

Use and Abuse of the Laws of War In the “War on Terrorism”

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Introduction

Unfortunately, war, terrorism, widespread deliberate attacks against civilians, and violence by non-State actors are not new phenomena. Neither is it new that groups consider their aim so noble that it justifies any means or that they deliberately place themselves outside the existing international order and fight against that order across national borders. Many (e.g., early communist) revolutionary or anarchist movements of the past had universal aims and fought, with very little restraint, against the existing political and economic (e.g., capitalist and imperialist) system worldwide.

Traditionally, when the main actors of the international system, i.e., States, were confronted with such international or similar, but purely domestic, challenges, the States employed the first line of defense against the restraints of the laws of war—denying that the laws of war applied, even when the challenge took on the intensity of an armed conflict. They applied national criminal laws and tried to deal with the trans-national aspect of the challenge through judicial cooperation in criminal matters. They insisted that they were not engaged in hostilities, but in law enforcement. Although reluctantly, States could not deny that international human rights law (to the extent that it was not suspended due to the emergency situation) and domestic constitutional guarantees applied to the situation.

Three primary rationales may have encouraged the reluctance to apply the laws of war, which in conformity with contemporary practice, I prefer to call “international humanitarian law” (IHL). First, States feared internationalizing domestic

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challenges. Second, even when the challenge clearly transcended national borders, States feared that recognizing the applicability of the laws of war would confer a certain status upon their non-State enemy. Under traditional international law, recognition of belligerency by the affected State meant, in addition, that non-State insurgents became the subjects of all the rights and obligations provided for by the law of *international* armed conflicts and that other States had the rights and obligations of neutral States.¹ Third, once triggered, IHL must perforce apply equally to both parties to a conflict; otherwise, it would never be respected.² No State therefore wanted to be placed, if only for the purpose of applying humanitarian rules, on the same level as that of a non-State actor.

Hopefully, and in conformity with applicable treaty rules, a State subject to an armed attack by a non-State actor would recognize that IHL of non-international armed conflicts applied. That law is less detailed and less protective than IHL of international armed conflicts and it explicitly states that its application does not affect the status of the parties.³ IHL of non-international armed conflicts does not require, as does that of international armed conflicts, the classification of enemy persons (e.g., as prisoners of war) or of territories (e.g., as an occupied territory), but simply provides fundamental guarantees for all those who do not, or no longer, directly participate in the

1. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163/II COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 119, 145 (1979).

2. See Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Preamble, para. 5, 1125 U.N.T.S. 3, 7 [hereinafter Protocol I]; MARCO SASSOLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 83-87, 665, 681, 682 (1999) (referencing precedents, *inter alia*, of the U.S. Military Tribunal at Nuremberg). See generally Christopher Greenwood, *The Relationship Between jus ad bellum and jus in bello*, 9 REV. INT'L STUD. 221 (1983); François Bugnion, *Guerre juste, guerre d'agression et droit international humanitaire*, 847 INT'L REV. RED CROSS 523 (2002); Robert Kolb, *Origin of the Twin Terms jus ad bellum/jus in bello*, 320 INT'L REV. RED CROSS 553 (1997); HENRI MEYROWITZ, *LE PRINCIPE DE L'ÉGALITÉ DES BELLIGÉRANTS DEVANT LE DROIT DE LA GUERRE* (1970).

3. Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 75 U.N.T.S. 31, 32 [hereinafter Convention I]; Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 75 U.N.T.S. 85, 86-88 [hereinafter Convention II]; Convention [No. III] relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 135, 136-38 [hereinafter Convention III]; Convention [No. IV] relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287, 288-90 [hereinafter Convention IV].

hostilities.⁴ It does not (as the law of international armed conflicts does through the very essence of combatant status and privilege) hinder the State from punishing, under its domestic legislation, all those who participate in the hostilities (for the sole fact that they did so). It simply requires that State punishment comply with “judicial guarantees which are recognized as indispensable by civilized peoples.”⁵

Since the great shock of September 11, 2001, the U.S. administration, challenged by the nebula of international terrorism, personified by Al-Qaeda and Ussama Bin Laden, chose an entirely different approach.⁶ It declared, first, that it was engaged in an international armed conflict. This was entirely correct as far as hostilities against Afghanistan (or, later, against Iraq) were concerned. Astonishingly, however, the administration proceeded to declare that it was engaged in a single worldwide

4. Convention I, *supra* note 3, art. 3, 75 U.N.T.S. at 32; Convention II, *supra* note 3, art. 3, 75 U.N.T.S. at 86-88; Convention III, *supra* note 3, art. 3, 75 U.N.T.S. at 136-38; Convention IV, *supra* note 3, art. 3, 75 U.N.T.S. at 288-90. *See generally* Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609-17 [hereinafter Protocol II].

5. Convention I, *supra* note 3, art. 3(1(d)), 75 U.N.T.S. at 34; Convention II, *supra* note 3, art. 3(1(d)), 75 U.N.T.S. at 88; Convention III, *supra* note 3, art. 3(1(d)), 75 U.N.T.S. at 138; Convention IV, *supra* note 3, art. 3(1(d)), 75 U.N.T.S. at 290. *See* Protocol II, *supra* note 4, at art. 6, 1125 U.N.T.S. at 613-14 (detailing protections for penal prosecutions).

6. *See* Anthony Dworkin, *Excerpts from an Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense*, CRIMES OF WAR, Dec. 16, 2002, <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last visited Apr. 10, 2004) (giving a legal explanation of the U.S. position); Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, *Padilla v. Rumsfeld*, 02 Civ. 4445 (MBM), 4-6 (S.D.N.Y. Aug. 27, 2002) *available at* <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf> (last visited Aug. 21, 2003) [hereinafter *Padilla Respondents' Response*]. Such position was partly accepted by the courts in *Hamdi v. Rumsfeld*, 296 F.3d 278, 280-81 (4th Cir. 2002), and *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), but rejected, concerning a U.S. citizen arrested far away from any conceivable battlefield, in *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2nd Cir. 2003). The U.S. Supreme Court has still to give its assessment of this theory. *See* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S.Ct. 534 (2003). *See also* Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 249 (2003), for a critical assessment of the U.S. position in particular; Catherine Moore, *International Humanitarian Law and the Prisoners at Guantanamo Bay*, INT'L J. HUM. RTS. 1, 2-6 (2003); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325 (2003); Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled*, 1 J. INT'L CRIM. JUST. 284, 287-90 (2003); and Michael J. D. Sweeney, *Detention at Guantanamo Bay—A Linguistic Challenge to Law*, 30 HUM. RTS. 15, 15-17 (2003).

international armed conflict against a non-State actor (Al-Qaeda) or perhaps also against a social or criminal phenomenon (terrorism) if not a moral category (evil).⁷ This worldwide conflict started—without the United States characterizing it as such at that time—at some point in the 1990s and will continue until victory. Next, while the United States claims in this conflict all the prerogatives that IHL of international armed conflicts confers upon a party to such a conflict (e.g., the right to attack members of the enemy armed forces as long as they do not surrender, or the right to detain prisoners of war without any judicial decision until the end of active hostilities), it denies the enemy the protection afforded by most of that law.⁸ Lastly, all those considered to be involved on the enemy side in the “war on terrorism,” even those who are—rightly or wrongly—denied the benefit of full protection by IHL of international armed conflicts, are not dealt with under domestic criminal legislation, any other new or existing legislation, or international human rights law, because, as the administration claims, their treatment is entirely and exclusively ruled by some mysterious rules of customary IHL.⁹

Intended as the branch of international law providing protection to all those affected by or involved in armed conflicts, IHL has thus become the justification for denying such people and others any protection afforded by human rights law and domestic legislation.

