinforcing protections applicable to persons falling under the authority and control of a state during wartime, including unprivileged combatants captured during an international armed conflict. This section of the paper will focus upon three core areas of protection to which unprivileged combatants are entitled under international human rights and humanitarian law: protection against unlawful detention; humane treatment; and fair trial guarantees.

THE UNITED STATES' OBLIGATIONS UNDER PERTINENT TREATY AND CUSTOMARY INTERNATIONAL LAW

The United States is bound by treaty and customary norms of international human rights and humanitarian law. Human rights treaties to which the United States is a party include the International Covenant on Civil and Political Rights (“ICCPR”),¹¹⁰ ratified on June 8, 1992, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UN

“every person in enemy hands must have some status under international laws; he is either a prisoner of war ... covered by the Third Convention ... [or] a civilian covered by the Fourth Convention” *Id.* Whether members of armed forces and irregular groups who, for whatever reason, do not qualify for prisoner of war status under Article 4 of the Third Convention are *automatically* protected under the Fourth Convention is problematical. Professor Richard Baxter maintained that irregular combatants who fail to comply with Article 4A(2)’s conditions and are captured while operating outside occupied territory or in the territory of the detaining power are not entitled to protection “either as peaceful civilians or prisoner of war” under the 1949 Geneva Conventions. BAXTER, *supra* note 13, at 328. The ICRC has not publicly claimed protected status under the Fourth Convention for al Qaeda and Taliban fighters in U.S. custody.

¹⁰⁹ ICRC PROTOCOLS COMMENTARY, *supra* note 33, at 1366, para. 4513.

¹¹⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR (Supp. No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (hereinafter ICCPR).

Torture Convention”),¹¹¹ ratified on October 21, 1994, and the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention Against Racial Discrimination”),¹¹² also ratified on October 21, 1994.

In addition, by virtue of its ratification of the Charter of the Organization of American States (“OAS Charter”)¹¹³ on June 15, 1951, the United States is bound to observe the “essential rights of man” referred to in the articles of that instrument. These rights in turn are contained in and defined by the American Declaration of the Rights and Duties of Man (“American Declaration”),¹¹⁴ which was adopted together with the OAS Charter during the Ninth International Conference of American States in 1948¹¹⁵ and which proclaims such fundamental protections as the right to life, liberty and personal security, the right of protection from arbitrary arrest, and the right to due process of law.¹¹⁶ The American Declaration constitutes a source of legal obligation for the United States not only by virtue of its ratification of the

¹¹¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 (hereinafter UN Torture Convention).

¹¹² International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 (hereinafter Convention Against Racial Discrimination).

¹¹³ Charter of the Organization of American States, OAS Treaty Series, Nos. 1-C and 61, 119 U.N.T.S. 1609, *entered into force* January 16, 1952, as amended by the Protocol of Buenos Aires, *signed* Feb. 27, 1967, the Protocol of Cartagena de Indias, approved on December 5, 1985, the Protocol of Washington, approved on December 14, 1992 and the Protocol of Managua, adopted on June 10, 1993 (hereinafter OAS Charter).

¹¹⁴ American Declaration of the Rights and Duties of Man (1948) (hereinafter American Declaration), in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS THE INTER-AMERICAN SYSTEM, at 15, OEA/Ser.L/V/I.4 rev. 8 (May 22, 2001) (hereinafter BASIC DOCUMENTS). According to the Inter-American Court of Human Rights, the American Declaration of the Rights and Duties of Man is the text that defines the human rights referred to in the OAS Charter to which member states are bound. *See* I/A Court H.R., Advisory Opinion OC-10/89 “Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A No. 10 (1989), paras. 43–46, *citing, inter alia*, OAS General Assembly Resolutions 314 (VII-0/7) of June 22, 1977, 371 (VIII-O/78 of July 1, 1978 and 370 (VIII-O/78 of July 1, 1978). The Inter-American Commission on Human Rights has reached similar conclusions. *See, e.g.*, Case 9647, Res. 3/87, James Terry Roach and Jay Pinkerton (United States), ANNUAL REPORT OF THE IACHR 1986-87, paras. 46-49; Case No 12.067, Report No. 48/01, Michael Edwards *et al.* (Bahamas), ANNUAL REPORT OF THE IACHR 2000.

¹¹⁵ For a brief history of the Inter-American human rights system, see BASIC DOCUMENTS, *supra* note 114, at 1-14, available at <<http://www.cidh.org>>.

¹¹⁶ *See* American Declaration, *supra* note 114, Art. I (“Every human being has the right to life, liberty and the security of his person”); Art. XXV (“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty of nonfulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.”); Art. XXVI (“Every accused person is presumed to be innocent until proven guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws, and not to receive cruel, infamous or unusual punishment.”).

OAS Charter, but also because the core provisions of the American Declaration, like comparable protections under the Universal Declaration of Human Rights (“Universal Declaration”),¹¹⁷ may be considered to constitute a part of customary international law binding on all states.¹¹⁸

As with international human rights law, the United States’ obligations under international humanitarian law flow from both treaty and custom. The United States is a party to numerous international humanitarian law treaties pertinent to the situation of captured combatants and other persons falling under the power of a party to an international armed conflict, including the Hague Convention (IV) of 1907¹¹⁹ ratified on November 27, 1909 and the four Geneva Conventions of 1949¹²⁰ ratified on August 2, 1955. Much of this body of treaty law is also widely considered to constitute a part of customary international law,¹²¹ including the grave breach provisions of the four 1949 Geneva Conventions,¹²² as well as Article 3 common to those treaties. Indeed, the latter provision, which has been described as

¹¹⁷ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948) (hereinafter Universal Declaration).

¹¹⁸ The Inter-American Commission on Human Rights, for example, has ruled that it is “beyond question” that the core rights protected under the American Declaration, which mirror those under the Universal Declaration of Human Rights, constitute customary norms of international law, including the right to life, the right to liberty and the right due process and to a fair trial. Case No. 12.379, Report No. 19/02 (Inadmissibility), Alfredo Lares Reyes *et al.* (United States), para. 46 and n.23, citing Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982); LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 574-75 (5th ed. 1998); Vratislav Pechota, *Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS—THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32, 38-39 (Louis Henkin ed., 1981); Restatement of Foreign Relations Law of the United States (Third) (1987) § 702 & comments k, n.

