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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE UNLAWFUL COMBATANT: HUMANITARIAN LAW'S  
OTHER**

**A Thesis Submitted to the**

**Department of Law**

**In partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Hussein Salama**

**December 2014**

The American University in Cairo  
School of Global Affairs and Public Policy

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THE UNLAWFUL COMBATANT: REPRESENTATIONS OF THE OTHER IN  
HUMANITARIAN LAW

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ABSTRACT

The war on terror triggered a debate over the treatment of members of Al Qaeda captured by US forces. The central point of the paper is that this debate is merely the most recent iteration of a dialectic constitutive of international humanitarian law. Non-state combatants in warfare have always been the object of conflicting desires. The history of international humanitarian law could be seen as the history of different attempts to engage (by excluding or including) with an *other*, outside the combatant/civilian distinction. The Paper focuses on two contrasting approaches to engaging with this *other*, namely, the inclusive approach of the 1974-1977 Diplomatic Conferences in Geneva that lead to the promulgation of Additional Protocols I and II and the exclusionary experience with the war on terror.

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## Introduction

There was a before-9/11 and an after-9/11....After 9/11 the gloves came off.<sup>1</sup> This was how Director of the CIA, Cofer Black, described the major change in policy brought about by the attacks of September 11, 2001. The attacks of 9/11 and the subsequent war on terror have triggered a very controversial debate. The main crux of the debate revolves around the application of humanitarian law to this conflict. One of the main elements of this debate on the applicability of humanitarian law to the war on terror is the unprecedented nature of the conflict and the novelty of the challenges it presents. In a speech given at the White House in 2006, President Bush stated, "We watched the twin towers collapse before our eyes, and it became instantly clear that we'd entered a new world and a dangerous new war."<sup>2</sup> In the same speech, while outlining his administration's response to the terrorist attacks of 9/11, Mr. Bush stated, "We had to wage an unprecedented war against an enemy unlike any we had fought before."<sup>3</sup> Members of the Bush Administration further emphasized the unprecedented nature of this war and added that this unprecedented war required the use of unprecedented and somewhat questionable methods. Vice President Richard Cheney stated that, "it's going to be vital to use any means at our disposal, basically, to achieve our objective" this would entail having to work through "some sort of dark side."<sup>4</sup> Members of the Bush Administration were not the only ones to point out the novelty of the challenge presented by international terrorism.. In fact, shortly after the 9/11 attacks, the United Nations' Security Council passed Resolution 1377 that addressed the issue of international terrorism. The resolution used very strong language to describe the threat posed by the war on terror. It stated that, "acts of international

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<sup>1</sup> John Barry, *The Roots of Torture*, NEWSWEEK, (May 24, 2004), available at <http://www.newsweek.com/roots-torture-128007>.

<sup>2</sup> *President Bush's Speech on Terrorism*, N.Y. TIMES, (September 6, 2006), available at [http://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html?pagewanted=all&r=0](http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&r=0)

<sup>3</sup> *Id.*

<sup>4</sup> MATHEW EVANGELISTA, *LAW, ETHICS, AND THE WAR ON TERROR* 59 (Polity Press 2008).

terrorism constitute a challenge to all states and to all of humanity.<sup>5</sup> The resolution also stated that “acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.”<sup>6</sup> Therefore the statements of Bush administration officials coupled with the Security Council Resolution condemning international terrorism demonstrate how the events of 9/11 created this image of a new threat arising. Although the most effective method of combating this new threat is still the cause of heated debate, the fact remains that the events of September 11<sup>th</sup> and the subsequent war on terror are represented as unprecedented events. In defending their approach to the war on terror, many members of the Bush administration claimed that international law was not equipped to deal with this new threat. Referring to the Geneva Convention, US Defense Secretary Donald Rumsfeld stated, “It was set up to deal with a war between sovereign states. It's got provisions for dealing with civil war. But in a case where you have nonstate actors out to kill civilians, then there's a serious question whether or not the Geneva Convention even applies.”<sup>7</sup> Despite its prevalence, the claim that the war on terror presents a new challenge to international law is not entirely accurate. The war on terror presents international humanitarian law with a type of conflict that challenges the coherence of the distinction between international and internal conflicts and between civilians and combatants. The terrorist, the so-called unlawful combatant is projected as the *other* in international humanitarian law. An other, outside the distinction between civilian and combatants, was always present in international humanitarian law. At some point the other was the mercenary. In another point it was the colonial subject engaged in an armed conflict with the armies of the colonizers. The aim of this paper is to explore the various methods with which international humanitarian law engages with its other. First, this paper will discuss the conceptual

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<sup>5</sup> Security Council Resolution 1377, Nov. 4, 2001, *available at* <http://www.un.org/docs/scres/2001/sc2001.htm>.

<sup>6</sup> Un Security Council Resolution, *supra* note 5.

<sup>7</sup> Katherine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, January 28, 2002, *available at* <http://www.nytimes.com/2002/01/28/world/a-nation-challenged-captives-detainees-are-not-pow-s-cheney-and-rumsfeld-declare.html>

grounding of the principle of distinction and the structure that the law establishes with regards to describing the lawful combatant. Then, it will explore the 1974-1977 Diplomatic Conferences in Geneva as an example of an instance when the law attempted to directly engage with the other by inviting members of national liberation movements to attend the conferences. Finally, the paper will discuss the war on terror as an example of a period when the law did not directly engage with the other, but rather dealt with the other indirectly. The main argument of this paper is that a dialectic with the *other* is constitutive of international humanitarian law. The thesis at the foundation of modern international humanitarian law is that only the legitimate forces of sovereign states have the right to wage a legal war. This assertion immediately creates its antithesis that states that non-state actors can also participate in war. The synthesis would be the change in the main foundation of modern humanitarian law, that war is the exclusive realm of the state. The paper will also demonstrate how the law engages in a perpetual spiral relationship with its *other*, where in every instance it attempts to include the *other*, it creates a new other that it then attempts to engage with. The paper argues that so long as the law is founded on the notion that war is the exclusive domain of the state, then this dialectical process will continue to exist and the non-state combatants, in all their forms, will remain on the peripheries of humanitarian law.

## **Distinction and the Unlawful Combatant**

## Conceptual Foundations of Distinction:

The modern formulation of the principle of distinction -in Articles 48 and 51 of the 1977 Additional Protocol I to the 1949 Geneva Conventions- comes to us from a line of codification endeavors expressing in different ways that in war combatants and non-combatants should be distinguished.<sup>8</sup> The origins of the principle of distinction do not lie strictly within the realm of legal discourse. Instead, the concept is rooted in a very specific worldview that is the result of a political decision as to the nature of war. Alejandro Lorite Escorihuela traces the origins of distinction to the social contract theories of the state. Escorihuela focuses mainly on the difference between Rousseau and Hobbes on the nature of war. The precise moment to be highlighted here happens when Rousseau—agreeing with Hobbes that “war” is a state, rather than an event—interjects that for it to be a state it has to be by necessity a public phenomenon.<sup>9</sup> Since war is a public act, the only legitimate actors in war are agents of the state. Violence between private individuals cannot be considered war because the act does not have a public element to it. These private individuals are not acting on behalf of a sovereign and, if there is no sovereign involved, then no state of war exists between these private individuals. War “demands from the groups which engage in it a unique intensity of societal organization and control.”<sup>10</sup> Rousseau adds to this by stating:

War needs political society to exist on both psychological and conceptual grounds. Psychologically, the constitution of political society through the social contract permits the growth of feelings that will offset man’s natural fear, such as honor, prejudice, or vengeance. Those will make war as war possible. Conceptually, and more importantly, the constitution of political society gives rise to the possibility of a “state” of war, a set of permanent, or at least continuous, relations among things, based on the fact that property relations are given stability and durability by law.<sup>11</sup>

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<sup>8</sup> Alejandro Lorite, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. U. COLL. L. J. INT’L L. 299, 299-408 (2010).

<sup>9</sup> Id.

<sup>10</sup> JEAN BETHKE ELSHTAIN, *JUST WAR THEORY* 23 (New York University Press 1992) (1992).

<sup>11</sup> JEAN JACQUES ROUSSEAU, *DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE* Jean Jacques Rousseau, 357 (1762).

Therefore, one cannot have war without states. The fact that this state of war only exists between sovereigns makes the very purpose of war to be the defeat of the sovereign rather than its individual citizens. When one says, therefore, that the objective in war is the destruction of the enemy State, that means that the target is the abstraction constituted by the social contract; if one could break the social contract in one strike, the State would *eo ipso* disappear and the war would be over, yet no life would have been lost.<sup>12</sup> Then, the participation of individuals in warfare is only by virtue of their status as agents of the state and this status is what gives them the right to legitimately engage in warfare. In other words, the privilege of killing is attached to the notion of the human being carrying out the function of soldiering, *i.e.* the idea that the human being is enveloped in that function in a way that makes him an instrument of the State.<sup>13</sup>

Distinction is the product of a very specific definition of what war is. War consists of such deliberate, controlled, and purposeful acts of force combined and harmonized to attain what are ultimately political objectives.<sup>14</sup> And as outlined above, the only entities allowed to wage war are states. The reason distinction is such an important aspect of international humanitarian law lies in the fact that it represents the foundation upon which the corpus of the law is built. Distinguishing between who has the right to legally wage war and who doesn't or who can be legitimately targeted and who cannot is the main function of humanitarian law.

