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Expanding the Horizons of Human Rights Law

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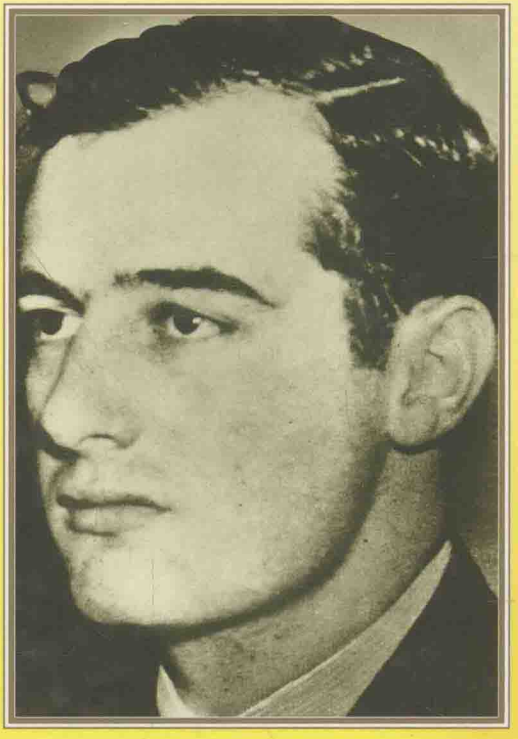

edited by
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EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW

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INTRODUCTION

By resolution 49/184 of 23 December 1994, the General Assembly of the United Nations proclaimed a Decade on Human Rights Education, commencing on 1 January 1995. The Decade and its accompanying Plan of Action are thoroughly rooted in a series of human rights instruments.*

A classical formulation of human rights education is contained in Article 26(2) of the *Universal Declaration of Human Rights* (UDHR):

> "Education shall be directed to . . . the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace."

Article 13(1) of the 1966 *International Covenant on Economic, Social and Cultural Rights* contains a similar formulation, adding references to human dignity, participation in a free society, and ethnic groups.

Under Article 7 of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination,*

> "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups . . ."

The 1978 UNESCO *Declaration on Race and Racial Prejudice* has detailed provisions about human rights education. It is stated in Article 5(2) that

> "States as well as all other competent authorities and the entire teaching profession, have a responsibility to see that the educational resources of all countries are used to combat racism, more especially
>
> - by ensuring that curricula and textbooks include scientific and ethical considerations concerning human unity and diversity; . . .
>
> - and by taking appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children."

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* For detailed discussion of the right to human rights education, see G. Alfredsson, "The Rights to Human Rights Education", in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights. A Textbook*. 2nd rev. ed. (Dordrecht: Martinus Nijhoff Publishers; Finish and Norwegian Institutes of Human Rights), pp. 273-288.

Several other instruments and conference reports adopted by or in cooperation with UNESCO address human rights education.

According to Article 29(1) of the 1989 *Convention on the Rights of the Child*, the education of the child shall, *inter alia*, be directed to:

> "(b) the development of respect for human rights and fundamental freedoms . . .
>
> (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin . . ."

Reference can also be made to Principle VI of the 1965 *Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples*.

The ILO *Convention concerning Discrimination in Respect of Employment and Occupation* (No. 111) of 1960, in Article 3(b), requires States "to promote such educational programmes as may be calculated to secure the acceptance and observance" of national policies aimed at equality of opportunity and treatment in the work place.

According to Article 4(4) of the UN *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*,

> "States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole."

The ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (No. 169) of 1989 stipulates in Article 31:

> "Educational measures shall be taken among all sections of the national community . . . with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples."

Human rights education is thus considered one way of overcoming the ignorance which often causes discrimination. For individuals and groups to expect and to demand respect for their rights and freedoms, knowledge is necessary.

On the road to the Decade, the 1993 World Conference on Human Rights reaffirmed the right to human rights education and the corresponding duties of States. Paragraph 33 of the *Vienna Declaration* reads in part:

> "The World Conference on Human Rights reaffirms that States are duty-bound . . . to ensure that education is aimed at strengthening the respect of human rights ... education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals . . ."

In paragraph 34, governments and the UN system-wide organizations "are urged to increase considerably the resources allocated to . . . human rights awareness through training, teaching and education . . .". In paragraphs 79 and 82, the *Vienna Programme of Action* calls on States to include human rights as subjects in the curricula of all learning institutions. Furthermore,

> "the . . . United Nations system should be able to respond immediately to requests from States for educational and training activities in the field of human rights as well as for special education concerning standards as contained in international human rights instruments . . ."