I will argue hereafter that all parts of the U.S. administration’s approach I just described are either contrary to existing international law or correct only for some persons in some circumstances other than those currently discussed. I will then briefly deal with the distinct question whether it would be possible and desirable to elaborate a new law along the lines suggested by the U.S. administration.

I. The Qualification of the “War on Terrorism” under International Humanitarian Law

Currently, IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions¹⁰ and the two 1977 Additional

7. See Paust, *supra* note 6, at 326-28.

8. See *id.* at 330-32.

9. American Society of International Law, *United States: Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba* (April 12, 2002), at <http://www.asil.org/ilib/ilib0508.htm#r2> (last visited Feb. 12, 2004).

10. Convention I, *supra* note 3, 75 U.N.T.S. 31; Convention II, *supra* note 3, 75

Protocols.¹¹ The United States is a party to the former, but not to the latter. It recognizes, however, Protocol II as desirable or even as existing law,¹² and many, but not all, provisions of Protocol I as reflecting customary international law.¹³ The four Geneva Conventions and Protocol I apply to international armed conflicts. Common Article 2 to the Geneva Conventions states that the Conventions “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.”¹⁴ Only States can be parties to the Geneva Conventions. Al-Qaeda, terrorism, or evil are not States. Therefore, the Geneva Conventions do not apply to a conflict between the United States and these non-State actors and amorphous concepts. There is no indication confirming what seems to be the view of the U.S. administration, i.e., that the concept of international armed conflict under customary international law is larger. State practice and *opinio juris* do not apply the law of international armed conflict to conflicts between States and some non-State actors. On the contrary, and in conformity with the basics of the Westphalian system, States have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which States were never prepared to apply those same rules, but only more limited humanitarian rules.

The law of international armed conflict covers some parts of the “war on terrorism”: all hostilities directed against forces representing another State (such as Afghanistan) or acting *de facto*, under the direction or control of such State¹⁵ (which may

U.N.T.S. 85; Convention III, *supra* note 3, 75 U.N.T.S. 135; Convention IV, *supra* note 3, 75 U.N.T.S. 287.

11. Protocol I, *supra* note 2, 1125 U.N.T.S. 3; Protocol II, *supra* note 4 1125 U.N.T.S. 609.

12. A Message from the President of the United States regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, US Government Printing Office, 100th Congress, 1st session, Treaty Doc. 100-2, Washington D.C. (1987), *reprinted in* SASSOLI & BOUVIER, *supra* note 2, at 603-05 (1999).

13. Michael J. Matheson, The United States Position in the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Address Before the Humanitarian Law Conference, *in* 2 AM. U. INT’L L. REV. 415, 419-30 (1987). At the time Matheson was the Deputy Legal Adviser of the U.S. State Department.

14. Convention I, *supra* note 3, art. 2, 75 U.N.T.S. at 32; Convention II, *supra* note 3, art. 2, 75 U.N.T.S. at 86; Convention III, *supra* note 3, art. 2, 75 U.N.T.S. at 136; Convention IV, *supra* note 3, art. 2, 75 U.N.T.S. at 288. *Cf.* Protocol I, *supra* note 2, arts. 1(3), 1(4), 1125 U.N.T.S. at 7 (expanding the field of application to national liberation wars, a position vehemently opposed by the United States).

15. *See* Prosecutor v. Tadic, 38 I.L.M. 1518, 1540-46 (Int’l Tribunal for the

have been the case for Al-Qaeda forces in Afghanistan, but not elsewhere). Other parts of that "war" are clearly not covered by IHL of international armed conflicts. Until now, it was regretted, mainly by humanitarian organizations, that once there was an international element to a conflict in a given territory, the entire conflict could not be classified as wholly international, but had, under consistent State practice, to be split off into its components.¹⁶ Therefore, a worldwide conflict could even less be characterized as international simply because some of its components are international.

Each component of the "war on terrorism" has therefore to be classified separately. Components that do not qualify as international armed conflicts may be non-international armed conflicts, covered by Article 3 common to the four Geneva Conventions, and by Protocol II. This raises two issues: first, whether every armed conflict not classified as international is perforce a non-international armed conflict; and second, when a situation is sufficiently violent to be termed an "armed conflict." On the first issue, the wording of the IHL treaties may be ambiguous. On the one hand, Article 3 common refers to "armed conflicts not of an international character"¹⁷ and Protocol II refers to "armed conflicts which are not covered by Article 1 of . . . (Protocol I),"¹⁸ two indications that every armed conflict not qualifying as international is perforce non-international. On the other hand, Article 3 common refers to conflicts "occurring in the territory of one of the High Contracting Parties,"¹⁹ whereas Protocol II refers to those "which take place in the territory of a High Contracting Party."²⁰ Does this imply that conflicts between a High Contracting Party and an armed group, which do not occur on the territory of that High Contracting Party, but on the territory of another State, are not non-international armed

Former Yugoslavia, Appeals Chamber 1999).

16. Schindler, *supra* note 1, at 119; Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon* 33 AM. U. L. REV. 145, 157-60 (1983); James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, 850 INT'L REV. RED CROSS 313, 323-40 (2003); ÉRIC DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* 153-60 (3rd ed. 2002).

17. Convention I, *supra* note 3, art. 3, 75 U.N.T.S. at 32; Convention II, *supra* note 3, art. 3, 75 U.N.T.S. at 86; Convention III, *supra* note 3, art. 3, 75 U.N.T.S. at 136; Convention IV, *supra* note 3, art. 3, 75 U.N.T.S. at 288.

18. See Protocol II, *supra* note 4, 1125 U.N.T.S. at 611.

19. Convention I, *supra* note 3, art. 3, 75 U.N.T.S. at 32; Convention II, *supra* note 3, art. 3, 75 U.N.T.S. at 86; Convention III, *supra* note 3, art. 3, 75 U.N.T.S. at 136; Convention IV, *supra* note 3, art. 3, 75 U.N.T.S. at 288.

20. See Protocol II, *supra* note 4, 1125 U.N.T.S. at 611.

conflicts? Or, does it simply recall that according to the principle of the relative force of treaties, those treaty rules apply only on the territories of States that have accepted them? From the perspective of the aim and purpose of IHL, the latter interpretation must be correct, as there would otherwise be a gap in protection, which could not be explained by States' concerns about their sovereignty. Those concerns made the law of non-international armed conflicts more rudimentary. Concerns about State sovereignty could not explain why victims of conflicts spilling over the territory of several States should benefit from lesser protection than those affected by conflicts limited to the territory of only one State. In addition, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce the law of non-international armed conflicts to the neighbouring countries.²¹ This confirms that even a conflict spreading across borders remains a non-international armed conflict. "[I]nternal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict."²²

As for the lower threshold of an armed conflict, no clear-cut criteria exist, but relevant factors include: intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capability to respect IHL; collective, open, and coordinated character of the hostilities; direct involvement of governmental armed forces (vs. law enforcement agencies); and *de facto* authority by the non-State actor over potential victims.²³ In any case, Protocol II excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."²⁴ The U.S. administration adopts a very wide concept of "armed conflict." Its instructions to Military Commissions explain that it

does not require . . . ongoing mutual hostilities, or a

21. *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between January 1, 1994 and December 31, 1994*, U.N. SCOR 3453rd mtg., Mar. 1994, at 3, 6, U.N. Doc. S/RES/955 (1994) (annexing the original resolution).

22. LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 136 (2002).

23. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 30-52 (James Crawford et al. eds., 2002).

24. Protocol II, *supra* note 4, at art. 1(2), 1125 U.N.T.S. at 611.

confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis . . . so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.²⁵

In other words, if I attack a single Montreal police officer with the intent to initiate an armed conflict between French-speaking and English-speaking Canadians, there is, according to the U.S. administration, an armed conflict (and the police may detain me as an enemy combatant without any judicial guarantees).

However, until now, terrorist acts by private groups (such as those José Padilla is alleged to have planned on U.S. territory)²⁶ have not customarily been viewed as creating armed conflicts.²⁷ The United Kingdom stated when it ratified Additional Protocol I: "[i]t is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."²⁸ The British and Spanish campaigns against the Irish Republican Army (IRA) and Euskadi ta Askatasuna (ETA) have not been treated as armed conflicts under IHL.²⁹

Among all the acts that form part of the "war on terrorism" and the persons detained in that context, we have therefore to distinguish those covered by IHL of international armed conflicts,

25. Department of Defense, Crimes and Elements for Trials by Military Commission, Military Commission Instruction No. 2, Section 5(C) (Apr. 30, 2003), available at <http://www.dtic.mil/whs/directives/corres/mco/mci2.pdf> (last visited Apr. 10, 2004).

26. Padilla v. Rumsfeld, 352 F.3d 695, 699 (2nd Cir. 2003).

27. LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 53-54 (I.M. Sinclair et al. ed., 1993) ("[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of 'IHL'"). This is also the understanding of the International Criminal Tribunal for the Former Yugoslavia. See *The Prosecutor v. Zejnir Delalic (Celebici Camp case)*, Judgment, IT-96-21, para. 268 (2001).

28. Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Protocol I, <http://www.icrc.org/ihl.nsf/e29be9b3462f48b8c12563110050c790/0a9e03f0f2ee757cc1256402003fb6d2?OpenDocument> (last visited Apr. 10, 2004).

29. See generally HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 318 (Dartmouth Publishing Co. ed., 1992).

those covered by IHL of non-international armed conflicts, and those not covered by IHL.

If IHL applies, each conflict has its own beginning and its own end. At the end of active hostilities in a given international armed conflict, prisoners of war (not accused of or sentenced for a crime) must be repatriated.³⁰ The detention, e.g., of Taliban fighters arrested in Afghanistan cannot be prolonged simply because in the Philippines or in Iraq the “war on terrorism” continues.³¹ While I was told in my Catholic catechism school that the war against evil will only end on the Day of Judgment, this cannot mean that the enemies in the U.S. war against evil may be detained until doomsday.

II. The Legal Status of Persons Held in the “War on Terrorism” by the United States Under International Humanitarian Law

A. *Under the Law of International Armed Conflict*

In international armed conflicts, there are two categories of “protected persons,” benefiting from two very different legal regimes: combatants, who become prisoners of war protected by Convention III if they fall into the power of the enemy, and civilians protected by Convention IV. Persons who do not fulfill the nationality or allegiance criteria of “protected persons,”³² e.g., nationals of a detaining power such as John Walker Lindh,³³ benefit only from fundamental guarantees of humane treatment.³⁴

30. Convention III, *supra* note 3, art. 118, 75 U.N.T.S. at 224.

31. In *Hamdi v. Rumsfeld*, 337 F.3d 335, 367-68 (4th Cir. 2003), the admissibility of that part of the theory of the administration was left open because hostilities continued, at the time, in Afghanistan.

32. Convention IV, *supra* note 3, art. 4 75 U.N.T.S. at 290 (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”). The International Criminal Tribunal for the Former Yugoslavia (ICTY) replaces the nationality standard by an allegiance standard. See *Prosecutor v. Tadic*, 38 I.L.M. 1518, 1549-51, ¶¶ 163-69 (Int’l Tribunal for the Former Yugoslavia, Appeals Chamber 1999). See also our criticism in Marco Sassoli & Laura Olson, *Prosecutor v. Tadic (Judgment). Case No IT-94-A. 38ILM 1518 (1999)*. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999, 94 A.J.I.L. 571, 576-77 (2000).

33. See *United States v. Lindh*, 212 F. Supp. 2d 541, 554-58 (E.D. Va. July 11, 2002). Vierucci, *supra* note 6, at 397, 310, applies the allegiance criteria of the *Tadic* decision, and therefore qualifies U.S. nationals fighting against the United States as protected persons.

34. Protocol I, *supra* note 2, art. 75, 1125 U.N.T.S. at 37-38.

1. Combatants

Combatants are defined as members of the armed forces of a party to the international armed conflict.³⁵ They have a right to participate actively in hostilities and may not be punished for doing so, but they may be attacked until they surrender or are otherwise *hors de combat*. The specific criteria individuals must fulfill to be granted combatant status differ depending upon whether only Convention III applies, whether Protocol I also applies, and whether they are members of regular forces or resistance movements.³⁶ As neither the United States nor Afghanistan is a party to Protocol I, I discuss hereafter only the criteria to be fulfilled under Convention III. The United States argues that the Taliban, who are members of the armed forces of the *de facto* government of Afghanistan, "have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war."³⁷ Under such conditions, a person is indeed denied prisoner of war status—and implicitly combatant status—if he or she is a member of "other militias . . . [or] volunteer corps, including those of resistance movements."³⁸ Such conditions, however, are not explicitly prescribed for the "members of the armed forces of a Party to the conflict."³⁹ There are good reasons to view the Taliban as belonging to the latter category. Requiring from regular armed forces respect of the laws of war as a precondition to obtaining combatant and prisoner of war status could endanger such forces. In all armed conflicts, the enemy is accused of not complying with IHL, and such accusations are all too often accurate. If accusations of IHL violations by regular armed forces were permitted to deprive all their members of their prisoner of war status, independently of whether the individual member to be classified complied with the laws of war, prisoner of war status

35. Protocol I, *supra* note 2, art. 43(2), 1125 U.N.T.S. at 23 and art. 1 of the *Regulations Concerning the Laws and Customs of War on Land*, annex to *Convention (IV) Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, *in.*, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 107 (James Brown Scott ed., Oxford University Press 3d ed. 1918).

36. See Convention III, *supra* note 3, art. 4, 75 U.N.T.S. at 138-40; Protocol I, *supra* note 2, arts. 43, 44, 1125 U.N.T.S. at 23-24.

37. Office of the Press Secretary, The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (last visited Apr. 10, 2003) [hereinafter *Statement on the Geneva Convention*].

38. Convention III, *supra* note 3, art. 4(A)(2), 75 U.N.T.S. at 138.

39. *Id.*, at art. 4(A)(1), 75 U.N.T.S. at 138.

could frequently have little or no protective effect. Historically, the United States never invoked such an argument concerning the German Wehrmacht, which cannot be claimed to have regularly complied with the laws of war.

