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(VENICE COMMISSION)

OPINION ON THE POSSIBLE NEED FOR FURTHER DEVELOPMENT OF THE GENEVA CONVENTIONS

Adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003)

on the basis of comments by

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I. Introduction

1. By a letter of 11 April 2003, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (hereinafter: "the Committee"), Mr Eduard Lintner, requested, on behalf of the committee, the opinion of the Venice Commission regarding "the possible need for a further development of the Geneva Conventions, in light of the new categories of combatants that have emerged recently".

2. The Commission nominated Messrs. Christoph Grabenwarter, Jan Helgesen and Georg Nolte as rapporteurs on this issue.

3. Two rapporteurs, Messrs. Christoph Grabenwarter and Georg Nolte, prepared a preliminary discussion paper to which Mr Jed Rubenfeld submitted a reply. Both papers were submitted to the Sub-Commission on International Law on 12 June 2003 in Venice. Subsequently, the three rapporteurs held an informal meeting in Strasbourg on 17 September 2003, to which Messrs Hans-Peter Gasser (an expert in International Humanitarian Law and former official of the International Committee of the Red Cross) and Jed Rubenfeld (the observer of the United States) were also invited. Following the informal meeting, Messrs. Grabenwarter and Nolte prepared a draft opinion (CDL-DI (2003) 2,) on which Mr Rubenfeld submitted comments (CDL-DI (2003) 3). The two texts were submitted to the Sub-Commission on International Law on 16 October 2003, and to the Plenary on 17 October 2003 in Venice. In accordance with the decision adopted by the Commission, a second informal meeting was held in London on 7 November 2003. It was attended by Messrs Jed Helgesen, Jeffrey Jowell, Olivier Dutheillet de Lamothe, Pieter Van Dijk, Giorgio Malinverni, Georg Nolte, Jed Rubenfeld and Hans Heinrich Vogel. The following opinion was adopted by the Commission at its 57th Plenary Session (Venice, 12-13 December 2003).

II. Scope of the opinion

4. The request of the Committee being formulated in rather general terms, the Commission stresses that the present opinion understands it to mean the following:

- The request raises only questions of general importance, not whether every single provision of the 1949 Geneva Conventions on the protection of the victims of war (hereinafter: "Geneva Conventions") needs further development;
- The expression "the new *categories* of combatants that have emerged recently" is understood in a purely factual sense of the new dimension of terrorism which has emerged, in particular in the attacks of 11 September 2001. It is *not* understood to contain a normative statement in the sense that a new *legal* category of combatants has actually emerged;
- The request does not seek to raise comprehensively the general issue of the possible need to revise International Humanitarian Law in the light of the new challenges posed by international terrorism. Rather, it is limited to the question whether the rules of International Humanitarian Law, as they concern the detention and treatment of persons who have been arrested in the course of an international armed conflict, need further development;
- Since the Geneva Conventions are not the only source of international law which may apply to "the new categories of combatants", this opinion understands the request as asking how far International Humanitarian Law as a whole, and the pertinent human rights law are in need of development;

- The present opinion is concerned with international legal standards in general, and not with any issue in particular. The issue of the persons held in the custody of the United States in Afghanistan or Guantanamo Bay (hereinafter: Afghanistan/Guantanamo issue), which is the most important single example for the general question, will, however, be referred to by way of example;
- Finally, this opinion is not concerned with persons who have been arrested outside of an armed conflict in the sense of common Articles 2 of the Geneva Conventions, and in particular, not with persons who have been arrested outside the territory of states which are parties to the said international armed conflict. The legal position of such persons is determined by human rights law.

5. It should be noted that the International Committee of the Red Cross (ICRC) is at present considering the need for possible clarification of International Humanitarian Law, however with a broader scope than the present opinion. In this context the ICRC has prepared a Report on "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts" for the 28th International Conference of the Red Cross and Red Crescent (December 2003)[1].

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[1] Dr Jakob Kellenberg, the President of the International Committee of the Red Cross made the following statement on 26 March 2002 at the 58th Annual Session of the UN Commission on Human Rights: *"It has been said that the world will never be the same after the heinous crimes of September 11, 2001, which shocked the world's conscience. The September 11 attacks delivered a blow to the most fundamental values of human society, particularly those at the heart of international humanitarian and human rights law.*

The crisis generated by the attacks has posed a host of questions /.../. One line of reasoning appears to suggest that certain individuals are undeserving of the protection of the law because of the heinous nature of their criminal acts. Such assumptions should be rejected. Human beings, by virtue of being human, are entitled to the protection of the law. Just as no state, group or individual can place himself or herself above the law, so also, no person can be placed outside the law. /.../

Another question that has been raised is whether international law in general, and International Humanitarian Law specifically, are adequate tools for dealing with the post-September 11th reality. My answer to this is that international law, if correctly applied, is one of the strongest tools that the community of nations has at its disposal in the effort to re-establish international order and stability. /.../

International Humanitarian Law is /.../ the body of rules that regulates the protection of persons and conduct of hostilities once an armed conflict has occurred. Its aim is to alleviate the suffering of individuals affected by war regardless of the underlying causes - and therefore regardless of any justification - for the armed conflict. There are no "just" or "unjust" wars in terms of International Humanitarian Law because civilians, to name just one category of persons protected by its rules, have the right to be spared murder, torture or rape, no matter which side they happen to belong to.

A related doubt that has been raised in the aftermath of September 11 is whether International Humanitarian Law is applicable to the new security threats posed by acts of terrorism. Several bodies of law, including national and international rules of criminal law, are relevant in the struggle against terrorism. As for International Humanitarian Law, it is that body of rules that is applicable whenever the fight against terrorism amounts to or includes armed conflict. There is no question that its norms are adequate to deal with security risks in war because its provisions were designed specifically for the exceptional situation of armed conflict. The generations of experts and diplomats who crafted International Humanitarian Law over the last two centuries were fully aware of the need to balance state security and the preservation of human life, health and dignity. That balance has always been at the very core of the laws of war.

Our belief in the continued validity of existing law should not be taken to mean that International Humanitarian Law is perfect, for no body of law can lay claim to perfection. What we are suggesting is that any attempt to re-evaluate its appropriateness can only take place after it has been determined that it is the law that is lacking, and not the political will to apply it. Pacta sunt servanda is an age-old and basic tenet of international law which means that existing international obligations must be fulfilled in good faith. This principle requires that attempts to resolve ongoing challenges within an existing legal framework be made before calls for change are issued. Any other course of action would risk depriving the law of its very raison d'être – which is to facilitate the predictable and orderly

III. Different groups of persons potentially concerned

6. The persons who give rise to the request belong to one of the following three categories:

a) members of forces which may arguably be attributed to a state, be it as regular armed forces or otherwise (an example of the former category in the Afghanistan/Guantanamo context would be "the Taliban", a group which controlled the greatest part of Afghanistan prior to October 2001);

b) more independent combatants (in the case of the Afghanistan conflict this group is usually described as "al Qaeda", an international terrorist network which is generally held to be responsible for the terrorist attacks of 11 September 2001); and

c) persons who belong to neither of the two preceding groups and may not even have engaged in any kind of hostilities at all. The third category of persons is also important in the present context.

