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**THE AMERICAN UNIVERSITY IN CAIRO**

**SCHOOL OF HUMANITIES AND SOCIAL SCIENCES**

**DEPARTMENT OF POLITICAL SCIENCE**

**THE APPLICATION OF *JUS AD BELLUM* AND *JUS IN BELLO* TO THE  
CONFLICT IN AFGHANISTAN**

**MAHA WAGDI SAYED EID**

**A THESIS SUBMITTED  
IN PARTIAL FULLFILLMENT OF THE REQUIREMENTS FOR  
THE DEGREE OF MASTER OF ARTS IN INTERNATIONAL  
HUMAN RIGHTS LAW**

**(DECEMBER 2002)**

**The American University in Cairo**

**THE APPLICATION OF *JUS AD BELLUM* AND *JUS IN BELLO* TO THE  
CONFLICT IN AFGHANISTAN**

**A Thesis Submitted by  
Maha Wagdi Sayed Eid**

**To Department of Political Science  
December 2002**

**In partial fulfillment of the requirements for  
The degree of Master of Arts**

**Has been approved by**

**Dr. Curtis Doebbler**  
**Thesis Committee Advisor**  
**Affiliation**

\_\_\_\_\_

**Dr. Jean Allain**  
**Thesis Committee Reader**  
**Affiliation**

\_\_\_\_\_

**Dr. Hayat Alvi**  
**Thesis Committee Reader**  
**Affiliation**

\_\_\_\_\_

\_\_\_\_\_  
**Department Chair**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Dean of Huss**

\_\_\_\_\_  
**Date**

## **ABSTRACT**

This thesis examines the application of international humanitarian law to the international armed conflict that took place in Afghanistan starting in October 2001. It examines the United States' right to use force in self-defense against Afghanistan in retaliation for the 11 September 2001 incidents that involved the destruction of the twin towers in New York and damaged the Pentagon in Washington D.C. It further evaluates whether the United States and the de facto government of Afghanistan, the Taliban, committed violations of international law. Finally, the thesis identifies the possible remedies to which States may have recourse when they commit internationally wrongful acts, including violations of international humanitarian law, by among other alternatives, briefly examining the prospects for action by the International Criminal Court in such situations.

The thesis argues and proves the following: the United States was not justified in using force as self-defense against Afghanistan (based on the evidence available); Afghanistan's use of force in self-defense against the United States and its allies was justified; international humanitarian law applies regardless of whether the use of force was legitimate or not; the Geneva Conventions of 1949 and other customary norms apply to this armed conflict; indiscriminate attacks and the treatment of prisoners of war by the United States, and placing civilians near military targets and taking over hospitals for military purposes by the Taliban, violated norms of international humanitarian law; and finally remedies for violations of international law (use of force) and international humanitarian law are applicable.

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## INTRODUCTION

A brief chronological account of the events that led to the conflict in Afghanistan provides the factual background for this thesis. On 11 September 2001, the United States was an object of attack when four planes were hijacked simultaneously. Two planes crashed into the World Trade Center; one into the Pentagon, and another into a field in Western Pennsylvania, although the last was alleged to have been heading towards Washington D.C. Following the attacks, the United States thought that al-Qaida, and specifically Osama Bin Laden, were responsible for planning the attacks. At that time, the Taliban government of Afghanistan was hosting al-Qaida. When the United States requested the *de facto* government of Afghanistan, the Taliban, to extradite Osama Bin Laden, the Taliban responded by requesting the United States provide proof of his involvement in the 11 September incidents. The United States refused to provide such proof for security reasons. Despite not providing this proof and despite the fact that the United States government did not recognize the Taliban government; the United States threatened to use force against Afghanistan as it viewed the government of Afghanistan as an accomplice to al-Qaida and ultimately responsible for the attacks because it had been harboring al-Qaida personnel, including its leader Osama Bin Laden.

Offers by the government of Afghanistan to arrest and try Osama Bin Laden if provided the proof of his involvement were ignored by the United States. By the beginning of October, the North Atlantic Council, NATO's top decision-making

body, invoked Article 5<sup>1</sup> thereby obligating Member States to assist the United States, which was viewed by the Council to be under military attack. NATO Secretary General Lord Robertson stated:

[T]he attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North American shall be considered an attack against them all... [He] reiterate[d] that the United States of American can rely on the full support of its 18 NATO Allies in the campaign against terrorism.<sup>2</sup>

On 7 October 2001, the United States and its allies began using force against Afghanistan.<sup>3</sup> The use of force continues until today, although because the government of Afghanistan has been destroyed by the use of force in November 2001, it is possible to evaluate the legality of the use of force both under the *jus ad bellum* and *jus in bello*.

The evaluation of the *jus ad bellum* will consider the legality of the United States' use of force from the point of view of international law. This will center on the prohibition of the use of force found in the Charter of the United Nations (UN Charter),<sup>4</sup> and under customary international law. It will also consider the legal

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<sup>1</sup> North Atlantic Treaty, Apr. 4, 1949, art. 5, 34 U.N.T.S. 243, 246.

<sup>2</sup> Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), at <http://www.nato.int>.

<sup>3</sup> The United States policy regarding the Taliban is that there is no distinction between them and the organizations that they allegedly claim to be terrorist, al-Qaida in this case. President Bush stated that, "in this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril." George Bush, Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432, 1432 (Oct. 7, 2001). He further stated, "We will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." George Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001).

<sup>4</sup> Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945) [hereinafter U.N. Charter].{ TA \l "Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945) [hereinafter U.N. Charter]." \s "U.N. Charter" \c 5 }

justification that may allow a State to use force by exception to the general prohibition.

The evaluation of the *jus in bello* will concentrate on the conduct of hostilities irrespective of whether the use of force was legal in the first place. When a state of armed conflict exists, the laws of war bind the conflicting parties and place legal restraints on their conduct.<sup>5</sup> These laws limit both the means that may be used to engage in a war and require certain precautions to be taken to respect human life. They also relate to the conduct of hostilities and to the minimum protections that should be afforded to the individual. This law is found in the Four Geneva Conventions of 1949 and their 1977 Additional Protocols,<sup>6</sup> as well as in the Hague Conventions of 1899<sup>7</sup> and 1907,<sup>8</sup> and under customary international law.

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<sup>5</sup> See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1019, 1025-1026 (3<sup>rd</sup> ed. 1993); MALCOLM N. SHAW, *INTERNATIONAL LAW* 806 (4<sup>th</sup> ed. 1997); Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 1-38, 10 (Dieter Fleck ed., 1999). See generally Su Wei, *The Application of Rules Protecting Combatants and Civilians Against the Effects of the Employment of Certain Means and Methods of Warfare*, in *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* 375-393 (Frits Kalshoven & Yves Sandoz eds., 1989). Jean Pictet states that the International Committee of the Red Cross adopted the following to be the full definition of international humanitarian law:

By 'international humanitarian law applicable in armed conflicts' the International Committee of the Red Cross means international rules, established by treaties and custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

*Quoted in* Jean Pictet, *International Humanitarian Law: Definition*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* xix-xxii, xxi (Henry Dunant Institute ed., 1988).

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention (I)]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention (II)]; Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention (III)]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention (IV)]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

<sup>7</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429 (entered into force Sept. 4, 1900) [hereinafter Hague Convention (II) of 1899].



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<sup>8</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227 (entered into force Jan. 26, 1910) [hereinafter Hague Convention (IV) of 1910].

## QUESTIONS OF LAW

The following are the main questions discussed in this thesis:

1. Was the United States use of force against Afghanistan a violation of international law?
2. Could the United States use of force be justified as self-defense?
3. Was the government of Afghanistan's use of force against the United States and its allies justified as self-defense?
4. Does the illegitimate use of force mitigate State responsibility under international humanitarian law?
5. What international humanitarian law is applicable to the armed conflict between Afghanistan and the United States?
6. What international humanitarian laws were violated in the conflict in Afghanistan?
7. What remedies are available for violations of international law?
8. What remedies might be available in future armed conflicts under the Statute of the International Criminal Court?

## SOURCES OF LAW

As concerns the application of *jus ad bellum*,<sup>9</sup> this thesis applies the UN Charter,<sup>10</sup> the Pact of Paris or the Kellogg-Briand Pact,<sup>11</sup> and customary international law regarding the legality of the use of force.<sup>12</sup>

As concerns the application of *jus in bello*,<sup>13</sup> this thesis considers the Four Geneva Conventions from 1949<sup>14</sup> and the Hague Convention (IV) concerning the Laws and Customs of War on Land and its annex from 1907.<sup>15</sup> The latter Convention contains codifications of customary international humanitarian law. Provisions from it are thus sometimes used to indicate an expression of customary international law. The United States has ratified both Conventions while Afghanistan has ratified only the Four Geneva Conventions.<sup>16</sup> Provisions from other conventions or treaties that reflect norms of customary international law will also be considered.

Although Afghanistan is not a party to the Hague Convention (IV)<sup>17</sup> (which has a ‘general participation clause’ that attempts to restrict the application of the rules in the Convention to State parties)<sup>18</sup> it is the contention of this thesis that the rules contained therein have evolved into customary international law and are thus binding on all parties to the conflict. In paragraph 35 of the Report of the Secretary General pursuant

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<sup>9</sup> Law of war that deals with legality of starting a war.