Human rights education is also anchored in instruments adopted by regional organizations. In the 1981 *Declaration regarding Intolerance – A Threat to Democracy*, adopted by the Council of Europe, it is decided in operative paragraph IV(iii)

> "to promote an awareness of the requirements of human rights and the ensuing responsibilities in a democratic society, and to this end, in addition to human rights education, to encourage the creation in schools, from the primary level upwards, of a climate of active understanding of and respect for the qualities and cultures of others."

In the 1982 *Declaration on the Freedom of Expression and Information,* it is resolved in operative paragraph III(b) to intensify cooperation in order "to promote, through teaching and education, the effective exercise of the freedom of expression and information".

The *European Charter for Regional or Minority Languages*, adopted by the Council of Europe in 1992, in Article 7(3), calls for the promotion of "respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training . . .". The Charter also contains interesting provisions (Articles 7 and 8) on the use of such languages in education, including "arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language". Similar references are contained in the 1994 *Framework Convention on the Protection of National Minorities.*

Several documents and reports adopted under the auspices of the Organization on Security and Cooperation in Europe (OSCE) address human rights education, such as the *Concluding Document of the Vienna Meeting* in Principle 13(6); and the *Document of the Copenhagen Meeting on the Human Dimension* in paragraph 26 concerning "the teaching of democratic values, institutions and practices in educational institutions". References can also be made to Article 25 of the *African*

Charter for Human and Peoples' Rights and Article 13(2) of the 1988 *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (the San Salvador Protocol).

The preceding survey establishes that States have for good reasons committed themselves to provide human rights education. States have undertaken the legal commitments, but the teaching profession, researchers, scientists, universities and other institutions of higher education also carry moral and political obligations to the same end. This approach is recognized in the UNESCO *Declaration on Race and Racial Prejudice* which lists duties for individuals and organizations.

The subjects to be covered in human rights education should include equal rights and equal opportunities across the spectrum of civil, cultural, economic, political and social rights, including dignity, identity, liberty, elimination of racial and ethnic discrimination, human rights in the development process, and so on.

Human rights education should be provided at all school levels, that is in primary education, secondary education and institutions of higher learning. It should encompass theoretical dimensions, practical application, adult education and formal and non-formal education. At the different levels, human rights should be incorporated in a variety of school disciplines, such as history and the social sciences.

Among the targets of human rights education should be judges, prosecutors, defence attorneys, police, other officials engaged in the administration of justice, members of armed forces, politicians and journalists, but human rights education should not be limited to them. The decision-makers are of particular concern since in a democratic and rule of law governed State most decisions involve human rights considerations.

While States have the primary responsibility for implementation, international organizations have contributions to make as indicated by Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* about the role of "international assistance and cooperation". Referring to human rights education as "a universal priority", UN bodies have in a series of resolutions recommended that international agencies for financial and technical cooperation should include support for programmes of human rights education as a priority in educational policies.

States do not always live up to their obligations under the international human rights instruments. For this reason, international organizations monitor State performance. The available methods include examination of State reports, scrutiny of complaints submitted by individuals and groups, fact-finding and investigative procedures, and public debates with the threat of embarrassment. Unfortunately, few monitoring mechanisms are in place for human rights education.

An examination of State reports under human rights treaties is an effective method for keeping an eye on the issue, but the treaty bodies are yet to be fully utilized to this end. In General Comment No. 10 from 1998 on the role of national human rights institutions, the Committee on Economic, Social and Cultural Rights has included the "promotion of educational and information programmes" in an indicative list of activities. Other monitoring methods have not been effectively

employed to further human rights education. It is to be hoped that human rights education will become an important issue for monitoring.

The right to human rights education is clearly established in the international instruments. We also have plenty of action plans. The problem is national implementation and international assistance as well as international monitoring.

Despite the lack of a systematic and comprehensive approach to the issue at national and international levels, the attention to human rights education is gradually growing in the world at all school levels, including degree programs at universities as demonstrated by the master students who have produced the theses in this book.

Human rights education is an important element of the empowerment of individuals and groups as well as an important guarantee for the right decisions in a rule of law governed State. The launching of this volume is an example of the achievement of human rights education and a contribution to its strengthening.