¹¹⁹ 1907 Hague Convention and Regulations, *supra* note 27.

¹²⁰ 1949 Geneva Conventions, *supra* note 2.

¹²¹ *See, e.g.*, ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 (hereinafter Advisory Opinion on Nuclear Weapons), paras. 79, 84; ICJ, Nicaragua v. United States, Judgment of 27 June 1984, ICJ REP. 1986, at 14, para. 220 (hereinafter “Nicaragua Case”); ICTY, Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-9401 (Appeals Chamber) (hereinafter Tadic Appeals Chamber Jurisdiction Decision”), paras. 98, 102, 112, 134. *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Resolution Security Council 808 (1993), UN Doc. S/25704 & Add.1, May 3, 1993; UN Security Council Resolution 827, May 25, 1993; 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, S.C. Res. 827, U.N. SCOR, 48th Sess., UN Doc S/Res/827, of 25 May 1993, Arts. 2-5 (hereinafter ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/Res/955 (1994), Arts. 24 (hereinafter ICTR Statute); Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), corrected by the *procès-verbaux* of Nov. 10, 1998 and July 12, 1999, *entered into force* July 1, 2002 (hereinafter Rome Statute); IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999 (hereinafter Colombia Report), at 82, para. 39. *See generally* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 239, 244, 247 (1996).

¹²² Tadić AC Decision Jurisdiction, *supra* note 121. *See also* U.N. GAOR, 3d Committee, 23d Sess., UN Doc. A/C.3/SR.1534 (1968), UN GAOR, 25th Session, Supp. No. 28 UN Doc. A/8028 (1970).

“essentially pure human rights law,”¹²³ is considered to reflect the “elementary considerations of humanity” applicable in all armed conflicts¹²⁴ and addresses minimum standards governing humane treatment, deprivations of liberty and fair trial protections as follows:

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

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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. 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:

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

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.¹²⁵

The legal status of the provisions of Additional Protocols I¹²⁶ and II¹²⁷ to the 1949 Geneva Conventions in relation to the United States is more controversial. The United States is not a party to either of these instruments, and, as noted above, has expressly rejected certain provisions, including the definition of combatants under Article 43 and the relaxation under Article 44 of the Third Geneva

¹²³ Case No. 11.137, Report No. 55/97, Juan Carlos Abella v. Argentina, ANNUAL REPORT OF THE IACHR 1997 (hereinafter Abella Case), para. 158, n.19.

¹²⁴ In its decision in the Nicaragua Case, the International Court of Justice declared that the mandatory minimum rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949 reflect “elementary considerations of humanity” applicable under customary international law to any armed conflict, whether it is of an internal or international character. Nicaragua Case, *supra* note 121, para. 218. *See similarly* Tadić AC Decision Jurisdiction, *supra* note 121, paras. 98, 102.

¹²⁵ Article 3 common to the 1949 Geneva Conventions, *supra* note 2.

¹²⁶ Protocol I, *supra* note 1.

¹²⁷ Protocol II, *supra* note 11.

Convention's requirements concerning prisoner of war status for irregular combatants.¹²⁸

At the same time, certain aspects of Additional Protocols I and II have been recognized as declaratory of existing rules or as having crystallized emerging rules of customary law. Although Protocol II applies to a more narrowly defined category of internal armed conflicts than common Article 3,¹²⁹ its core provisions may be considered to constitute a part of customary law, to the extent that these provisions develop and supplement the protections enshrined in common Article 3.¹³⁰ Provisions falling within this category likely include Articles 2, 4, 5, and 6 of Protocol II, which develop upon the provisions of common Article 3 governing nondiscrimination, humane treatment, deprivations of liberty and fair trial guarantees, and which were inspired by, and in some instances based word for word upon, the ICCPR.¹³¹

Of particular pertinence to the legal protections of unprivileged combatants is Article 75 of Protocol I, which, like the other provisions of the Protocol, applies to situations of international armed conflict as defined under Article 2 common to the 1949 Geneva Conventions and Article 1(4) of Protocol I. Article 75(1) of Protocol I defines the Article's field of application as follows:

75.(1) In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

¹²⁸ See *supra* note 81 and accompanying text.

¹²⁹ Common article 3 to the 1949 Geneva Conventions applies to all armed conflicts "not of an international character," while Protocol II is limited to those armed conflicts not covered by Protocol I which take place in the territory of a state party "between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol II, *supra* note 11, Art. 1.

¹³⁰ See Protocol II, *supra* note 11, Art. 1(1) (providing that the Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application [...]"); see also Tadic Appeal Chamber Jurisdiction Decision, *supra* note 121, para. 117 (concluding that many of the provisions of Protocol II "can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles."); Matheson *supra* note 81, at 430-31 (indicating in his capacity as Deputy Legal Adviser of the United States Department of State that "the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process.").

¹³¹ See, e.g., ICRC PROTOCOLS COMMENTARY, *supra* note 33, at 1366-67, paras. 4507-14.

As noted in the first part of this analysis, unprivileged combatants are by reason of their failure to comply with the requirements of Article 4 of the Third Geneva Convention excluded from the protections of prisoners of war under that treaty and also fail to qualify as peaceable civilians for the purposes of the Fourth Geneva Convention. By its terms, then, Article 75 of Protocol I would explicitly encompass unprivileged combatants as “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under [the] Protocol.”¹³²

The core provisions of Article 75 should also be considered to constitute a part of customary international law binding on the United States. This status arises in part from the fundamental nature of the protections under Article 75, which pertain to such matters as humane treatment and fair trial standards. The International Committee of the Red Cross has stated in this connection that

Article 75, even more than common Article 3 of the 1949 Conventions, which was called a “mini Convention,” constitutes a sort of “summary of the law” particularly in the very complex field of judicial guarantees, which will certainly facilitate the dissemination of humanitarian law and the promulgation of its fundamental principles.¹³³

The customary legal status of the central provisions of Article 75 is reinforced by the fact that its text addressing fundamental guarantees and penal prosecutions were drawn, *mutatis mutandis*, from the terms of Articles 4 and 6 of Protocol II, which in turn were based to a significant extent upon the corresponding provisions of the ICCPR.¹³⁴ Further, the United States itself has previously recognized the customary legal status of the principles encapsulated in the core provisions of Article 75,¹³⁵ including the prohibited acts under Article 75(2),¹³⁶ the fair trial protections under Article 75(4)¹³⁷ and the particular

¹³² *Id.* at 1366-67, paras. 4507-14.

