The Status of Persons Held in Guantánamo under International Humanitarian Law

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Abstract

Every component of the 'war on terrorism', every situation in which persons held in Guantánamo were involved and every individual detained there have to be qualified separately. Many persons held in Guantánamo are not at all covered by international humanitarian law (IHL). Others benefit from the fundamental guarantees of IHL of non-international armed conflicts, which do not offer a legal basis for their detention — an issue dealt with by domestic law. Those persons who were arrested in Afghanistan are protected by IHL of international armed conflicts. In such conflicts, there are two categories of 'protected persons': combatants, who become prisoners of war protected by the Third Geneva Convention if they fall into the power of the enemy; and civilians protected by the Fourth Geneva Convention when in enemy hands. The US administration claims that the persons it holds in Guantánamo are neither combatants nor civilians, but 'unlawful combatants'. However, no one can fall in between the two aforementioned Conventions and therefore be protected by neither of the two. There are good reasons to consider the captured Taliban as prisoners of war. As for the al Qaeda members captured in Afghanistan, it may be justified to deny them prisoner of war status, on a number of legal grounds. However, as protected civilians, they may not be deported to Guantánamo, but may be detained in Afghanistan for the prosecution and punishment of criminal offences (including for having directly participated in hostilities); or they may be interned for imperative security reasons, upon individual decision made in a regular procedure which must include a right of appeal.

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1. Introduction

The persons held by the US in Guantánamo Bay, Cuba, have become a symbol for critics of the US administration's approach towards human rights and international humanitarian law in its 'war on terrorism'. Many of the Guantánamo detainees fell into the hands of the US in Afghanistan, belonging either to the Taliban or, allegedly, to al Qaeda. Other prisoners held in Guantánamo were, however, arrested in Pakistan, Bosnia and Herzegovina, Gambia and other places far away from Afghanistan.

From a humanitarian point of view, other persons involved in or affected by the 'war on terrorism', and, even more so, the much greater number of victims of the many other armed conflicts around the world, certainly deserve more concern. From a legal point of view, however, the justifications given by the US — a democracy governed by the rule of law — for the detention of those persons give rise to great concern. They oblige us to discuss the very innovative interpretation of the 'laws of war', which I prefer to call 'international humanitarian law' (IHL), that the US administration adopts in the 'war on terrorism'. Some elements of this interpretation are arguable; others are unreasonable. Together, they lead to the surprising result that the detainees in Guantánamo are held outside the law.

The line of argument made by the US administration may be summed up as follows.[1] First, the US is engaged in an international armed conflict — the 'war on terrorism'. This is, secondly, one single, worldwide international armed conflict against a non-state actor (al Qaeda) or perhaps also against a social and criminal phenomenon (terrorism). That armed conflict started — without the US defining it so at that time — at some point in time in the 1990s and will continue until victory.

1 For a legal explanation of the US position, see A. Dworkin, *Crimes of War Project, Excerpts from an Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defence* (16 December 2002), available at http://www.crimesofwar.org/onnews/news-pentagon-trans.html (last visited 31 October 2003) and, with a more moderate approach, W.H. Taft IV, 'The Law of Armed Conflict after 9/11: Some Salient Features', 28 *Yale Journal of International Law* (*YJIL*), (2003) 319. Such position was partly accepted by the courts in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), and *Hamdi v. Rumsfeld*, No. 02–7338 (4th Cir. 8 January 2003), (also available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/4th/027338p.html (last visited 5 August 2003)). See, for a critical assessment, J. Fitzpatrick, 'Speaking Law to Power: the War against Terrorism and Human Rights', 14 *European Journal of International Law* (2003), at 249; M.J.D. Sweeney, 'Detention at Guantánamo Bay — a Linguistic Challenge to Law', 30 *Human Rights* (2003) 15; J. Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War', 28 *YJIL* (2003), at 325; L. Vierucci, 'Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled', 1 *Journal of International Criminal Justice* (2003), at 284; C. Moore, 'International Humanitarian Law and the Prisoners at Guantanamo Bay', 7 *International Journal of Human Rights* (2003), at 1; M. Mofidi and A.E. Eckert, '"Unlawful Combatants" or "Prisoners of War": the Law and Politics of Labels', 36 *Cornell International Law Journal* (2003), at 59; R.J. Wilson, 'United States Detainees at Guantánamo Bay: the Inter-American Commission on Human Rights Responds to a "Legal Black Hole"', 10 *Human Rights Brief* (2003) (also available at http://www.wcl.american.edu/hrbrief/10/3detainees.cfm (last visited 31 October 2003)); N. McDonald and S. Sullivan, 'Rational Interpretation in Irrational Times: the Third Geneva Convention and the "War on Terror"', 44 *Harvard International Law Journal* (2003), at 301; and G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the War on Terror', 27 *Fletcher Forum of World Affairs* (2003), at 55.