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University is pleased to introduce the first volume in the new The Raoul Wallenberg Institute New Authors' Series', as part of its publications within the Raoul Wallenberg Institute Library. The Institute together with the Law Faculty in Lund offers two Master Programmes: Master in International Human Rights Law and Master in International Human Rights and Intellectual Property Law. The Institute and its teachers are also involved in the Venice-based European Master in Human Rights and Democratisation, the Mediterranean Master in Human Rights and Democratisation at the University of Malta, and the Master Program with a Human Rights Research Direction at the Law School of the University of Beijing.

As a result of this involvement, professors at the Raoul Wallenberg Institute have the opportunity and the pleasure to supervise many thought provoking student theses. Most of the time, this work of master students does not reach a wider audience. To address this shortcoming the decision was made to create this new series for which annually a selection of the best theses will be nominated by the supervisors.

This first volume contains seven theses that have been defended by master students in Lund and Venice in 2000, 2002 and 2003. Prior to publication, the authors have been asked to update and shorten their texts. The themes that have attracted the interest of our new authors reflect topical issues which have been high on international agendas during these years. The spectrum of topics is truly wide.

The concerns about respect for human rights by the United States in its treatment of detainees in Guantanamo Bay are reflected on in a study by *Filipa Marques Júnior* and questions surrounding the consequences of the fight against terrorism for the respect of human rights are researched by *Dominic Laferrière*, both are significant contributions to the debate concerning one of the most controversial international problems after 9/11.

The theses by *Kajsa Öbrink* and *Annette Lyth* focus on persistent grave problems that women face in different situations. The authors question the adequacy of the available theoretical approaches to the determination of these problems and

thus of the limitations that existing legal frameworks have for providing adequate remedies.

The additional two contributions in this book take a very critical look at two phenomena, that is minimum wage regulation and behaviour of transnational corporations in the developing world, which in a more globalised world have the potential to either assist in the eradication of poverty or, on the contrary, to worsen the situation even further.

Mona Ressaissi draws a sombre picture of disparities that have grown, in part because minimum wage regulation has been left to market forces rather than being seen as linked to human rights, in particular the right to an adequate standard of living. She shows how the lack of State regulation of minimum wages has affected the enjoyment by poverty-stricken individuals and groups of the rights to education, family and several other human rights.

Malin Käll introduces the case of oil explotation in Nigeria by foreign transnational companies. Even if many of the violations that companies either commit themselves or encourage governments to do are reported in the world media, the lack or the shortcomings of the legal remedies available to the victims of these violatons at national and international levels present themselves. As a result, the international responsibility of transnational corporations in a globalised world stands prominently on the agenda for the international normative process.

Finally, an example of a master thesis from the International Human Rights and Intellectual Property Programme is also included in the book. *George Jokhadze* examines the practices of five multinational entertainment conglomerates of the music industry from the points of view of copyright protection and human rights. The author concludes that there are important human rights considerations that apply to the music industry and that it is becoming more difficult for the conglomerates to ignore the societal demands which have been enlightened in part through the freedom of expression as it should be applied in the field of copyright protection.

At least one feature unites the contributions chosen as best examples for publication in this volume. They all note limitations and the inadequacy of current theoretical approaches in international human rights law, as reflected in existing legal regulations and their application, to the complexities of the world in which we live. The new authors demand the revision of these approaches, in the service of human dignity, through the demonstration of flexibility of solutions and the bringing down of unnecessary barriers between theories and areas of legal regulation.

Ineta Ziemele

Visiting Professor, RWI

CONTENTS

FAIR TRIAL IN DEATH PENALTY CASES: A CASE STUDY ON THE NEW MILITARY COMMISSIONS IN THE USA*

Filipa Marques Júnior•

CONTENTS

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* The paper presented is based on a Master's thesis presented by the author as part of the European Master's in Human Rights and Democratisation program, academic year 2001–2002: "Fair Trial in Death Penalty Cases: a Case Study on the New Military Commissions in the USA". The research and studies for the Master's thesis were carried out in collaboration with the Lund Faculty of Law and Raoul Wallenberg Institute (RWI), Sweden, and under the guidance of Prof. Dr. Ineta Ziemele, visiting Professor at RWI. The thesis was discussed in September 2002 in Padova. The original thesis undertakes an analysis of Laws and Orders creating the Military Commissions in the USA, following the events of the September 11, as a case study on the topic of the relationship between fair trial and the death penalty. In order to better analyse the Military Commissions, chapters on the applicable human rights standards and humanitarian law were included. What is now presented corresponds mainly to the thesis' chapters relating to the analysis of the Military Commissions themselves. As a result the paper does not go into detail into the applicable international law instruments and only refers to those directly applicable and to the exact extent that they are applicable. Moreover, as a result of the original thesis topic, it is evident that there are concerns related to the relationship between fair trial and the death penalty, which was the basis for choosing the case study. However, in the latter part of the paper the author also refers to some updates, in relation to developments on this topic that were made public or happened after September 2002, the date the thesis was presented. For a more detailed view on this topic please refer to the original thesis, which can be found at the Raoul Wallenberg Institute Library.