As for the Al-Qaeda members captured in Afghanistan, denying them combatant and prisoner of war status may be justified either because they did not belong to a party to the international armed conflict, or, if they are considered to be members of an Afghan militia, it is highly doubtful whether they complied with the aforementioned conditions such members must fulfill.⁴⁰

When doubt exists regarding whether persons who committed a belligerent act are combatants, Convention III prescribes that they must be treated as prisoners of war "until such time as their status has been determined by a competent tribunal."⁴¹ The United States established such tribunals in the Vietnam War⁴² and in the 1991 Gulf War,⁴³ but argues that in the case of those detained in Guantánamo, there is no doubt.⁴⁴ If the clause applied only when the detaining power has doubts, the latter could always escape from its obligation, which would make the clause practically useless.⁴⁵

If a person fallen into the power of the enemy is determined to be a combatant, he or she is a prisoner of war. Prisoners of war may be interned, not as a punishment, but to hinder them from rejoining the fighting. Therefore no individual decision has to be taken on the detention. The simple fact that someone is an enemy combatant is reason enough to justify his or her detention until the end of active hostilities in that conflict. While in detention, prisoners of war benefit however from a detailed regime of treatment ensuring that they are treated not only humanely, but

40. See Vierucci, *supra* note 6, at 292-95 (discussing the requirements for prisoner of war status).

41. Convention III, *supra* note 3, art. 5, para. 2, 75 U.N.T.S. at 142.

42. United States Military Assistance Command, Vietnam, Directives No. 381-46, Military Intelligence: Combined Screening of Detainees, 27 Dec. 1967, reproduced in SASSOLI & BOUVIER, *supra* note 2, at 780-83.

43. U. S. DEPT. DEF., REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, reproduced in 31 I.L.M. 612, 629 (1992).

44. See *Fiscal Year 2003 Defense Budget Testimony—Senate Armed Services Committee* (2002) (testimony by Secretary of Defense Donald Rumsfeld), available at <http://www.defenselink.mil/speeches/2002/s20020205-secdef4.html> (last visited Apr. 10, 2002).

45. Cf. *United States v. Percheman*, 32 U.S. 51, 69-70 (1833) ("It is one of the admitted rules of construction, that interpretations which lead to an absurdity, or render an act null, are to be avoided.").

also not as prison inmates,⁴⁶ unless they are prosecuted or sentenced. Except in the latter case, they are not serving a sentence and have committed no unlawful act.

2. Civilians

Civilians are "protected civilians" (a term of art of Convention IV) if they fall during an international armed conflict, either on an occupied territory or on enemy territory, into the hands of a State of which they are not nationals.⁴⁷ Enemy nationals are always protected. In an occupied territory, third-party nationals other than nationals of an ally of the occupier are equally protected; on a party's own territory, only neutral third-party nationals are protected, and only if they do not benefit from normal diplomatic protection.⁴⁸ Civilians may not directly participate in hostilities and are protected against attacks. Protected civilians may be detained only for two reasons: first, under domestic legislation for the prosecution and punishment of criminal offenses (including for direct participation in hostilities); second, civilians may be interned for imperative security reasons, upon individual decision made in a regular procedure, which has to be prescribed by the belligerent concerned, and must include a right of appeal.⁴⁹ Such civilians are civil internees whose treatment is governed by extremely detailed provisions of Convention IV and whose cases must be reviewed every six months.⁵⁰

3. "Unlawful Combatants"?

While the United States complied with those rules pertaining to combatants and civilians in the war in Iraq, the United States respects neither of them in (other parts of) the "war on terrorism."⁵¹ The justification given by the administration is that "terrorists" who have fallen into the hands of the U.S. are "unlawful combatants" and as such are neither protected by Convention III nor by Convention IV. U.S. President Bush himself makes this argument concerning the status of Taliban fighters captured in Afghanistan (a situation that is indeed covered by the

46. Convention III, *supra* note 3, art. 22, para 1, 75 U.N.T.S. at 154.

47. See Convention IV, *supra* note 3, art. 4, para. 1, 75 U.N.T.S. at 290.

48. See *id.* art 4, para. 2.

49. *Id.* arts. 41-43, 78.

50. See *id.* arts. 79-135.

51. Whether the war against Iraq is or is not part of the "war on terrorism" is unclear to me. For my purposes it is sufficient to note that the United States does not invoke the interpretation of IHL I criticize in this article concerning Iraq.

law of international armed conflicts)⁵² and later held at a U.S. military base in Guantánamo, Cuba.⁵³ Other administration officials make the same argument concerning the war against Al-Qaeda and others labeled as “terrorists.”⁵⁴

I argue that according to the text, context, and aim of Conventions III and IV, no one can fall in between the two Conventions and therefore be protected by neither of the two.⁵⁵

The first paragraph of Article 4 of Convention IV reads as follows: “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁵⁶ According to paragraph four of that article, persons protected by Convention III “shall not be considered as protected persons within the meaning of the present Convention.”⁵⁷ This clearly indicates that anyone who is not protected by Convention III falls under Convention IV (if he or she fulfills the requirement for protected person status⁵⁸). The *Commentary* published by the International Committee of the Red Cross (ICRC) reads:

Every person in enemy hands must have some status under

52. See Convention IV, *supra* note 3, art. 2, 75 U.N.T.S. at 288.

53. See, e.g., Department of Defense, American Forces Information Service, Geneva Convention Applies to Taliban, not Al Qaeda, Feb. 7, 2002, available at http://www.defenselink.mil/news/Feb2002/n02072002_200202074.html; *Statement on the Geneva Convention*, *supra* note 37.

54. See Dworkin, *supra* note 6 (interviewing Deputy General Counsel for International Affairs); Padilla Respondents’ Response, *supra* note 6. Courts have accepted this line of argument. See *United States v. Lindh*, 212 F. Supp. 2d 541, 552-58 (E.D.Va. 2002). See generally Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror,”* 44 HARV. INT’L L.J. 301 (2003); Manoocher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: The Law and Politics of Labels, 36 CORNELL INT’L L. J. 59, 81 (2003); Paust, *supra* note 6; Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER FORUM OF WORLD AFFAIRS 55 (2003); Vierucci, *supra* note 6; Richard J. Wilson, *United States Detainees at Guantánamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole,”* HUMAN RIGHTS BRIEF, Spring 2003 2, available at <http://www.wcl.american.edu/hrbrief/10/3detainees.cfm> (last visited Apr. 10, 2003).

55. See generally Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45 (2003); Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 328, 344 (1951) (stating that “unlawful combatants” are protected by Convention IV). When the concept of “unlawful combatants” was used by the U.S. Supreme Court in *Ex Parte Quirin et al.*, 317 U.S. 1 (1942), Convention IV did not yet exist.

56. Convention IV, *supra* note 3, art. 4, para. 1, 75 U.N.T.S. at 290.

57. *Id.* art. 4, para. 4.

58. See *supra* note 32.

international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.* We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.⁵⁹

The drafting history of the article confirms this interpretation. The XVIIth International Red Cross Conference criticized the wording suggested by the ICRC that referred to “persons who take no active part in hostilities” because “[t]his phrasing did not, however, cover those who commit hostile acts whilst not being regular combatants, such as *saboteurs* and *franc-tireurs*.”⁶⁰ This problem was reported to the Diplomatic Conference, which proceeded to adopt the present wording.

Moreover, Article 5 of Convention IV, allowing for some derogation from the protective regime of that Convention for persons engaged in hostile activities,⁶¹ would not have been necessary, if such persons did not fall within Convention IV.