7. It could be suggested that terrorists do not deserve any kind of legal protection. Although this view has some understandable emotional appeal, the issue must be considered in the light of fundamental rules of law and prudence. Every human being, without exception, carries with him or her an inherent dignity. This has been recognised by all states with constitutions under the rule of law, all humanitarian and human rights treaties, and by all major religions. Rules and principles of such weight and force should not be discarded in the shock of a moment. In addition, one of the most important functions of the law is to distinguish between the responsible and the non-responsible, just as between the guilty and the innocent. Procedures to determine whether a person is responsible do not only have the function of protecting the responsible from possible state abuse, but they also protect the non-responsible from falsely being held responsible. In short: The law inevitably protects the terrorist by protecting the non-responsible, and if the law no longer protects the terrorist, all non-responsible persons will remain unprotected as well.

IV. Applicability of International Humanitarian Law

8. The Geneva Conventions provide for a comprehensive system concerning the treatment of persons affected by armed conflicts. The Commission considers that the (Third) Geneva Convention relative to the Treatment of Prisoners of War (hereinafter "GC III"), the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter "GC IV") as well as the two Additional Protocols of 1977 are pertinent for the present opinion. As regards the Additional Protocols, it is to be stressed that many of their provisions are today generally recognised as forming part of customary international law that is binding on all states.

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conduct of international relations. Care should especially be taken not to amend rules designed to protect individuals in times of crises, because individuals have no other protection from arbitrariness and abuse except implementation of the law. /.../

In our view, the fundamental principles of humanity underlying these texts cannot and must not be disturbed. They mandate that the life, health and dignity of all persons not taking or no longer taking part in hostilities must be respected and that military operations must be conducted so as to minimize the suffering caused by war. /.../

I would, lastly, like to address the fear that the protection afforded individuals by International Humanitarian Law is an obstacle to justice. The Geneva Conventions and their Additional Protocols do not prevent justice, they only require that the due process of law be applied in dealing with offenders. /.../ The Conventions and Protocols not only encourage states to bring perpetrators of war crimes to justice, they demand it, including by means of exercise of universal jurisdiction."

In addition to the Geneva Conventions, human rights treaties and customary human rights law are also relevant.

A. Character of the armed conflict

9. In general, the Geneva Conventions apply during "armed conflict". They distinguish between international and non-international armed conflicts. As stated before, the present opinion is only concerned with international armed conflicts, such as the conflict in Afghanistan after the involvement of US troops in October 2001. The Geneva Conventions will apply to such conflicts if the belligerent parties are states, as was the case for Afghanistan and the United States with respect to the Afghanistan conflict. According to the traditional interpretation of the Geneva Conventions, this implies that they are also applicable to persons who have been arrested in connection with the armed conflict, even if they are neither members of the regular armed forces of a belligerent state nor peaceful civilians (see below under B. c) iii.).

10. It could be questioned whether the Geneva Conventions (should) apply to an international terrorist organisation, such as al Qaeda, or their members. The question proceeds from common Article 2 (3) of the Geneva Conventions, which speak of "Powers in conflict". It reads:

> *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.*

11. It has been argued that if an international terrorist organisation, such as al Qaeda, were a "Power" in the sense of common Articles 2 (3) of the Geneva Conventions, its members would not be entitled to prisoner of war treatment in accordance with the GC III, or even any protection, under the Geneva Conventions since al Qaeda, as a non-state organisation, is neither a party to the Conventions, nor has accepted or applied them.

12. Such argumentation may be related to the view that it is appropriate after 11 September 2001 to speak of a "war against terrorism" and thus assimilate international terrorist organisations to states. Given the new dimension of international terrorism, as evidenced by the attacks of 11 September 2001, this view may appear intuitively attractive. It nevertheless overlooks several crucial points: when the Geneva Conventions speak of "Power" they mean "State". Other provisions of the Conventions use the term "Power" in connection with "nationals" or "territory" (see e.g. Articles 4 (1), 9 (1) (2), 11 (5), 23 (1), 36 (1) (2), 39 (1) and 48 (1) GC IV). The Commission therefore considers that the Geneva Conventions imply that a "Power" must be a State and cannot merely be a powerful organisation of some kind.

13. Furthermore, the question has been raised as to whether common Articles 2 (3) of the Geneva Conventions reflect the basic idea of reciprocity in the sense that if a powerful group, such as al Qaeda, does not respect the minimum rules of armed conflict by committing terrorist acts it should equally not be entitled to the benefits of these rules. This consideration is, however, not appropriate: violations of the Geneva Conventions by one State Party do not entitle another State Party to violate its obligations reciprocally (see common Article 1 of the Geneva Conventions). While the customary law status of the prohibition of reprisals is still subject to debate, the treaties of international humanitarian law expressly prohibit reprisals against protected persons and objects. Such prohibitions of reprisals have been provided for in the

Geneva Conventions so that the elementary considerations of humanity are not made dependent on irresponsible policy decisions, which have been taken on whatever level of the state hierarchy. In addition, States Parties must not apply the principle of reciprocity to individuals but treat them according to the law. Common Articles 2 (3) must be seen in the light of these considerations. The purpose of these provisions is to induce states to become parties to the Geneva Conventions by making access to their benefits as easily as possible. Their purpose is not to exclude actors that are already in the sphere of their application (even if it is only as "other protected persons" (in particular civilians) in the sense of GC IV), but to include them as far as it is appropriate to do so(see below under B.c.).

14. Only if States had an interest and were likely to agree that terrorist organizations such as al Qaeda be classified as "Powers" in the sense of common Article 2 (3), could it be contemplated that they and their members be excluded from the protection of the Geneva Conventions. However, States have never accepted, and are highly unlikely in the future to accept, that such organisations be classified as "Powers". This is because the principle of reciprocity would then also have to work in the opposite direction. If an international terrorist organisation were a "Power" and if it would then actually decide to "accept and apply" the provisions of GC III (with respect to its own "prisoners"), as certain national liberation organisations have attempted to do in the past, then such an organisation would be able to claim all the rights for its members which are contained in the Convention. They would then stand on an equal footing with States. States might arguably even have to give members of a terrorist organisation the full respect that is due to members of regular armed forces. It is hardly conceivable that such a consequence would be in the interest of the worldwide effort to bring terrorism to an end.