• European Master's in Human Rights and Democratisation, academic year 2001/2002. The author is practicing Law at MGT-JSS Law Firm, Lisbon, Portugal and teaching International Law in *Universidade Independente*, Lisbon.

1. CASE STUDY: MILITARY COMMISSIONS IN THE USA

> "The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States – a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems."[1]

Military Commissions (MCs) have existed in the United States of America (USA) since before the beginning of the Republic with power to try persons that otherwise would not be subject to military law, for the violation of laws of war and other offences committed in territory under military occupation. They derive their authority from the USA Constitution (Articles I and II).

After the events of the 11 September 2001 new issues were raised as for the tactics and means used by the USA in the so-called war against terrorism.

One of this new issues is the way people suspected of international terrorism are to be tried. On the 13 November 2001 President Bush of the United States issued a Military Order dealing with Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.[2]

On 18 September 2001, the US Congress enacted a Joint Resolution[3] to authorize the President to:

> "use all necessary and appropriate force against those nations, organisations, or persons he determines, planned, authorised, committed or aided the terrorists attacks on 11th September 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the USA by such nations, organisations or persons".

The Joint Resolution gave authority to the President to issue this Military Order.

With this authority, President Bush of the USA issued the 13 November 2001 Military Order (MO) establishing the main features of the MC and delegating authority on the Department of Defence to issue the orders and regulations necessary to carry out the MO.[4] On March 21, 2002 the Department of Defence announced the Military Commission Order No. 1 establishing the Procedures for Trials by Military

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[1] Amnesty International, 'Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay', <web.amnesty.org/library/Index/eng AMR510532002>, 15 April 2002.

[2] Military Order, 13 November 2001, in Federal Register, Part IV, 16 November 2001.

[3] Public Law 107-40, 115 Stat. (224), 18 September 2001.

[4] "As a military function and in light of the findings in Section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section." (Military Order 13 November 2001, section 4 (b)).

Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1).

2. THE ORDER AND RELEVANT DEVELOPMENTS

According to the Military Order, the so-called MCs were created with the power to try non-American citizens suspected of international terrorism and empowered to pass death sentences.

The Military Order establishes in Section (2)(a) that the "individual subject to this order" shall be any non US citizen who:

- Is or was member of the Al Qaeda;
- Has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- Knowingly harbored those persons, . . .

In addition to the criteria outlined above, other individuals subject to the Order are those whom the President makes a determination that it is in the interest of the USA that the individual shall be subject to the Military Order, that is, that the individual should be tried by a MC.

There is a discretionary power given to the Executive to decide who will be prosecuted, and it is up to the President to decide and determine who is within these categories, on a case-by-case basis.

The MCs have the power to try people for any offence that can be tried by a MC and prescribe the punishment in accordance with the penalties provided under 'applicable law', including life imprisonment or death (Sec. 4(a) MO). Any conviction shall have the concurrence of two thirds of the members of the commission (Sec. 4(6) and (7) MO).

As for the evidence admitted, the Military Order gives the power to the Presiding Officer of the MC to decide which evidence shall have probative value (Sec. 4(c) (3) MO).

There is no provision for review of the convictions and sentences by a high court; this power lies only in the hands of the executive (either the President or the Secretary of Defense) that can review the conviction or sentences and have a final decision on the matter (Sec. 4 (8) MO).

In Section 7 the Military Order allows the detention or trial of any person who is not an individual subject to this Order if so authorized by the Secretary of Defense or any military commander or other officer or agent.

Finally, an individual subject to this Military Order shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any

such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any state thereof, (ii) any court of any foreign nation, or (iii) any international tribunal (Section 7 (b)(2) MO).

However, according to some Non Governmental Organizations (NGOs)[5] what is most striking in this Military Order of 13 November is not what is written, but what is lacking:

- Lack of recognition of the rights of detainees to be afforded access to legal counsel;
- Lack of recognition of the right for detainees to be informed of the charges against them;
- Lack of recognition of the right of detainees to be brought before a judicial authority in order to determine the lawfulness of their detention;
- No requirements that the trial and other proceedings will be open and public;
- Lack of recognition of the right of accused persons to be provided with the evidence against them;
- The accused does not necessarily enjoy the presumption of innocence;
- No evidentiary standard, such as a 'proof beyond a reasonable doubt' is necessary to secure convictions;
- There is no role provided for the judiciary in any phase of the process;
- No notice as to the particular offences to be covered by the Executive order. Only 'acts of international terrorism', without specifying in what the particular acts may consist are mentioned.