It may appear strange to classify heavily armed “terrorists” captured in an international armed conflict, but found not to benefit from combatant and prisoner of war status,⁶² as “civilians.” In law, however, borderline cases never correspond to the ideal type of a category and nevertheless fall under its provisions. What counts is that such “civilian status” does not lead to absurd results. As “civilians,” unprivileged combatants may be attacked while they unlawfully participate in hostilities.⁶³ After arrest, Convention IV does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes.⁶⁴ In addition, it permits administrative detention for

59. INT’L COMM. OF THE RED CROSS, COMMENTARY: IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., Ronald Griffin et al. trans., 1958).

60. INT’L COMM. OF THE RED CROSS, REVISED AND NEW DRAFT CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, REMARKS AND PROPOSALS SUBMITTED BY THE ICRC 68 (1949).

61. See Convention IV, *supra* note 3, art. 5, 75 U.N.T.S. at 290-92.

62. If the “terrorists” fail to fulfill the conditions set up by Article 4 of Convention III, e.g., belonging to a resistance movement which does not distinguish itself from the civilian population, or because their group does not belong to a party to the international conflict, they would be found not to have benefited from combatant and prisoner of war status.

63. See Protocol I, *supra* note 2, at art. 51(3), 1125 U.N.T.S. at 26.

64. Convention IV, *supra* note 3, at art. 64, 146 75 U.N.T.S. at 328; *id.* at art. 146, 75 U.N.T.S. at 386.

imperative security reasons⁶⁵ and it allows for derogations from protected substantive rights of civilians within the territory of a State and from communication rights within occupied territory.⁶⁶ Convention IV was not drafted by professional do-gooders or professors, but by experienced diplomats and military leaders, fully taking into account the security needs of a State confronted with dangerous people.

Applying Convention IV to persons captured in Afghanistan who are neither combatants nor U.S. citizens produces two consequences clearly at variance with the treatment that the United States purportedly⁶⁷ offers in Guantánamo. First, there needs to be an individual decision on their status and detention and that decision must be periodically reviewed.⁶⁸ Second, they may not be held in Guantánamo, but must rather be interned in Afghanistan.⁶⁹ While combatants may be held as prisoners of war in every corner of the earth, civilians may not be deported out of an occupied territory.⁷⁰ Afghanistan was an occupied territory because it came under U.S. and coalition control during an international armed conflict. Could not the security of the United States be assured if those persons were held and questioned on Afghan territory, and if the decision to intern them had to be made according to a regular procedure prescribed by the United States and regularly reviewed?

Surprisingly and much to my relief, the Legal Adviser of the U.S. State Department has recently admitted that “unlawful combatants” are protected by Convention IV.⁷¹ However, the administration has yet to draw practical conclusions from this admission as it does not yet apply the laws that necessarily follow and continues to detain those persons in Guantánamo, denying them individual judicial or administrative determinations of the justification for their detentions.

65. See *supra* note 49 and accompanying text.

66. Convention IV, *supra* note 3, art. 5, 75 U.N.T.S. at 290-92.

67. The U.S. does not claim that such people may be tortured or be treated inhumanely. See sources cited, *supra* note 53.

68. See Convention IV, *supra* note 3, art. 43, 75 U.N.T.S. at 314-16; *id.* art. 78, 75 U.N.T.S. at 336-38.

69. See Convention IV, *supra* note 3, at art. 49, 75 U.N.T.S. at 318-20; *id.* art 76., 75 U.N.T.S. at 336.

70. See Convention IV, *supra* note 3, at art. 49, 75 U.N.T.S. at 318-20; *id.* art 76., 75 U.N.T.S. at 336.

71. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321 (2003) (referring to Article 64 of Convention IV, which is located in the part of Convention IV covering protected civilians in occupied territories).

Some may find it shocking that while captured lawful combatants, i.e., prisoners of war, may be interned without any judicial or individual administrative decision, "unlawful combatants" as civilians may be detained only for imperative security reasons or in view of a trial.⁷² However, lawful combatants can be easily identified, based on objective criteria, which they will normally not deny (i.e., being a member in the armed forces of a party to an international armed conflict), while the membership and past behavior of an unprivileged combatant and the future threat he or she represents can only be determined individually.

From a humanitarian perspective, it is dangerous to revive such an easy escape category for detaining powers as "unlawful combatants." One wonders how a detaining power will avoid indefinite detention without trial, which is the most difficult challenge for anyone in charge of a place of detention. Reports of numerous suicide attempts in Guantánamo and of the very delicate psychiatric state of health of its inmates are not surprising.⁷³

As a lawyer, it is important to me that no one falls outside the law and in particular not outside IHL, which is the minimum safety net in a profoundly inhumane situation that is war, in which most of the other legal safeguards tend to disappear. The United States has declared that it will treat all captured "terrorists" humanely.⁷⁴ First, such a vague commitment is insufficient. The law covers even those who commit the most horrible crimes; only this allows us to pass judgment over them. Second, other, less scrupulous States may take advantage of such a new loophole in the carefully constructed protective system offered by the Geneva Conventions by, for example, denying protection to U.S. personnel.

B. Under the Law of Non-International Armed Conflicts

IHL of non-international armed conflicts foresees no prisoner of war status, contains no other rules on the status of persons detained in relation to the conflict, or reasons justifying detention

72. See *supra* note 49 and accompanying text.

73. See, e.g., Associated Press, *Suicide Attempts at Guantánamo Reach 32* (Aug. 26, 2003), cited in LAWYERS COMM. FOR HUM. RTS., ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 53, 108 (2003).

74. Ambassador Pierre-Richard Prosper, Remarks at the Chatham House on Status and Treatment of Taliban and al-Qaida Detainees (Feb. 20, 2002), at <http://www.state.gov/s/wci/rm/2002/8491.htm>.

of civilians.⁷⁵ Therefore, it cannot possibly be seen as a sufficient legal basis for detaining anyone. Everyone may be detained under domestic legislation, as far as it is compatible with international human rights law. Under IHL, he or she simply benefits from guarantees of humane treatment and, if prosecuted for criminal offences, from judicial guarantees.

C. *Outside Armed Conflicts*

IHL applies only to armed conflicts.⁷⁶ It cannot therefore offer any protection to those held in connection with those components of the “war on terrorism” that do not meet the threshold of either international or non-international armed conflict. It is evident that IHL provides even less of a legal basis for detaining such persons.

III. Who May Be Targeted?

Inevitably, IHL tolerates that combatants kill each other in wartime, which would never be tolerated by international human rights law or any domestic legislation in peacetime. Combatants may be targeted as long as they do not surrender and do not otherwise fall “*hors de combat*.”⁷⁷ Civilians who unlawfully take a direct part in hostilities lose their protection against attacks for as long as they directly participate.⁷⁸ Commentators dispute both what “direct participation in the hostilities” is, and how long a civilian participating loses immunity from attack.⁷⁹ The ICRC is

75. See sources cited *supra* note 4 (omitting any discussion of the admissible reasons for detaining persons in non-international armed conflict).