<sup>10</sup> U.N. Charter, *supra* note 4.

<sup>11</sup> Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

<sup>12</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27).

<sup>13</sup> Relates to actual conduct of hostilities and the minimum protection to be afforded to individuals also known as the laws of armed conflict or humanitarian law.

<sup>14</sup> Geneva Convention (I), (II), (III), (IV), *supra* note 6.

<sup>15</sup> Hague Convention (IV) of 1910, *supra* note 8.

<sup>16</sup> Afghanistan ratified the Geneva Conventions of 1949 on Sept. 26, 1956, and the United States on Aug. 2, 1955. The United States ratified the Hague Convention (IV) on Nov. 27, 1909.

<sup>17</sup> Hague Convention (IV) of 1910, *supra* note 8.

to paragraph 2 of Security Council resolution 808,<sup>19</sup> it is pointed out that rules of international humanitarian law, that have become part of customary international law, beyond doubt, are those rules in the Geneva Conventions of 1949,<sup>20</sup> the Hague Convention (IV),<sup>21</sup> the Convention on the Prevention and Punishment of the Crime of Genocide of 1948,<sup>22</sup> and the Charter of the International Military Tribunal of 1945.<sup>23</sup> Frits Kalshoven specifically cites the Hague Conventions and Regulations on Land Warfare of 1899<sup>24</sup> and 1907,<sup>25</sup> stating that with the outbreak of the World War II, those Conventions had “been so widely accepted by States that they had become part of international customary law. After the war, this view was endorsed in so many words by the International Military Tribunal at Nuremberg in its judgment of the major war criminals of the European theatre.”<sup>26</sup> This indicates the customary status of the provisions of the respective Hague Conventions.

Customary rules are also essential for the protection of victims’ rights that are not covered by treaties, for example when a State involved in an armed conflict is not a party to a particular treaty.<sup>27</sup> Furthermore, in some domestic legal systems only rules of customary law are directly applicable.<sup>28</sup> However, as Sassoli and Bouvier suggest, the reliance on custom as a source of international humanitarian law has drawbacks. The authors point out that:

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<sup>18</sup> See *infra* note 185, for reference to the clause.

<sup>19</sup> *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704 (1993).

<sup>20</sup> Geneva Conventions (I), (II), (III), (IV), *supra* note 6.

<sup>21</sup> Hague Convention (IV) of 1910, *supra* note 8.

<sup>22</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

<sup>23</sup> Charter of the International Military Tribunal established by Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Charter of the Nuremberg Tribunal].

<sup>24</sup> Hague Convention (II) of 1899, *supra* note 7.

<sup>25</sup> Hague Convention (IV) of 1910, *supra* note 8.

<sup>26</sup> FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 18 (1987).

<sup>27</sup> MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 109 (1999).

<sup>28</sup> *Id.*

It is very difficult to base uniform application of the law, military instruction, and the repression of breaches on custom which by definition is in constant evolution, is difficult to formulate, and is always subject to controversy. The codification of international humanitarian law began 150 years ago precisely because the international community found the actual practice of belligerents unacceptable, while custom is – despite all modern theories – also based on the actual practice of belligerents.<sup>29</sup>

Additionally, this thesis will attempt to apply provisions of instruments that might be applied to the actions of the United States' allies since they have ratified them. Specifically, Protocol I to the Geneva Conventions would be applied to the conduct of the armed forces whose State is a party to the protocol. For example, Protocol I would apply to the armed forces of the United Kingdom, Canada and Norway, all of whom have ratified it, and are serving as United States' allies in the conflict. It will also be illustrated that several provisions of Protocol I are considered to be of customary status.

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<sup>29</sup> *Id.*

## LEGAL METHODOLOGY

This thesis applies international humanitarian law to the conflict in Afghanistan. Having been the initial factor that led to this conflict making the situation applicable under international humanitarian law, the use of force is covered in the first chapter. Chapter I will evaluate the use of force with attention both to the general prohibition and the justification of self-defense. It will be assumed that Osama Bin Laden and al-Qaida were responsible for the 11 September events as the United States alleged.<sup>30</sup>

Chapter II will examine the development of international humanitarian law. Chapter III will then apply international humanitarian law to the armed conflict in Afghanistan that began on 7 October 2001. Among the rules considered are those relating to indiscriminate attacks, prisoners of war, placing civilians near military targets, and taking over hospitals for military purposes.

Chapter IV will address the possible remedies to violations of international humanitarian law in Afghanistan. The International Law Commission's *Draft Articles on State Responsibility*<sup>31</sup> will be the focus of this assessment concerning the consequences for violations of international law.

### Note on the legal Status of the Taliban government:

Although the status of the Taliban as the *de facto* government of Afghanistan, when the use of force upon it took place, is not a matter of relevance to this thesis, it is the contention of this thesis that the Taliban government was bound by international

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<sup>30</sup> An in depth study of this case is beyond the scope of this paper.

<sup>31</sup> *Draft Articles on State Responsibility*, Int'l L. Comm'n, 53<sup>rd</sup> Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001).

legal obligations. The argument is based on the fact that the Taliban government has acceded to the treaties that the previous government of Afghanistan has ratified, especially those dealing with human rights and humanitarian affairs. It is also relevant to note that Professor Ian Brownlie had stated that legally, the distinction between *de jure/de facto* recognition and the recognition as the *de jure/de facto* government does not matter.<sup>32</sup> He further states that “certainly the legal and political elements of caution in the epithet *de facto* in either context are rarely regarded as significant, and courts both national and international accord the same strength to *de facto* recognition as evidence of an effective government as they do to a *de jure* recognition.”<sup>33</sup> He maintains that the recognition occurs “exclusively in the political context of recognition of governments.”<sup>34</sup>

Furthermore, within the meaning of the Vienna Convention on Succession of States in respect of Treaties,<sup>35</sup> succession “means the replacement of one State by another in the responsibility for the international relations of territory.”<sup>36</sup> This Convention governs situations when a nation dissolves, fragments, or goes through a change where it becomes one or more nations. The term succession though, has to be evidently made distinguishable from the continuity of identity, “where a state is not changed as a subject under international law by external or internal events and thus retains the same identity. If the state indicates that this identity binds it to its international rights and duties, the problem of state succession does not even arise.”<sup>37</sup> In this case, it is important to note that a change of government does not break the

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<sup>32</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 92 (5d. 1998).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 17 I.L.M. 1488 (1978).

<sup>36</sup> *Id.* art. 2(1)(b).

<sup>37</sup> Dieter Papenfu, Comment, *The Fate of the International Treaties of the GDR Within the Framework of German Unification*, 92 AM. J. INT’L L. 469 (July 1998).

continuity of a State where a change in regime does not allow for a denunciation of treaties. Alternatively, there is no sign that Afghanistan controlled by the Taliban objected to the bound by multilateral treaties to which the predecessor government were a party.



## CHAPTER I: Use of Force

### A. General Overview on the Use of Force and the Development of its Prohibition

There were few restraints on the use of force by States as between 1648, when nation-states system emerged, until the middle of the 20<sup>th</sup> century. The resort to war was seen as a lawful measure to which a State may have recourse on condition that the war was declared.<sup>38</sup> This state of international affairs was the result of the “European balance of power system after the Peace of Westphalia, 1648, [where] the concept of the just war disappeared from international law as such.”<sup>39</sup> States were regarded as equal and sovereign and consequently, what was important was not whether or not a war that took place was just, but rather whether a state of war existed.<sup>40</sup>

By the beginning of the 20<sup>th</sup> century, The Pact of Paris (Kellogg-Briand Pact)<sup>41</sup> prohibited the use of force by States as an instrument of foreign policy. In 1945, with the creation of the UN, the Charter prohibited the use of force in its Article 2(4).<sup>42</sup> However, Article 51 of the Charter provided for the exceptional use of force, individual and collective, in self-defense.<sup>43</sup> The right to use force in self-defense as well as the Security Council using force when necessary was guaranteed, but subject

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<sup>38</sup> ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 17 (1993).

<sup>39</sup> MALCOLM N. SHAW, *supra* note 5, at 779. *See e.g.*, IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 14 (1963).

<sup>40</sup> IAN BROWNLIE, *supra* note 48, at 26-28 (1963), *cited in* MALCOLM N. SHAW, *supra* note 5, at 779.

<sup>41</sup> Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

<sup>42</sup> U.N. Charter, *supra* note 4. See Appendix A for the full text of this article.