B. Categories of persons concerned

15. The Geneva Conventions make a fundamental distinction with respect to persons who are arrested by a power in the course of an international armed conflict: such persons are protected either as prisoners of war (hereinafter "POW") (see below under a) or as other "protected persons" (in particular civilians) (see below under c). The determination whether a particular person is a POW or another "protected person" must be made, in cases of doubt, on the basis of a specific procedure (see below under b).

16. Although the terms "unlawful combatant", "unprivileged combatant" or "illegal combatant" do not appear either in the Geneva Conventions or in other international instruments, it will nevertheless be assessed whether they (should) constitute a third category of persons with a different legal status (see below under c) iii). For the purpose of the present opinion, it is the most neutral term "unprivileged combatant", meaning persons who have actively participated in hostilities but do not qualify for the status of POW under GCIII, that will mostly be used.

a) Prisoners of war

17. Article 4.A GC III defines POWs as:

persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those 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, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed 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 recognised by the Detaining Power.

i. Forces of Unrecognised or Illegitimate Governments

18. Article 4 GC III explicitly provides that the status of POW is not excluded if the Detaining Power does not recognize the government to which a member of regular armed forces professes allegiance. This means, for example, that when the United States (a State Party to GC III) did not recognize the Taliban government of Afghanistan (also a State Party to GC III), it did not mean that Taliban fighters lost their status as members of regular armed forces, and therefore as POWs. This rule is an important element of International Humanitarian Law and, as such, has little to do with new forms of terrorism and "new categories of combatants".

19. It could be asked whether the non-recognition of a government, or its designation as a pariah government because of its involvement with (new forms of) terrorism, should be an exception to this rule. Such an exception, however, would give states an easy and inappropriate possibility to deprive many deserving persons of their rights under GC III.

ii. Compliance with the conditions of Article 4 (2) GC III

20. Another question is whether detainees who are members of regular armed forces are or should be precluded from claiming POW status if the conditions under Article 4 A (2) GC III for "Members of other militias..." have not been complied with, that is

1. *being commanded by a person responsible for his subordinates;*
2. *having a fixed distinctive sign recognizable at a distance;*
3. *carrying arms openly; and*
4. *conducting their operations in accordance with the laws and customs of war.*

21. The plain wording of Article 4 GC III suggests that this is not the case. Several sets of fact must nevertheless be distinguished in this context:

- First: where certain individual members of regular armed forces do not comply with conditions (b)-(d) it cannot be a valid reason to declare GC III inapplicable to the armed forces in general.
- Second: it is, on the other hand, arguable (but by no means generally recognised) that individual soldiers who, in the course of their operations, have not complied with *all* the conditions which are contained in Article 4 A (2) (b)-(d) GC III (e.g. by secretly planting a

bomb in civilian clothing against civilians) may thereby forfeit their (potential) POW status[2]. Such a determination of a forfeiture of POW status, however, would have to be made on an *individual* basis, following the proper procedures under Article 5 GC III (see below IV. B.b).

- Third: it might be asked whether the requirement of responsible command (a), distinctive sign (b) and carrying arms openly (c) should at least generally be present in regular armed forces to make GC III applicable for them.

22. The answer to this last question, however, has little relevance for the subject of the request, which is "the need to further develop the Geneva Conventions in the light of the new categories of combatants which have recently emerged".

23. The "new categories of combatants" are members of international terrorist organisations, such as al Qaeda, and these are not, as a general rule, members of regular armed forces or "forming part of such armed forces". The question of their status is determined below (IV. B. c). Forces like the Taliban, however, are of a traditional nature (in the sense of being the regular armed forces of a state), even if some of their members have operated in a way which disregarded certain of the conditions of Article 4 A (2) (b)-(d) GC III.

24. It is not the Commission's task to assess and determine questions of fact. If, however, regular forces have generally distinguished themselves (e.g. Taliban forces by black turbans) and have made coordinated efforts at openly defending their territory, then there is no question that they must be recognised as POWs upon their arrest by forces of a party to the conflict. The mere association or even cooperation of their leaders with members of an international terrorist network, such as al Qaeda, cannot be a sufficient ground for generally disentitling members of regular armed forces to their protection under GC III. If that were the case, the protection of large groups of persons might entirely depend on assertions of fact by one interested State, which in most cases, can be contradicted by other States.

b) Procedure for determining entitlement to POW status

25. Article 5 (2) GC III contains certain procedural requirements for the determination of the status of a person. It reads as follows:

> *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 [meaning: they must be treated as if they were POWs until such time as their status has been determined by a competent tribunal.*

26. This provision applies in the case of persons who are arrested as combatants on the battlefield, such as those that have been arrested in Afghanistan, whether or not they have been transferred to Guantanamo Bay. It could be argued, however, that no duty to comply with the requirement of Article 5(2) GC III arises if the detaining power declares that it - the detaining power itself - has no doubt about the status of the person detained. Such an interpretation would, however, reduce the protective effect of Article 5 GC III to very little. It would give the detaining power an easy means to circumvent its obligation under Article 5 by simply declaring that it has no doubts that the conditions of Article 5 GC III are not satisfied.

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[2] See the judgment of the Privy Council of the House of Lords in the case of Mohamed Ali v. Public Prosecutor (1968) [1969] 1 AC 430

27. In the past it has been in particular the United States, which has, to the contrary, repeatedly asserted that the mere assertion by an *individual person* suffices to require a decision to be taken by a tribunal under Article 5 GC III[3]. This position is in conformity with the protective function of Article 5 GC III. Therefore, a presumption of POW status applies not only when a captured person himself or herself claims this status but also when the claim is made by the State Party on which the person depends. In addition, Article 5 (2) GC III creates a presumption that a captured combatant is a POW unless a competent tribunal determines otherwise on an individualised basis.

28. There are good reasons to maintain this traditional interpretation of Article 5 GC III, particularly when keeping in mind the interests of the personnel of those states who engage in transfrontier anti-terrorist operations and who may fall into the hands of their opponents. Article 5 GC III should therefore be applicable at least when a substantial number of other states, or the ICRC, express doubts as to the status of certain persons accorded by the detaining Power. It is hardly conceivable that any requirements of modern anti-terrorist policy exist that would militate against convening a competent tribunal in an Afghanistan-like situation in order to determine the status of a person who has been captured on the battlefield. In any case, such reasons have not been put forward so far. To the contrary, compelling reasons of humanity require that there be a procedure to determine the status a detained person. Otherwise, he or she would remain in a limbo with regard to his or her status. Such a determination is practicable since it remains reasonably clear what constitutes a prisoner of war, even if certain techniques of clandestine or asymmetrical forms of combat are taken into account. The competent tribunals (in the sense of Article 5 (2) GC III) may proceed from the assumption that there must be certain reasonably clear evidence for a person to obtain a prisoner of war status.