¹³³ *Id.*, at 865, para. 3007.

¹³⁴ *Id.* at 865, para. 3005.

¹³⁵ *See Matheson, supra* note 81, at 427-28.

¹³⁶ Article 75(2) provides: “The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment ; and (iv) Mutilation; (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) The taking of hostages; (d) Collective punishments; and (e) Threats to commit any of the foregoing acts.”

¹³⁷ Article 75(4) of Protocol I provides: “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all

protections for women and families under Article 75(5).¹³⁸

The present discussion will therefore focus and elaborate upon the minimum and nonderogable standards under Article 75 of Protocol I pertaining to unlawful detention, humane treatment, and fair trial standards.

PRINCIPLES GOVERNING THE INTERPRETATION AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

In addition to the above treaty and customary law obligations, several principles governing the interpretation and application of international human rights and humanitarian law must also be taken into account in identifying the basic protections and rights to which unprivileged combatants in the hands of the United States are entitled.

It is well recognized that the international human rights commitments of states apply at all times, whether in times of peace or situations of armed conflict, to all persons subject to a state's authority and control.¹³⁹ The International Court of Justice has stated in this regard, for example, that “the protection of

necessary rights and means of defence; (b) No one shall be convicted of an offence except on the basis of individual penal responsibility; (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) Anyone charged with an offence is presumed innocent until proved guilty according to law; (e) Anyone charged with an offence shall have the right to be tried in his presence; (f) No one shall be compelled to testify against himself or to confess guilt; (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.”

¹³⁸ Article 75(5) of Protocol I provides: “Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.”

¹³⁹ That international human rights obligations apply at all times, subject to lawful derogations, is recognized in the provisions of human rights treaties themselves as well as the jurisprudence of their supervisory bodies. *See, e.g.*, ICCPR, *supra* note 110, Art. 2(1) (obliging States parties to respect and ensure the rights recognized thereunder “to all individuals within its territory and subject to its jurisdiction”); UNHRC, López Burgos (Uruguay), Communication No. 52/1979, para. 12.3 (admitting a communication by a person who had been kidnapped by Uruguayan agents in neighboring states on the basis that State Parties to the ICCPR are responsible for the actions of their agents in foreign territory). *See similarly* I/A Court H.R., Advisory Opinion OC-2/82, *The Effect of Reservations in the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Sept. 24, 1982, Ser. A, No. 2, para. 29 [hereinafter Advisory Opinion OC-2/82]; Report No. 38/99, Victor Saldaño

the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”¹⁴⁰ International humanitarian law, on the other hand, generally does not apply in peacetime¹⁴¹ and its fundamental purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities, which, as outlined above, includes the fundamental protections under Article 75 of Protocol I applicable to “persons who are in the power of a Party to the conflict.” Consequently, in situations of armed conflict, both international human rights law and international humanitarian law apply concurrently,¹⁴² and a state that is a party to a conflict must afford the fundamental protections under these regimes of law to persons falling within its power in accordance with the terms of the applicable instruments.

In the context of the present discussion, there is no question that Taliban and al Qaeda fighters captured by the United States in Afghanistan have fallen into and remain within the power of the United States and that the United States exercises full and effective authority and control over these individuals. Accordingly, the United States’ fundamental obligations under conventional and customary international law, including those under the ICCPR and Article 75 of Protocol I, extend to these detainees.

The interpretation and application of international human rights and humanitarian law share the absolute requirement that protection of the law be provided without discrimination of any kind, including adverse distinctions based upon such factors as race, nationality, religion or political opinion. Article 2(1) of the International Covenant on Civil and Political Rights, for example, provides that “[e]very State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁴³ Common Article 3 to the 1949 Geneva Conventions similarly provides that the

(Argentina), Annual Report of the IACHR 1998, paras. 15-20; IACHR, Precautionary Measures Adopted in respect of the Detainees at Guantanamo Bay (March 12, 2002); Eur. Ct. H.R., *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, Ser. A, No. 310, paras. 59-64.

¹⁴⁰ Advisory Opinion on Nuclear Weapons, *supra* note 121, para. 25. *See also* ICCPR, *supra* note 110, Art. 4 (permitting derogations from certain obligations under the Covenant “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”). *See similarly* *Abella Case*, *supra* note 123, para. 158.

¹⁴¹ 1949 Geneva Conventions, *supra* note 2, common Art. 2; *Abella Case*, *supra*, note 123, para. 159, n.20 (noting that the four 1949 Geneva Conventions contain provisions applicable in peacetime for States Parties, such as the obligation for the dissemination of the convention contained in Article 144 of the Fourth Geneva Convention and the authorization in Article 14 of the same Convention to establish, in peacetime, hospital and safety zones).

¹⁴² *See* Advisory Opinion on Nuclear Weapons, *supra* note 121, para. 25; *Abella Case*, *supra* note 123, para. 158.