Thirdly, while the US claims, in this conflict, all the prerogatives that IHL of international armed conflicts confers upon a party to such a conflict, in particular to detain enemy combatants without any judicial decision in Guantánamo, it denies these detainees protection by most of that law, claiming that their detention is governed neither by the IHL rules applying to combatants nor by those applicable to civilians.

Fourthly, all those considered to be enemies in the 'war on terrorism' — even those who are denied the benefit of full protection by IHL of international armed conflicts — are not dealt with under domestic criminal legislation, nor under any other new or existing legislation; nor do they benefit from international human rights law. The US administration claims that their treatment is entirely and exclusively ruled by some mysterious rules of customary IHL.[2]

I will now discuss the approach of the US administration towards the persons held in Guantánamo from the point of view of IHL. As always, applying IHL implies, first, that the situation in which those persons are involved has to be legally classified in order to determine whether it is an armed conflict and whether the conflict is international or non-international in character. Secondly, for those persons who are covered by IHL, their status under this body of law has to be determined.

2. The Classification of the 'War on Terrorism' under International Humanitarian Law

IHL is, today, largely codified in treaties, in particular the four 1949 Geneva Conventions[3] and the two 1977 Additional Protocols.[4] The US is a party to the former, but not to the latter. It recognizes, however, Protocol II as desirable or even as existing law and most, but not all, provisions of Protocol I as reflecting customary international law.

The four Geneva Conventions and Protocol I apply to international armed conflicts. Article 2, common to the Geneva Conventions, provides that the latter 'shall apply to all cases of declared war or of any other armed conflict which may arise between two

2 See, in particular, *United States: Response of the United States to Request for Precautionary Measures — Detainees in Guantanamo Bay, Cuba* (12 April 2002), reproduced in American Society of International Law, *International Law in Brief* (4 June 2002), available at http://www.asil.org/ilib/ilib0508.htm#r2 (last visited 31 October 2003).

3 Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 6 *UST* 3114, 75 *UNTS* 31–83; Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949), 6 *UST* 3316, 75 *UNTS* 85–133; Convention [No. III] Relative to the Treatment of Prisoners of War (12 August 1949) 6 *UST* 3217, 75 *UNTS* 135–285; Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 6 *UST* 3516, 75 *UNTS* 287–417.

4 Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 *UNTS* 3–434; Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 *UNTS* 609–699.

or more of the High Contracting Parties'. Only states can be party to the Geneva Conventions. Al Qaeda and terrorism are not states. Therefore, the law of international armed conflict does not apply to a conflict between the US (a state) and them. There is no indication that state practice and *opinio juris* go further and apply the law of international armed conflict also 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 they were never prepared to apply the same rules, but only more limited humanitarian rules. Even a conflict spreading over borders may remain 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.'[5]

If the aforementioned principles are applied to the 'war on terrorism', it may be held that the law of international armed conflicts covered the conflict in Afghanistan, because it was directed against the Taliban, representing *de facto* that state. As for al Qaeda, where it is acting *de facto* under the global or effective direction or control of the Taliban, the conflict against it may also be characterized as international.[6] Such direction and control exist, however, only in Afghanistan and not elsewhere.