### **Textual Sources of Distinction:**

The conceptual framework of the law outlined above has been reinforced in almost every single humanitarian law treaty. Therefore, this section will highlight exactly how these texts define the lawful combatant and how they reinforce the structural bias within the law. One of the first documents to distinguish between lawful and unlawful combatants was the Lieber Code of 1863. Francis Lieber, a German born law professor, was tasked with drafting a code of conduct for Union forces during the American Civil War. This document came to be known as General

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<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> ELSHTAIN, *supra* note 10, at 25.

Orders No.100 and is more commonly referred to as the Lieber Code. The Lieber Code outlines prisoner of war status and details various types of unlawful actors on the battlefield. The most relevant of these categories is that of the war rebel outlined in article 85 of the Code:

War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.<sup>15</sup>

Another codification of the concept of distinction can be found in Article 48 of the Hague Convention on Land Warfare of 1904:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>16</sup>

Therefore, civilians and civilian structures are not to be targeted since they do not belong to the military forces of the enemy and do not constitute military objectives. The St Petersburg Declaration and the Hague Convention do not outline how this distinction could be achieved; What if the military forces of the enemy state have taken up positions inside civilian population centers? What about structures, such as bridges, that have a dual purpose? Before discussing how the law attempts to answer these questions it is important to outline what the legal definition of a civilian is.

### **Who is A Civilian?**

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<sup>15</sup> Article 85 Lieber code ICRC website

<sup>16</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. Article 48, Oct. 18, 1907. ICRC.

Most international humanitarian law treaties define the civilian in negative terms. So in essence, the law defines individuals who can legally be targeted in times of war, namely combatants, and anything that falls outside said definition is considered a civilian and cannot be legitimately targeted.

Article 4 outlines the characteristics of a combatant; the detailed definition of a combatant will be covered in the following section. However, what is very clear about the article is the negative approach to defining a civilian. The civilian is anybody who does not fall under the category of combatant. Paragraph 3 makes it clear that the rule of distinction still applies to situations where combatants are present within a civilian population. Therefore, civilian populations remain protected even if combatants are present within them.

### **Who is A Combatant?**

The first detailed definition of a combatant is that outlined in the 1899 Hague Convention:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."<sup>17</sup>

The definition of the lawful combatant outlined in the article makes it very clear that the drafters of the convention remained faithful to the notion that war occurs only between states. Even when the Convention discussed militia or volunteer corps, they

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<sup>17</sup> Convention (IV) Respecting the Rules and Customs of War on Land, *supra* note 16.

made sure to stress that they need to constitute part of the armed forces of a state. It wasn't until 1949, with the adoption of the Geneva Conventions, that this definition of a combatant was expanded. This expansion of the definition of a combatant appeared in the 3rd Geneva Convention on the Treatment of Prisoners of War and provided what seemed to be a slightly less state-centric definition of a combatant:

Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

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

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

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a 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 recognized by the Detaining Power.....

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>18</sup>

Article 4 represents a much more comprehensive approach to defining the lawful combatant. However, despite the fact that it slightly expanded the category of the lawful combatant, Article 4 still maintains the state-centric approach of the Hague Convention. Despite the fact that various provisions in the article recognize militia

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<sup>18</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva. Article 4. Aug. 12, 1949. ICRC.

groups, volunteer corps and other resistance movements, the requirement that they be under the authority of a state still remains in place. The only section in the article where this state-centric approach is not adhered to is paragraph 6. Paragraph 6 discusses the situation where civilians spontaneously take up arms against an occupying power. The temporal requirement in paragraph 6 is what limits the effect it has on expanding the category of lawful combatants. This is because paragraph 6 stipulates that the uprising should take place as soon as the occupying forces arrive and the forces engaged in said uprising had not time to organize themselves into an effective resistance force.

The Convention also recognizes that in certain instances, it can be difficult to determine whether an individual detained in times of war qualifies as a combatant or not. Article 5 outlines how states should deal with determining the status of individuals captured in times of war:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>19</sup>

It is important to note that failure to fit the definition of a combatant does not leave a detainee in an armed conflict without any rights. The Geneva Conventions outline a set of rights that must be afforded to detainees who are not recognized as lawful combatants. According to Article 45 (3) of Protocol I additional to the Geneva Conventions, prisoners who do not qualify as lawful combatants are protected under Article 75 of the Protocol:

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

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<sup>19</sup> Convention III, *supra* note 19.

any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.<sup>20</sup>

### **Unlawful/Unprivileged Combatants:**

The terms unlawful/unprivileged combatant do not appear in any of the international humanitarian law treaties. Despite this, these terms have been used frequently throughout the modern history of armed conflict. Terms such as 'illegal combatants', 'unprivileged combatants', and 'unlawful combatants' have been around for as long as there have been laws governing the conduct of hostilities.<sup>21</sup> The exact definition of what an unlawful combatant is has differed throughout history. In 1863, Francis Lieber outlined various categories of individuals who were not considered lawful actors on the battlefield. They remained subject to prosecution and, possibly, death sentences.<sup>22</sup> In essence, these categories of individuals, by virtue of their unlawful status, forfeit the protections afforded to combatants. The punishment of captured guerrilla forces, including in some instances by death, was evidenced subsequently in the United States-Mexican War, the American Civil War, the Franco-Prussian War, the Philippine Insurrection, and the South African War.<sup>23</sup> One of the most well known cases of unlawful combatancy was the *Ex Parte Quirin* case of 1942 before the US Supreme Court. The case involved a group of German soldiers who had landed on US soil to engage in acts of sabotage. The soldiers discarded their uniforms after landing on US soil. The soldiers were subsequently captured and put on trial and charged with unlawful combatancy. The court stated that unlawful combatants were "subject to capture and detention,... [and] trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>24</sup> The period of the Second World War saw an increase in cases related to unlawful combatants.

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<sup>20</sup> Protocol I, *supra* note 17.

<sup>21</sup> Rene Vark, *The Status and Protection of Unlawful Combatants*, available at [http://www.juridicainternational.eu/public/pdf/ji\\_2005\\_1\\_191.pdf](http://www.juridicainternational.eu/public/pdf/ji_2005_1_191.pdf)

<sup>22</sup> Kenneth Watkins, *Warriors Without Rights? Combatants, Unprivileged Belligerents, And the Struggle Over Legitimacy* 1-77. (Occasional Paper Series, Number 2, 2005)

<sup>23</sup> *id.*

<sup>24</sup> *Ex Parte Quirin et al* 317 U.S. 1 (1942)

Unlawful combatants in the Second World War were mostly members of guerilla and resistance movements. In the 1948 Hostages Case, the Nuremberg Tribunal stated that a person “may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such.”<sup>25</sup> The court in some sense acknowledges the legal right of these resistance movements to resist occupation, however, it also acknowledges the rights of the enemy to treat guerilla fighters as criminals and detain and try them.

Throughout the modern history of warfare, the issue of unlawful/unprivileged combatants seems to have always been present. However, it is clear that various states have dealt with the matter individually and have created somewhat of an informal legal doctrine on the issue of unlawful combatancy

In conclusion, the principle of distinction represents a very specific definition of warfare that has been extrapolated from a specific political worldview. This conceptual grounding is carried over into the text of the law and is reinforced at every opportunity. All those participants in warfare who do not fit into this conceptual framework are cast out. They are the unlawful, the illegitimate, and the *other* of the law. This section sought to outline the structure that the law had put in place to distance itself from its *other*. The coming sections will explore two examples of the law’s interaction with its *other* and the consequences of these interactions.

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<sup>25</sup>[Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, United States v Wilhelm et al, 1244 \(1948\)](#)

## **The 1974-77 Diplomatic Conferences in Geneva: Recognition of the *Other***

The Diplomatic Conferences in Geneva, which began in 1974 and ended with the promulgations of Additional Protocols I and II in 1977, represent an important turning point in humanitarian law. Before the Diplomatic Conferences in Geneva, colonial resistance and wars of national liberation were regarded as an internal affair where domestic, rather than humanitarian, law applied. Throughout the 19<sup>th</sup> century and much of the 20<sup>th</sup>, the actions of colonial powers in wars of national liberation

reinforced the notion that colonial resistance movements fell outside the scope of international law. During the war of the Rif, the President of the Spanish Red Cross described the Rifans as “rebels against their government, outside the law of their country and not belligerents.”<sup>26</sup> Various other European powers shared the view of the President of the Spanish Red Cross. On July 3, 1924, Mr. Ponsonby of the British Parliament reported that His Majesty King George V recognized the Riffians not as belligerents but as rebels, therefore refusing to acknowledge the Rif as a nation or to intervene in the bloodshed of the Rif War.<sup>27</sup> Another Example of the exclusion of national liberation movements from the corpus of international humanitarian law is the Algerian war of independence. During war, France did not recognize Algerian fighters as fellow belligerents. Until 1956, captured members of the FLN were routinely prosecuted under a special powers act, which provided for detention without trial and special court jurisdiction for crimes against the security of the State.<sup>28</sup> Therefore, prior to the conferences in Geneva, national liberation movements were not recognized by colonial powers as belligerents and thus purposefully excluded from international law. The lack of recognition of belligerency meant that these conflicts were regarded as internal conflicts, giving colonial powers a very large amount of discretion when it came to suppressing national liberation movements.