29. Article 5 GC III does not specify the characteristics of this "competent tribunal". The establishment of such tribunals remains largely under the responsibility of domestic law. The term "competent tribunal" expresses "an authorised forum of judgment, not necessarily judicial in character"[4]. State practice in the field of composition of tribunals for the purposes of Article 5 (2) GC III shows that a minimum standard of independence and legal character of the decision-making body is respected by relevant States[5]. States have generally treated the requirements of Article 5 (2) GC III as a minimum protection. Article 5 (2) GC III requires neither a lengthy procedure nor a possibility of an appeal.

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[3] This has been confirmed by decisions of national courts, by the US 1997 Army Regulation dealing with prisoners of war and finally by the presumption of prisoner of war status in Article 75(1) P I (which expresses a corresponding rule of customary international law).

[4] Y.Naqvi, Doubtful Prisoner-of-War Status (2002) 84 RICR 571-595, 577.

[5] The 1997 U.S. Army Regulations, for example, provide that a competent tribunal must be composed of three commissioned officers, one of whom must be of field grade, and fundamental due process rights must be guaranteed (for example: persons shall be advised of their rights at the beginning of their hearing; persons shall be allowed to call witnesses if reasonably available and to question those witnesses called by the tribunal; persons have a right to testify). Similar provisions have been made in the United Kingdom, Canada, Australia, New Zealand and Israel (which is a state that has much experience with military occupation, detention of combatants and new forms of terrorism).

c) Other protected persons

30. The distinction between POWs and other "protected persons" (in particular civilians) derives from the following provisions of the Geneva Conventions: Article 4 GC III gives a definition of POW, whereas Article 4 GC IV gives a definition of other "protected persons" (in particular civilians). The plain wording of Article 4 (1) and (4) GC IV makes it clear that there should be no category of persons that would remain unprotected:

(1) Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals /.../
(4) Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

31. Article 4 GC IV clearly provides that, in principle, all persons (in particular civilians) who are not nationals of the detaining Power or are not protected by other Conventions shall be "protected persons" under GC IV. Members of an international terrorist network, such as al Qaeda, who have been arrested in connection with an armed conflict, will mostly fall into this category of other "protected persons", since they usually do not qualify for POW status (i). Nationals of a state, which is not a party to the armed conflict, are under a different regime, but they, too, do not remain unprotected (ii).

i. Suspected Members of Terrorist Organisations (and POW status)

32. Suspected members of an international terrorist network, such as al Qaeda, will rarely be entitled to POW status since they will not simultaneously be members or "form part" of the regular armed forces of a state (see Article 4 A (1) GC III). Even if certain members were to qualify for POW status, it would not shield them from prosecution for criminal acts committed before or after their arrest, including acts of terrorism. In addition, such members of international terrorist organisations will typically not have complied with the conditions for obtaining POW status mentioned in Article 4 A (2) GC III – for "Members of other militias…", that is (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) conducting their operations in accordance with the laws and customs of war. The exact interpretation of Article 4 A (2) GC III has always been subject to controversy, and the provision has been subject to reform under the First Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (hereinafter "P I"). However, these questions of interpretation and reform are largely irrelevant to the issue of "the possible need to further develop the Geneva Conventions in the light of the new categories of combatants which have recently emerged".

33. Since, therefore, the "new categories of combatants that have recently emerged" typically do not qualify for POW status, it is not necessary develop the rules of GC III concerning the status of POWs. It is, however, necessary to recall at this point that Article 5 GC III provides for a mandatory procedure to determine formally whether or not a particular person qualifies for POW status and as long as this has not taken place, the person in question must be accorded the rights of a POW (see above under b).

ii. Third Party Nationals

34. Article 4 (2) (2) GC IV makes one exception to the general rule that all persons who are not nationals of the detaining Power or who are not protected by one of the other Geneva Conventions shall be "protected persons" under GC IV. This exception concerns

> *"nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, [which] shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.*

35. This provision does not, however, mean that the Geneva Conventions actually leave this category of persons unprotected. The protection for such persons operates on two different levels.

36. The first level is the rules of diplomatic protection. The best protection for a person vis-à-vis a foreign state has traditionally been the diplomatic protection which is exercised on that person's behalf by his or her own country. The system of diplomatic protection, however, cannot operate between states that are opposing parties to an armed conflict. Therefore, the Geneva Conventions provide for a special system of protection for persons who are nationals of the parties to the conflict. The authors of the Geneva Conventions did not, however, consider it necessary to extend the special system of protection under the Conventions to third party nationals, that is to say, to those categories of persons for which the regular procedures of diplomatic protection remain available.

37. The second level of protection for third party nationals who are arrested in connection with an international armed conflict is found in Article 75 P I, common Article 3, which the International Court of Justice[6], in its judgment on the Nicaragua case, considered to be applicable to all types of armed conflicts, as well as human rights law, to the extent that there has been no derogation from the guaranteed rights. Article 75 P I explicitly provides that its rules are also applicable to "Nationals of States not Parties to the Conflict".

38. These rules are based on the assumption that nationals of States which are not Parties to the conflict or nationals of co-belligerent States do not need the full protection of GC IV since they are normally even better protected by the rules on diplomatic protection. Should, however, diplomatic protection not be (properly) exercised on behalf of such third party nationals, International Humanitarian Law provides for protection under Article 75 P I and common Article 3 so that such persons do not remain without certain minimum rights.

39. This legal situation is still appropriate today. First of all, it takes into account both the special situation of third party nationals, and it also provides them with the minimum guarantees to which every human being is entitled. Furthermore, it is also appropriate for third party nationals who are deemed to be unprivileged combatants, such as members of international terrorist organisations.

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[6] C] Rep. 1986, 114 (para 218)

iii. "Unprivileged combatants"?

40. The fact that a person who does not meet the criteria of Article 4 GC III (which would entitle him or her to POW status) has participated in hostilities is not a ground for excluding the application of GC IV, if the person involved meets the nationality criteria specified in Article 4 of the latter convention. If such a person does not meet the nationality criteria, then he or she is, as a minimum, entitled to the fundamental guarantees provided for in Article 75 P I and common Article 3. This is confirmed by Article 45 (3) P I, which was adopted by consensus and which is generally recognised as stating customary international law. This provision reads:

> *"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 communication under that Convention."*

41. The provision presupposes that GC IV is applicable to persons who do not meet the criteria of Article 4 GC III (e.g. "unlawful combatants"). Otherwise, the words "and who does not benefit from more favourable treatment in accordance with the Fourth Convention" would be meaningless or superfluous[7]. This textual analysis of the Geneva Conventions is confirmed by an analysis of the pertinent *travaux préparatoires*, scholarly writings and past practice[8].