Each component of the 'war on terrorism' — and every situation in which persons held in Guantánamo were arrested — has to be classified separately. Until now, it was a matter of regret that once there was an international element in a conflict on a given territory, the whole conflict could not, under constant state practice, be defined as wholly international, but had to be split off into its components.[7] Even less could a worldwide conflict be characterized as international simply because some of its components were international. No one claimed during the 'cold war' that IHL of international armed conflicts applied to internal conflicts, such as those in Greece, Angola, El Salvador, Nicaragua, or even to political tensions and arrests in Germany, Italy or Latin America, simply because those were part of the cold war — the 'war against communism' — or because there were international armed conflicts between proxies of the two superpowers in the Near East, Korea or Vietnam.

Components of the 'war on terrorism' 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. To fall under those provisions, they must, however, be armed conflicts. Criteria permitting such qualification are the

5 L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 136.

6 See ICTY, Judgment, *Tadić*, (IT-94–1-A), Appeals Chamber, 15 July 1999, *ILM* 1518 (1999), paras 116–144.

7 D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', 163 *Hague Academy Collected Courses* (1979–II), at 119; H.P. Gasser, 'Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon', 33 *American University Law Review* (1983), at 145; J.G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict', 850 *International Review of the Red Cross* (*IRRC*) (2003), at 313; É. David, *Principes de Droit des Conflits Armés* (3rd edn, Bruxelles: Bruylant, 2002), 153–160.

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 (versus law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.[8]

Other situations are not armed conflicts at all. 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'.[9] Terrorist actions by private groups have not customarily been viewed as creating armed conflicts.[10] The UK stated, when it ratified Protocol I, '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'.[11] The British and Spanish campaigns against the IRA and ETA have not been treated as armed conflicts under IHL.[12]

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. 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' goes on.

3. The Status of Persons Held in the 'War on Terrorism' under International Humanitarian Law

A. Under the Law of International Armed Conflict

In international armed conflicts, there are two categories of 'protected persons', who are subject to two very different legal regimes: combatants, who become prisoners of war protected by the Third Geneva Convention if they fall into the power of the enemy; and civilians protected by the Fourth Geneva Convention when in enemy hands.

1. 'Unlawful Combatants'?

The US administration claims that the persons it holds in Guantánamo are neither combatants nor civilians, but 'unlawful combatants'. President Bush himself made

8 See L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 30–52.

9 Protocol II, *supra* note 4, Art. 1(2).

10 L.C. Green, *The Contemporary Law of Armed Conflict* (2nd edn, Manchester: Manchester University Press, 2000), ('[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism [. . .] are outside the scope of "IHL"', at 56).

11 Reservation by the UK to Arts 1(4) and 96(3) of Protocol I, available at http://www.icrc.org/ihl.nsf (last visited 31 October 2003).

12 H. McCoubrey and N.D. White, *International Law and Armed Conflict* (Dartmouth: Aldershot, 1992), 318.

this argument concerning the status of Taliban fighters.[13] Other administration officials extend it to members of al Qaeda and others qualified as 'terrorists'.[14] However, according to the text, context and aim of the Third and Fourth Conventions, no one can fall between the two Conventions and thus be protected by neither of the two.[15]

The first paragraph of Article 4 of Fourth Geneva Convention reads as follows: '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.' According to paragraph 4 of that Article, persons protected by the Third Geneva Convention 'shall not be considered as protected persons within the meaning of the present Convention'. This clearly indicates that anyone (fulfilling the requirement for protected person status[16]) who is not protected by Convention III falls under Convention IV. The *Commentary* published by the International Committee of the Red Cross (ICRC) reads:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third 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.[17]

The preparatory work of the article confirms this interpretation. The ICRC had first suggested referring to 'persons who take no active part in hostilities'. The XVIIth International Red Cross Conference objected that '[t]his phrasing did not, however, cover those who commit hostile acts whilst not being regular combatants, such as *saboteurs* and *franc-tireurs.*'[18] This problem was reported to the Diplomatic Conference, which therefore adopted the present wording.