The 1974-1977 Diplomatic Conferences in Geneva did not engage with the non-state combatant as existing outside the bounds of the law. By the beginning of the 1970s, the evolution of law and practice had thus reached such a stage as to make it extremely difficult to continue to deny the international legal character of wars of national liberation.<sup>29</sup> As a result, for the first time in the history of humanitarian treaty negotiations, representatives of various national liberation movements were invited to participate in the proceedings in Geneva. Such organisations included, inter alia, the Palestine Liberation Organization (PLO) and the People’s Movement for the

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<sup>26</sup> Anna Chotzen, *Beyond Bounds: Morocco’s Rif War and the Limits of International Law*, 5 HUMNTY 33, 33-54 (2014).

<sup>27</sup> Id,

<sup>28</sup> Heather Wilson, *Humanitarian Protection in Wars of National Liberation*, 8 ARMS CNTRL 36, 38-48 (2007).

<sup>29</sup> ABI SAAB, *Wars of National Liberation* 357-445 (Collected Courses Of The Hague Academy of International Law, Volume IV, 1979).

Liberation of Angola. The inclusion of national liberation movements in the Diplomatic Conferences of 1974-1977 was part of a larger historical change that was taking place in the world.

### **Decolonization and its Effect on the Negotiations in Geneva:**

The inclusion of national liberation movements in the Diplomatic Conferences of 1974-1977 was part of a larger historical change that was taking place in the world. Decolonization was by far one of the most significant historical phenomena of the 20<sup>th</sup> century. It would be impossible to fully capture the essence of this historical phenomenon in this paper. However, my aim in this section is to shed light on the main historical changes that initiated the process of decolonization and the effects this process had on the international order. For it was this process that eventually led to the convening of the 1974-1977 Diplomatic Conference in Geneva and the conclusion of the Additional Protocols.

### **Change in the Balance of Power:**

The Second World War saw the rise to prominence of two major powers, namely the Soviet Union and the United States. Towards the end of the war, the disparity in power between Europe and the United States became unmistakable. By 1944, when plans were being made for D-day, the day of the naval invasion of German-held Europe, Great Britain seemed to have been reduced to a military staging area, no longer the seat of a colonial empire.<sup>30</sup>

During the war, the United States began articulating its position towards the colonial possessions of European states. In 1942, the State Department drafted a document calling for the independence of colonies. In final form, as the Declaration of National Independence, the statement extended the Atlantic Charter principles to all nations.<sup>31</sup> The Atlantic Charter was a joint British American Declaration that outlined various principles that were common between both states; these principles were later

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<sup>30</sup> BETTS, *supra* note 28 at 24.

<sup>31</sup> JAMES P. HUBBARD, *THE UNITED STATES AND THE END OF BRITISH COLONIAL RULE IN AFRICA* (Mcfarland and Company Inc. 2010) (2010).

incorporated into the Charter of the United Nations. The principle that created controversy between the American and British government was the third principle which stated that, “they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them”.<sup>32</sup> The State Department declaration did not only emphasize that this principle applies to all nations and not just those occupied by Nazi Germany. It called upon colonial powers to prepare dependent peoples for independence, through education and progressive steps toward self-government.<sup>33</sup> Consequently, the United States envisioned a system of tutelage, where European powers would educate their colonial subjects on how to be independent states and then grant them said independence when they are deemed ready. In 1944, the United States promoted the idea of creating a trusteeship council that would monitor this process. The council was empowered to conduct investigations of trust areas, to receive petitions for their inhabitants, and to receive reports from the administering authorities.<sup>34</sup> In essence, the Roosevelt administration created a system similar to the League of Nations mandate system where colonial rulers would teach the inhabitants of their colonies how to become independent states. The goal here seemed to be to ensure that these independent states would behave like their “civilized” European counterparts.

The cold war complicated the approach of the United States towards decolonization. The Truman administration was afraid that rapid decolonization might increase the influence of the Soviet Union. That the basic ideology of colonial liberation was a compound of nationalism and Marxism, with the second considered the more volatile element, led Americans to see the influence of the Soviet Union nearly everywhere.<sup>35</sup> As a result, the United States developed a more conservative, approach to decolonization. As the State Department’s perceptions of the postwar world changed, they became more favorable towards colonial regimes prepared to offer sufficient satisfaction to moderate nationalists to forestall the danger of

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<sup>32</sup> The Atlantic Charter, Aug 14, 1941, <http://avalon.law.yale.edu/wwii/atlantic.asp>.

<sup>33</sup> HUBBARD, *supra* note 33.

<sup>34</sup> HUBBARD, *supra* note 33.

<sup>35</sup> Betts, *supra* note 28 at 34.

communist penetration.<sup>36</sup> This contradictory policy toward decolonization endured up until the 1974-1977 Diplomatic Conferences held in Geneva.

### **Intellectual Movement Against Colonialism:**

The move towards decolonization was not simply the result of Europe's weakness and the change in the global balance of power in favor of the United States and the Soviet Union. However, the colonial encounter itself played a major role in the rise of the anti-colonial movement that would later be termed Third Worldism. Third Worldism then, was the child of two encounters: the territorial, as Europe foisted itself upon the Third World and the Third World encroached upon Europe; and the ideological, as preexisting modes of thought and perspectives, together with new outlooks born of these contacts, confronted each other.<sup>37</sup> Colonialism itself played a role in the creation of the very movement that would call for its end.<sup>38</sup> This was due to the various internal contradictions that existed within the colonial structure. Colonialism was a messy business: on its tail came economic dislocation and upheaval, rural pauperization, the privatization of land, forced resettlement, and anarchic urbanization.<sup>39</sup> Basically, colonialism dismantled and sought to replace the main power structures of the colonies. Colonialism thus encouraged the emergence of an educated local elite, a middle class whose links to traditional economic, political, even cultural structures were severed.<sup>40</sup> These local elites would facilitate colonial rule by participating in the bureaucratic process of colonial administration. Paradoxically, however, and at the same time, the colonial order blocked this ascent, erecting an insurmountable color or racial barrier.<sup>41</sup> Therefore, this class of elites was not only isolated from the majority of the local population, but it was also not fully welcome amongst the European elite. The European elite would not acknowledge the colonial elite as equals. What European rule offered with one hand –dangling titillating prospects of membership in a modern social and cultural universe- it

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<sup>36</sup> John D. Hargeaves, *Decolonization in Africa* 92 (Longman 1988) (1988).

<sup>37</sup> ROBERT MALLEY, *THE CALL FROM ALGERIA: THIRD WORLDISM, REVOLUTION, AND THE TURN TO ISLAM* 18 (University of California Press 1996) (1996).

<sup>38</sup> *Id.*

<sup>39</sup> Malley, *supra* note 39 at 19.

<sup>40</sup> MALLEY, *supra* note 39 at 20.

<sup>41</sup> MALLEY, *supra* note 39 at 20.

unceremoniously withdrew with the other.<sup>42</sup> It is this internal contradiction that turned members of these elites against colonialism. For it became apparent that the creation of this elite was merely another tool through which colonial powers could exert their dominance over their colonial possessions. The fact remained that despite their status as elites in the colonies, they were still considered as inferior by European states.

Frequently educated in the languages that provided access to a wide readership, knowledgeable of the European philosophical tradition of protest, and often writing and organizing their initial efforts in the capitals or major cities of the countries whose colonial policies they roundly denounced, these individuals adapted and reworked European thought to express their own concerns and intentions.<sup>43</sup> This class of intellectuals did not direct their work towards their compatriots as much as they did towards their oppressors. Their goal was to provide a different perspective on colonialism, a perspective that demonstrated the oppressive nature of colonialism.

One of the most significant works of this period was Frantz Fanon's *Wretched of the Earth*, which was widely read at the time and still stands out as one of the most influential works on the topic of decolonization. Fanon's main claim was that colonialism was primarily an act of violence and that the only way to effectively resist colonization was through violent means. As a result, the book created a large degree of controversy in Western circles. Many European intellectuals hailed the book as a true representation of the sentiments of the third world. In his preface to Fanon's book, Jean Paul Sartre states:

Europeans, you must open this book and enter into it. After a few steps in the darkness you will see strangers gathered around a fire; come close, and listen, for they are talking of the destiny they will mete out to your trading centers and to the hired soldiers who defend them. They will see you, perhaps, but they will go on talking among themselves, without even lowering their voices. This indifference strikes home: their fathers, shadowy creatures, *your* creatures, were but dead souls; it was you who allowed them glimpses of light, to you only did they dare speak, and you did not bother to reply to such zombies. Their sons ignore you; a fire warms them and sheds light around them, and you have not lit it. Now, at a respectful distance, it is you who will

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<sup>42</sup> MALLEY, *supra* note 39 at 20.

<sup>43</sup> BETTS, *supra* note 28 at 37.

feel furtive, nightbound, and perished with cold. Turn and turn about; in these shadows from whence a new dawn will break, it is you who are the zombies.<sup>44</sup>

Sartre's foreword does not only illustrate the power of Fanon's work, but it also says something about the entire intellectual movement against colonialism. It demonstrates how this movement had allies amongst the European intelligentsia. Sartre is but one example of the large number of European intellectuals who spoke out against colonialism. In fact the term Third World first appeared in 1952 in an article written by a French economist named Alfred Sauvy in the French newspaper *L'Observateur*. In this article, Sauvy coined the term *third world* stemming from the medieval notion of the *third estate*, a term that described the common man as distinguished from nobility and clergy.<sup>45</sup> By suggesting a parallel between the emergence of the nations of the South and the awakening of the *tiers état* that had led to the French Revolution of 1789, Sauvy gave words to the feelings of humiliation and appetite for international recognition that animated colonies and dependencies.<sup>46</sup> Therefore, the encounter between the intellectuals of the colonies and their European counterparts might have yielded some positive results in terms of establishing a global movement against colonialism. However, it also constricted this movement. The European education that the colonial elites received, which facilitated the encounter with their European counterparts, also constricted their movement against colonialism within a specific European worldview.