42. The drafting history also makes it clear that the question of the legal status of "unlawful combatants" was meant to be resolved by Article 5 GC IV. This provision reads as follows:

> *" (1) Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.*
> *(2) Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so*

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[7] This view has been confirmed in Military Manuals. For example, The US Military Manual FM 27-10, The Law of Land Warfare, 1956, pp. 31, 98 *et seq*., states the law as follows:

"*73. Persons Committing Hostile Acts not Entitled to be Treated as Prisoners of War.* If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the categories listed in Article 4 GC III, he is not entitled to be treated as prisoner of war. He is, however, a "protected person" within the meaning of Article 4 [GC IV]."

[8] Knut Dörmann, a legal adviser at the Legal Division of the International Committee of the Red Cross, describes this drafting history in "*The Legal Situation of "unlawful/unprivileged Combatants*" in: International Review of the Red Cross vol. 85 (2003) pp. 45-73 (at pp. 52-58): "While certain delegations took the view that GC IV should not protect persons violating the laws of war, saboteurs and spies /.../, other delegations disagreed. As stated by the Australian delegate, "two schools of thought had become evident during the discussion – that of those delegations which wished a broad and 'elastic' Convention, and that of those which wanted a restricted Convention." In order to overcome the divergent views the Committee adopted, as a compromise, draft Article 3A (which became Article 5 GC IV). This provision treated persons violating the laws of war, saboteurs and spies as "protected persons", but allowed States in certain circumstances to deprive such persons of some of the protections of GC IV. This compromise solution was adopted overwhelmingly by the Diplomatic Conference."

> *requires, be regarded as having forfeited rights of communication under the present Convention.*
> *(3) In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be".*

43. Although it does not expressly speak of "unlawful combatants", Article 5 GC IV makes it clear that persons who are definitely suspected as engaging in hostile activities against the detaining or occupying power are, in principle, protected persons, but that they may at the same time be deprived of certain (but not all) rights under GC IV. Most authors in the legal literature share this view; the few authors who disagree do not give specific reasons for doing so[9].

44. The discussions as to whether there exist, under the Geneva Conventions, a category of legally unprotected "unlawful combatants" have been aptly summed up as follows:

> *"In 1949, GC IV was adopted with the knowledge of the problems associated with unlawful combatants /.../. It is therefore in our view hardly defendable to maintain that unlawful combatants were generally excluded from the scope of application of GC IV, contrary to the rather comprehensive wording of its Article 4. The same would be true of claims that there is coexisting customary international law, which comprehensively covers unlawful combatants and would constitute a sort of lex specialis /.../. In this connection it should also be recalled that the drafters of P I [in 1977] apparently had an understanding of the scope of application of GC IV which would include at least certain types of unlawful combatants."*[10]

45. It has been argued, however, that an interpretation of the Geneva Conventions which would attribute to every person either the status of POW under GC III or the status of a protected person (in particular civilian) under GC IV would miss the simple logic that *combatants* who are disqualified from POW status (because they have violated Article 4 GC III, see above) should be treated less favourably than regular POWs, but that this would not be the case if they were treated as "civilians" who, in turn, are treated better than POWs. This argument, however, does not withstand scrutiny for two reasons:

- First, while combatants who are disqualified from POW status by virtue of Article 4 GC III should indeed have a less favourable legal status than regular POWs, it is clear that an application of GC IV to disqualified combatants actually gives them no better position than regular POWs have. As a general matter, the status of POW and the status of "protected person" (in particular civilian) (under GC IV) cannot easily be brought into a better-worse-relationship. More specifically, however, the status of POW is "better" than that of some kinds of "protected persons" under GC IV, such as unprivileged combatants, for example with respect to immunity from prosecution for previous acts of violence (which were in

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[9] This prevailing view has recently been confirmed by the International Criminal Tribunal for the Former Yugoslavia in the Delalic Case (ICTY, Judgment, The Prosecutor v. Delalic et al., IT-96-21-T, 16 November 1998, para 271). Ambiguous state practice which has been interpreted to the contrary (in particular *Ex parte Quirin*, US Supreme Court, 317 U.S. 1, 63 (1942)) precedes the drawing up of the Geneva Conventions.

[10] Dörmann, supra note 7, at p. 60.

conformity with the laws of war) or certain forms of entertainment and possibilities of communication with similarly situated detainees.

- Second, the aforesaid argument overlooks that GC IV does not merely provide for a fixed bundle of rights for civilians but that it comprehensively covers other "protected persons" (Article 4 GC III). These other "protected persons" (in particular civilians) must not necessarily all enjoy the same rights. Article 5 GC IV, in particular, provides that certain "individual person[s] shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person(s), be prejudicial to the security of such State" (Para. (2)) or "as having forfeited rights of communication under the present Convention" (Para. (3)). It is precisely this provision which is meant to give the detaining power the possibility to restrict these rights of "unprivileged combatants" which they would enjoy if they were peaceful civilians.

46. For these reasons "unprivileged combatants" enjoy, in principle, the protection of GC IV as other "protected persons", whether or not they are technically labelled "civilians". Article 5 GC IV gives the detaining power certain competences to restrict the rights of "unprivileged combatants" in comparison to other "protected persons" (in particular civilians), but only as far as its security interests so require and under strict limitations, in particular the minimum rights under Article 5 (3) GC IV.

47. This state of the law is appropriate, particularly in the light of the new forms of terrorism, which have recently emerged. While it is true that the law is open and flexible enough to accommodate security concerns, it is also true that it requires the detaining power to justify specifically any departure from the standards of GC IV. So far, such specific justification for any departure from these standards in case of "unprivileged combatants" has not been given by any State concerned.

48. The comprehensive system of the Geneva Conventions, which leaves no room for persons to fall into a legal void between GC III and GC IV, has a well-founded humanitarian rationale, and it is sufficiently flexible to accommodate legitimate security concerns, in particular as they arise from the new forms of international terrorism.