13 White House, Office of the Press Secretary, Statement by the Press Secretary on the Geneva Convention (7 May 2003) available at http://www.whitehouse.gov/news/releases/2003/05/20030507–18.html (last visited 31 October 2003).

14 Dworkin *supra* note 1; *Respondents' Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus*, 7, *Padilla v. Rumsfeld*, 02 Civ. 4445 (MBM), 2002 US Dist. (SDNY, 27 August 2002) (also available at http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf (last visited 21 August 2003)), at 22.

15 K. Doermann, 'The Legal Situation of "Unlawful/Unpriviledged Combatants"' 849 *IRRC* (2003), at 45. That 'unlawful combatants' are protected by Convention IV is also recognized by R. Baxter, 'So-called "Unprivileged" Belligerency: Spies, Guerillas and Saboteurs', 28 *British Yearbook of International Law* (1951), at 323, 328 and 344. When the concept of 'unlawful combatants' was used by the US Supreme Court in *Ex Parte Quirin et al.*, 317 *US* 1 (1942), Convention IV did not yet exist.

16 The ICTY replaces the nationality standard laid down in Art. 4 by an allegiance standard (see *Tadić*, *supra* note 6, paras 163–169, and our criticism M. Sassòli and L. Olson, 'Case Report, Judgment, *The Prosecutor v. Dusko Tadic*, Case no IT-94-A, ICTY Appeals Chamber (15 July 1999)' 94 *American Journal of International Law* (*AJIL*) (2000) 571, at 576–577.

17 J. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 51.

18 International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims, Remarks and Proposals Submitted by the ICRC* (1949), 68.

Moreover, Article 5 of the Fourth Geneva Convention allows for some derogations from the protective regime of that Convention for persons engaged in hostile activities. If such persons did not fall at all under that Convention, such a provision would not have been necessary.

From a humanitarian perspective, it is dangerous to revive such an easy escape category for the purpose of detaining persons as 'unlawful combatants'. No one should fall outside the law and, in particular, not outside the carefully built protective system offered by the Geneva Conventions. This system constitutes the minimum safety net in that profoundly inhumane situation which is war, where most of the other legal safeguards tend to disappear.

The US administration has declared that it treats all captured 'terrorists' humanely. First, such a vague commitment is not sufficient. The law covers even those who commit the most horrible crimes; only this allows us to judge over them. Secondly, other, less scrupulous states may take advantage of such a new loophole by, for example, denying protection to US personnel. In conclusion, all persons held in Guantánamo who are covered by IHL of international armed conflicts, must, perforce, be either combatants or civilians.

2. Combatants

Combatants are defined as members of the armed forces of a party to the international armed conflict. The US argues that the Taliban held in Guantánamo, who are members of the armed forces of the *de facto* government of Afghanistan, are not prisoners of war, because they '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'.[19] This allegation may astonish those who remember that, during 'Operation Enduring Freedom', the US stressed that it attacked Taliban command and control centres and did not complain about an impossibility to distinguish Taliban from civilians.[20] If the allegation were true, the legal consequence would be that the Taliban are indeed denied prisoner of war status, if they are considered as 'other militias ... volunteer corps, ... including resistance movements', but not if they are 'members of the armed forces of a Party to the conflict'.[21] It is at least arguable that the Taliban belong to the latter category. For regular armed forces, however, it would be dangerous to require respect for the laws of war as a precondition for prisoner of war status. In all armed conflicts, the enemy is accused of not complying with IHL, and such accusations are all too often accurate. If IHL violations by regular armed forces were permitted to deprive all their members, independently of their individual behaviour, of prisoner of war status, that status could frequently not perform its protective effect. Historically, the US never invoked

19 White House, *supra* note 13.

20 US Department of Defense News Briefing — Secretary Rumsfeld and Gen. Myers, Washington DC (8 February 2002), available at http://www.defenselink.mil/news/Feb2002/t02082002–t0208sd.html (last visited 22 November 2003).