This Presidential Military Order was regulated by the Department of Defense, on 21 March 2002, following what was stated in Section 4[6] of the Presidential Military Order. The Department of Defense issued the Military Commission Order No. 1 dealing with the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MC Order No.1)[7].

This governmental regulation of the procedure of the MC took into consideration some of the criticisms that were made and provided for some of the

[5]International Commission of Jurists, 'Letter to President George Bush', <www.icj.org/press/press01/english/bush12.htm>, 6 December 2001. See also Amnesty International, 'USA: Presidential order on military tribunals threatens fundamental principles of justice',<www.amnesty.org>, 15 November 2001; Human Rights Watch, 'U.S.: New Military Commissions Threaten Rights, Credibility', < www.hrw.org>, 15 November 2001.

[6] *Supra* note 4.

[7] DoD MCO No. 1, 21 March 2002.

guarantees that were lacking in the 13 November 2001 Presidential Military Order, referred to above.

The guarantees introduced in the MC Order No.1 include making trials public-only with some exceptions related to national security (Chapter 5(O)); requiring proof beyond reasonable doubt for conviction (chapter 5(C)); establishing the presumption of innocence (Chapter 5(B)); providing access to a defense attorney (chapter 4(C)); permitting the defendant to see the prosecution's evidence (Chapter 5(E)(I)) and to cross-examine witnesses (Chapter 5(G)(I)) as well as requiring unanimity before the Commission can impose the death penalty (Chapter 6(F)).

However there are still some guarantees lacking and provisions that violate human rights law and as it states in Chapter 7(B) MC Order n.1:

> "In the event of any inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military order shall govern."

3. ANALYSIS OF THE MILITARY ORDER

In this Chapter I will analyze the Presidential Military Order of 13 November 2001 already taking into consideration the Procedures for Trials by Military Commissions of Certain Non-United States citizens in the War Against Terrorism of the Department of Defense from 21 March 2002.

I will make this analysis in light of international human rights and humanitarian law, showing that some international rules are binding on the USA and give rise to legal obligations to respect, protect and fulfil certain rights.

3.1. Status

The debate on the persons subject to this Order gains special relevance under humanitarian law as it leads to the applicability of the Geneva Conventions.

Under humanitarian law, if a person is entitled to Prisoner Of War (POW) status, such a person shall be tried by regular military courts, with the same procedure that the forces of the detaining power would be entitled to. Therefore, if one talks about combatants to whom POW status should be afforded , the MCs would not be able to try these persons as MCs are special Commissions which do not follow the same rules as the U.S General Courts-Martial (one basic difference being the right to appeal[8]).

In accordance with this, only unlawful combatants and civilians[9] could be under this Orders' provisions and in this case, one would also have to apply the 1949

[8] Human Rights Watch, 'A comparison between the proposed US Military Commissions and US General Courts-Martial', < www.hrw.org/press/2001/12/miltribchart1217>, 17 December, 2001.

[9] The possibility of trying civilians in military courts was affirmed by the HRC in its General Comment no.13 where stated that "[w]hile the Covenant does not prohibit such categories of

Geneva Convention relative to the Protection of Civilian Persons in Time of War and Article 75 of the Additional Protocol 1 to the Geneva Conventions in order to ensure a fair trial (at least in terms of international customary law as the USA are not part to it).

How does this apply to the detainees from the war in Afghanistan? Taleban fighters cannot be subjected to these Commissions. In fact, if we consider Taleban fighters as combatants to whom the status of POW is afforded, according to Article 4(1) of the *Geneva Convention relative to the Treatment of Prisoners of War*[10] because they belonged to the armed forces of a Party to the conflict, these persons will have to be tried by the US Military Courts (Articles 82 and 84 of the 3rd Geneva Convention).[11]

As for the Al Qaeda members, the question remains open. It seems that these MCs could try them. But what if they can also be afforded POW status? It is an ongoing debate, but it seems that in some cases they could be afforded this protection. If Al Qaeda members were acting under the same command as the Taleban armed forces, they would fall within the scope of Article 4 (A)(1) of the 3rd Geneva Convention and therefore be entitled to POW status. Otherwise, they would have to fulfil the four conditions enumerated in paragraph 2 of the same Article before POW status could be afforded.