V. Applicability of Human Rights Treaties

49. In addition to the International Humanitarian Law of the Geneva Conventions, human rights treaties apply in principle to all persons that are subject to a State's authority and control[11]. The nationality of the individual or his or her affiliation to a Party to the conflict is not relevant for the application of human rights law. This is also true for cases in which terrorists have committed criminal acts on the territory of one particular state. Article 2 International Covenant on Civil and Political Rights (hereinafter: ICCPR) and Article 1 of the European Convention on Human Rights (hereinafter: ECHR) give clear answers to such situations. The same is true for certain acts of states, which are performed outside their own territory; According to Article 2 (1) ICCPR each State Party undertakes to respect and to ensure to all individuals "within its territory and subject to its jurisdiction" the rights recognised in the Covenant. The first - territorial - restriction is not contained in the corresponding Article 1 of the ECHR Despite this difference in the wording, the difference is smaller than it may appear at first sight. In both cases, the state can

[11] See, inter alia, UNHRC, Lopez Burgos, Communication No. 52/1979, para 12.3.

be held responsible even in cases of extraterritoriality[12]. In any event, the guarantees of the ICCPR are - subject to explicitly declared admissible reservations - applicable in all cases in which a State Party has taken persons into custody in the course of belligerent actions and has deliberately brought them to a territory which is under its factual control, notwithstanding the fact that the territory does not formally belong to the State.

50. The question of whether the rights and obligations arising under human rights treaties are modified as a result of the applicability of International Humanitarian Law is a question of substantive law which will be treated below.

VI. Rights and Protection Guaranteed by the Law of the Geneva Conventions and Human Rights Law

51. The status of POW is connected with certain well-defined rights and privileges under GC III. Civilians are also protected by an elaborate set of rules contained in GC IV. Any person who has taken part in hostilities, but who is not entitled to POW status and does not benefit from more favourable treatment under GC IV is nevertheless protected, in particular, by Article 75 P I which is generally recognised (including by the United States) as stating the minimum rules of customary international law.

52. The substantive rules of the Geneva Conventions concerning the protection of prisoners of war and of "protected persons" are quite elaborate and complex. It is not necessary to analyse all these rules in detail. It is undisputed that persons who are in the hands of a party to an international armed conflict (or an occupying power) are entitled to a minimum of level of protection which is based, at the highest level of abstraction, on the requirements of humanity. The question cannot therefore be whether or not each and every rule relating to prisoners of war or to other "protected persons" (in particular civilians) is reasonable, but rather how certain key questions are resolved.

A. The Relationship between International Humanitarian Law and Human Rights Law

53. The International Humanitarian Law of the Geneva Conventions and human rights law have their source in the same moral roots. Both fields of law "contain rules for the treatment and protection of human beings on considerations of humanity"[13]. Both require that the protection of the law be provided without discrimination of any kind. Both apply in situations of armed conflict.

54. Human rights law complements International Humanitarian Law, and together, both areas of law provide minimum standards of treatment for persons involved in armed conflict[14].

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[12] See Appl. No. 52/1976, § 12.3 – Lopez Burgos; Appl. No. 56/1979, § 10.3 – Celiberti; see also T. Meron, 'Extraterritoriality of Human Rights Treaties', (1995) 89 *AJIL* 78-82.

[13] K.J. Partsch, "Human Rights and Humanitarian Law", in R. Bernhardt (ed.), Encyclopedia of Public International Law II (Amsterdam, Lausanne and New York et al. 1995), 910.

[14] In its Decision of 12 March 2002 on request for precautionary measures regarding the detainees at Guantanamo Bay, the Inter-American Commission on Human Rights recalled that in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity (HRLJ, 30 September 2002, Vol. 23, no. 1-4, p.16).

While International Humanitarian Law contains the rules regulating the behaviour of parties to an armed conflict, human rights law, in principle, applies at all times, whether in times of peace or in situations of armed conflict, to all persons subject to a state's authority and control ("jurisdiction").

55. The exact relationship between the two sets of rules has been subject to controversy and depends on the particularities of the specific case and on the rights in question. In its Advisory Opinion on the legality of the threat or use of nuclear weapons, the ICJ has ruled that the protection of human rights does not cease in times of war except by operation of provisions, which permit certain derogations in a time of national emergency[15]. The *Martens' Clause* (Article 1 (2) P I), for example, emphasises the proximity of the two areas. Article 60 (5) of the Vienna Convention on the Law of Treaties integrates both concepts in the term "treaties of a humanitarian character". It should be noted that both fields of law contain provisions, which are referred to as "most-favourable-to-the-individual" clauses. Thus, pursuant to Art 5 (2) ICCPR and Article 75 (8) P I, other favourable or more extensive human rights provisions to which individuals might be entitled under international or domestic law or practice cannot be limited through derogations or otherwise.

56. Once an armed conflict has begun human rights law is normally partly superseded by the more specific International Humanitarian Law. This does not mean, however, that human rights law entirely ceases to apply in times of war. Its non-derogable rules and rules which have not been derogated from in accordance with the derogation mechanism provided for under the relevant treaty instrument are also applicable in times of war. There are also some situations in which human rights law defers to the more specific provisions of International Humanitarian Law. The right to life, for example, forms one of the basic guarantees within human rights law: interference with it is limited to exceptional cases (Art 6 (2) ICCPR, Article 2 (2) ECHR). Under International Humanitarian Law, the killing of a combatant is not in principle prohibited, although the right to life is normally considered as a non-derogable right.

57. Human rights provisions do not specifically take account of the regime and status of prisoners of war. Article 9 ICCPR is not designed for international armed conflict situations. Therefore, Article 9 ICCPR is not determinative for the question whether the detention of a combatant during an international armed conflict is arbitrary or otherwise unlawful. The Geneva rules for POWs largely serve as *lex specialis* with respect to the rules concerning detention in general human rights provisions. International Humanitarian Law provisions permit the detention of persons based upon certain grounds and subject to certain conditions. GC III permits the prolonged internment for prisoners-of-war that are the subjects of criminal proceedings for an indictable offence until the end of such proceedings and, if necessary, until the completion of the punishment. Similar provisions exist with respect to civilian internees pursuant to Article 133 (2) of GC IV and to persons who do not benefit from more favourable treatment under GC IV and are protected by Article 75 P I (which is part of international customary law). The same is true for guarantees of *fair trial* to the extent that there are more specific rules under International Humanitarian Law. In such situations, the standards of human rights law must be interpreted with reference to International Humanitarian Law.

58. This does not mean, however, that human rights law becomes meaningless in situations where International Humanitarian Law applies as *lex specialis*. The two areas remain

[15] ICJ Reports, 1996, p. 265 (at para 24).

autonomous; they complement each other and provide for a double protection. human rights law can therefore be applicable in situations where International Humanitarian Law does not accord sufficient protection.