As a result of the creation of an international movement against colonialism, decolonization became a global phenomenon endorsed by almost every international or regional organization in the globe. In 1960, the United Nations General Assembly adopted resolution 1514 which stated:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of

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<sup>44</sup> FRANTZ FANON, *THE WRETCHED OF THE EARTH VII* (trans. Richard Philcox Grove Press 2004) (2004).

<sup>45</sup> J. Ward, *Third World*, available at

[http://search.credoreference.com/content/entry/sageidentity/third\\_world/0](http://search.credoreference.com/content/entry/sageidentity/third_world/0)

<sup>46</sup> Malley, *supra* note 39 at 78.

the United Nations and is an impediment to the promotion of world peace and co-operation.<sup>47</sup>

Resolution 1514 did not simply condemn colonization as constituting a violation of the United Nations charter, but it also demanded that any remaining colonies should be freed of the shackles of colonial rule and be allowed to gain independence.

### **National Liberation Movements:**

While the intellectual movement against colonialism was gaining ground in both the first and third world, another form of colonial resistance was also forming, namely wars of national liberation. The main players in these wars were armed groups formed to violently resist colonial occupation.

The colonial era was characterized by a strict adherence to the classical definition of warfare as being between states and of the lawful combatant being the agent of these warring states. Wars fought between colonial powers and the resistance movements in the various colonies fell within the domain of internal wars. However, the rise to prominence of national liberation movements challenged this notion of warfare. A notion that had been enshrined in the provisions of the 1949 Geneva Conventions:

What the drafters in 1949 could not have foreseen, was the truly enormous tidal wave of guerilla activities which in the thirty years following 1945 affected countries which had not yet achieved independence. It was not clear at that time that ultimately guerilla warfare would be the method *par excellence* for liberation movements and that the tide of self-determination would propel these movements forwards, without giving thought to the conditions agreed upon in the Hague in another time and for other circumstances<sup>48</sup>

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<sup>47</sup> UN General Assembly Resolution 1415, Dec. 5, 1959, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/142/38/IMG/NR014238.pdf?OpenElement>

<sup>48</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8 1977 384 (Yves Sandoz ed. Christophe Swinarski ed. Bruno Zimmermann ed., Martinus Nijhoff Publishers 1987) (1987).

These newly independent states were eager to exercise their sovereign rights, as subjects of the law, to shape the content of the law itself. In essence, these states wished to change the law into a more universal law, to dilute the Eurocentric biases that existed within it and to make it more representative. These nations wanted to make the law also reflect their needs and protect their positions as newly established states.

The creation of a special status for national liberation movements in humanitarian law was one of the main objectives of many recently decolonized states participating in the negotiations on the Additional Protocols. The state agent can no longer be recognized as the only legitimate actor on the battlefield. The efforts of the Third World nations and the various national liberation movements led to the inclusion of somewhat expansive provisions into the text of the Additional Protocols.

This departure from the traditional approach to warfare is most apparent in two aspects of the Additional Protocols. The first challenge to the traditional view of warfare came in the form of the relaxation in Additional Protocol I of the requirements for armed combatants in. The other very controversial aspect of Additional Protocol I was the expansion of the scope of application. The coming sections will be devoted to exploring the debate that occurred during the drafting of these articles and the various obstacles that the final wording of these articles have created.

### **Controversy over Invitation of Non-state Actors:**

It became evident from the very first session of the Diplomatic Conference that the issue of national liberation movements would take center stage in the negotiation process. Four otherwise simple organizational matters caused a large degree of controversy in the first proceedings of the conference. First, there was the problem of the division of conference offices. The Swiss government's proposal for dividing the officers was rejected by many of the delegations present at the conference. As a result, a long process of negotiation ensued in order to devise a more acceptable method for the allocation of offices. Final agreement was not achieved

until March 1, more than one week after convocation of the session.<sup>49</sup> The second controversial issue, an issue that will be covered in detail in this section, was the invitation of national liberation movements to participate in the conference. The third organizational challenge came in the form of extending an invitation to the Provisional Revolutionary Government of the Republic of South Vietnam (PRG). The fourth controversial organizational issue to arise was related to the issue of credentials. Various states made reservations or statements of protest with regard to the credentials of various delegations participating at the conference. Reservations were stated with respect to the Republic of Vietnam (a state which some delegations said should be represented in whole or in part by the PRG), South Africa (due to its policy of apartheid), Portugal (on the grounds that it had no right to speak for its overseas territories), the Khmer Republic (which several states asserted should have been represented by the Sihanouk regime), and Israel (on the ground that it was an aggressor).<sup>50</sup> Therefore, the controversy in the diplomatic conferences started before the conference began discussing substantive issues. The fact that delegations attending the conference spent so much time in negotiations to agree on issues that were purely organizational in nature is telling of the nature of the conferences themselves. This section will be dedicated to exploring one of these controversies in detail, namely the invitation of national liberation movements to participate in the proceedings of the diplomatic conferences in Geneva. An examination of the debate on this topic is crucial because it represents one of the instances in the conference of an engagement with the *other*, the non-state actor.

Calls to include national liberation movements in the proceedings of the diplomatic conference were made before the conference was inaugurated. The first official demand for the inclusion of national liberation movements in the proceedings in Geneva came in General Assembly Resolution 3102, which urged that the national liberation movements recognized by the various regional intergovernmental

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<sup>49</sup> David E. Graham, *The 1974 Diplomatic Conference On The Law of War: A Victory For Political Causes And A Return To The "Just War" Concept Of The Eleventh Century*, Washington and Lee L. Rev. 25, 25-63 (1975).

<sup>50</sup> Graham, *supra* note 53.

organizations concerned be invited to participate in the Diplomatic Conference as observers in accordance with the practice of the United Nations.<sup>51</sup>

Once the conference began, it was the representatives of third world states and members of the socialist bloc of states that demanded that invitations to attend the diplomatic conferences be extended to members of national liberation movements. The statements of the Ukrainian representative at the third plenary session capture the main justification behind the desire to include national liberation movements. According to the Ukrainian representative, “the struggle for independence and for liberation from the colonial yoke was an irreversible phenomenon of modern times” and thus “the conference should profit from the experience of people fighting for their national liberation.”<sup>52</sup> This support for national liberation movements must be seen in light of the rise of Third Worldism and specifically Third World Approaches to International Law; these movements sought to challenge the status quo of the international order and more specifically international law.

The opposition to this proposal came primarily from the United States and Western Europe. The main reason behind the objection was the unusual nature of the proposal itself. The view was also expressed that since none of the organizations had gained international recognition as the legitimate representatives of an established state, they had no basis for participating in a conference called for the expressed purpose of formulating new concepts of international law.<sup>53</sup> The representative of the Federal Republic of Germany elaborated on this point by stating that “international law was created only by states, which alone were in a position to apply it” and that “[T]he Conference should of course take advantage of the experience of other organizations, but conclusions could be drawn only by States which would be responsible for implementing them.”<sup>54</sup> In essence, the states that had reservations over the inclusion of national liberation movements were concerned about the effect this

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<sup>51</sup> General Assembly Resolution 3102, Dec. 12, 1973, *available at*: <http://unispal.un.org/UNISPAL.NSF/0/19643531603D59A98525694B006E943B>.

<sup>52</sup> LIBRARY OF CONGRESS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT VOLUME V 24 [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-5.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-5.pdf).

<sup>53</sup> Graham, *supra* note 53.

<sup>54</sup> Library of Congress, *supra* note 58 at 28.

move would have in terms of challenging the position of states as the sole subject of international Law.

After intense negotiations, the delegations present at the conference in Geneva passed a resolution that allowed for the inclusion of national liberation movements in the proceedings of the conference. The resolution stated that it

Decides to invite the national liberation movements, which are recognized by regional intergovernmental organizations concerned, to participate fully in the deliberations of the conference and its main committees

Decides further that, notwithstanding anything contained in the rules of procedure, the statements made or the proposals and amendments submitted by delegations of such national liberation movements shall be circulated by the Conference Secretariat as Conference documents to all the participants in the Conference, it being understood that only delegations representing States will be entitled to vote.<sup>55</sup>

This proposed article attempted to close the gap between the states demanding the representation of national liberation movements at the conference and those who were reluctant to do so because said representation would constitute a departure from custom. Although this moment is celebrated as marking a departure from convention, a closer reading of the text of the resolution paints a different picture. The resolution did allow national liberation movements to take an active part in the negotiation process in the Diplomatic Conferences. This should not be viewed as a shift in the law; rather, it was a momentary decision that took into consideration and was influenced by the various historic processes that were outlined above. This was made clear by the statements of the representative of the United States. In agreeing to this procedure, the Chairman of the United States delegation emphasized that participation by these groups in this particular diplomatic session should not be regarded as a precedent for future international conferences.<sup>56</sup> In essence, the inclusion of national liberation movements in the Diplomatic Conference was not meant to reflect the development of a new trend in the drafting of international agreements.