¹⁴³ ICCPR, *supra* note 110, Art. 2(1).

protections under that article shall apply “without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria,” and Article 75(1) of Protocol I requires persons falling under that provision to enjoy its protections “without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.”¹⁴⁴ Accordingly, the United States must comply strictly with the prohibition against discrimination in affording the protections of international human rights and humanitarian law to unprivileged combatants captured in Afghanistan. This requirement is augmented by the commitments assumed by the United States under the Convention Against Racial Discrimination, Article 1(1) of which defined “racial discrimination” as follows:

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁴⁵

Also pertinent to the coextensive application of international human rights and humanitarian law is the fact that the governing treaties in both areas share what are often referred to as “most-favorable-to-the-individual” clauses.¹⁴⁶ According to Article 5(2) of the International Covenant on Civil and Political Rights, for example,

[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 75(8) of Protocol I similarly provides that

[n]o provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

¹⁴⁴ See similarly Third Geneva Convention, *supra*, note 2, Art. 16; Fourth Geneva Convention, *supra* note 2, Art. 13; Protocol II, *supra* note 11, Art. 2 (providing that “[t]his Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as “adverse distinction”) to all persons affected by an armed conflict as defined in Article 1”).

¹⁴⁵ Convention against Racial Discrimination, *supra* note 112, Art. 1(1).

¹⁴⁶ Colombia Report, *supra* note 121, para. 16, n.10.

In accordance with these provisions, one instrument may not be used as a basis for denying or limiting, through derogations¹⁴⁷ or otherwise, other favorable or more extensive human rights that individuals might otherwise be entitled to under international or domestic law or practice.¹⁴⁸ In this way, these instruments establish an interrelated and mutually reinforcing regime of human rights protections with which the United States' treatment of persons under their authority and control, including unprivileged combatants, must conform.

International human rights and humanitarian law treaties have also been regarded as constituting more than bilateral or multilateral arrangements between states and therefore as subject to rules of interpretation somewhat distinct from those applicable to other types of treaties. More particularly, human rights obligations have been recognized as different from other international commitments, because states are, through their international human rights commitments, deemed to submit themselves to a legal order within which they assume various obligations, not in relation to other states parties, but toward all individuals within their jurisdiction.¹⁴⁹ Similarly, the responsibilities of states parties to respect and ensure respect for the provisions of the 1949 Geneva Conventions have been viewed as amounting to more than arrangements agreed upon on the basis of reciprocity, but rather as constituting "a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties."¹⁵⁰

Finally, as with all international obligations, the United States must perform its human rights and humanitarian law obligations in good faith, and cannot invoke its domestic law as an excuse for

¹⁴⁷ The ICCPR, like other international human rights treaties, permits states parties to take measures derogating from certain provisions under narrowly prescribed situations of emergency. *See* ICCPR, *supra* note 110, Art. 4 ("1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."). In contrast, with very limited exceptions, the provisions of international humanitarian law treaties are nonderogable. For one exception, see Protocol I, *supra* note 1, Art. 54(5) (providing that "[i]n recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibition contained in paragraph 2 [against the attack, destruction, removal or rendering useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity").

¹⁴⁸ *See generally* T. Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 73, 89 (L. Henkin ed., 1981).

¹⁴⁹ *See, e.g.*, Advisory Opinion OC-2/82, *supra* note 139, para. 29; Eur. Court H.R., *Case of Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, Series A No. 310, paras. 59-64.

¹⁵⁰ ICRC COMMENTARY, *supra* note 31, at 17-18.

noncompliance with these obligations.¹⁵¹ This includes the obligation to respect and to ensure to all persons subject to their jurisdiction the free and full exercise of human rights without discrimination of any kind.¹⁵²

Notwithstanding the concurrent application of international human rights and humanitarian law in situations of armed conflict, international human rights protections must in certain circumstances be interpreted and applied in light of particular rules of international humanitarian law in order to properly and effectively regulate state conduct and fundamental protections in situations of war. It has been recognized, for example, that the International Covenant on Civil and Political Rights and other universal and regional human rights instruments were not designed to regulate in detail armed conflict situations and, as a consequence, do not contain specific rules governing the use of force and the means and methods of warfare in that specific context. Accordingly, in situations of armed conflict, including the circumstances arising out of the conflict in Afghanistan, international humanitarian law may serve as *lex specialis* in interpreting and applying certain provisions of international human rights instruments.¹⁵³

¹⁵¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Art. 27. According to the Inter-American Court of Human Rights, “[p]ursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions.” I/A Court H.R., Advisory Opinion OC-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)*, 9 December 1994, Ser. A, No. 14, para. 35, citing Greco-Bulgarian “Communities,” Advisory Opinion, 1930, P.C.I.J., Ser. B, No. 17, p.32; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, P.C.I.J., Ser. A/B, No. 44, p. 24; *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932, P.C.I.J., Ser. A/B, No. 46, p. 167.

¹⁵² See ICCPR, *supra* note 110, Art. 1(1) (obliging States Parties to the Covenant to “respect and to ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the present Covenant”); Article 1 common to the 1949 Geneva Conventions and Protocol I (requiring High Contracting Parties to “respect and to ensure respect for” the provisions of the treaties in all circumstances).

¹⁵³ In its Advisory Opinion on the Legality of Nuclear Weapons, for example, the International Court of Justice considered that the question whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the International Covenant on Civil and Political Rights could only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. Advisory Opinion on Nuclear Weapons, *supra* note 121, paras. 23-34. The Inter-American Commission on Human Rights has similarly noted that

both Article 4 [right to life] of the American Convention and humanitarian law applicable to armed conflicts protect the right to life and, thus, prohibit summary executions in all circumstances. However, reference to Article 4 of the Convention alone may be insufficient to assess whether, in situations of armed conflicts, the right to life has been infringed. This is in part because the Convention is devoid of rules that either define or distinguish civilians from combatants and other military targets. Nor does the Convention specify the circumstances under which it is not illegal, in the context of an armed conflict, to attack a combatant or civilian or when civilian casualties as a consequence of military operations do not imply a violation of international law. Consequently, in such circumstances, one must necessarily look to and apply definitional

Drawing upon this framework of international human rights and humanitarian law rules and principles binding upon the United States, the minimum protections that must be afforded to unprivileged combatants will be reviewed in three areas: lawful detention, humane treatment, and fair trial guarantees.