Although is claimed that they don't comply with the requirement of behaving accordingly to the laws and customs of war (Article 4(2)(d) of the 3rd Geneva Convention) and therefore would not qualify for POW status, it could also be argued that Additional Protocol 1 to the Geneva Conventions is a part of international

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courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".

[10] Article 4 of the 3rd Geneva Convention sets the requirements for POW status. POWs are captured individuals that fall into the power of the enemy and belong to one of the categories enounced in numbers (A)(1) to (6). Additional Protocol I (PI) to the Geneva Conventions broadens this concept. According to Article 44, a violation of the laws of war doesn't deprive a combatant of his status and of being considered a POW if he falls in the power of the enemy as long as he carries his arms openly (Article 44 (2) and (3) PI) and a combatant that falls to meet these requirements shall nevertheless be afforded protection equivalent to that afforded to the POW, including the protection afforded by the 3rd Geneva Convention on the trial and punishment of any offences committed (Article 44(4) PI). In any case, any doubts in relation to the status of the detainee, must be determined by a 'competent tribunal' accordingly to Article 5 of the 3rd Geneva Convention. The reason to refer Protocol I in this context is exactly because this Protocol broadens the concept of POW of the 3rd Geneva Convention and that has importance for the assessment of the Taleban and Al Qaeda status. However, the USA is not part of the Additional Protocol I and unless one determines that this rule is an international customary rule, it will not be applicable to the war in Afghanistan.

[11] The lack of recognition of the Taleban by the US would not appear to deprive Taleban fighters of POW status. Article 4 A/3 includes "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power".

customary law,[12] and that the criteria would then be that of Article 43(1) and 44(2) of Protocol 1, entitling them to POW protection. Even though the USA is not a party to this Protocol, it is bound by international customary law to consider its provisions. However, Article 44 doesn't seem to be international customary law.[13]

Even if there are doubts, these doubts should be decided by a court, in accordance with Article 5 of the 3rd Geneva Convention. Until their status is determined by a competent tribunal, 'such persons shall enjoy the protection of the Convention'.

Even an individual, who is determined by a competent tribunal not to be POW, would still have the legal protection of the 4th Geneva Convention that includes some minimum rights.[14]

The USA has already recognized the application of the principles of the Geneva Conventions to the Taleban Guantanamo detainees (although not to the members of

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[12] *See infra* note 25.

[13] In determining which rules of humanitarian law can be considered customary rules of international humanitarian law, the International Committee of the Red Cross (ICRC) affirmed that although the Protocol is not universally adopted, customary international law couldn't be determined only by the behaviour of 54 States that are not bound by it. However, if a State expressly rejects a norm, it will be more difficult to affirm that is bound by it. This provision of Article 44 was expressly rejected by the USA and one can say that most likely does not represent customary international law, following the persistent objector principle as established in the Fisheries case. One can see that the State practice in relation to this Article is not strong enough in a way to enable us to affirm its customary character (to afford POW status to combatants that do not comply with those requirements is not universally accepted). Moreover, the *opinio iuris* is not well established as one can see in the discussions on the adoption of this Article. Despite further considerations on the customary character of other norms of Protocol I, Article 44 broadening the concept of POW doesn't seem to qualify as international customary law. The same conclusion was reached in the Report of the Swedish International Humanitarian Law Committee that affirms the view of which are the customary rules under Protocol I and although it refers to various Articles of this Protocol, Article 44(2) is not referred to. In fact, only the rule of POW status for regular combatants is affirmed. However, the ICRC is preparing a study on customary rules of international humanitarian law and it will be interesting to see its conclusions under Protocol I.

[14] Article 4 of the 4th Geneva Convention defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or an occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". This is very important as individuals to whom one cannot afford POW status but that fall under the definition of this Article shall be considered protected persons and will qualify for the protection of the 4th Geneva Convention. The protected persons under the 4th Geneva Convention are entitled to the protection of Articles 71 to 76 of this Convention. These guarantees include the right to a regular trial (Article 71), the right to be informed of the charges against them and be brought to trial as rapidly as possible (Article 71), the right of choosing one's own counsel that will be free to visit the accused and will be provided with all the necessary facilities to prepare the defence (Article 72), the right of appeal "provided for by the laws applied by the court" (Article 73), the right to petition or pardon in case of death sentence (Article 75).