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<sup>55</sup> LIBRARY OF CONGRESS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT VOLUME I 5 [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol1.pdf).

<sup>56</sup> Graham, *supra* note 53.

## Article 1:

The drafting process of Article 1 was by far one of the most controversial aspects of the Diplomatic Conferences in Geneva. The purpose of Article 1 was to outline the material scope application of Additional Protocol I. As the Drafting Committee opened its deliberations, three proposals were immediately submitted with respect to wars of "national liberation" and "self-determination" - a Soviet bloc proposal, a proposal by Algeria and fourteen other states (including Australia and Norway), and a proposal by Romania.<sup>57</sup> The Algerian proposal was the proposal that eventually passed and became the text of Article 1. The most important and controversial part of Article 1 was paragraph 4:

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>58</sup>

The majority of third world states attending the Diplomatic Conference celebrated the adoption of the above-mentioned article. It represented a crowning of the effort to include a category of non-state actors into the realm of humanitarian law. The Syrian representative stated, "that the vote on Article 1 was a historic occasion of great legal, humanitarian and political significance."<sup>59</sup> Although Article 1 achieved what its drafters intended, it still fell short of fully engaging with humanitarian law's *other*.

The first limiting factor of Article 1 is that in 1977, wars of national liberation represented an anachronism. The provisions on wars of national liberation were very much a product of the decolonization era that came to an end not long after the

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<sup>57</sup> Graham, *supra* note 53.

<sup>58</sup> Protocol Additional to the Geneva Conventions of 12 of August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, Jun. 8, 1977, International Committee of the Red Cross.

<sup>59</sup> LIBRARY OF CONGRESS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT VOLUME VI 51, [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_vol-1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_vol-1.pdf).

adoption of the Additional Protocols.<sup>60</sup> By the time the Additional Protocols were adopted in 1977, only a handful of states remained under colonial rule. In essence, the Article 1 (4) dealt with a mode of conflict that was in its final stages.

The inclusion of national liberation movements into the scope of Protocol I excluded other forms of non-state militant groups. Third world nations at the Geneva conferences sought only the recognition of wars of national liberation in Additional Protocol I. The question of why said states did not endeavor to include other forms of conflict can only be explained by taking into account the larger historical context. Most of the representatives of third world states attending the conference in Geneva had just recently gained their independence. This was the golden age of the legal concept of *Uti Possidetis Juris*. Most governments in the third world were in the process of consolidating their power. As a result, most of the governments of these states were concerned with maintaining their hold on power and preserving the political unit that they govern. The Nigerian representative touched upon this in his statement before the Drafting Committee. He understood the right to self-determination not, as encouraging secessionist and divisive subversion in multi-ethnic nations, but as applying to a struggle against colonial and alien domination, foreign occupation and racist regimes.<sup>61</sup> However, these limitations should not be seen as representing a failure to engage with the other. Instead, they represent the very dynamic this paper seeks to uncover.

#### **Article 44:**

Article 44 is by far the most crucial provision of Additional Protocol I. After a series of lengthy negotiations, the final draft of Article 44 was adopted at the fortieth plenary meeting. It states that:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

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<sup>60</sup>Id.

<sup>61</sup> LIBRARY OF CONGRESS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT VOLUME VIII 12, [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-8.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-8.pdf).

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

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>62</sup>

Paragraph 3 initially reaffirms the notion that combatants should always distinguish themselves from the civilian population; it also envisages situations where such a distinction cannot be made. The distinction outlined above, or rather the recognition of instances when the traditional forms of distinction should be changed, serves to include the guerilla fighter into the fold of lawful combatants. The article also takes into account the very practical reasons behind the inability of guerilla fighters to distinguish themselves from the civilian population in the same way members of the regular armed forces of a state are required to.

Article 44 sparked yet another controversy among the delegations attending the Diplomatic Conferences. The final version of the article represented a compromise that was reached after a lengthy process of negotiation. In theory, the participants in the Diplomatic Conference of 1974-1977 all agreed on the need to change the traditional definition of the lawful combatant in order to recognize members of national liberation movements as legitimate participants on the battlefield. However, reaching consensus on the practicalities of this expansion of the definition of the lawful combatant proved somewhat elusive.

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<sup>62</sup> *Supra* note 64.

The extent to which the negotiations on the drafting of Article 44 were difficult can be seen clearly in the final vote on the article; 73 members voted in favour of Article 44, while Israel voted against and 21 participants abstained<sup>63</sup>. Although Israel was the only country to vote against Article 44, the fact that so many countries abstained on the vote tells us something about the level of discord amongst the participants in the Geneva conference. Most of the delegations that voted on the draft of Article 44 addressed the drafting committee to explain their vote. Despite the fact that most of the recently decolonized states and the national liberation movements represented in the conference regarded this article as a massive step forward, many of them remained somewhat disappointed with the final outcome. The representative for The Palestinian Liberation Organisation stated that his delegation was not fully satisfied with the compromise text achieved as a result of arduous negotiations, but it constituted a basis for the further development and improvement of humanitarian law.<sup>64</sup> The representative of Egypt for example stated that some wording of the article left something to be desired.<sup>65</sup> The representative of Sudan described the article as “falling short”<sup>66</sup> of his country’s expectations.

On the other hand, many states expressed concern with regards to the effect that Article 44 might have with respect to the obligations of parties to a conflict to protect the civilian population. In explaining why his delegation abstained, the representative of Spain stated that “the text does not guarantee the safety of the civilian population, which is the essential aim of the instruments under consideration.”<sup>67</sup> The representative of Ireland went even further by stating that the “protection of the civilian population demanded by humanitarian principles is eroded by Article 42 to an unacceptable extent.”<sup>68</sup> Denmark, in explaining why it had abstained, also stated that Article 44 “had appeared unduly to blur the distinction

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<sup>63</sup> LIBRARY OF CONGRESS, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT VOLUME VI 121, [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-6.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-6.pdf).

<sup>64</sup> Library of Congress, *supra* note 68 at 147.

<sup>65</sup> Library of Congress, *supra* note 68 at 144.

<sup>66</sup> Library of Congress, *supra* note 68 at 138.

<sup>67</sup> Library of Congress, *supra* note 68 at 138.

<sup>68</sup> Library of Congress, *supra* note 68 at 137.

between civilians and combatants which was of fundamental importance in building the structure of the two protocols.”<sup>69</sup>

Another limiting factor of Article 44 however does not lie in the text of the article itself, but rather in the limitations set forth in previous articles. As outlined above, the Additional Protocols only apply to national liberation movements. As a result, the provisions of Article 44 only apply to this specific context as well. Many delegations at the conference sought to make this point very clear. The Canadian representative stated that “the situations described in the second sentence of paragraph 3 could exist only in occupied territory or in armed conflicts as described in Article 1, paragraph 4, of Protocol I.”<sup>70</sup>

The Diplomatic Conferences of 1974-1977 represent a unique moment in international legal history. Its uniqueness originates from the fact that it represents an attempt to directly engage with the other. This shift from excluding the other to attempting to include and engage with the other can only be explained by discussing the context in which such a shift occurred. The various political and economic changes that took place after the end of World War II had severely weakened European empires. Furthermore, as a result of the internal contradictions that existed within the colonial system itself, the elites in the colonies began interacting with their European counterparts and began exposing the ugly side of colonialism. Segments of the European elite were receptive to this critique of colonialism because they themselves had started questioning the merits of the colonial system. The carnage of World War I had left many deeply skeptical about Western values.<sup>71</sup> This period also saw the rise of various national liberation movements who took up arms against their colonial oppressors and began articulating demands for self-determination. The encounter between colonial elites and their European counterparts coupled with the proliferation of national liberation movements across the colonies gave rise to a strong international movement that called for an end to colonialism. It was against this backdrop that the Diplomatic Conferences in Geneva took place. From the first

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<sup>69</sup> Library of Congress, *supra* note 68 at 143.

<sup>70</sup> Library of Congress, *supra* note 68 at 146.

<sup>71</sup> NATHANIEL BERMAN, *THE APPEALS OF THE ORIENT: COLONIZED DESIRE AND THE WAR OF THE RIFF* 199 (Karen Knop ed., Oxford University Press 2004) (2004).

session of the conference, it became clear that the status of national liberation movements would take center stage at the negotiations. However, this process reduced the *other* into the narrow category of national liberation movements. It would be erroneous to claim that the issue here was the negotiations themselves. The issue here is more structural. The moment the third world intellectual encountered the European intellectual and engaged with him, the colonial subject ceased to become the *other*. The colonial elite articulated their demands using the various philosophical doctrines that had originated from Europe. National liberation movements also became part of this encounter. Even as early as the war of the Rif, national liberation movements were articulating their demands based on the European model of the nation state. The same analysis applies to the 1974-1977 diplomatic conferences. The moment the delegations of national liberation movements were recognized in the conference they ceased to be the other. This moment of recognition rearrange the internal structure of international humanitarian law and project another category of participants in conflicts as a new other. The cycle of the dialectic between *self* and *other* continued and as the Diplomatic Conference in Geneva was engaging with one category of the other, another was emerging.