76. See *supra* notes 14-29 and accompanying text.

77. Protocol I, *supra* note 2, at art. 41, 1125 U.N.T.S. at 22; *id.* art. 48., 1125 U.N.T.S. at 25.

78. Protocol I, *supra* note 2, art. 51(3), 1125 U.N.T.S. at 26.

79. See ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 484 (A.R. Thomas & James C. Duncan eds., 1999) (defining “direct participation in hostilities” as committing harmful or espionage acts); Frits Kalshoven, *Noncombatant Persons*, in THE LAW OF NAVAL OPERATIONS 300, 311-12 (Horace B. Robertson, Jr. ed., 1991) (arguing the loss of civilian immunity is limited to the length of participation in hostilities and the participation being an act that causes actual harm); Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 209, 232-33 (Dieter Fleck ed., 1995) (construing participation to include preparation for and intent to engage in military operations but not extending to employees in armament factories); Michael E. Guillory, *Civilianizing the Force: Is the United State Crossing the Rubicon?*, 51 A.F. L. REV. 111, 117 (2001) (stating that activities traditionally engaged in by civilians are not “direct participation in the hostilities”); Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 21 (2001) (arguing that U.S. civilians perform acts that could make them direct participants in hostilities).

presently holding expert consultations on both questions, possibly in view of drawing up lists of what clearly constitutes direct participation in hostilities, what clearly does not fall under that concept, and what remains in a grey zone. My view on both questions is that any analogy to the situation of members of armed forces should be avoided. The fact that members of regular armed forces (who may be attacked) normally perform a certain activity (e.g., cooking for combatants) does not mean that civilians who undertake such activity are directly participating in hostilities. What counts is the immediate impact on the enemy. As for the duration of the loss of protection, one should not deduce from the fact that combatants may be attacked until they are *hors de combat*, that civilians who are suspected of planning to participate directly in hostilities, or who could resume a previous participation are legitimate targets. Otherwise, the whole civilian population would be placed in jeopardy, as such civilians cannot be distinguished, unlike members of the armed forces, from the rest of the civilian population. What is needed are easily applicable and factually-based criteria that can be readily established in the heat of battle.

Everyone who is neither combatant nor civilian directly participating in hostilities is a civilian benefiting from the protection provided by the law governing the conduct of hostilities. In case of doubt, a person must be considered to be a civilian and he or she may not be targeted.⁸⁰ Together, in the law on the conduct of hostilities, the categories of civilians and combatants complement one another: in effect avoiding circumstances where some people may fight but may not be fought against, or where others may be attacked but may not—and do not—defend themselves. Such privilege or disadvantage would never be respected and would undermine the whole fabric of IHL in a given conflict.

One of the dangerous effects of the U.S. characterization of the “war on terrorism” as a single global international armed conflict is that, if correct, such classification makes deliberate attacks upon members of the “enemy armed forces” lawful worldwide.⁸¹ The United States considers any member of a terrorist group as an “enemy combatant” who may be attacked. Thus, the United States justified an unmanned missile strike that

80. Protocol I, *supra* note 2, art. 50(1), 1125 U.N.T.S. at 26.

81. Anthony Dworkin, *The Yemen Strike: The War on Terrorism Goes Global*, CRIMES OF WAR, Nov. 14, 2002, <http://www.crimesofwar.org/onnews/news-yemen.html>.

hit and killed suspected members of Al-Qaeda in Yemen.⁸² Without this qualification under the laws of war, such targeted assassinations not preceded by an attempt to arrest the persons concerned would be classified as extra-judicial executions, which would seriously violate international human rights law.⁸³ The latter accepts the deliberate killing of even the worst criminal only under the most extreme circumstances.⁸⁴ Fortunately (for inhabitants of countries of the North), the United States applies its theory only selectively and does not target suspected members of terrorist groups in the United States, Canada, or Germany by aerial attacks or targeted assassinations. If fully applied, this theory would have justified, subject to the principle of proportionality, an ambush attack on José Padilla when he left his plane at a Chicago airport or at his grandmother's birthday party. U.S. administration officials have indeed implied that the President's claimed authority to designate as an enemy combatant any individual, including a U.S. citizen within the United States, includes authority to carry out extra-judicial executions, within or outside the United States, of suspects so designated.⁸⁵ Under the laws of war, if those persons were combatants, such claims would be correct. This absurd result, permitting targeted assassinations in the midst of peaceful cities, proves once more that all those suspected to be "terrorists" cannot be classified as combatants.

82. David Johnston & David E. Sanger, *Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16; Dworkin, *supra* note 81.

83. Press Release, Amnesty International, Yemen/USA: Government Must Not Sanction Extra-Judicial Executions (Nov. 8, 2002) at <http://web.amnesty.org/library/Index/ENGAMR511682002?open&of=ENG-USA> (last visited Feb. 29, 2004). The Late foreign minister of Sweden, Anna Lindh, also classified that attack as a summary execution. *Press Cuttings*, PALESTINIAN TIMES, reprinted from CHI. TRIB., Nov. 24, 2002, available at <http://www.ptimes.org/issue138/pcuttings.html> (last visited Apr. 10 2004).

84. See, e.g., Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug. to 7 Sept. 1990, art. 9, referred to by Report of the Eighth United Nations, U.N. Doc. A/CONF.1/28, at 121 (1990) (prohibiting law enforcement officials from using firearms against people unless it is in self-defense), available at http://www.unhchr.ch/html/menu3/b/h_comp43.htm. Under Article 8 of those principles, no derogation is admissible, even in times of emergency. *Id.*, art. 8.

85. See LAWYERS COMM. FOR HUM. RTS., *supra* note 73, at 71.

IV. The Relationship Between International Humanitarian Law, International Human Rights Law, and Domestic Law

IHL first developed as the law of international armed conflicts and was therefore necessarily international law in the traditional sense: an objective legal order governing interstate relations. Its main objective, to protect individuals, was not expressed in the form of subjective rights of the victims but was a consequence of the rules of behavior for States. Human rights have only recently become protected by international law. They were always formulated as subjective rights of individuals (and, more recently, of groups) against the State—mainly their own State. Because of the philosophical axiom driving them, they apply to everyone everywhere. As they are concerned with all aspects of human life, human rights have a much greater impact on public opinion and international politics than IHL, which is applicable only in armed conflicts, a situation to be avoided. Human rights-like thinking therefore increasingly influences IHL.

If one translates the protective rules of IHL into rights and compares these rights with the ones provided by international human rights law, it becomes apparent that IHL protects only those human rights that are particularly endangered by armed conflicts, and are compatible with the very nature of armed conflicts.⁸⁶ These few rights are protected by much more detailed regulations adapted to the specific problems arising in armed conflicts than the comprehensive guarantees formulated in international human rights law.⁸⁷ In addition, IHL regulates some issues that are vital for the protection of victims of armed conflicts, but which human rights law fails to address, even implicitly.⁸⁸ Conversely, on certain issues, such as the precise content of judicial guarantees, the rules applicable to the use of firearms by law enforcement officials, medical ethics, or the definition of torture, human rights law and the jurisprudence of its international enforcement bodies are more detailed.

86. *E.g.*, Protocol I, *supra* note 2, art. 41, 1125 U.N.T.S. at 22 (protecting the right to life of enemies [begin ital] *hors de combat* [end ital]); *id.* art. 56, 1125 U.N.T.S. at 28-29 (protecting the right to a health environment); Convention IV, *supra* note 3, art. 56, 75 U.N.T.S. 176-78 (protecting the right to health of inhabitants of occupied territories).

87. *See, e.g.*, Protocol I, *supra* note 2, art. 57, 1125 U.N.T.S. 29 (detailing rules of behavior for those conducting hostilities, which essentially translates the right to life and physical integrity into those detailed rules).

88. *E.g., id.* art. 44, 1125 U.N.T.S. at 23-24 (stating who may use force, which is not an issue addressed by human rights law but is necessary to protect civilians).