<sup>43</sup> *Id.*

to the control of the Security Council. Under Chapter VII, the UN Security Council was authorized to use force when there was threat to peace and security. And in many cases when States committed acts of aggression “the vast majority of the world’s nations routinely and automatically condemn it as illegal.”<sup>44</sup> The definition of what the term aggression encompassed was outlined by General Assembly Resolution 3314 (1974), rendering a more detailed definition of aggression and declaring it to be “the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>45</sup>

### 1. Customary International Law in Relation to the Use of Force

General Assembly Resolution 2131 issued in 1965,<sup>46</sup> concerning the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, stresses that:

No state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.<sup>47</sup>

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<sup>44</sup> Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 1 (Winter 2002). See, e.g., S.C. Res. 600, U.N. SCOR, 45th Sess., 2932d mtg. at 19, U.N. Doc. S/RES/660 (1990) (condemning the ‘Iraqi invasion of Kuwait’); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 28, U.N. Doc. S/RES/678 (1990) (which authorized the use of ‘all necessary means’ to secure the withdrawal of Iraqi forces from Kuwait); S.C. Res. 479, U.N. SCOR, 35th Sess., 2248th mtg. at 23, U.N. Doc. S/RES/479 (1980) (calling upon ‘Iran and Iraq to refrain immediately from any further use of force.’); S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/1511 (1950) (calling on member states to ‘furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack.’). Slaughter and White further state that, “most recent incidents of the use of force begin as a civil conflict only to escalate subsequently into an international conflict contrary to Article 2(4).” See, e.g., S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg. at 10, U.N. Doc. S/RES/1160 (1998) (calling on member states to respect the ‘territorial integrity of the Federal Republic of Yugoslavia’ based on Article 2(4) while working to secure an ‘enhanced status for Kosovo.’); S.C. Res. 749, U.N. SCOR, 47th Sess., 3066th mtg. at 10, U.N. Doc. S/RES/749 (1992) (deploying a U.N. protective force in Yugoslavia after the escalation of the domestic conflict there).

<sup>45</sup> G.A. Res. 3314, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 19, at 142, art. 1, U.N. Doc. A/9619 (1974). See also G.A. Res. 36/103, U.N. GAOR, 36<sup>th</sup> Sess., Supp. No. 31, art. 1, U.N. Doc. A/36/761 (1981).

<sup>46</sup> G.A. Res. 2131, U.N. GAOR, 20<sup>th</sup> Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

<sup>47</sup> *Id.*

This principle of non-intervention had already been applied in the *Corfu Channel*<sup>48</sup> case when the International Court of Justice stated that “between independent States, respect for territorial sovereignty is an essential foundation of international relations,”<sup>49</sup> and that States have an obligation to respect each other’s political integrity under international law.<sup>50</sup> D.J. Harris, an international law scholar, further notes that, “the existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice.”<sup>51</sup> General Assembly Resolution 2625 dealing with Principles of International Law concerning Friendly Relations and Cooperation Among States in 1970<sup>52</sup> reaffirmed that violations of these principles were against the norms of international law.<sup>53</sup>

The prohibition of the use of force is also established under customary international law. The existence of a rule as customary international law requires two primary elements: State practice and *opinio juris*.<sup>54</sup> In the *Military and Paramilitary Activities* case,<sup>55</sup> the Court looked at the practice and *opinio juris* of States and noted that the 1970 Declaration on Principles in International Law concerning Friendly Relations and Cooperation Among States had been adopted by the overwhelming majority of States and was thus evidence that the prohibition of the use of force was customary international law.<sup>56</sup> The consent was seen by the Court not merely as a “reiteration or elucidation” of States’ commitments to the provisions of the UN Charter, but as acceptance of the validity of the rules declared in the resolution as

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<sup>48</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

<sup>49</sup> *Id.* at 35.

<sup>50</sup> D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 874 (5th ed. 1998).

<sup>51</sup> *Id.*

<sup>52</sup> G.A. Res. 2625, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

<sup>53</sup> *See also* *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, at 35 (Apr. 9); IAN BROWNLIE, *supra* note 39, at 283-289; H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 90 (1958).

<sup>54</sup> *See infra* note 195, for a discussion in the accompanied text on what constitutes *opinio juris*.

<sup>55</sup> *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

customary international law.<sup>57</sup> The Court confirmed the statement made by the International Law Commission that the prohibition of the use of force codified in the UN Charter has the character of *jus cogens*.<sup>58</sup>

## 2. Treaty Law in Relation to the Use of Force

The UN Charter in Article 2(4) prohibits the use of force where it states that, “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”<sup>59</sup> This provision binds member States of the United Nations.<sup>60</sup> However, there are exceptions to the rules laid down in Article 2(4) where Article 51 acknowledges the inherent right of all States, whether collectively or individually, to use force in self-defense.<sup>61</sup> The Security Council under Chapter VII is also given the power to authorize the use force.<sup>62</sup>

Chapter VII gives the Security Council the legal authority to determine whether a threat or breach to peace, or an act of aggression exists or not, and to further decide upon the action to be taken in accordance with Articles 41 and 42 of the Charter.<sup>63</sup> While Article 41 relates to measures not involving the use of force,<sup>64</sup> Article 42 authorizes the Security Council to resort to measures involving the use of force, if the

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<sup>56</sup> *Id.* ¶ 188.

<sup>57</sup> See Thomas M. Franck, *Appraisals of the ICJ's Decision: Nicaragua v. the United States (Merits)*, 81 AM. J. INT'L L. 116, 118 (Jan., 1987).

<sup>58</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27). See *Commentary of the Commission to Article 50 of its Draft Articles on the Law of Treaties*, Y.B. Int'l Int'l L. Comm'n, 1966-II, at 247, ¶ 1.

<sup>59</sup> U.N. Charter, *supra* note 4, art. 2(4). See Appendix A for the full text of this article.

<sup>60</sup> See MALCOLM N. SHAW, *supra* note 5, at 781. See, e.g., LOUIS HENKIN ET AL., *supra* note 5, at 893.

<sup>61</sup> U.N. Charter, *supra* note 4, art. 51. See Appendix A for the full text of this article.

<sup>62</sup> See *id.* art. 42. See Appendix A, for the full text of this article.

<sup>63</sup> *Id.* art. 39. It is important to note that the difference between ‘aggression’ and ‘breach to the peace’ has not been clarified.

<sup>64</sup> *Id.* art. 41. See Appendix A for the full text of this article.

measures described in Article 41 have been deemed or proved to be inadequate.<sup>65</sup> The measures relating to the use of force in Article 42 include “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>66</sup> Article 43 further requires member states to make available its armed forces for assistance,<sup>67</sup> while Article 49 requires member states to assist in the carrying out of measures that the Security Council decides upon.<sup>68</sup>

Collective security may be said to be the goal of the system of international security created by the Charter of the United Nations whereby an attack on one State is considered an attack on all. This system operates by not allowing a government to “conquer another or otherwise disturb the peace for fear of retribution from all other governments.”<sup>69</sup> It must be stressed, therefore, that while Article 2(4) prohibits all forms of force, Article 51 grants the right to use force only in relation to self-defense and expands it to include collective self-defense. The right to collective self-defense enumerated in Article 51 is regarded as customary international law.<sup>70</sup> In the *Military and Paramilitary Activities* case the Court recognized this norm and further concluded, “that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.”<sup>71</sup> Thus, the exercise of collective self-defense requires that a victim State request assistance.<sup>72</sup>

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<sup>65</sup> *Id.* art. 42.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* art. 43(1).

<sup>68</sup> *Id.* art. 49.

<sup>69</sup> THOMAS G. WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 21 (1994).

<sup>70</sup> *See* *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 199-200 (June 27).  
*See also* D. J. HARRIS, *supra* note 50, at 899; MALCOLM N. SHAW, *supra* note 5, at 795.

<sup>71</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 199 (June 27).

<sup>72</sup> *See id.*

## B. Jus ad bellum

The term *jus ad bellum* refers to the legality of starting a war.<sup>73</sup> It rests upon the determination of whether a war is justified where “[t]his school of thought determines ‘just wars’ from ‘unjust wars’ and was pervasive in the early development of law. In particular it allowed Christian thinkers the moral standing to support war. When fighting a “just war” it was permissible to violate any and all current rules of armed conflict.”<sup>74</sup> As will be further elaborated in Chapter II, this view has changed where whether or not the initial use of force was legal, parties in the conflict are obliged to respect the rules of armed conflict.

Consequently, it is imperative to understand the context of the rules of law that regulate the conduct of States when resorting to non-peaceful means of resolving their conflicts. Pointed out earlier, the Pact of Paris (Kellogg-Briand Pact)<sup>75</sup> prohibited the use of force by States as an instrument of foreign policy, where “[t]oday there is a re-emergence of the “just war” concept and the idea of the ‘modern’ Jus ad bellum is based upon several articles from the Charter of the United Nations. They are Article 2(4), Article 51, and the heart of Chapter VII (Articles 43-48).”<sup>76</sup> Article 2(4) of the UN Charter prohibits the use of force, while Article 51 of the same Charter acknowledges the right of self-defense as an inherent right of all States, individual or collective. Understanding the scope and meaning of those articles is crucial to issues relating to the use of force in international law.

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<sup>73</sup> REBECCA WALLACE. INTERNATIONAL LAW 247 (3d. ed. 1997). See also INTERNATIONAL LAW DICTIONARY (Prof. Ray August, Washington State University), available at <http://jurist.law.pitt.edu>. (where the definition of *Jus ad bellum* is the Latin for ‘the right to initiate war’).

<sup>74</sup> Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, at note 12 (2000).

<sup>75</sup> Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. (Both the United States and Afghanistan signed this Pact).

<sup>76</sup> Gregory P. Noone, *supra* note 74, at note 12.