### **The War on Terror and the Emergence of a New *Other***

While the Diplomatic Conferences in Geneva were taking place, a new distinction was emerging between national liberation movements and international terrorist groups. The international community recognized the legitimacy of national liberation movements and sought to distinguish them from the new category of the other. A 1972 General Assembly resolution tackling the issue of international terrorism reaffirms:

The inalienable right to self-determination and independence of all peoples under colonial and racist régimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national

liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.<sup>72</sup>

This distinction between national liberation movements and international terrorists was reaffirmed in various resolutions of the General Assembly adopted in 1977, 1979, 1981 and 1983.<sup>73</sup> In essence, international terrorist groups replaced national liberation movements as the new other of international humanitarian law.

### **The Terrorist as Outlaw:**

Over the decades, international terrorism has been depicted as the civilized world's most dangerous enemy. In her paper titled *On Terrorism: Reflections on violence and the Outlaw*, Iliana M. Porras outlines how the literature on the topic of terrorism depicts the terrorist as being the opposite of what western democracies stand for. In her analysis of a statement made by Gideon Rafael at the third session of the Jerusalem Conference on International Terrorism, Porras outlines the elements that are commonly used to describe terrorism:

First comes the claim that a terrorist is the “antithesis of democracy”; both cannot therefore concurrently exist. By necessity one threatens or extinguishes the other. Since democracy is good, terrorism must be evil. Terrorism, we are told, “subjugates and perverts”; these are images of domination and perversion. Terrorists are “reckless” and resort to “unbridled violence.” They are out of control. They “plot the extermination of another people”; they are heartless, cruel, and extreme and seek the total destruction of their “other,” that is, “us.” They terrorize their own kinsmen”; they do not even recognize family ties, the most basic human allegiance. “A fiendish fringe which worships violence and despises humanity”; they are devils, or devil worshipers, and outside the human family. “They are the outlet for uncontrolled savage passions”; they are everything that civilization was created to suppress. They threaten us with falling back in our primitive and savage past.<sup>74</sup>

The description above depicts the terrorist as totally alien. The terrorist is totally alien to any notion of civilization. The terrorist does not value human life and is hell bent on destruction. The terrorist is foreign to his own people. Even other

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<sup>72</sup> General Assembly Resolution 3034, Dec. 18, 1972, available at [http://www.un.org/documents/ga/docs/27/ares3034\(xxvii\).pdf](http://www.un.org/documents/ga/docs/27/ares3034(xxvii).pdf)

<sup>73</sup> Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Whenever and by Whomever Committed*, 41 Colum. J. Transnat'l L. 573, 573-585 (2002-2003).

<sup>74</sup> Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, Utah L. Rev. 119, 119-147 (1994).

movements that engage in violence, such as national liberation movements, have nothing in common with terrorists:

The idea that one person's "terrorist" is another's "freedom fighter" cannot be sanctioned. Freedom fighters or revolutionaries don't blow up buses containing non-combatants; terrorist murderers do. Freedom fighters don't set out to capture and slaughter schoolchildren; terrorist murderers do. Freedom fighters don't assassinate innocent businessmen or hijack and hold hostage innocent men, women and children; terrorist murderers do.<sup>75</sup>

The language of both statements describing terrorists is overly emphatic and fraught with emotion. This serves to emphasize the otherness of the terrorist. It also serves to close debate on the whole issue. It becomes impossible to talk about terrorism in any manner that does not emphasize the otherness of the terrorist. Terrorists "slaughter schoolchildren" and "assassinate innocent businessmen", how can one explain their madness? There is no room to question this depiction of the terrorist. Instead of finding fault with those who truly care about the innocents' dying, we should be out there doing something about terrorism.<sup>76</sup> There is only one choice that terrorist literature leaves us with, to fight terrorism. To unequivocally stand against it, anything else would be construed as supporting terrorism. To not condemn terrorism is to condone it, and to condone terrorism is to be morally as bad as a terrorist.<sup>77</sup> Terrorism is depicted as being something foreign to Western societies:

The terrorist is always the "enemy." The trick is to locate him in the category of the most terrifying traditional enemy -that one which the public is accustomed to think of as the barbarous and primitive outsider. The enemy of legend and history books. The bloodthirsty invader of our collective imagination and individual nightmares. The moslem moorish turkish invader of Europe dark mysterious turban wearing merciless scimitar wielding head cutting harem keeping mosque going minaret prayer chanting magician Christian hating Jerusalem prophanator holy war maker of he past has made a remarkable comeback.<sup>78</sup>

The international terrorist enemy is typically represented as the Islamic fundamentalist. An enemy that has threatened Europe before, threatened to destroy its civilization. As evidenced by the statement above, every aspect of this enemy is

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<sup>75</sup> TERRORISM HOW THE WEST CAN WIN 19 (Benjamin Netanyahu ed. Avon Books 1987) (1987).

<sup>76</sup> Porras, *supra* note 79.

<sup>77</sup> Porras, *supra* note 79.

<sup>78</sup> Porras, *supra* note 79.

absolutely foreign and barbaric in nature. This depiction of the international terrorist as the dark skinned and barbaric Muslim fundamentalist is constantly emphasized in mainstream Western discourse. In 1992, the State Department used a report on the topic of global terrorism; there were eight photographs in the report. Of the eight photographs, six depict persons or incidents related to Islamic fundamentalism.<sup>79</sup> Furthermore, the foreignness of the international terrorist was supplemented with a focus on the nomadic nature of terrorist groups. In 1993, law enforcement agencies in the United States were chasing Mohamed A. Salameh, a Jordanian fugitive who was wanted in connection with the World Trade Center bombings. In response to the fact that Mr. Salameh was constantly on the move, one official stated: “one search is leading to another... but these are nomadic people. While it may lie in the culture, they bounce from place to place. All different people sleep there, stay a short time, then leave.”<sup>80</sup> It is telling that the justification the investigator gave regarding Mr. Salameh’s constant movement was because he came from a nomadic culture where such behavior was typical. The depictions of terrorists as both foreign and nomadic serve to further emphasize their otherness and to also highlight the danger they pose to western society. The terrorist is seen as an infiltrator in society rather than a member of it. Terrorism becomes a disease in society and the only option is to violently purge it:

Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer; unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags down to destruction.

Furthermore, the reference to the nomadic nature of the terrorist raises very specific fears in the Western world. International law has, in fact, from its inception been wary of nomads- it has not known what to do about them.<sup>81</sup> Nomads did not respect borders and boundaries, which put them in a position outside the scope of

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<sup>79</sup> Porras, *supra* note 79.

<sup>80</sup> Ralph Blumenthal, *The Twin Towers; Trade Center Bombing Suspect Not a Patsy, Officials Conclude*, N.Y. TIMES, March 9, 1993, available at: <http://www.nytimes.com/1993/03/09/nyregion/the-twin-towers-trade-center-bombing-suspect-not-a-patsy-officials-conclude.html>.

<sup>81</sup> Porras *supra* note 79.

international law. In a statement in 1890, J.B. de Martens Ferrao posited that: “natural rights are born with man... but international rights cannot be recognized in those [savage] tribes, for want of the capacity for government... being nomads or nearly such, they have no international character.”<sup>82</sup> This depiction of terrorists as barbarous, nomadic outlaws that exist outside the structure of the law is very similar to how colonial powers depicted resistance movements. Colonial powers used the ‘uncivilized’ and ‘savage’ nature of these resistance movements as a justification for the use of harsh tactics in suppressing such movements and denying them any rights under humanitarian law. For example, in his book titled the Reformation of War, Colonel J. F. C. Fuller of the British Army states:

In small wars against uncivilized nations, the form of warfare to be adopted must tone with the shade of culture existing in the land by which I mean that, against peoples possessing a low civilization, war must be more brutal in type.<sup>83</sup>

The ‘uncivilized’ nature of the adversary in this case is what justifies the circumvention of humanitarian law. The depiction of terrorists as savage outlaws is yet another articulation of this very same rhetoric. The coming section will demonstrate how the justifications given to deny Al Qaeda and Taliban fighters prisoner of war status rely on the same arguments used by colonial powers to violently suppress resistance movements.

### **Confronting the New Other, the War on Terror:**

On September 11<sup>th</sup> 2001, a group of terrorists hijacked American airliners and used them as missiles by crashing them into the twin towers of the World Trade Center in New York and the Pentagon. Some 3,000 persons died or were missing as a result of the most devastating terrorist episode in U.S. history.<sup>84</sup> In an address before a joint session of Congress on the 20<sup>th</sup> of September 2001, President Bush labeled the

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<sup>82</sup> Porras, *supra* note 79.

<sup>83</sup> Elbridge Colby, *How to Fight Savage Tribes*, 21 AM J. INT’L L. 279, 280-285 (1927).

<sup>84</sup> 9/11 (2013) *The Columbia Encyclopedia*, available at [http://search.credoreference.com.library.aucegypt.edu:2048/content/entry/columency/9\\_11/0](http://search.credoreference.com.library.aucegypt.edu:2048/content/entry/columency/9_11/0)

attacks of September 11<sup>th</sup> as “an act of war.”<sup>85</sup> There was obviously only one response to this act of war. President Bush later outlined the goal of the new war that America would be engaging in by stating, “our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>86</sup> This marked the beginning of a new form of engagement with the terrorist other. The attacks of the 11<sup>th</sup> of September 2001 ushered in a new era of engagement with the terrorist outlaw. Having committed an act of war, the terrorist outlaw would be confronted through war. According to President Bush, this war on terror would end with the total eradication of terrorist groups. From the moment it was declared, the war on terror stirred up a lot of controversy. By literalizing its “war” on terror, the Bush administration has broken down the distinction between what is permissible in times of peace and what can be condoned during war.<sup>87</sup> The terrorist was not a simple criminal that could be dealt with through the domestic justice system of a state, but a warrior engaged in a war against the state. In times of war, law-enforcement rules are supplemented by a more permissive set of rules: namely, international humanitarian law, which governs conduct during armed conflict.<sup>88</sup> However, applying the international law of armed conflict to the war on terror created a fair amount of controversy. This section will focus on the contentious debate that arose as a result of the war on terror, in particular, the rules relating to the legal status the treatment of terrorists detained during the war on terror.