DETENTION OF UNPRIVILEGED COMBATANTS

International human rights law addresses the protection of personal liberty principally in the context of the right not to be subjected to arbitrary arrest or detention, and only permits the detention of persons in cases or circumstances expressly provided by law and subject to strict adherence to the procedures defined thereunder.¹⁵⁴ Article 9 of the ICCPR, for example, provides in part that “[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁵⁵

While the right to personal liberty is not expressly included among the nonderogable rights in the ICCPR and similar treaties, it is widely considered that certain aspects of this right are so fundamental that the exigencies of a situation may never reasonably permit their suspension. This restriction is due in part to the indispensable role that controls on arbitrary detention play in the protection of nonderogable rights such as the right to life and the right to humane treatment.¹⁵⁶ Nonderogable aspects of the right to personal liberty have been considered to include the rights:

- Not to be deprived of physical liberty except for the reasons and under conditions established by law;
- To be informed, at the time of the arrest and in a language they understand, of the reasons for their detention and to be promptly informed of any charges against them;

standards and relevant rules of international humanitarian law as sources of authoritative guidance in the assessment of the respect of the inter-American Instruments in combat situations.

Abella Case, *supra* note 123, para. 161.

¹⁵⁴ I/A Court H.R., *Suárez Rosero* Case, Judgment of November 12, 1997, Ser. C No. 35, para. 43.

¹⁵⁵ ICCPR, *supra* note 110, Art. 9(1). *See similarly* Universal Declaration, *supra* note 117, Art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile”); American Declaration, *supra* note 113, Art. XXV(1) (“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law”).

¹⁵⁶ *See, e.g.*, I/A Court H.R., Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Oct. 6, 1987, Ser. A, No. 9 (hereinafter Advisory Opinion OC-9/87), para. 31.

- To be brought promptly before a judge or other officer authorized by law to exercise judicial power to determine the lawfulness of his or her arrest or detention and to order his or her release if the arrest or detention is unlawful; and
- To be tried within a reasonable time or to be released without prejudice to the proceedings, which release may be subject to guarantees to assure his or her appearance for trial.¹⁵⁷

As with all other international human rights protections, the right to personal liberty and security applies during times of armed conflict, except to the extent that it may be the subject of lawful derogation. At the same time, it must be recognized that, as international human rights treaties were not specifically designed to regulate international armed conflict situations, they do not contain specific rules governing such concepts as prisoner of war status and the detention of privileged and unprivileged enemy combatants in the course of hostilities and are devoid of rules addressing the detention or internment of such persons. Therefore, international human rights law may not be sufficient to determine whether the detention of a combatant during an armed conflict is arbitrary or otherwise unlawful and it may be necessary to have regard to the *lex specialis* of international humanitarian law.

International humanitarian law in turn, like international human rights law, permits the detention of persons based upon certain grounds and subject to certain conditions. Of particular significance in this regard is the fact that international humanitarian law has throughout its history recognized that enemy combatants in armed conflicts may, upon capture, continue to be held and interned.¹⁵⁸ This entitlement stems in part from the principle of military necessity and the need to prevent the opposing party from benefiting from the continued participation of members of their forces who have laid down their arms or

¹⁵⁷ For discussions of nonderogable protections relating to the right to personal liberty and security, see UNHRC, General Comment No. 29, States of Emergency (Art. 4), adopted at the 1950th meeting on 24 July 2001, para. 16; INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (Geneva, 1983) (hereinafter International Commission of Jurists, States of Emergency), at 461-63, Nos. 21, 22, 23, 24, 26, 29, 34, 36; International Law Association, Paris Minimum Standards of Human Rights Norms in a State of Emergency, reproduced in R. Lillich, *Current Developments: The Paris Minimum Standards of Human Rights in a State of Emergency*, 79 AM. J. INT'L L. 1072 (1985) (hereinafter Paris Minimum Standards); The Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR, 7 HUM. RTS. Q. (1985), at 3 (hereinafter Siracusa Principles), Princs. 70(e)-(g); NICOLE QUESTIAUX, STUDY OF THE IMPLICATIONS FOR HUMAN RIGHTS OF RECENT DEVELOPMENTS CONCERNING SITUATIONS KNOWN AS STATES OF SIEGE OR EMERGENCY, United Nations Commission on Human Rights, ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1982/15, July 27, 1982, at 45; IACHR, Ten Years of Activities 1971-1981 (General Secretariat, OAS: 1982) (hereinafter IACHR, Ten Years of Activities), at 317, 342.

¹⁵⁸ See, e.g., Third Geneva Convention, *supra* note 2, Art. 5 (“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”), Art. 21 (“The Detaining Power may subject prisoners of war to internment.”).

those placed *hors de combat* by sickness, wounds, detention or any other cause.¹⁵⁹

Further, the Third Geneva Convention permits the internment of prisoners of war by a Detaining Power until the cessation of active hostilities, when they must be released and repatriated. However, prisoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings and, if necessary, until the completion of the punishment.¹⁶⁰ While like requirements are not expressly prescribed in respect of unprivileged combatants who may fall into the hands of an enemy, Article 75(6) of Protocol I suggests that similar principles should be extended to those protected by Article 75, by specifying that “[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided for by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.” Under applicable international human rights standards as informed by humanitarian law norms, therefore, it appears that the United States may detain unprivileged combatants captured in the Afghan hostilities at least until the cessation of active hostilities and, if such detainees are the subject of criminal proceedings for an indictable offense, until the end of such proceedings and, if necessary, until the completion of the punishment.