Article 2(4) goes beyond prohibiting war, as it does not distinguish between wars and using force that falls short of war, such as reprisals.<sup>77</sup> Therefore, this Article points to all threats of, and acts of, the use of force without distinction. As an exception to Article 2(4), Article 51 permits the use of force as means of self-defense against an armed attack. It is important to note that Article 51 confines itself to measures of self-defense those where the purpose is defensive and not to wage war. Furthermore, there is the condition that an armed attack has to have taken place, which seems to extinguish any right to anticipatory self-defense.

### C. Legality of the Use of Force on Afghanistan

There are different types of legal designations that may have been used to legally classify the United States' use of force against Afghanistan. The first is the use of force as aggression. This type of force is prohibited as discussed earlier. The second most obvious description that may also be a legal justification for the use of force is self-defense. Where a claim to self-defense is not justified by the facts, however then this description may also dissolve into unjustified and illegal aggression. The third is the use of force as a reprisal. Reprisals are justified uses of force that may be considered aggression, when the narrow requirements of a legitimate reprisal are not met. A major difference between self-defense and reprisals is that while the former is for defensive purposes, the latter is a retaliatory act. Finally, the use of force is permissible if authorized by the UN Security Council under Chapter VII. Full implementation of this Charter-based system of collective self-defense requires that States and the Security Council attempt to resolve the dispute peacefully. When the

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<sup>77</sup> Refer to Article 2(4) stating “or in any other manner inconsistent with the Purposes of the United Nations.” Then refer to the purposes of the United Nations found in Article 1. See Appendix A for the full text of the articles.

Security Council determines that this has failed, then according to Article 42 it may authorize the use of military force. Such force should be under the authority and the control of the UN,<sup>78</sup> or a regional body authorized to undertake force by the UN.<sup>79</sup>

The first scenario involving a violation of Article 2(4) of the UN Charter that prohibits the use of force by a State against other States has already been discussed earlier.<sup>80</sup> The second scenario concerning self-defense under Article 51 of the UN Charter that gives States the ‘inherent right’ to respond in self-defense, individually or collectively, if faced with an armed attack occurring on a Member State of the UN. Self-defense provided for in Article 51 is thus an exception when a State can legally use force, which in itself does not violate Article 2(4) of the UN Charter.<sup>81</sup> However, if no justification is applicable then the use of force in this case must be considered as aggression. The third scenario is that of a reprisal, which is an action that is prima facia illegal, but under certain circumstances becomes justified. The International Court of Justice in the *Case Concerning Gabcikovo-Nagymaros Project*<sup>82</sup> accepted that the resort to reprisals or countermeasures could justify an otherwise illegal act. However, it would have to be done in response to an international wrongful act of a State and be ‘directed against that State’ with the stipulation that certain conditions

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<sup>78</sup> See U.N. Charter, *supra* note 4, arts. 42-48. See Appendix A for the full text of the articles.

<sup>79</sup> *Id.* art. 47 (where regional bodies may also be a forum through which States exercise collective self-defense under Article 51).

<sup>80</sup> A brief discussion on the general prohibition of the use of force is included at the beginning of this chapter.

<sup>81</sup> See *Report of the International Law Commission*, U.N. GAOR Int’l L. Comm’n, 56th Sess., Supp. No. 3, at 177, ¶ 1, U.N. Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/> [hereinafter *Report of the International Law Commission 2001*]. Noted in this report, the resort to self-defense does not preclude “the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to the international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all parties in an international armed conflict, and the same is true of customary international humanitarian law.” *Id.* at 178, ¶ 3. For further illustration refer to the International Court of Justice opinion stating that rules of international humanitarian law constitute ‘intransgressible principles of international customary law.’ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, at 257, ¶ 79 (July 8).

<sup>82</sup> *Case Concerning Gabcikovo-Nagymaros Project (Hung. v. Solvk.)* 1997 I.C.J. 7, (Sept. 25).



are met.<sup>83</sup> Arbitration tribunals have held the same opinion.<sup>84</sup> In the decision of the *Naulilaa* case,<sup>85</sup> which is regarded as the classic example that enumerates criteria for a reprisal that would be permissible, the tribunal laid down three conditions that have to be met. Those included: “first, there had to be a ‘a previous violation of international law.’<sup>86</sup>... Second, the reprisal had to be ‘preceded by an unsuccessful demand for redress.’<sup>87</sup>... Third, the reprisals ‘must be proportionate to the injury suffered’.”<sup>88</sup> The German reprisal in this case that included a “military raid on the colony of Angola, which destroyed property, in retaliation for the mistaken killing of three Germans lawfully in the Portuguese territory,”<sup>89</sup> was regarded not to be a justified reprisal by the rejection of the German claim on the three grounds discussed above.<sup>90</sup> The *Naulilaa* case thus sets a precedent for not allowing reprisals that do not meet the stated requirements. In this case, reprisals using force was not ruled out but the tribunal set the conditions outlined above for a reprisal to be justified.<sup>91</sup>

### 1. The United States Attack on Afghanistan:

With the support of Pakistan, which provided access to its airspace, the United States launched an attack on Afghanistan claiming to be acting in self-defense.<sup>92</sup> The

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<sup>83</sup> *Id.* at 55, ¶ 83.

<sup>84</sup> *See* Air Services Agreement (Fr. v. U.S.), 18 R.I.A.A. 416 (1978); *Naulilaa* (Port. v. F.R.G.), 2 R.I.A.A. 1011, 1025-1026 (1928).

<sup>85</sup> *Naulilaa* (Port. v. F.R.G.), 2 R.I.A.A. 1011 (1928).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> ANTHONY C. AREND & ROBERT J. BECK, *supra* note 38, at 17-18.

<sup>89</sup> MALCOLM N. SHAW, *supra* note 5, at 786.

<sup>90</sup> *See id.*

<sup>91</sup> ANTHONY C. AREND & ROBERT J. BECK, *supra* note 38, at 17-18.

<sup>92</sup> *See* Donald Rumsfeld, Briefing at the Pentagon (Sept. 25, 2001), *available at* <http://www.cnn.com/2001/US/09/25/ret.rumsfeld/>; Public Announcement, U.S. Department of State, Office of the Spokesman, Worldwide Caution (Oct. 7, 2001), *available at* <http://usembassy.egnet.net/consular/wc100701.htm>; *See also* Letter from Permanent Representative of the United States of America, to President of the Security Council, the United Nations, UN Doc. S/2001/946 (Oct. 7, 2001), *available at* <http://www.un.int./usa/s-2001-946.htm>, in *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 245-246 (Jan. 2002); U.S. Department of State, Office of the Historian, Bureau of Public Affairs, *The U.S. and the*

United States regarded the attack on 11 September, as an act of war against it.<sup>93</sup> The attack on Afghanistan that was initiated on 7 October 2001 was considered justified under international law as self-defense, according to the government of the United States.

As of 7 October 2001, there was a state of armed conflict in Afghanistan, and therefore, the laws of war or international humanitarian law bound all parties to that conflict. The armed conflict existed because one country, the United States, had used extensive armed force against another country, Afghanistan. This use of force was also explicitly stated to be against the territorial integrity and political independence of Afghanistan. The laws obliging States to respect human rights and limiting the means and methods of conducting a war will be discussed in Chapter II of this thesis.

Clear evidence that the United States was claiming to be acting in self-defense can be found in the letter sent by the permanent Representative of the United States to the UN on 7 October 2001 on the day the use of force was initiated against Afghanistan, explaining why the United States together with other States, resorted to force. It states the following:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

On 11 September 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is

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*Global Coalition against Terrorism: September-November 2001* (Nov. 20, 2001), available at <http://www.state.gov/r/pa/ho/pubs/fs/index.cfm?docid=5889>.

<sup>93</sup> President George Bush, Remarks After Meeting with National Security Team (Sept. 13, 2001) (transcript available at <http://www.usa.or.th/news/press/2001/nrot060.htm>).

supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property. In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.<sup>94</sup>

The United States also claimed that it is exercising its right under international law to use force in self-defense in retaliation to the attacks on its territory on 11 September 2001, in statements by United States President George W. Bush who referred to the 11 September events as “acts of war”.<sup>95</sup> In addition, the United States Secretary of Defense Donald Rumsfeld stated, “this is not something that begins with a significant event and ends with a significant event.... The truth is, this is not about revenge. It’s not about retaliation. This is about self-defense. The only way we can defend against terrorism is by taking the fight to the terrorists.”<sup>96</sup> The official policy

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<sup>94</sup> Letter from Permanent Representative of the United States of America, to President of the Security Council, the United Nations, UN Doc. S/2001/946 (Oct. 7, 2001), *available at* <http://www.un.int/usa/s-2001-946.htm>, in *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 237, 245-246 (Jan. 2002). This letter was inserted to clarify to the reader both the position of the United States and the events that led up to the conflict in Afghanistan.

<sup>95</sup> President George Bush, Remarks After Meeting with National Security Team (Sept. 13, 2001) (transcript *available at* <http://www.usa.or.th/news/press/2001/nrot060.htm>).