Most human rights, except the most fundamental ones belonging to “the hard core,” may be derogated from in times of emergency, to the extent required by the exigencies of the situation, and if this derogation is consistent with other international obligations of the derogating State.⁸⁹ IHL contains some of those “other international obligations.” Therefore, when confronted in times of armed conflict with derogations admissible under human rights instruments, the enforcement bodies of international human rights law must determine whether those measures are compatible with IHL.⁹⁰ If they are not, they also violate international human rights law.

International human rights law considers the right to life as non-derogable, even in time of armed conflict. There is however, in some instruments an explicit⁹¹—and in all others an implicit—exception for “lawful acts of war.” IHL declares what is lawful in war. When confronted with State-sponsored killings in time of armed conflict, human rights courts, commissions, or NGOs must therefore check whether such actions are consistent with IHL before they can know whether those actions violate international human rights law.

In case of armed conflict, both IHL and those provisions of international human rights law that cannot be or are not suspended apply simultaneously. IHL can be understood as a *lex specialis* where it is more detailed,⁹² but only on issues dealt with by both branches. Thus, in an international armed conflict, the detailed rules of Convention III on the treatment of prisoners of war are a *lex specialis* concerning their freedom of movement, their right to be treated humanely, their right to family life, their right to work, and their right to health.⁹³ The same is true for the detailed rules of Convention IV on the treatment of civil

89. American Convention on Human Rights, opened for signature Nov. 22, 1969, OAS Treaty Series No. 36, art. 27(1); International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 4(1), 999 U.N.T.S. 171[hereinafter ICCPR]; Convention on the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, E.T.S. No. 5, art. 15(1) (limited derogations from human rights permissible in time of public emergency).

90. General Comment No. 29, in Report of the Human Rights Committee, para. 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (commenting on Article 4 of the International Covenant of Civil and Political Rights relating to states of emergency).

91. *E.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 89, at art. 15(2).

92. The Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, at para. 25.

93. *See generally* Convention III, *supra* note 3, 75 U.N.T.S. 135.

internees.⁹⁴ On the treatment of civilians being detained pre-trial or serving a sentence, the law on occupied territories contains only a general rule⁹⁵ and the law applicable to a party's own territory foresees no specific rule at all. On these issues, therefore, human rights law must prevail (but may be suspended to the extent necessary to tackle a threat to the life of the nation).

As for the reasons justifying a deprivation of liberty, Convention III implies that enemy combatants may be interned as prisoners of war for the simple reason that they are combatants, without any individual judicial or administrative decision.⁹⁶ This title justifying detention prevails, as *lex specialis* for combatants, over human rights law and domestic law requiring an individual judicial determination. The legal situation of civilians is more complex. Convention IV permits the administrative detention of an individual protected civilian for imperative reasons of security, upon the individual decision of an administrative board.⁹⁷ It prescribes a right of appeal and a review every six months.⁹⁸ In an occupied territory the decision must be "made according to a regular procedure prescribed by the Occupying Power."⁹⁹ On a belligerent's own territory, it may be argued that domestic legislation is necessary as the basis of detention as well, because IHL only limits the rights of belligerents on their territory, but does not enable them to do what they could otherwise not do. This is even less doubtful for civilians in pre-trial detention. On a detaining party's own territory, Convention IV provides for no specific judicial guarantees. Here, human rights law is the *lex specialis* and any arrest must be based on domestic legislation.¹⁰⁰ In an occupied territory, a person may either be detained based on local legislation or on legislation introduced by the Occupying Power to protect its security, to fulfill its IHL obligations or to maintain an orderly government.¹⁰¹

In non-international armed conflicts, IHL contains human rights-like provisions on the humane treatment of all persons

94. See generally Convention IV, *supra* note 3, 75 U.N.T.S. 287.

95. Convention IV, *supra* note 3, at art. 76, 75 U.N.T.S. at 336.

96. Convention III, *supra* note 3, art. 21, 75 U.N.T.S. at 152-54; see *supra* Part III(A)(1).

97. Convention IV, *supra* note 3, art. 43, 75 U.N.T.S. at 314-16; *id.* art. 78, 75 U.N.T.S. at 336-38.

98. Convention IV, *supra* note 3, art. 43, 75 U.N.T.S. at 314-16; *id.* art. 78, para. 2, 75 U.N.T.S. at 336-38.

99. Convention IV, *supra* note 3, art. 78, para. 2, 75 U.N.T.S. at 336-38.

100. ICCPR, *supra* note 89, at art. 9.

101. Convention IV, *supra* note 3, art. 64, para 2, 75 U.N.T.S. at 328.

affected by the conflict,¹⁰² more specific ones benefiting persons whose liberty has been restricted,¹⁰³ and judicial guarantees applicable to the prosecution of offenses related to the conflict.¹⁰⁴ It does not contain any provision on the possible reasons for arrest, detention, or internment. These issues are therefore entirely governed by domestic legislation and human rights law requiring such a domestic legal basis and limiting the possible reasons for arrest, detention, or internment. As there is no combatant status under IHL of non-international armed conflicts, the debate about the possibility of detaining unlawful combatants does not even arise. No one can be deprived of his or her liberty except based on the law.¹⁰⁵ In State practice too, governments confronted by non-international armed conflicts have based the arrest, detention, or internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They have never invoked the "law of war."

Based on the understanding of the relationship between IHL and human rights law suggested above, it is astonishing that the U.S. Court of Appeals for the Fourth Circuit has accepted that a U.S. citizen captured during active hostilities in Afghanistan, Yaser Esam Hamdi, may be detained as an "enemy combatant," contrary to federal legislation,¹⁰⁶ and deprived of U.S. constitutional rights, simply based on a presidential order, falling within the constitutional powers of the President as Commander in Chief.¹⁰⁷ A federal district court accepted the same for José Padilla, although he is not even alleged to have ever been in Afghanistan or any other theatre of active hostilities,¹⁰⁸ but this has been overturned by the U.S. Court of Appeals for the Second Circuit.¹⁰⁹ The Fourth Circuit, contrary to the Second Circuit, considered Congress' Authorization for Use of Military Force¹¹⁰

102. Convention I, *supra* note 3, art. 3, 75 U.N.T.S. at 32; Convention II, *supra* note 3, art. 3, 75 U.N.T.S. at 86-88; Convention III, *supra* note 3, art. 3, 75 U.N.T.S. at 136-38; Convention IV, *supra* note 3, art. 3, 75 U.N.T.S. at 288-90.; Protocol II, *supra* note 4, art. 4, 1125 U.N.T.S. at 8.

103. Protocol II, *supra* note 4, art. 5, 1125 U.N.T.S. at 8.

104. Convention I, *supra* note 3, art. 3(1)(d), 75 U.N.T.S. at 34; Convention II, *supra* note 3, art. 3(1)(d), 75 U.N.T.S. at 88; Convention III, *supra* note 3, art. 3(1)(d), 75 U.N.T.S. at 138; Convention IV, *supra* note 3, art. 3(1)(d), 75 U.N.T.S. at 90.; Protocol II, *supra* note 4, at art. 6, 1125 U.N.T.S. at 613-14.

105. IICPR, *supra* note 89, at art. 9.

106. 18 U.S.C. § 4001(a) (2000).

107. *Hamdi v. Rumsfeld*, 296 F.3d 278, 281-82 (4th Cir. 2002).