21 Convention III, *supra* note 3, Art. 4(A), paras (2) and (1), respectively.

such an argument concerning the German *Wehrmacht*, which cannot be considered to have consistently complied with the laws of war.

As for the al Qaeda members captured in Afghanistan, it may be justified to deny them prisoner of war status, either because al Qaeda did not belong to Afghanistan, the enemy in the international armed conflict, or, if it is considered as an Afghan militia, it is highly doubtful whether it complied with the aforementioned conditions that it must fulfil.[22]

In case of doubt whether persons having committed a belligerent act are combatants, the Third Geneva Convention prescribes that they must be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal'.[23] The US established such tribunals in the Vietnam War and the 1991 Gulf War.[24] However, it argues now that, in the case of those detained in Guantánamo, there is no doubt.[25] If the applicability of the clause merely depended on whether the detaining power has doubts, the latter could, however, always evade its obligation, which would make the clause practically useless.[26]

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 prevent them from rejoining the fight. Therefore, no individual decision has to be taken on the detention. The mere fact that they are enemy combatants is a sufficient justification for their detention until the end of active hostilities in that conflict.[27] This 'title' for detention prevails, as *lex specialis* for combatants, over human rights law and domestic law requiring an individual judicial determination. While in detention, prisoners of war benefit, however, from the protection of the Third Geneva Convention — a detailed regime making sure that they are treated not only humanely, but also not as prison inmates[28] — as they are not serving a sentence and have committed no unlawful act.

3. Civilians

Civilians are protected civilians if they fall, during an international armed conflict, into the hands of a belligerent and fulfil certain nationality requirements.[29] Enemies, i.e. Afghan nationals, are always protected. In an occupied territory, nationals of a

22 For a detailed discussion, see Vierucci, *supra* note 1, at 392–395.

23 Convention III, *supra* note 3, Art. 5(2).

24 United States Military Assistance Command, Vietnam. Directives No. 381–46, Military Intelligence: Combined Screening of Detainees, 27 December 1967, reproduced in M.Sassòli and A. Bouvier, *How Does Law Protect in War?* (Geneva: International Committee of the Red Cross, 1999), 780–783; and Department of Defense, 'Report to Congress on the Conduct of the Persian Gulf War', 31 *ILM* (1992), at 612 and 629.

25 Donald Rumsfeld, *Fiscal Year 2003 Department of Defense Budget Testimony*, available at http://www.defenselink.mil/speeches/2002/s20020205-secdef2.html (last visited 6 February 2002).

26 Cf. *United States v. Percheman*, 32 *US* 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.').

27 Convention III, *supra* note 3, Arts 21 and 118.

28 Ibid., Art. 22(1).

29 *Supra* note 16.

third country other than an ally of the occupier are equally protected. On a party's own territory, only neutral nationals are protected, and only if they do not benefit from normal diplomatic protection.[30] Protected civilians may not be detained, except for two reasons. First, under domestic legislation (or security legislation introduced by an occupying power), they may be detained with a view to the prosecution and punishment of criminal offences (including for having directly participated in hostilities). Secondly, civilians may be interned for imperative security reasons, upon individual decision made in a regular procedure to be prescribed by the belligerent concerned and which must include a right of appeal.[31] Such civilians are civil internees whose treatment is governed by extremely detailed provisions of the Fourth Geneva Convention and their case must be reviewed every six months.[32]

Civilians who fell into US hands in Afghanistan may, in any case, not be held in Guantánamo, but only in Afghanistan. While combatants may be held as prisoners of war in every corner of the earth, civilians protected by the Fourth Geneva Convention may indeed never be deported out of an occupied territory.[33] Afghanistan was an occupied territory because it came under control of the US and its allies during an international armed conflict.