<sup>96</sup> Donald Rumsfeld, Briefing at the Pentagon (Sept. 25, 2001), *available at* <http://www.cnn.com/2001/US/09/25/ret.rumsfeld/>

of the United States is that it is acting in self-defense. This is illustrated by its public announcement on the day of the use of force on Afghanistan stating that, “the U.S. Government initiated military action today pursuant to its inherent right of self-defense recognized in Article 51 of the UN Charter, after the events of 11 September in the United States.”<sup>97</sup> Furthermore, the letter presented by Ambassador Negroponte to the Security Council stated that the attacks taking place in Afghanistan were United States’ acts of self-defense under Article 51 of the UN Charter.<sup>98</sup> Finally, Condoleezza Rice, National Security Advisor, had stated that the action of the United States was justified as self-defense under Article 51 of the UN Charter and therefore needs no UN authorization to carry it out. These statements can be considered to reflect the official policy of the United States.

The statements made by United States officials that it is acting within the right given to it under Article 51 of the UN Charter, indicates that the claim is that of a self-defense in relation to an existing armed attack that occurred. While Article 51 sets the guidelines for the inherent right to self-defense, the *Caroline*<sup>99</sup> example may further be used to elaborate on certain conditions that need to be met. The incident of the *Caroline* involved a set of correspondences between the United States and United Kingdom foreign ministers. Although dealing with anticipatory attacks upon a State, the relevant issues that were outlined in the exchange of correspondences were that of necessity and proportionality, in which the use of force is only permitted when there is a “necessity of self-defense, instant, overwhelming, leaving no choice of means and

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<sup>97</sup> Public Announcement, U.S. Department of State, Office of the Spokesman, Worldwide Caution (Oct. 7, 2001), available at <http://usembassy.egnet.net/consular/wc100701.htm>

<sup>98</sup> U.S. Department of State, Office of the Historian, Bureau of Public Affairs, *The U.S. and the Global Coalition against Terrorism: September-November 2001* (Nov. 20, 2001), available at <http://www.state.gov/r/pa/ho/pubs/fs/index.cfm?docid=5889>. (The letter further stated “we may find that our self-defense requires further action with respect to other organizations and other states”).

<sup>99</sup> Exchanges between U.K. and U.S. Foreign Ministers regarding ‘The Caroline’ incident, 1841.

of moment for deliberation.”<sup>100</sup> Proportionality means that the use of force must not be ‘unreasonable’ or ‘excessive’. However, the *Caroline* doctrine of allowing anticipatory self-defense under those conditions is still not legitimate as Article 51 specifically states that self-defense is justified ‘if an armed attack occurs against a member State’.<sup>101</sup>

In the *Military and Paramilitary Activities* case,<sup>102</sup> looking at the issue of the use of force as a resort to self-defense or a collective one and its status in customary international law, the Court remained subjected to the *Caroline* requirements of ‘necessity’ and ‘proportionality’, in which it stated that Article 51 of the UN Charter<sup>103</sup> did not change this.<sup>104</sup> Article 51 gives the right of individual or collective self-defense if attacks occur on any member of the UN. The Court recognized that this article in itself refers to pre-existing customary law when it stated the following in paragraph 176:

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<sup>100</sup> D. J. HARRIS, *supra* note 50, at 895.

<sup>101</sup> The United States was the one that insisted on this phrasing of Article 51. Present then at the drafting of the Charter “Green Hackworth, the State Department’s legal adviser, was alarmed that this language ‘greatly qualified the right of self-defense,’ but Governor Harold Stassen, deputy head of delegation at San Francisco, refused to yield, insisting ‘that this was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred.’” *Minutes of the Forty-Eighth Meeting (Executive Session) of the United States Delegation, Held at San Francisco, Sunday, May 20, 1945, 12 Noon*, in 1 FOREIGN REL. U.S. 1945, 813, 818 (1967), in Thomas M. Franck, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Forces Without Prior Security Council Authorization?* 5 WASH. U.J.L. & POL’Y 51, 58 (2001).

However “when another member of the U.S. delegation, Mr. Gates, ‘posed a question as to our freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked,’ Governor Stassen replied that ‘we could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came.’” *Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, Monday, May 14, 1945, 9:05 a.m.*, in 1 FOREIGN REL. U.S. 1945, 707, 709 (1967), in Thomas M. Franck, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Forces Without Prior Security Council Authorization?* 5 WASH. U.J.L. & POL’Y 51, 58-59 (2001). (The author, Thomas Franck, thus illustrated that the founders had intentionally closed the possibility to any claim of ‘anticipatory self-defense’).

<sup>102</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>103</sup> U.N. Charter, *supra* note 4, art. 51. See Appendix A, for the full text of the article.

<sup>104</sup> Additionally, in a discussion of proportionality in the sense of *jus ad bellum*, Oscar Schachter looked at the legality of the military operations that are authorized by the UN Security Council under Chapter VII in the second Gulf war, he stated that the “Resort to collective self-defense (*jus ad bellum*) is also subject to requirements of necessity and proportionality, even though these conditions are not

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter ... by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right”...of individual or collective self-defense, which “nothing in the present Charter shall impair” and which applied in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.<sup>105</sup>

This doctrine could be applied to the use of force against Afghanistan to determine if the United States’ use of force is justified. To be justified, the self-defense would have to have adhered to the principles of necessity and the use of force must be proportional to the original attack against the United States. Similarly, Peter H.F. Bekker (PhD International law), former staff attorney of the International Court of Justice explains that in the *Advisory Opinion on the Legality of Nuclear Weapons*,<sup>106</sup> the International Court of Justice held that “Charter provisions apply to any use of force, regardless of the type of weapon employed, and that the dual customary condition of necessity and proportionality applies whatever the force used in self-defense.”<sup>107</sup> Consequently, this reinforces that the condition of necessity and proportionality must be met by the United States. Thus, for the United States’ use of force to be lawful it must be proportionate to the danger faced.<sup>108</sup> In a comment by John Cerone, Executive Director of the War Crimes Research Office at the American University’s Washington College of Law, in the American Society of International

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expressly stated in Article 51.” Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452, 460 (1991).

<sup>105</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 176 (June 27).

<sup>106</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

<sup>107</sup> Peter H.F. Bekker. *Recent Developments at the World Court*, AM. SOC’Y INT’L L. NEWSL. (Sept.-Oct. 1996).

<sup>108</sup> See IAN BROWNLIE, *supra* note 39, at 372-3.

Law Insights, he notes that for a State to resort to self-defense it has to first establish that the State against which it is using force “has committed an internationally wrongful act.”<sup>109</sup>

It is therefore necessary to determine if Afghanistan was responsible for an international wrongful act that allowed the United States to legitimately use force in self-defense. Perhaps the first point of importance is that the United States itself did not direct its accusations at the Taliban government of Afghanistan, but at al-Qaida that is headed by Osama Bin Laden, who was allegedly hosted by the government of Afghanistan.<sup>110</sup> The question of attributability arises, where if the acts of al-Qaida are found to be attributable to the Taliban or Afghanistan, then the United States is justified in its use of force. However, the United States did not direct such accusations to the government of Afghanistan, but rather considered them enemies for their unwillingness to hand members of al-Qaida, including Osama Bin Laden, over to the United States.<sup>111</sup>

Regarding the issue of necessity discussed previously, to determine whether the United States’ act was necessary an important question that should be addressed is —

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<sup>109</sup> John Cerone, Comment, *Acts of War and State Responsibility in ‘Muddy Waters’: The Non-state Actor Dilemma*, ASIL Insights 4 (Sept. 2001), at <http://www.asil.org/insights/insigh77.html>.

<sup>110</sup> The determination of what al-Qaida is in law is complex. Evidently, they are not part of any government but existing on the territories of Afghanistan, by the latter hosting them. Their involvement in the conflict in Afghanistan stems from two distinguishable facts: the first being the direct accusation by the United States that they were behind the incidents of 11 September 2001, and the second their existence on Afghanistan territory and further fighting alongside the Taliban resorting to its claim of self-defense. Refer to section ‘Status of Combatants’ in Chapter III and to the section on the prisoners of war. While fighting al-Qaida is considered, by the United States, in the wording of Article 4(2) of Geneva Convention (III) “Members of other militias and members of other volunteer corps ... belonging to a Party to the conflict.” (Internationally, al-Qaida is recognized as a ‘terrorist network’. See generally, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’LL. 237 (Jan. 2002); Note, *Responding to Terrorism: Crime, Punishment and War*, 115 HARV. L. REV. 1217 (Feb. 2002)).