### **The Legal Status of Detainees:**

From the very start of the war on terror, the US government engaged in an internal legal discussion to address the various legal challenges presented by this war. Various memoranda and letters circulated between the White House, the Department of Justice, the Department of State and the Department of Defense. These documents shaped US policy with regards to the war on terror. One of the most important

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<sup>85</sup> Selected Speeches of President George W. Bush, *available at* [http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected\\_Speeches\\_George\\_W\\_Bush.pdf](http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf)

<sup>86</sup> *supra* note 80.

<sup>87</sup> Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS, Feb. 2004, *available at* [www.foreignaffairs.com/articles/59524/kenneth-roth/the-law-of-war-in-the-war-on-terror](http://www.foreignaffairs.com/articles/59524/kenneth-roth/the-law-of-war-in-the-war-on-terror).

<sup>88</sup>*Id.*

documents of this exchange is the legal memorandum sent in January 2002 by the Department of Justice to the legal advisor to the President, Alberto R. Gonzales. The memorandum sought to answer the question of whether or not the Third Geneva Convention applied to the war with Al Qaeda and the Taliban. The memorandum dealt with the status of Al Qaeda fighters and Taliban fighters as two separate issues.

First, the memorandum found that Geneva III did not apply to the war with Al Qaeda and the Taliban. According to the memorandum, Article 2 of Geneva III, which outlined the scope of the treaty, did not apply to the war with Al Qaeda. Article 2 states that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>89</sup> The memorandum concluded that the war against Al Qaeda did not fall within the scope of Article 2 because Al Qaeda is not a High Contracting Party to the Geneva conventions. The Memorandum goes on to discuss Common Article 3 of the Geneva Conventions, which sets minimum standards that should be adhered to in conflicts that fall outside of the scope of Article 2. According to the memorandum, “common Article 3 addresses only non-international conflicts that occur within the territory of a single state party, again like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states.”<sup>90</sup> Therefore, Al Qaeda enjoyed no Geneva rights whatsoever, even those enshrined in Common Article 3. According to the memorandum, “it appears that the drafters of the Conventions had in mind only two forms of armed conflict that were regarded as matters of general international concern at the time: armed conflict between Nation-States (subject to article 2), and large-scale civil war within a Nation-State (subject to Article 3).”<sup>91</sup>

The memorandum stated that Geneva III did not apply to the Taliban as well. The memorandum used various arguments in support of not extending Geneva III to

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<sup>89</sup> Convention (III) relative to the Treatment of Prisoners of War Article 2, Aug. 12, 1949, International Committee of The Red Cross.

<sup>90</sup> U.S. DEPARTMENT OF JUSTICE, MEMORANDUM FOR ALBERTO R. GONZALES COUNSEL TO THE PRESIDENT, AND WILLIAM J. HAYNES II GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, [www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf](http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf).

<sup>91</sup> Id.

captured Taliban militants. The memorandum discussed various options including the President's constitutional right to suspend the application of Geneva III to the conflict in Afghanistan. However, the memorandum later concluded that if the President declined from exercising his constitutional right to suspend the application of Geneva III to the conflict in Afghanistan, it could still be argued that the Taliban do not enjoy the legal status of prisoners of war. The first argument forwarded was that Afghanistan was a failed state and that the Taliban did not exercise effective control over the territory of Afghanistan. Basically, the Taliban could not be considered the legitimate government of Afghanistan. The collapse of functioning political institutions in Afghanistan is a valid justification for the exercise of the President's authority to suspend our treaty obligations towards that country."<sup>92</sup> The terrorist respects no law- not the criminal law, not moral law, not the law of peace, and not the law of war.<sup>93</sup> The first justification for the declaration of Afghanistan as a failed state was that it did not exercise effective control over its territory. It is unclear whether the Taliban militia ever fully controlled most of the territory of Afghanistan.<sup>94</sup> The memorandum went on to quote an expert opinion addressing the issue of Afghanistan being a failed state. According to this opinion, Afghanistan had:

Ceased to exist as a viable state... the entire Afghan population had been displaced, not once but many times over. The physical destruction of Kabul has turned it into the Dresden of the late twentieth century... There is no semblance of an infrastructure that can sustain society – even at the lowest common denominator of poverty... The economy is a black hole that is sucking in its neighbors with illicit trade and the smuggling of drugs and weapons, undermining them in the process... complex relationships of power and authority built up over the centuries have broken down completely. No single group or leader has the legitimacy to reunite the country. Rather than a national identity or kinship-tribal-based identities, territorial regional identities have become paramount.. [T]he Taliban refuse to define the Afghan state they want to constitute and rule over, largely because they have no idea what they want. The lack of a central authority, state organizations, a methodology for command and control and mechanisms which can reflect some level of popular participation... make it impossible for many Afghans to accept the Taliban or for the outside world to recognize a Taliban government... no warlord faction has ever felt itself responsible for the civilian population, but the Taliban are

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<sup>92</sup> DEPARTMENT OF JUSTICE, *supra* note 94.

<sup>93</sup> PORRAS, *supra* note 79.

<sup>94</sup> DEPARTMENT OF JUSTICE, *supra* note 94.

incapable of carrying out even the minimum of developmental work because they believe that Islam will take care of everyone.<sup>95</sup>

Therefore, the Taliban seemed unable to carry out the basic internal functions of a government. The report also added that the Taliban were unable to engage in foreign relations. Publicly known facts suggest that the Taliban were unable to obey their international legal obligations.<sup>96</sup> The final point made by the memorandum pertained to the issue of recognition. The Taliban militia was not recognized as the legitimate government of Afghanistan by the United States or by any member of the international community except Pakistan.<sup>97</sup> The memorandum also suggests that even if Afghanistan were to be considered a functioning state, the Taliban would still not fit within the bounds of Article 4 of Geneva III. The arguments relating to Article 4 are outlined in a second memorandum sent by Jose Gonzales to the President on February 7, 2002. In this memorandum Mr. Gonzales argues that “the Taliban have described themselves as a militia rather than the armed forces of Afghanistan;”<sup>98</sup> therefore, the provisions of Article 4 that related to militias would apply in this case. Mr. Gonzales then concludes that even if these provisions were to be taken into consideration, the Taliban would not enjoy prisoner of war status. First, there is no organized command structure whereby members of the Taliban militia report to a military commander who takes responsibility for the actions of his subordinates.<sup>99</sup> Furthermore, Mr. Gonzales reiterated that “there is no indication that the Taliban militia wore any distinctive uniform or any other insignia that served as a fixed distinctive sign recognizable at a distance.”<sup>100</sup> The interesting part of Mr. Gonzales’s memorandum is that when it came to the requirement of carrying arms openly, he stated that the Taliban failed to meet it not because they didn’t carry arms openly. Mr. Gonzales stated, “this fact, however, is of little significance because many people in Afghanistan carry arms openly.”<sup>101</sup> According to Mr. Gonzales’ logic, the Taliban carrying arms openly would not

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<sup>95</sup> DEPARTMENT OF JUSTICE, *supra* note 94.

<sup>96</sup> DEPARTMENT OF JUSTICE, *supra* note 94.

<sup>97</sup> DEPARTMENT OF JUSTICE, *supra* note 94.

<sup>98</sup> MARK DANNER, TORTURE AND TRUTH AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 96 (The New York Review of Books, 2004) (2004).

<sup>99</sup> *Id.*, at 98.

<sup>100</sup> DANNER, *supra* note 102 at 98.

<sup>101</sup> DANNER, *supra* note 102 at 98.

distinguish them from the civilian population since everybody in Afghanistan carries arms openly. The final point Mr. Gonzales seems to be making is based on the concept of reciprocity. There is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of, the Geneva Conventions or any other body of law.<sup>102</sup> In essence, Mr. Gonzales seemed to be using the fact that the Taliban acted in a manner inconsistent with the law as a justification for why the law should not apply to them.

On February 7 2002, President Bush sent a memo to the various departments of the US governments outlining the decisions he had made with regards to the treatment of Al Qaeda and Taliban detainees. In this memorandum, President Bush stated, “based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that Geneva does not apply to our conflict with al Qaeda; al Qaeda detainees also do not qualify as prisoners of war.”<sup>103</sup>

This position received a fair amount of criticism from various legal scholars and even from international organizations such as the International Committee of the Red Cross. Once criticism of the US approach to the Taliban was that it relied on a narrow interpretation of Article 4 of the 3<sup>rd</sup> Geneva Convention. According to Article 4:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces<sup>104</sup>

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<sup>102</sup> DANNER, *supra* note 102 at 98.

<sup>103</sup> Danner, *supra* note 102 at 106.

<sup>104</sup> Geneva Convention III relative to the Treatment of Prisoners of War, art. 4, Aug. 4, 1949, International Committee of the Red Cross.