B. Rights and Protection under International Humanitarian Law

59. As far as the substantive protection under International Humanitarian Law is concerned, it is sufficient to distinguish between the rights of POWs (a) and the rights of non-POW Combatants (b).

a) Rights of POWs

60. Provisions on criminal procedure and pre-trial detention relating to POWs are embodied in Article 103 GC III. This provision includes, in particular, certain time limits and restrictions for detention on remand. Article 104 GC III provides for a notification of trial to the Protecting Power in the case of the initiation of proceedings against a POW as soon as possible and at least three weeks before the opening of trial. According to Article 84 GC III, only a military court shall try a prisoner of war, 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 offence alleged to have been committed by the prisoner of war.

61. Under no circumstances whatsoever 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 recognised, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105 GC III. Article 105 GC III provides for assistance by comrades and defence by a qualified advocate or counsel.

62. The principle of fair trial is guaranteed in a more general way in Article 99 (3) GC III ("*No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel*.").

63. The principle of *nulla poena sine lege* is reflected in Article 99 (1) GC III. No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law in force at the time when the said act was committed.

64. Finally the principle of *nemo tenetur* applies also to POWs. According to Article 99 (2) GC III no moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit his guilt as to the act of which he is accused. All these rules are inherently plausible, and it is difficult to see what reasons could exist for not applying them to POWs whose leadership has associated or even cooperated with an international terrorist organisation.

65. Article 102 GC III requires that POWs must be prosecuted before "*the same courts according to the same procedure as in the case of members of armed forces of the Detaining Power*". It could be argued that since some states have established much higher standards of due process than others in the military prosecution of members of their own armed forces and since that they would therefore be required to accord POWs more protective and more expensive proceedings than would other states, this could lead to inappropriate situations and that consideration should be given to eliminate the requirement that a Detaining Power try POWs in the "same courts according to the same procedure". Upon careful reflection, however, this thought should be rejected. The State Parties to GC III have indeed decided that every State

should give every POW its own procedure, subject to certain minimum requirements, and they have thereby consciously accepted the consequence that this might cost some of them more than if the Geneva Conventions would have provided for a standard procedure for all POWs in all states. The rule in Article 102 has strong foundations in considerations of legal certainty (because each military is used to their own procedure), and mutual respect and reciprocity. The question can therefore only be whether a modification of Article 102 C III should be contemplated "in light of the new categories of combatants which have emerged recently". Article 102 GC III, however, does not apply to terrorists, who as a matter of practice, usually do not form part of the regular armed forces (see below d)). As long as it is accepted that it is possible to distinguish regular and irregular combatants and when such a selection has been done the rule in Article 102 GC III continues to make sense, even if it entails certain higher costs for more developed states.

66. The Detaining Power is not precluded by GC III to take necessary and reasonable safety measures concerning POWs, in particular, those that are designed to ensure the detaining power's security. It is possible that security reasons could, for example, justify a restriction of the access of POWs to certain objects that are provided for under GC III, if there would be indications that these objects would be misused for the purpose of physical attack or of committing suicide). It may be that certain security reasons exist for not giving such objects or privileges to persons who are typically not entitled to POW status (al Qaeda associates, see below d)) who could then abuse them and involve other POWs in such abuse. It should also be noted that although Article 17 regulates questioning of POWs, it does not prohibit interrogations as such.

67. For these reasons, little need arises to further develop the rules of the Third Geneva Convention.

b) The Rights of Non-POW Combatants

68. A person who does not qualify for POW status under GC III is nevertheless entitled, even if he or she is an "illegal combatant", to protection as another "protected person" under GC IV (see above IV. B. c). This means that the person, as a general rule, holds all the rights of a civilian under GC IV, subject, however, to certain qualifications. For "unprivileged combatants" the basis for these qualifications is Article 5 GC IV:

> *" (1) Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.*
> *(2) Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."*

69. The two paragraphs of this provision give the Detaining Power more powers to restrict the rights of protected persons for security reasons if these persons are on its own territory rather than in occupied territory. The reasons behind this distinction are not entirely clear, and it is perhaps here that the Geneva Conventions need some clarification. It is arguable that persons

who are reasonably suspected of international terrorism come under the more general rule of Article 5 (1) GC IV.

70. Assuming that Article 5 (1) GC IV forms a basis for the restriction of rights of "unprivileged combatants" under GC IV, there are certain important limitations to this power. Such limitations are contained in Article 5 (3) GC IV Article 75 P I and Common Article 3 of the Geneva Conventions (see Appendix).

71. Article 75 P I expressly covers "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". As mentioned earlier, these would be persons who are not entitled to POW status and do not meet the nationality criteria of Article 4 GC IV. It is generally recognised that the provisions of Article 75 P I, due to their fundamental nature, constitute part of customary international law[16]. In the past, the United States has recognised that Articles 45 and 75 are among the many Articles of P I, which are " either legally binding as customary international law or acceptable practice though not legally binding"[17]. There are no conceivable reasons, nor have such reasons been specifically adduced, why Article 5 (3) GC IV and Article 75 P I should not be the minimum standard of protection for all persons, including "unprivileged combatants".

72. It has also been argued, however, that criminal prosecution of "unprivileged combatants" may not always be possible, either legally or practically, when large numbers of such combatants emerge on the scene of international conflicts, are captured in large numbers and against whom there is no individualized evidence of criminal conduct (other than their association with other combatant members of an international terrorist organisation, such as Al Qaeda). This argument overlooks that International Humanitarian Law does not exclude the possibility of administrative detention (internment or assigned residence, see Article 78 GC IV), in addition to criminal proceedings but subject to certain conditions.

73. It may therefore be justified for an Occupying Power to detain "unprivileged combatants" for the amount of time which is necessary to clarify their individual circumstances (which may take time if they are captured in large numbers), in particular, to find evidence whether they are indeed associated with an international terrorist organisation and pose a continuing threat. If, however, no sufficient evidence can be found within a reasonable time, either to justify continued administrative detention or to commence criminal proceedings, then the fact that a person has been arrested in the course of an armed conflict in which an international terrorist organisation was involved does not justify his or her indeterminate detention. The same is true for other forms of treatment which are based on the assumption that the person is guilty or dangerous. The evidence, which would justify continued administrative detention, must be subject to periodic review (see Article 78 GC IV)[18].

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[16] See Robert K. Goldman & Brian Tittemore, Unprivileged Combatants and the Hostilities in Afganistan: Their Status and Rights Under International Humanitarian and Human Rights Law, ASIL Task Force on Terrorism, URL: http:/www.asil.org/taskforce/goldman.pdf, at p. 38

[17] US Army, Operational Law Handbook (2002), International and Operational Law Department, The Judge Advocate General's School, US Army, Charlottesville, Virginia, issued 15 June 2001, Ch. 2 at p. 5.