<sup>111</sup> There was a stream of UN Security Council Resolutions calling upon the government of Afghanistan to refrain from giving sanctuary to terrorists, ensure that their territory was not being used for preparing terrorist acts, and demanding the Taliban to hand over Osama Bin Laden. See e.g., S.C. Res. 1193, U.N. SCOR, 3921st mtg., U.N. Doc. S/RES/1193 (1998); S.C. Res. 1214, U.N. SCOR, 52d Sess., 3952nd mtg. at 82-83, U.N. Doc. S/RES/1214 (1998); S.C. Res. 1267, U.N. SCOR, 52d Sess., 4051st mtg. at ¶ 1-2, U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

was another reasonable avenue open to the United States that it could have taken instead of using force against Afghanistan? This is especially important because it was not Afghanistan, or the government, that initially was responsible for the acts committed on 11 September 2001, even by the United States government's own admission. Article 2(3) of the UN Charter requires member States of the UN to "settle their international disputes by peaceful means."<sup>112</sup>

Measures that could have been taken include what the United States first resorted to, which was requesting that the Afghanistan government hand over Osama Bin Laden. Afghanistan refused to hand him over to the United States claiming that it needed to see evidence that demonstrated his responsibility for the attacks on the World Trade Center and the Pentagon.<sup>113</sup> Applying proportionality, discussed earlier, to the case at hand, would entail that if the United States holds that the international wrongful act that Afghanistan has committed is Afghanistan's failure to prosecute or extradite the perpetrators of the attacks on the United States, it then cannot take measures of use of force because of Afghanistan's failure to try or extradite, a breach of its international obligation.<sup>114</sup> The necessity and proportionality elements appear to be missing from the actions of the United States. Furthermore, proportionality could also be assessed in the military operation carried out by the United States in Afghanistan, in comparison to the attacks on the World Trade Center and the Pentagon. However, this is beyond the scope of this paper.

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<sup>112</sup> U.N. Charter, *supra* note 4, art. 2(3). See Appendix A, for the full text of the article.

<sup>113</sup> This reaction from the Taliban was viewed by the United States to be an endorsement of the terrorist attacks of 11 September 2001. *See, e.g.,* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 35 (May 24) (the Court found that the 'approval' or 'endorsement' of private non state actors activities could 'transform the legal nature of the situation...into acts of state'). The United States viewed the Taliban in this way to have endorsed the September 11 acts. *See* Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 21.

<sup>114</sup> John Cerone, *supra* note 109.



Furthermore, by establishing that the wrongful act committed by Afghanistan is the refusal to hand over the man responsible for the attacks on the United States, the use of force on Afghanistan by the United States as a claim of self-defense, not authorized by the UN, is unjustified because the element of necessity was not satisfied because there were other reasonable options open to the United States. The element of proportionality was absent too since the use of force is evidently not proportional to a failure, by Afghanistan, to try or extradite Osama Bin Laden.

On the other hand, the argument that the acts committed on 11 September are attributed to the government of Afghanistan could be made. The *Trial Smelter*<sup>115</sup> and *Corfu Channel*<sup>116</sup> cases demonstrate that States could be held responsible for knowingly allowing their territory to be used to injure other States. In the *Trial Smelter* case, the tribunal held that States are not allowed to use or permit the use of their territory to injure another State's territory "when the case is of serious consequence and the injury is established by clear and convincing evidence."<sup>117</sup>

An important question arises and that is the nature of the relationship between officials from the Taliban and members of al-Qaida.<sup>118</sup> If they are distinguishable, then the traditional test of effective control could be applied,<sup>119</sup> where "it would still be possible to hold the government responsible for the terrorist acts, but the counter measures allowed could fall short of the use of force."<sup>120</sup> Professor of Law, Gregory Travalio argues that,

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<sup>115</sup> Trial Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

<sup>116</sup> Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

<sup>117</sup> Trial Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

<sup>118</sup> See Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 20.

<sup>119</sup> See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 109-112 (June 27).

<sup>120</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 20. See Helen Duffy, *Responding to September 11<sup>th</sup>, the Framework of International Law* (Oct. 2001), available at <http://www.interrights.org/about/sept0102001.asp> (the author mentions that U.N. Security Council and General Assembly resolutions called upon States to desist from "supporting or allowing terrorist activity, this bolstering the claim for attribution of such acts when states fail to prevent them").

A state that is so weak that it literally cannot control terrorist activity emanating from within its borders can be hardly said to have *acted* at all. Although this may not necessarily preclude the use of military force in response to a terrorist attack emanating from such a state, the impotence of a state to control international terrorist organizations would not be an armed attack against another state, and therefore the use of force in response is not expressly sanctioned by Article 51.<sup>121</sup>

Consequently, the important issue here is the definition of ‘armed attack’ in Article 51 of the UN Charter, where “the mere inability of a state to control terrorist activity within its borders does not constitute an armed attack by that state.”<sup>122</sup> In *Military and Paramilitary Activities* case<sup>123</sup>, the International Court of Justice addressed the issue of control when it looked at,

[W]hether the activities of the Nicaraguan ‘contras’ could be attributed to the United States government because of strong evidence that the contras were largely trained, equipped, and armed by the United States. The Court decided that only if it could be proved that the United States exercised effective control over the contras ‘in all fields’ could the contras be considered as acting on behalf of the United States government.<sup>124</sup>

This further reinstates the view that a State that tolerates or encourages terrorist acts “is an insufficient state connection to constitute an armed attack under Article 51 of the UN Charter.”<sup>125</sup> In addition, a state is only responsible for culpable acts or omissions that emanate from its borders.<sup>126</sup> Thus, if Afghanistan’s actions or omissions were culpable in this case, the United States being the harmed state would still not necessarily be entitled to respond by using force in self-defense within the scope of Article 51.<sup>127</sup>

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<sup>121</sup> Gregory M. Travalio, *Terrorism, International Law and the Use of Military Force*, 18 WIS. INT’L L. J. 145, 153 (Winter 2000).

<sup>122</sup> *Id.* at 152.

<sup>123</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>124</sup> Gregory M. Travalio, *supra* note 121, 152-153. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 109 (June 27).

<sup>125</sup> Gregory M. Travalio, *supra* note 121, at 154.

<sup>126</sup> RICHARD ERICKSON, LEGITIMATE USE OF FORCE AGAINST STATE SPONSORED TERRORISM 100-103 (1989).

<sup>127</sup> *See id.* *See also* Michael Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 7-9 (1985).

However, if activities of the Taliban and al-Qaida are inseparable, such test would be deemed useless, where “attacks on the state apparatus could be legitimized either as a direct attack on the terrorists or as a direct response to a state act. Relevant evidence in such inquires could come from many sources, including the post hoc ratification of terrorist acts.”<sup>128</sup> The International Court of Justice in the *U.S. Diplomatic & Consular Staff in Tehran* case<sup>129</sup> discussed post hoc ratification of acts. The Court opined that “the approval given [to the actions of students holding American hostages] ... by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.”<sup>130</sup> Consequently, the Court found that the ‘approval’ or ‘endorsement’ of activities by non-state actors could “transform the legal nature of the situation ... into acts of state,”<sup>131</sup> holding the State responsible as though it had perpetuated the initial actions.<sup>132</sup> Consequently, the question remains as to whether the Taliban was distinguishable from al-Qaida. It still stands that if the United States was justified to use force it would still be subject to the necessity and proportionality requirement.

Finally, in relation to the use of force as self-defense and the question of international humanitarian law, Theodor Meron makes reference, in his article titled *The Humanization of Humanitarian law*, to the opinion of the International Court of Justice in 1996 concerning the *Legality of the Threat or Use of Nuclear Weapons*,<sup>133</sup>

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<sup>128</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 20.

<sup>129</sup> United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

<sup>130</sup> *Id.* at 35.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

stating that this opinion showed the “distinctions between proportionality in *jus in bello* and in *jus ad bellum*.”<sup>134</sup> He points out to the following from the opinion:

As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua*...: “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” This dual condition applied equally to Article 51 of the Charter, whatever the means of force employed.

The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict that comprise in particular the principles and rules of humanitarian law.<sup>135</sup>

#### D. Legality of the Use of Force by the Taliban Government of Afghanistan

To establish whether or not the Taliban, the existing government of Afghanistan at the time, violated the customary rule of the prohibition of the use of force, the same standard that was applied above to the United States’ use of force against Afghanistan should be applied. The rule of importance is Article 51 of the UN Charter that gives States the right to resort to self-defense, whether individually or collectively, if an armed attack occurs on that State.<sup>136</sup>

After the United States started its military campaign early October 2001,<sup>137</sup> the reaction that came from Afghanistan was that of Taliban forces, defending their territorial sovereignty and therefore acting on behalf of the State. Now acting as State

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<sup>134</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 242 (Apr. 2000).

<sup>135</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 41-42 (July 8), *in id.*

<sup>136</sup> U.N. Charter, *supra* note 4. See Appendix A for the full text of this article.

<sup>137</sup> See *supra* note 3, for the United States position regarding Taliban.

forces, the Taliban, allied by al-Qaida, engaged in an armed conflict with the United States and its allies. Consequently, since the Taliban reacted in self-defense to the attacks by the United States and its allies, their use of force falls within the scope of Article 51. The key issue is that an armed attack against it took place, and thus, it had a right to act under Article 51.

However, it was established above that there are generally accepted conditions for the resort to self-defense under customary international law. Where the issue of importance was regarding the necessity and proportionality of the use of force in self-defense. Self-defense is permitted given the necessity of responding to the acts and furthermore it has to be proportional to the initial acts against the State, where it should be reasonable and not excessive.<sup>138</sup> The resort to self-defense is seen as the use of force, which falls short of war. The purpose of resorting to self-defense is then not to launch a campaign of war, but may well include defending against it.<sup>139</sup> Furthermore, the adherences to international humanitarian norms is incumbent upon parties to the conflict, including the government of Afghanistan, whether or not the initial armed attack by the United States was legal or not.