108. *Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002).

109. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

110. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224

after September 11, 2001 as statutory authorization for this policy.¹¹¹ Even more astonishingly, the Fourth Circuit added that Congress has appropriated funding to the Department of Defense to pay for expenses incurred in connection with “the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the Army, navy or Air Force whose status is determined . . . to be similar to prisoners of war.”¹¹² By funding the detention of “prisoners of war” and persons “similar to prisoners of war,” the court argues, Congress has authorized the military detention of enemy combatants.¹¹³

Concerning “unlawful combatants” held in Guantánamo, I cannot judge whether U.S. courts are competent to determine their status.¹¹⁴ As those persons are, however, under U.S. jurisdiction, U.S. human rights obligations apply.¹¹⁵ This has been recognized by the Inter-American Commission of Human Rights.¹¹⁶ As for the persons who have fallen into the hands of the United States during an armed conflict, which is the case for all of the Guantánamo detainees, according to the United States (while, as mentioned above, I have considerable doubts and consider that distinctions have to be made), IHL applies. Both branches require, except for prisoners of war, a domestic legal basis for such

(Sept. 18, 2001).

111. *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *cert. granted*, 124 S.Ct. 981 (2004).

112. *Id.* at 467 (quoting 10 U.S.C. § 956(5) (2002)).

113. *Id.* at 467-68. The government also argued this point in Padilla Respondents’ Response *supra* note 6 at 35.

114. Denied in *Al Odah v. United States*, 321 F.3d 1134 (D. C. Cir. 2003) (finding U.S. courts lack jurisdiction over Guantanamo detainees), but affirmed in *Gherebi v. Bush*, No. 03-55785, 2003 U.S. App. LEXIS 25928 (9th Cir. Dec. 18, 2003).

115. Under the International Covenant on Civil and Political Rights, for example, a State party undertakes to respect and ensure the rights foreseen by the Covenant “to all individuals within its territory and subject to its jurisdiction.” ICCPR, *supra* note 89, art. 2(1). Commentators convincingly argue that to avoid absurd results, this provision may only be interpreted as creating a disjunctive conjunction between “within its territory” and “subject to its jurisdiction.” Thus, they maintain that the International Covenant on Civil and Political Rights applies as well to territories occupied by State parties to the Covenant. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 73-77 (Louis Henkin ed., 1981). U.N. practice also dictates application of the Covenant to territories occupied by States parties. Walter Kälin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation* at ¶¶ 55-59, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992).

116. Inter-American Commission on Human Rights, *Decision on the Request for Precautionary Measures, Detainees on the Guantánamo Base*, Mar. 12, 2002, *reprinted in* 41 I.L.M. 532, 533 (2002).

detention.¹¹⁷ In Guantánamo, only the United States could create such a basis. On November 13, 2001, President Bush adopted a military order allowing the United States to detain any non-citizen if the President finds “reason to believe that such individual . . . has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore,” that could harm the United States.¹¹⁸ It is, however, doubtful whether such an order can be considered “law” (within the meaning of international human rights law), and whether such individual presidential orders have not been issued for most persons held in Guantánamo.

Conclusion: Do We Need a New Law for the “War on Terrorism”?

Once the existing regime has been described, the question arises as to whether it must and can be revised. I have tried to argue that “terrorists” captured in Afghanistan or Iraq can be dealt with under IHL of international armed conflicts, which provides in certain respects for a *lex specialis* and for different and more appropriate legal protections as compared with the normal rules of international human rights law and domestic law. Those captured elsewhere must perforce find themselves on the territory of a State (or on a ship registered in a State). If that State does not oppose the U.S. “war on terrorism,” and the captured persons are not nationals or members of armed forces of a State engaged in an armed conflict with the United States, the law of international armed conflicts does not apply. Depending on the intensity of the hostilities in the territory of that State, the law of non-international armed conflicts may apply. This law provides for some protective rules that go beyond the non-derogable core of international human rights law and possibly beyond many domestic laws. However, it does not enable States to derogate from their domestic laws so as to justify acts those laws prohibit. Finally, on the territory of some States involved in the “war on terrorism,” there is no armed conflict. Fortunately, on the territory of the United States of America, for instance, there is no non-international armed conflict. In such situations, the “war” can and must be fought with the means of law enforcement and international human rights law. IHL has no role to play.

Some may be unsatisfied with this need to split the conflict

117. See *supra* notes 102-105 and accompanying text.

118. Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

legally into several sub-categories to which different rules apply (a phenomenon not unfamiliar to lawyers) and the differences between the legal regimes applicable to captured Al-Qaeda members captured in Afghanistan, the Philippines, or Minneapolis. In addition, the law of non-international armed conflicts may appear in certain respects inappropriate for a trans-national conflict between a State and a global non-State actor since such law was designed for conflicts occurring within a country, mainly between the government and rebels, and its rules accord much consideration for the sovereignty of the State concerned. Conceptually, one might consider that in the aforementioned trans-national conflicts a higher level of protection should be possible as opposed to a conflict occurring in the territory of only one State and fought between government and rebel forces, where the sovereignty of that State is an obstacle to greater protection.

It may be that a law specific to such trans-national armed conflicts could be elaborated. After every major war, IHL has been revised to adapt it to changing military and technological realities and to cover new humanitarian problems and additional categories of victims.¹¹⁹ In recent years, the focus has been on adding new mechanisms for implementation. However, any revision introduces the risk that States will take advantage of it to weaken rather than to strengthen their obligations and the corresponding rights of the war victims. The result of any revision has until now been a treaty, which binds only those States formally accepting it.¹²⁰ The United States has still not ratified the 1977 Protocols.¹²¹ It is doubtful whether a new law for trans-national conflicts, as it should necessarily also give some rights to the non-State actors involved, would be acceptable to the United States and whether such a law would be accepted and respected in the future by other States involved in such conflicts. It is even more doubtful as to how such a new law could be binding on, and whether it would be respected by, groups such as Al-Qaeda.¹²² A new law would also

119. Theodor Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239, 242-47 (2000).

120. For a post-modern process not aimed at new treaty rules, but at action-oriented research, informal discussions with governments and possibly "new interpretations," see Harvard University, Program on Humanitarian Policy and Conflict Research, *Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (IHL)*, at http://www.hsph.harvard.edu/hpcr/ihl_research_meeting.htm (last visited Apr. 10, 2004).

121. See *supra* note 12 and accompanying text.

122. See Marco Sassòli, Armed Groups Project, *Possible Legal Mechanisms to*

inevitably create a third category of armed conflicts, adding to the existing difficulties in classifying situations under the laws of war. If that new law diminished the protection offered to prisoners in such conflicts, would it apply to both sides, or would it abandon the age-old principle of equality of the belligerents before the laws of war?¹²³ If the latter is the purpose, who believes that those qualified as “terrorists” will respect that new law?

As with all laws, the laws of war can and must adapt to new developments. However, no law can be adapted in every new case of application to fit with the results desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution of the Westphalian system, the law must, in addition, be the same for all States. To see it only as a means, to be immediately adapted to new claims,¹²⁴ or to apply it selectively undermines the predictability and therefore the normative force that defines legal rules.

Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law, at http://www.armedgroups.org/_media/Sassoli%20Armed%20Groups%20paper.doc (last visited Apr. 10, 2004).

123. *See supra* note 2.

124. *See, e.g.,* W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 A.J.I.L. 82 (2003).