[18] As to detention of suspected terrorists, see the instructive judgments of the Israeli Supreme Court of 2003 concerning detentions by the Israeli Defence Forces of large groups of persons in the West Bank in connection with the "Operation Defensive Wall" (Marab *et al.* V. IDF. Commander in the West Bank, Judgment of 5 February 2003, HCJ 3239/02) and of 1999 concerning the so-called Lebanese detainees (C.F.H. 7048/97 Anonymus (Plonim) v. Minister of Defense P.D.54 (1) 721).

C. Rights and Protection under International Human Rights Law

a) Substantive Protection

74. According to Article 9 ICCPR, everyone has the right to liberty and security of the person. Arbitrary arrest is excluded; no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, for execution of the judgement. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 5 of the ECHR contains corresponding rights at European level.

75. Article 10 ICCPR is a main guarantee in the context of the treatment of detained persons irrespective of their legal classification: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Article 3 ECHR is more general in its wording. However, according to the Strasbourg case-law, the requirements are very much the same.

76. Article 14 ICCPR guarantees fairness of proceedings. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Moreover, there are a number of specific guarantees for accused persons. One of them is the presumption of innocence. Article 14 (5) ICCPR provides for a double degree of jurisdiction in criminal matters: Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The principle of *ne bis in idem* is guaranteed in Article 14 (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. Article 6 ECHR and its Protocol No. 7 contain the same rights for the European level.

77. The principle of "nulla poena sine lege" forms an integral part of every international human rights instrument. Article 15 ICCPR and Article 7 ECHR are two prominent examples of this principle located at the heart of the rule of law. Both under the ICCPR and the ECHR, this right belongs to the non-derogable rights under the derogation clauses.

78. The wording of the human rights guarantees shows that the requirements of International Humanitarian Law are not as strict as they are under general human rights treaties. However, they form a solid basis for protection against arbitrary proceedings before organs that do not merit the notion of an "independent tribunal" or "court". Several fundamental protections in Article 14 ICCPR are not explicitly enumerated in Article 75 P I, such as the right to have the free assistance of an interpreter, the right of the accused to defend himself in person or through legal assistance of his own choosing and to be informed, if he does not have legal assistance, of

this right. According to Article 75 (8) P I, any other more favourable provisions cannot be excluded because of the mere fact that it is not included under the rights in Article 75 P I.

79. Therefore, the broader protections of Article 14 ICCPR are, in principle, also applicable with regard to unprivileged combatants, such as those who are detained in Guantanamo Bay.

b) Derogation of rights in case of emergency

80. Human rights treaties usually provide for a possibility of derogation of specific rights under the respective Conventions. One example is Article 4 ICCPR according to which the States Parties may "in time of public emergency which threatens the life of the nation" and the existence of which is officially proclaimed, take measures derogating from their obligations under the 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[19]. However, no derogation from articles 6, 7, 8 (Para. 1 and 2), 11, 15, 16 and 18 may be made under this provision[20].

81. Article 4 (3) ICCPR provides for a special procedure. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Party 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 for which it did so. A further communication shall be made, through the same intermediary, on the date on which such derogation terminates.

82. This legal regime of derogation of Article 4 (3) ICCPR and Article 15 ECHR is open for reactions in exceptional cases. At the same time, there remains a certain minimum of international control as to whether the limits of the derogations have not been overstepped. It should be mentioned that the United Kingdom has made a declaration under Article 15 ECHR in the course of the adoption of new legislation following the incidents of 11 September 2001. It appears that this power of derogation meets the requirements of States that are in a situation

[19] In this regard, see the CCPR General Comment 29 which stresses: "*A fundamental requirement for any measures derogating from the Covenant, as set forth in Article 4.1 is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers (*Para 4, pp. 139-140). *Furthermore, Article 4.1 requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of* International Humanitarian Law. *Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations whether based on treaty or general international law* (Para 9, p. 141)".

[20] *The fact that some of the provisions of the Covenant have been listed in Article 4.2 as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists (CCPR General comment 29, Para 6, p. 140).*

where an effective reaction to terrorism within the limits of human rights guarantees seems impossible[21].

VII. Conclusion

83. The new dimension of international terrorism, which has emerged in particular, on the occasion of the attacks of 11 September 2001, raises the crucial issue of the capacity of International Humanitarian Law adequately to address new forms of terrorist violence .

84. The foregoing analysis shows that International Humanitarian Law, as far as it concerns the rules on detention and treatment of persons who have been detained in the course of an international armed conflict, offers a generally appropriate legal framework. This is because:

- Suspected members of an international terrorist network, such as al Qaeda, who are nationals of a party to such a conflict, fall into the category of other "protected persons" under GC IV, though they usually do not qualify for POW status, and,
- Although GC IV excludes the nationals of a state that is not a party to the conflict, these nationals benefit from the protection of Article 75 of the First Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts (which reflects a rule of customary international law), from human rights law and from the rules on diplomatic protection.

85. It therefore appears that in respect of these matters there is no legal void in international law, and no need for further development of the Geneva Conventions. However, it is of paramount importance that the rules of International Humanitarian Law, as well as human rights law, be properly implemented.

86. Having said that, and as far as the general issue of "new categories of combatants" and recent developments of international terrorism are concerned, the Commission does not mean to close the door to the progressive development of international law. International law, as any branch of law, is perfectable and must adapt to meet new conditions. The Geneva Conventions, framed in 1949 in the context of the conditions pertaining in World War II, have since been continually developed, in particular, by the two Protocols of 1977. Since 11 September 2001, a new dimension of international terrorism has appeared with the emergence of unprecedented militarised international terrorist organisations. The membership of these organisations crosses national boundaries. Their purposes are often diffuse. They have attacked different kinds of targets, individual or collective, in different countries. Their methods are unconventional and have the potential to bring about widespread destruction on a massive scale.

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[21] "*In those provisions of the Covenant that are not listed in Article 4.2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under Article 4. Some examples are presented bellow: a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in Article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in Article 4.2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between Articles 7 and 10. /.../*" (CCPR General Comment 29, Para 13, p. 142).

87. The Commission recommends further reflection to consider whether any additional instrument may be needed in the future to meet or anticipate these novel threats to international peace and security. Any attempt in this respect must, however, take care not to inadvertently undermine the existing level of protection under the international humanitarian law as well as the international law of human rights.

APPENDIX

Article 5 (3) of the Fourth Geneva Convention:

"Article 5 (3)

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

Common Article 3 of the Geneva Conventions:

"Article 3

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 recognised as indispensable by civilized persons.

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.

Article 75 of the First Additional Protocol the Geneva Convention:

"Article 75. – Fundamental guarantees

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.

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.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

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 recognised 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 guilt 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

(*j*) 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.

5. 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.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(*a*) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(*b*) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No 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."