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<sup>138</sup> D. J. HARRIS, *supra* note 50, at 895.

<sup>139</sup> ANTHONY C. AREND & ROBERT J. BECK, *supra* note 38, at 18.

## CHAPTER II: Historical Overview of International Humanitarian Law and its Application

“I establish these laws to prevent the strong from oppressing the weak.”<sup>140</sup>  
Hammurabi, King of Babylon.

### A. History and Evolution of International Humanitarian Law

#### 1. Cultural Context of International Humanitarian Law

Humanitarian principles are based in diverse civilizations and cultures.<sup>141</sup> For purposes of this thesis it is relevant to note that these principles were apparent in times of war in relation to the conduct of hostilities. They could also be “traced back to ancient times. The Summerians, Hammurabi King of Babylon, Cyrus I King of the Persians, and the Hittites all formulated rules or codes that were designed to regulate and provide structure to armed conflict.”<sup>142</sup> As will be illustrated in this Chapter, today we have treaties and conventions that regulate the conduct of war and obligate State parties; which have ratified the instruments, and non-State parties when a norm has evolved into customary law, and thus extend the legal obligation encompassed in these treaties to all States.

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<sup>140</sup> Quoted in ICRC Publication, *Extract from International Humanitarian Law: Answers to Your Questions* (1999), available at <http://www.icrc.org>.

<sup>141</sup> See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 162 (2d ed. 1993) (stating that some legal rules that regulated war date back to the ancient civilizations of China, India, Greece, and Rome); *Introduction: Hugo Grotius and the Law of War*, in *THE LAW OF WAR: A DOCUMENTARY HISTORY-VOLUME I* 3-15, 3-15 (Leon Friedman ed., 1972); Su Wei, *supra* note 5, at 375. See also Jean Pictet, *Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 3-4, 3-4 (Henry Dunant Institute ed., 1988). See generally *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* (Henry Dunant Institute ed., 1988); J.H. HAUNG, SUN TZU: *THE NEW TRANSLATION* (1993) (In the 4<sup>th</sup> century B.C., Sun-tzu was responsible for creating one of the first recognized set of rules governing the conduct of war).

<sup>142</sup> Gregory P. Noone, *supra* note 74, at 177.

Following is a brief account of several principles regulating the methods of warfare in the Islamic context, which concisely illustrates that international humanitarian norms have taken into consideration different traditional approaches to conducting wars. In addition, it further demonstrates that international humanitarian law is derived from different cultural backgrounds and civilizations. International law has been generally viewed as a Western approach that does not always coincide with Islamic principles or norms.<sup>143</sup> The discussion below on Islamic principles illustrates that this contention cannot be made with regards to humanitarian law, as it is derived from those very principles found in ancient diverse cultures and civilizations, one of which is the Islamic culture and way of life. One of the parties to the conflict is an Islamic State and thus, it is crucial to show how relevant principles of international humanitarian law are to Islamic laws and customs.

The relevance of Islam to the rule of law in this field can be in the concept of international humanitarian law in societies espousing Islamic legal systems.<sup>144</sup> The existences of some rules of international humanitarian law during the time of the Prophet Mohammed are evident in the historical contexts and accounts of the wars fought at that time. The concept of humanity is also seen by the orders given by Caliph Abu Bakr in 632 to his troops “never to destroy palm trees, burn dwellings or cornfields, cut down fruit trees, kill livestock unless constrained by hunger and never

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<sup>143</sup> For example the proposal to create an Arab Court of Justice was turned down due to disagreements among Arab States whether precedence should be given to international law or Islamic law. Some States argued that since international law is not derived from, and does not take into consideration, Islamic principles and norms then international law should not be given priority over Islamic law.

<sup>144</sup> Hamed Sultan, *The Islamic Concept, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 29-39, 29 (Henry Dunant Institute ed., 1988). *See generally* ABDEL GHANY MAHMOUD, AL KANUN AL DAWLI AL INSANI: DERASA MOKARANA BELSHARIA ALISLAMIYA (International Humanitarian Law: A Comparative Study with Islamic Sharia) 16 (1991) (The author’s writing revolve around humanitarian law and illustrates in his work how Islamic law or Sharia law has evident influences in the progressive development of the rule of law in this area. He stresses that principles recognized today in the Geneva Conventions of 1949 and their additional Protocols of 1977, were already applied under Sharia and the practices of the Prophet).

to lay hands on monasteries.”<sup>145</sup> Concerning that protection to be afforded to victims of an armed conflict, Professor Mahmoud (Public and International Law, Al-Azhar University) explains that Islam guaranteed those victims, including the wounded, sick and shipwrecked, special protection. He substantiates his argument by making reference to the order that the Prophet gave his companions in the Battle of Badr stating that they are obliged to be generous to their prisoners of war.<sup>146</sup> For example, they were to provide prisoners of war food before they themselves ate.<sup>147</sup> Consequently, we see the Koranic verses that were revealed to the Prophet referring to this kind of treatment by the soldiers in the Battle of Badr, “And (they) feed the needy for the love of Him [Allah], and the orphans and the captives. We feed you for the sake of God, desiring neither recompense nor thanks. We fear the dismal day calamitous from our Lord.”<sup>148</sup> Thus prisoners of war were protected as a plea for God’s mercy and fear of His punishment.<sup>149</sup>

Many other concepts that were to become established principles of modern international humanitarian law can be traced back to the Koran and the practices of the Prophet. For example, distinguishing between combatants and non-combatants is demanded by the Koranic verse that states: “Fight those in the way of God who fight you...”<sup>150</sup> There are also rules concerning the protection of civilian populations and objects that come from the Prophet’s reported statement to his officers who were sent out to lead an army to fight a war: “Fight in the name of God, fight those who deny God; kill not children and do not betray, mutilate or commit perfidy.”<sup>151</sup> Finally, the

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<sup>145</sup> Hamed Sultan, *supra* note 144, at 38. *See also* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 14 (Dieter Fleck ed., 1999).

<sup>146</sup> ABDEL GHANY MAHMOUD, *supra* note 144, at 16.

<sup>147</sup> *Id.*

<sup>148</sup> AL-QURAN, Sura 76, Ayat 8-10, at 514 (Ahmed Ali trans., 1994).

<sup>149</sup> ABDEL GHANY MAHMOUD, *supra* note 144, at 17.

<sup>150</sup> AL-QURAN, Sura 2, Ayat 190, at 34 (Ahmed Ali trans., 1994).

<sup>151</sup> Hamed Sultan, *supra* note 144, at 37.



humanitarian dictate in distinguishing between military and non-military targets can be seen in the words of Caliph Omar, the second caliph, when he instructed his officers who were going to battle to “[o]ppress nobody, for God loves not oppressors. Be not cowardly in combat, cruel in strength nor abusive in victory. Kill not the aged, women or children and be mindful not to kill them during skirmishes or cavalry incursions.”<sup>152</sup> From this brief review, it can be seen that diverse civilizations and cultural antecedents played a meaningful role in the development of principles and foundations of international humanitarian law and that this law did not come into being all of a sudden.

## 2. Development of International Humanitarian Law

Centuries later, the notion that wars should be regulated was progressing where it was “espoused by the likes of Saint Augustine, Saint Thomas Aquinas, Hugo Grotius, and Jean Jacques Rousseau.”<sup>153</sup> The first international war crimes trial for the violation of the rules of war was that of Peter von Hagenbach in 1474.<sup>154</sup> After the Duke of Burgundy made him the governor of Breisach “he subsequently proceeded to rape, murder, confiscate private property, and illegally tax (to name a few) its’ citizens.”<sup>155</sup>

Hugo Grotius, father of modern international law, wrote his *The Law of War and Peace* in 1625.<sup>156</sup> This publication was inspired by the two wars during the Holy

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<sup>152</sup> *Id.*

<sup>153</sup> Gregory P. Noone, *supra* note 74, at 177.

<sup>154</sup> See HOWARD LEVIE, *TERRORISM AND WAR: THE LAW OF WAR CRIMES* 11 (1992); Gregory P. Noone, *supra* note 74, at 181.

<sup>155</sup> Gregory P. Noone, *supra* note 74, at 182. The author continues to write in endnote 25 that the court “was ‘composed of representatives of the twenty-eight Allies towns’ that were German and Swiss and opposed to Burgundy. Von Hagenbach maintained a ‘superior orders’ defense at his trial. This was rejected and he was convicted. He was condemned to death, but first ‘deprived of his knighthood’ and then executed.” See HOWARD LEVIE, *supra* note 154, at 11.

<sup>156</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1625) (English Translation: *The Law of War and Peace*, Francis W. Kelsey trans., 1925).