Are the Taliban soldiers not members of the armed forces of a Party to the conflict? Or, at least, are they not members of militias or volunteer corps forming part of those armed forces?<sup>105</sup> International Organisations such as the International Committee of the Red Cross insisted that the doubt over the status of prisoners of war be resolved pursuant to the 3<sup>rd</sup> Geneva Convention. The ICRC stated that it ‘stands by its position that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.’<sup>106</sup> This is a reference to Article 5 of the Convention, which states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>107</sup>

The United States failed to adhere to provisions of Article 5. Despite claiming to fully support the Geneva Conventions, the US Government has refused to grant prisoner of war status to any of the people in its custody in Afghanistan or Guantánamo Bay, or submit the question of each person’s status to a competent tribunal to resolve the doubts about their status that plainly exist.<sup>108</sup> Furthermore, the United States was criticized for treating Al Qaeda detainees in a cruel and inhumane manner. The most prominent instance of the abuse of prisoners in US custody was the 2004 Abu Ghraib scandal. Leaked pictures showed US soldiers abusing detainees, “forcing Iraqis to conduct simulated sexual acts, among other things, in order to break down their will

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<sup>105</sup> George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal combatants*, 96 AM J. INT’L LAW 891, 891-898 (2002).

<sup>106</sup> Barbara J. Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, J. Int’l L & Int’l Rel. 3, 31-60 (2007).

<sup>107</sup> Geneva Convention III relative to the Treatment of Prisoners of War, art. 5, Aug. 4, 1949, International Committee of the Red Cross.

<sup>108</sup> AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: MEMORANDUM TO THE US GOVERNMENT ON THE RIGHTS OF PEOPLE IN US CUSTODY IN AFGHANISTAN AND GUANTANAMO BAY 2 (APR. 2002), <http://www.amnesty.org/en/library/asset/AMR51/053/2002/en/c92423a1-d868-11dd-9df8-936c90684588/amr510532002en.pdf>.

before they were turned over to others for interrogation.”<sup>109</sup> Abu Ghraib was an example of what seemed to be a policy of abuse that was sanctioned by the Bush administration. For several years we have known that former Secretary of Defence, Donald Rumsfeld, was directly involved with torture, that he set down techniques, including chaining to the floor, stripping, hooding, and the use of dogs at Guantanamo and Abu Ghraib.<sup>110</sup> US courts also weighed in on the debate on the treatment of detainees apprehended as part of the war on terror. An example of this is the Supreme Court ruling in *Hamdan V. Rumsfeld*. Mr. Hamdan was accused of being a member of Al Qaeda and tried before a military commission that was established by a presidential order. Hamdan challenged that decision before the Supreme Court of the United States. One of Hamdan’s main challenges against his trial before a military commission was that the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.<sup>111</sup> The court agreed with Hamdan stating that Common Article 3 “ requires that Hamdan be tried by a “regular” constituted court.”<sup>112</sup>

The controversial debate that started as a result of the war on terror is yet another reflection of the dialectic of the self and the other. The war on terror, like the 1974 conference, represents a form of engagement with the other. However, unlike the Diplomatic Conferences, the legal debate surrounding the war on terror did not attempt to include the other. The terrorist is portrayed as representing an unprecedented challenge to the law. This challenge does not simply lie in the novelty of the challenge created by international terrorism, but also in how the international terrorist engages with the law. It is constantly emphasized that the terrorist does not respect the law. These two elements were used by members of the Bush

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<sup>109</sup> James Risen, *The Struggle For Iraq: Treatment of Prisoners; G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, April 29, 2004.

<sup>110</sup> Alan Clarke, *U.S. War Crimes: Torture As Official Bush Administration Policy*, 66 NATL LWYRS Gld Rev 95, 98-104 (2009).

<sup>111</sup> *Hamdan V. Rumsfeld*, 548 US 557

<sup>112</sup> *Supra* note 113

Administration to justify non-applicability of the laws of war to the Taliban and Al Qaeda. The Bush Administration officials claimed that, since the laws of war did not account for international terrorism and the terrorists themselves seemed to flout the law, then the law should not apply to them. The Bush Administration's distinction between Al Qaeda and the Taliban is quite telling. The Bush Administration uses many of the features outlined previously to describe Al Qaeda's peculiarity. For example, the memorandum drafted by the Justice Department stated that Article 3 could not apply to Al Qaeda because they operated in several states. In essence, the fact that Al Qaeda operates across borders, much like nomadic tribes, is one of the reasons why the law cannot apply to them. Al Qaeda is immediately dismissed as being outside the bounds of the law. The paradoxical result is that terrorists are charged with being violators of the laws of war and, yet, are treated as being outside of the scope of the law of war since they can never be recognized as legitimate combatants.<sup>113</sup> Therefore, despite the fact that Al Qaeda is portrayed as a savage, irrational and violent *other* that exists outside the bounds of the law, this *other* is still held accountable for violating the law. Therefore, even through their exclusion from the law, the terrorist *other* is still somehow incorporated within it.

The Taliban issue feeds into one of the main arguments being forwarded in this paper. Since war is the exclusive realm of the sovereign, and Afghanistan was a sovereign state that was governed by the Taliban, then surely the forces of the Taliban would be considered the armed forces of the state. The Bush Administration did not consider that to be true. They argued that since the Taliban did not act like a sovereign, then it couldn't be considered as such. In essence, the Taliban acted more like terrorist bands and therefore forfeited their status as sovereign rulers. They were instead associated with the terrorists of Al Qaeda and seen as sharing their status as unlawful combatants. The Taliban did not exercise effective control over the territory of Afghanistan and were not able to provide basic services to the population. As a result, they could not be considered as the legitimate government of Afghanistan. Even when the Bush Administration caved to criticism relating to their refusal to apply Geneva III to the Taliban, they still didn't afford the Taliban full coverage of the

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<sup>113</sup> Porras, *supra* note 79.

Convention. The Taliban were still seen as unlawful combatants, much like their Al Qaeda allies.

In conclusion, the international terrorist represents yet another category of humanitarian law's *other*. However, unlike what happened with the national liberation movements that attended the Geneva Conferences, the law is uninterested in engaging with this *other*. The international terrorist is portrayed as the antithesis of everything the law represents. However, this *other* is still included within the law. Despite the fact that the terrorist is portrayed as an outlaw that operates outside the scope of the law and despite the fact that many claim that the law is not equipped to deal with this new phenomenon, the terrorist is still included in the law by being held accountable for violating it. The main structure of the law is upheld, war still remains the exclusive realm of the sovereign where non-state actors are punished for their involvement in hostilities. Even in the case of the Taliban, the fact that they did not act like a sovereign and that they were affiliated with a terrorist organization, made them forfeit their status as lawful combatants. Therefore, the war on terror demonstrates a different method of engaging with the *other*. However, even in this approach of exclusion, the international terrorist is still included within the law.

## Conclusion

Since its inception, humanitarian law has been engaged in a dialectical process with its *other*, the non-state affiliated combatant. From indigenous resistance groups in the colonial era to modern day international terrorists, this *other* has manifested in different forms throughout history. The two historical moments outlined previously represent two different methods in which the law engaged with the *other*. However, the pattern remains clear, the law is in a constant process of exclusion of its *other*. Whenever, law attempts to engage the *other*, a new *other* is created to challenge the legal structure once more. So in Geneva in 1974, the law chose to engage with national liberation movements, to include them in the law-making process. However, this engagement created a new category of the *other*, the international terrorist. The international terrorist presented a new challenge to the law. The international terrorist could not be reconciled with the law. However, even when the law spoke of the *other* instead of speaking to them, this *other* was somehow included. That even through exclusion from the law, the terrorist was still a part of it, informing its movement and evolution without actually being an active member in the process. Both instances demonstrate that the law constantly creates and excludes its other. This perpetual spiral of engagement between *self* and *other* is the dynamic that this paper has sought to uncover. This perpetual dialectical process will always exist as long as the current structure of the law remains in place. The reason that the laws on lawful combatants and prisoners of war cannot be expanded to include non-state actors lies in the conceptual grounding of the principle of distinction. War is the domain of the sovereign and only the agents of the sovereign can wage war. The main purpose of the law becomes to uphold this worldview. This conceptual grounding is also what informs the engagement of the law with the *other*. The law engages with

those who conform to its worldview and excludes those who do not. The national liberation movements wished to be emancipated through the law, which is why they could engage directly with the law. Whereas the international terrorist movements rejected the law, which is why they were excluded and branded as outlaws. This type of engagement between the law and its *other* is never ending and constantly creates new categories of *others*. In essence, if the law wanted to truly engage with the *other*, then it need only engage in a process of introspection. So long as the only legitimate combatant in the eyes of the law is the state actor, then nothing will change. The notion that law is the sole domain of sovereign states must be reconsidered. The law must let go of the mythical battlefields of 18<sup>th</sup> Century Europe where armed men in uniform faced each other on open plains - battlefields imagined by philosophers such as Rousseau and Hobbes. If we were to assume that these battlefields truly existed beyond the imagination of European political philosophers, it could be safely said that they do not exist today. The wars of the 21<sup>st</sup> Century demonstrate that war is no longer the exclusive domain of the state. If the law truly wishes to engage with its *other*, to include non-state actors into the corpus of humanitarian law, then it must come to terms with this critical fact. If the law fails to do so, then it risks rendering itself obsolete. For most of the wars that are being fought involve non-state actors, the law's continued inability to adapt to this reality threatens the entire system of humanitarian law.