This is not to say, however, that the detention of unprivileged combatants during an international armed conflict is unregulated. International humanitarian law provides for several mechanisms that, when available, serve to monitor the detention of persons apprehended during the course of hostilities. The terms of the 1949 Geneva Conventions contemplate two supervisory mechanisms in particular: the Protecting Powers regime, which, to date, has never been employed and has not been available in the context of the conflict in Afghanistan;¹⁶¹ and the services of the International Committee of the Red

¹⁵⁹ According to the ICRC, “prisoners of war are in the power of the State which has captured them. This power is based on force, and the first concern of the captor is to maintain it by resisting any escape or attempted escape by prisoners.” ICRC COMMENTARY, *supra* note 31, p. 178. *See similarly* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (D. Fleck ed., 1995), at 326 (indicating that the “purpose of captivity is to exclude enemy soldiers from further military operations. Since soldiers are permitted to participate in lawful military operations, prisoners of war shall only be considered as captives detained for reasons of security, not as criminals [...] Taking an enemy combatant prisoner can therefore never serve as a punishment but only to prevent further participation in military operations against the detaining power. Because of this fundamental perception of lawful operations during an armed conflict, the internment of prisoners of war must differ from that of convicts.”).

¹⁶⁰ Third Geneva Convention, *supra* note 2, Arts. 118, 119.

¹⁶¹ *See, e.g., id.*, Art. 8 (“The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties. The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers. The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.”).

Cross, which may be offered and accepted in the context of international or noninternational armed conflicts¹⁶² and which have been employed in the context of combatants captured by the United States in Afghanistan.¹⁶³

At the same time, it has been recognized that in certain situations, the rules and mechanisms under international humanitarian law may prove insufficient to properly regulate the detention of victims of armed conflict. This may occur, for example, where continued existence of active hostilities becomes uncertain, or where a belligerent occupation continues over a prolonged period of time. In such circumstances, the regulations and procedures prescribed under international humanitarian law may prove inadequate to properly safeguard the minimum human rights standards of detainees.¹⁶⁴ In circumstances of this nature, human rights supervisory mechanisms, including *habeas corpus* and comparable remedies under domestic law, may necessarily supercede international humanitarian law where this is necessary to safeguard the fundamental rights of those detainees.¹⁶⁵ The continued confinement of unprivileged combatants captured by the United States in Afghanistan should be monitored in light of these considerations, to ensure that any uncertainties arising in relation to the existence or subsistence of the armed conflict or other circumstances that may have justified their detention do not operate to diminish or undermine the minimum international standards of protection to which they are entitled. Whether and in what manner events may unfold so as to require the application of human rights supervisory mechanisms remains to be seen.

¹⁶² See, e.g., Article 3 common to the 1949 Geneva Conventions (providing, *inter alia*, that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”); Third Geneva Convention, *supra* note 2, Art. 9 (“The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.”).

¹⁶³ See BUSH STATEMENT, *supra* note 83.

¹⁶⁴ See, e.g., ICRC COMMENTARY, *supra* note 31, 546 (observing with respect to the repatriation of prisoners of war following the Korean War that “[t]he International Committee of the Red Cross had access to the camps set up by the United Nations, but was never in a position to make similar verifications in North Korea. The Protecting Powers never took up their duties, on either side. Moreover, the prisoners of war were never able to correspond with their families or to receive parcels from them. Thus, the essential provisions of the Convention were not applied and the application of Article 118 was considerably affected thereby. The Convention constitutes a whole and if some of its essential provisions are neglected, the whole of it is jeopardized”).

¹⁶⁵ See similarly Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 266 (2000), citing Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 70, 70-74 (1990) (suggesting that where international humanitarian law proves inadequate to address certain situations such as prolonged military occupations, the applicable human rights protections should be invoked to fill the void).

HUMANE TREATMENT OF UNPRIVILEGED COMBATANTS

International human rights and humanitarian law exhibit perhaps their greatest convergence in the principles and standards of humane treatment, which in both fields are predicated on fundamental respect for human dignity. The International Criminal Tribunal for the former Yugoslavia has observed in this regard that the

essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is [...] the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.¹⁶⁶

Foremost among the humane treatment protections common to both bodies of law is the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment. Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”¹⁶⁷ This right is also nonderogable under Article 4(2) of the ICCPR. Also pertinent in this connection is Article 10(1) of the ICCPR, which provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect of the inherent dignity of the human person.”¹⁶⁸

The prohibition of torture and other cruel, inhuman, or degrading treatment or punishment under international human rights law has been further elaborated upon in the UN Torture Convention, to which the United States is also a party, which defines torture as

[a]ny 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 other 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

¹⁶⁶ ICTY, *The Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgment of December 19, 1998 (Trial Chamber II), para. 183.

¹⁶⁷ ICCPR, *supra* note 110, Art. 7. *See similarly* Universal Declaration, *supra* note 117, Art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); American Declaration, *supra* note 114, Art. XXV (providing that every individual who has been deprived of his liberty “has the right to humane treatment during the time he is in custody”).

¹⁶⁸ ICCPR, *supra* note 110, Art. 10(1).

only from, inherent in or incidental to lawful sanctions.¹⁶⁹

Moreover, Article 2(2) of the UN Torture Convention specifically provide that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁷⁰

Article 75(2) of Protocol I, which tracks the wording of common Article 3, provides for similar and more specific humane treatment protections:

75. (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

(i) Murder;

(ii) Torture of all kinds, whether physical or mental;

(iii) Corporal punishment ; and

(iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts.

Under both international human rights and humanitarian law, violations of this prohibition are regarded as sufficiently grave to warrant not only state responsibility, but individual criminal responsibility on the part of those individuals participating in the violations.¹⁷¹

It is therefore beyond question that the United States is subject to an absolute and nonderogable obligation under international human rights and humanitarian law to ensure that unprivileged combatants under its power are not subjected to torture or other cruel, inhuman or degrading treatment or punishment. This applies to all aspects of the detainees’ treatment, including the transfer of detainees, methods of

¹⁶⁹ UN Torture Convention, *supra* note 111, Art. 1(1).

¹⁷⁰ *Id.*, Art. 2(2).