Surprisingly, and much to my relief, the Legal Adviser of the US State Department has recently admitted that 'unlawful combatants' are protected by the Fourth Geneva Convention.[34] However, the administration does not yet draw practical conclusions from this admission, as it still detains those persons in Guantánamo and denies them individual judicial or administrative determination of the justification for their detention.

It may appear strange to legally define as 'civilians' heavily armed 'terrorists' captured in an international armed conflict, but found not to benefit from combatant and prisoner of war status. In law, borderline cases never correspond to the ideal type of a category and fall nevertheless 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. After arrest, the Fourth Convention does not bar their punishment for unlawful participation in hostilities; it even prescribes such punishment for war crimes. In addition, it permits administrative detention for imperative security reasons and for derogations from protected substantive rights of civilians within the territory of a state and from communication rights within occupied territory.[35] The Fourth Convention has not been 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.

30 Convention IV, *supra* note 3, Art. 4(2).
31 Ibid., Arts 41–43 and 78.
32 Ibid., Arts 79–135.
33 Ibid., Arts 49 and 76.
34 Taft, *supra* note 1, at 324, refers to Art. 64 of Convention IV, which is located in the part of Convention IV covering protected civilians in occupied territories.
35 Convention IV, *supra* note 3, Art. 5(1) and (2), respectively.

Some may find it shocking that unprivileged combatants as civilians have thus an advantage over captured lawful combatants, i.e. prisoners of war, because the former may be interned only following a judicial or individual administrative decision. 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 behaviour of an unprivileged combatant and the future threat he or she represents can only be determined individually.

B. Under the Law of Non-international Armed Conflicts

IHL of non-international armed conflicts foresees no combatant or prisoner of war status, and contains no other rules on the status of persons detained in relation with the conflict, or on reasons justifying detention of civilians. The question as to whether 'unlawful combatants' are combatants or civilians does not arise. In non-international armed conflicts, IHL cannot possibly be seen as a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in case of prosecution for criminal offences, for judicial guarantees. Possible reasons for arrest, detention or internment are entirely governed by domestic legislation, human rights law requiring that no one be deprived of his or her liberty except based on the law. [36] In state practice, too, governments confronted with non-international armed conflicts based any arrest, detention or internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoked the 'law of war'.

C. Outside Armed Conflicts

IHL applies only to armed conflicts. It cannot, therefore, offer any protection to those held in connection with those components of the 'war on terrorism' that do not meet the lower threshold of a non-international armed conflict. It is evident that IHL can provide even less a legal basis for detaining such persons in Guantánamo or elsewhere.

4. Conclusion

Meant as the branch of international law that provides protection to all those affected by or involved in armed conflicts, IHL has become, for the US administration, a justification for denying such people and others any protection by human rights law and domestic legislation. In addition, while the US thus invokes IHL, it is not ready to provide them with the full benefit of this law.

To apply IHL, every component of the 'war on terrorism', every situation in which

36 Art. 9 of the UN Covenant on Civil and Political Rights.

persons held in Guantánamo were involved and every individual detained there have to be legally classified separately. Many persons held in Guantánamo are not covered by IHL at all. Others benefit from the fundamental guarantees of IHL of non-international armed conflicts, which do not offer a legal basis for their detention — an issue dealt with by domestic law. Those persons who were arrested in Afghanistan are protected by IHL of international armed conflicts. Under that law, only those who are prisoners of war may be held in Guantánamo; those who are not prisoners of war are civilians. As such, they may only be detained in Afghanistan and only after individual judicial or administrative determination. I am convinced that the 'war on terrorism' can be won — and victory may even be easier — if those carefully drafted standards of IHL were respected.