¹⁷¹ *See, e.g., id.*, Art. 4 (“1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature”); Third Geneva Convention, *supra* note 2, Art. 130 (obliging High Contracting Parties to search for and prosecute or hand over to another High Contracting Party for prosecution persons alleged to have committed, or to have ordered to be committed, grave breaches, and including among the acts that constitute grave breaches when committed against protected persons or property “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health”). *See also* Tadic Appeal Chamber Jurisdiction Decision, *supra* note 121, para. 134 (finding that customary international law imposes criminal liability for serious violations of common Article 3).

interrogation, conditions of detention, and any form of punishment imposed for disciplinary or penal offenses.¹⁷²

As in the case of protection against arbitrary or prolonged detention, effective supervisory mechanisms are critical to guaranteeing humane treatment protections. As observed by the Inter-American Court of Human Rights, effective supervisory mechanisms for persons in detention perform a “vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him or her against torture or other cruel, inhumane or degrading punishment or treatment.”¹⁷³ As noted above, international humanitarian law provides for several mechanisms that, when available, serve to monitor the detention of persons apprehended during the course of hostilities, including the Protecting Powers regime under the 1949 Geneva Conventions and the services of the International Committee of the Red Cross. The mandates of these mechanisms include supervising compliance with minimum standards of treatment of individuals who have been deprived of their liberty for reasons relating to an armed conflict.¹⁷⁴ And as previously noted, the services of the International Committee of the Red Cross have been employed in the context of combatants captured by the United States in Afghanistan.¹⁷⁵

As observed above, however, there may be circumstances in which the supervisory mechanisms under international humanitarian law are not properly engaged or available, or where the detention or internment of civilians or combatants continues for a prolonged period and the regulations and procedures under international humanitarian law prove inadequate to properly safeguard the minimum standards of treatment of detainees. Where these circumstances arise, as with protections against arbitrary detention, human rights supervisory mechanisms, including *habeas corpus* and comparable remedies under domestic law, may necessarily supercede international humanitarian law where this is necessary to safeguard the fundamental rights of those detainees. Accordingly, should the confinement of unprivileged

¹⁷² For authorities addressing various aspects of the right to humane treatment in the context of detention, see *Muteba v. Zaire*, (124/1982) Report of the Human Rights Committee, UN Official Records of the General Assembly, 22^d Sess., Supp. No. 40, (1984); I/A Court H.R., *Loayza Tamayo* Case, Sept. 19, 1997, Ser. C, No. 33; Case 10.970, Report No. 5/96, Raquel Martín de Mejía (Perú), Annual Report of the IACHR, at 185 (1995); Eur. Ct. H.R., *Ireland v. United Kingdom*, Jan. 18, 1978, Ser. A, No. 25 (1979-80) 3 E.H.R.R. 25.

¹⁷³ Advisory Opinion OC-9/87, *supra* note 156, para. 31.

¹⁷⁴ See, e.g., Third Geneva Convention, *supra* note 2, Art. 78 (permitting prisoners of war to apply to the representatives of the Protecting Powers in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity or internment); Art. 9 (providing that the “provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief”).

¹⁷⁵ See *supra* note 163 and accompanying text.

combatants captured by the United States in Afghanistan continue for a prolonged period, the adequacy of existing supervisory mechanisms should be reevaluated to ensure that the minimum international standards of protection to which they are entitled are effectively protected.

UNPRIVILEGED COMBATANTS AND FAIR TRIAL PROTECTIONS

As with the standards governing the right to humane treatment, there is marked convergence between international human rights and humanitarian law in minimum fair trial protections, including the standards applicable to unprivileged combatants.

Articles 14 and 15 of the International Covenant on Civil and Political Rights provide a detailed catalogue of substantive and procedural fair trial guarantees as follows:

14. 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

15. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.¹⁷⁶

Conventional and customary international humanitarian law provides for very similar protections.

Article 75(4) of Protocol I in particular prescribes the following fair trial requirements for persons

¹⁷⁶ ICCPR, *supra* note 110, Arts. 14, 15. *See similarly* Universal Declaration, *supra* note 117, Art. 11 (“1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence. 2. No one shall be held guilty of any penal offense on account of any act of omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed”); American Declaration, *supra* note 114, Art. XXVI (“Every accused person is presumed to be innocent until proven guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment”).

protected under that Article:

75.(4) No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) No one shall be convicted of an offence except on the basis of individual penal responsibility; (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) Anyone charged with an offence is presumed innocent until proved guilty according to law; (e) Anyone charged with an offence shall have the right to be tried in his presence; (f) No one shall be compelled to testify against himself or to confess guilt; (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

It is evident from a comparison of these two provisions that they share a common nucleus of fair trial requirements. These include the following:

- (a) The right to respect for fundamental principles of criminal law, including the prohibition of retroactive criminal law, the presumption of innocence, and the *non-bis-in-idem* principle;
- (b) The right to be tried by a competent, independent and impartial tribunal in conformity with applicable international standards. It is worth observing in this regard that distinctions in standards exist between the standard of independence and impartiality applicable to the trial of civilians as compared with members of the military. In respect of the prosecution of civilians, this requires trial by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try

civilians.¹⁷⁷ Military courts are, on the other hand, generally considered competent to prosecute members of a state's military for crimes relating to the functions that the law assigns to military forces and, during international armed conflicts, may try enemy combatants, provided that the minimum requirements of due process are guaranteed. Article 84 of the Third Geneva Convention expressly provides in this connection that

[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.¹⁷⁸

Although the provisions of Article 75 of Protocol I do not address this point, there appears to be no reason to consider that a different standard would apply as between privileged and unprivileged combatants;

(c) The right to due procedural guarantees, including the rights of an accused:

- (i) To prior notification in detail of the charges against him or her;
- (ii) To defend himself or herself personally and to have adequate time and means to prepare his or her defense;
- (iii) Not to be compelled to be a witness against himself or herself or to plead guilty;
- (iv) To be examine witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as opposing witnesses; and

¹⁷⁷ See, e.g., Colombia Report, *supra* note 121, para. 25. Some human rights supervisory bodies have suggested, however, that in exceptional circumstances military tribunals or special courts might be used to try civilians but only where the minimum requirements of due process are guaranteed. See, e.g., UNHRC, *Fals Borda v. Colombia*, Comm. No . 46/1979, 27 July 1982; Eur. Ct. H.R., *The Greek Case*, 1969, 12 Y.B. Eur. Conv. on H.R. 12, para. 328; UNHRC, General Comment 13 (Art. 14), *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/Gen/1/Rev.1 at 14 (1994), para. 4; Eur. Ct. H.R., *Case of Incal v. Turkey*, 8 June 1998, Reports 1998-IV, para. 70.

¹⁷⁸ Third Geneva Convention, *supra* note 2, Art. 84.

- (v) The right to have judgment pronounced publicly.

As with the right to personal liberty, the right to a fair trial is not listed as a nonderogable right in the principal international human rights instruments, including the ICCPR. Nevertheless, it is broadly considered that the core fair trial protections, including those enumerated above, are so essential that their suspension can never be justified.¹⁷⁹ Indeed, no human rights supervisory body has yet found the exigencies of a genuine emergency situation sufficient to justify suspending even temporarily basic fair trial safeguards. It is during times of emergency when due process safeguards are particularly crucial in order to guard against the enhanced risk of abuse of a state's exceptional authority and to protect other rights that are nonderogable.¹⁸⁰

A comparison of the above international human rights and humanitarian law standards also indicates that there are several fundamental protections included under Article 14 of the International Covenant on Civil and Political Rights that are not explicitly enumerated in Article 75 of Protocol I. These include:

- the right of an accused to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
- in the event he is convicted, the right to have his conviction and sentence reviewed by a higher tribunal according to law.

Notwithstanding their absence from Article 75 of Protocol I, these protections should be considered applicable in penal prosecutions against unprivileged combatants detained during international armed conflicts. More particularly, these guarantees are properly considered to fall within the parameters

¹⁷⁹ See UNHRC, General Comment No. 29, *supra* note 157, para. 16; International Commission of Jurists, States of Emergency, *supra* note 157, at 427-428, Nos. 1-8; Paris Minimum Standards, *supra* note 157, Art. 7; Siracusa Principles, *supra* note 157, Principles 70(e) – (g); IACHR, Report on the Situation of Human Rights in Peru (2000) OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, paras. 71-73.

¹⁸⁰ See *e.g.* Advisory Opinion OC-9/87, *supra* note 156, paras. 21-30.

of broader protections that are included under Article 75(4), including the right to be tried by a court respecting the fundamental aspects of generally recognized principles of regular judicial procedure, the right to all necessary rights and means of defense, and the right to be advised on conviction of his or her judicial and other remedies and of the time limits within which they may be exercised. Further, Article 75(8) of Protocol I precludes Article 75 from being construed so as to limit or infringe any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by the provisions. The United States could not, therefore, rely upon the absence of the above protections from Article 75(4) as a basis for denying unprivileged combatants the protections that are otherwise guaranteed under Article 14 of the ICCPR.

CONCLUSION

The events of September 11, 2001 have demonstrated that nonstate actors engaged in terrorist activities having a global reach and network are capable of perpetrating massive acts of violence with devastating consequences. This phenomenon may well lead to future developments in international law to more effectively characterize and regulate this form of violence and those who engage in it. Any changes in the law are only speculative at this stage, however, and consequently states are bound by international law as it presently stands in their military and other responses to terrorist violence.

This analysis has attempted to clarify one area that has witnessed considerable confusion in the wake of the U.S. military action in Afghanistan, namely the proper standards and procedures for determining whether captured fighters are privileged combatants entitled to prisoner of war status under the Third Geneva Convention or whether they constitute unprivileged or unlawful combatants under international humanitarian law. To this end, it has canvassed the legal distinction between privileged and unprivileged combatants in conventional and customary international humanitarian law, including the conditions under Article 4(A)(1) of the Third Geneva Convention necessary for members of regular forces to qualify for privileged combatant and prisoner of war status, and the more rigorous standards under Article 4(A)(2) of the Third Geneva Convention for members of irregular forces to be afforded the same status.

It has also assessed, in light of these standards and based upon the limited information available, the situation of Taliban and al Qaeda fighters captured by the United States during its military action in Afghanistan. It has concluded that members of the Taliban's armed forces should have been unconditionally granted prisoner of war status or, at a minimum, been presumed to be prisoners of war unless and until subsequently determined otherwise as required by Article 5 of the Third Geneva Convention. The proper treatment of al Qaeda fighters was found to depend in part upon a factual

determination as to whether they participated in hostilities as part of the Taliban's regular armed forces, in which case they, like the Taliban, should have been treated as regular combatants as provided for under Article 4A(1) of the Third Geneva Convention, or whether they fought in brigades or other units alongside but not as part of the Taliban's armed forces, in which case they would constitute irregular combatants subject to the specific and more rigorous requirements under Article 4(A)(2) of the Third Geneva Convention in order to qualify as privileged combatants.

The lack of certainty concerning the status of Taliban and al Qaeda fighters as illustrated by this analysis also raised questions concerning the United States' compliance with the requirements of Article 5 of the Third Geneva Convention, which, in light of the United States' past practice, should have resulted in the convocation of competent tribunals to independently determine whether Taliban and al Qaeda fighters were not entitled to prisoner of war status.

Finally, the paper demonstrates that even if captured Taliban and al Qaeda are considered to be unprivileged combatants, the United States is nevertheless obliged under conventional and customary international human rights and humanitarian law to afford to those combatants minimum standards of human rights protection. These include in particular the rights and principles under the ICCPR, the American Declaration of the Rights and Duties of Man, and Article 75 of Protocol I governing lawful detention, humane treatment and fair trial protections. The analysis also finds that the supervisory mechanisms under international humanitarian law, including the services of the International Committee of the Red Cross, might be appropriate and sufficient at present for securing compliance with these standards. However, where evidence suggests that the armed conflict or other circumstances justifying the combatants' detention have ceased, the detention continues for a prolonged period, or it otherwise appears that the fundamental rights of the captured combatants are no longer properly or effectively guaranteed, the supervisory mechanisms prescribed under international human rights law, including *habeas corpus* and comparable remedies, may necessarily supercede those under international humanitarian law to ensure the detainees' protection.



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