Roman Empire, the 100-years and the 30-years wars. He conceptualized a society-governing people in this area, to which later, the notion of nation-states evolved. During that time, the use of force was legal. The Peace of Westphalia in 1648 put an end to the 30-years war and solidified the concept of nation-states. It was evident though, that it was based on the principles that were outlined in the works of Hugo Grotius.<sup>157</sup> In addition, Grotius had “insisted that war should be governed by a strict set of laws.”<sup>158</sup> This was a reaction to how combatants in the wars behaved, where he wrote:

Fully convinced, by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for the law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.<sup>159</sup>

During the eighteenth century, the age of the Enlightenment produced noted philosophers; of particular relevance was Jean-Jacques Rousseau.<sup>160</sup> In his *Social Contract* published in 1762, Rousseau noted,

War, then, is not a relation between man and man, but a relation between State and State, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders. ... The aim of war being the destruction of the hostile State, we have a right to slay its defenders so long as they have arms in their hands; but as soon as they lay them down and surrender, ceasing to be enemies or instruments of the enemy, they become again simply men, and non has any further right over their lives. Sometimes it is possible to destroy the State

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<sup>157</sup> G.I.A.D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 67-90, 68 (Henry Dunant Institute ed., 1988).

<sup>158</sup> Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, at 52 (1994).

<sup>159</sup> THE CLASSICS OF INTERNATIONAL LAW: DE JURI BELLI AC PACIS LIBRI TRES BY HUGO GROTIUS 20 (John Brown Scott ed., & Francis W. Kelsey trans., 1964), cited in Gregory P. Noone, *supra* note 69, at 187-188.

<sup>160</sup> Gregory P. Noone, *supra* note 74, at 188.

without killing a single one of its members; but war confers no right except what is necessary to its end. These are not the principles of Grotius; they are not based on the authority of poets, but are derived from the nature of things, and are founded on reason.<sup>161</sup>

This doctrine elucidates that the conduct of wars should be limited to attacks against military objectives, leaving aside the civilian population.<sup>162</sup> He further points out that combatants who have laid down their arms should not be viewed as ‘instruments of the enemy’, thereby recognizing rights of prisoners of war.

In the early nineteenth century, Napoleon’s foreign minister Prince de Talleyrand sent him a letter dated 20 November 1806 stating,

Three centuries of civilization have given Europe a law of nations, for which ... human nature cannot be sufficiently grateful.

According to the maxim that war is not a relation between one man and another, but between state and state, in which private persons are only accidental enemies, not as men, nor even as members or subjects of the state, but simply as its defenders, the law of nations does not permit that the rights of war, an of conquest thence derived, should be applied to peaceable, unarmed citizens, to private properties and dwellings, to the merchandise of commerce, to the magazines which contain it, to the vehicles which transport it, to unarmed ships which carry it on streams and seas, in one word, to the person and the goods of private individuals.

The law of war, born of civilization, has favored its progress. It is to this that Europe must ascribe the maintenance and increase of her prosperity, in the midst of the frequent wars that have divided her.<sup>163</sup>

This further illustrates the surrounding atmosphere in Europe during the early 1800s, where there existed the belief that unarmed civilians and objects of non-military nature were to be spared. The humanitarian climate was therefore gradually building up.

During the same time period “custom and rules for the taking and protection of prisoners of war were also developing.”<sup>164</sup> For example, “the treaty of friendship and

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<sup>161</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* 13-15 (Lester G. Crocker ed., Washington Square Press 1967) (1762).

<sup>162</sup> See *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, *supra* note 145, at 16.

<sup>163</sup> TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS: A PERSONAL MEMOIR* 7 (1992), *cited in* Gregory P. Noone, *supra* note 74, at 189.

commerce between Prussia and the United States in 1785 ... contained some exemplary and pioneering provisions for the treatment of prisoners of war. It was also one of the first attempts to record new principle of humanitarian law in written form...”<sup>165</sup>

By the mid-nineteenth century, those ideas became significant “in military law though theologians and moralists had often made the point before that certain practices should be forbidden, regardless of their military utility, because they were inhumane.”<sup>166</sup> One of the first attempts of codifying the existing laws of war was in a manual, the Lieber Code.<sup>167</sup> This code was solely intended for the Union soldiers who were fighting in the American Civil War and thus did not have the status of a treaty.<sup>168</sup> It is considered to be the origin of what today we know as the ‘Hague Law’, written from the perspective of combatants, focusing on the rights and duties of armed forces in a conflict.<sup>169</sup>

In 1863, a Swiss businessman named Henry Dunant published *A Memory of Solferino*.<sup>170</sup> The publication was a reaction to his experience witnessing the Battle of Solferino in 1859, which took place during the Italian War of Unification.<sup>171</sup> As a civilian present and witnessing, “the plight of 40,000 Austrian, French, and Italian soldiers wounded”<sup>172</sup> in this war between Austria and France, he managed to organize, at his own expense, relief assistance that provided medical care for the

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<sup>164</sup> *Id.*

<sup>165</sup> THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 145, at 17.

<sup>166</sup> HOWARD LEVIE, *supra* note 154, at 15.

<sup>167</sup> Instructions for the Government of Armies of the United States in the Field, originally published as Adjutant General's Office, War Dep't, General Orders No. 100, art. 23 (1863) [hereinafter Lieber Code].

<sup>168</sup> ICRC Publication, *Extract from International Humanitarian Law: Answers to Your Questions* (1999), available at <http://www.icrc.org>.

<sup>169</sup> THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 145, at 18.

<sup>170</sup> HENRY DUNANT, *A MEMORY OF SOLFERINO* (English Version, American Red Cross, 1939, 1959).

<sup>171</sup> Gregory P. Noone, *supra* note 74, at 191.

<sup>172</sup> THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 145, at 18.

wounded.<sup>173</sup> This experience led him to write his book that contributed to the development of a humanitarian climate, which grew during this period.<sup>174</sup> His main proposal was to establish an “international Convention acknowledging the status and function of such relief societies.”<sup>175</sup> It was then that the International Committee of the Red Cross was formed in 1863 that originated by Henry Dunant’s movement and was the catalyst for the development of the substance of humanitarian law.<sup>176</sup>

By 1864, the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field<sup>177</sup> was adopted wherein, for the first time States agreed to put a limit “in an international treaty open to universal ratification their own power in favour of the individual and, for the first time, war gave way to written, general law.”<sup>178</sup> By 1899 and 1907 The Hague Conventions were adopted.<sup>179</sup> In 1949 the four Geneva Conventions were adopted,<sup>180</sup> and in 1954 a Geneva Convention for the Protection of Cultural Property in the Event of Armed Conflict was further adopted.<sup>181</sup> The additional protocols to the 1949 Geneva Conventions were adopted in 1977, one applicable to international armed conflicts and the other to non-international armed conflicts.<sup>182</sup> Those two instruments “represent the most up-to-date achievement of the forward movement of humanitarian law, and must be read with, and as part of, the Geneva Conventions of 1949.”<sup>183</sup> During the 1980s and 1990s Conventions relating to the prohibition of the use of certain types of weapons were

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<sup>173</sup> G.I.A.D. Draper, *supra* note 157, at 70.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See generally MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 97-99.

<sup>177</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 129 Consol. T.S. 361 (entered into force June 22, 1865).

<sup>178</sup> MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 99-100.

<sup>179</sup> Hague Convention (II) of 1899, *supra* note 7; Hague Convention (IV) of 1910, *supra* note 8.

<sup>180</sup> Geneva Convention (I), (II), (III), (IV) *supra* note 6.

<sup>181</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 (entered into force Aug. 7, 1956).

<sup>182</sup> Protocol I, *supra* note 6. Protocol II, *supra* note 6.

<sup>183</sup> G.I.A.D DRAPER, *supra* note 157, at 84.

adopted ending with the 1997 Ottawa Convention Banning Anti-Personnel Land Mines. The diagram annexed to the work at Appendix B<sup>184</sup> of this thesis, is useful to show the development of international humanitarian law since the 1864 first Geneva Convention was adopted.

For comparative purposes, it is worth noting that Article 2 of the Hague Convention IV of 1910, respecting the laws and customs of war, included the following: “[t]he provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.”<sup>185</sup> Known as the ‘general participation clause’, this provision attempts to restrict the application of the rules codified in the Hague regulations. When the drafters of the Geneva Conventions came together, this clause was excluded. For example Article 2 of the Geneva Convention (I) of 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field states that “[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.”<sup>186</sup> This is repeated in the Geneva Conventions (II),<sup>187</sup> (III)<sup>188</sup> and (IV).<sup>189</sup> It was therefore that “the paralyzing effects of the general participation clause were annulled in the humanitarian instruments of 1929 designed for the better and more humane protection of the sick and wounded and of POW war victims, the primary concern of the humanitarian law of war.”<sup>190</sup>

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<sup>184</sup> See Appendix B.

<sup>185</sup> Hague Convention (IV) of 1910, *supra* note 8, art.2.

<sup>186</sup> Geneva Convention (I), *supra* note 6.

<sup>187</sup> Geneva Convention (II), *supra* note 6, art. 2.

<sup>188</sup> Geneva Convention (III), *supra* note 6, art. 2.

<sup>189</sup> Geneva Convention (IV), *supra* note 6, art. 2.

<sup>190</sup> G.I.A.D DRAPER, *supra* note 157, at 77. The author’s reference to the 1929 instruments includes the following conventions: Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847. Because of the problems that states encountered during World War I those Conventions were adopted. However,

International humanitarian law further progressed by protecting combatants while initially designed to protect noncombatants or those who fall *hors de combats*.<sup>191</sup> Similarly, Theodor Meron argues that the human rights movement has changed the parameters of humanitarian law by stimulating the “reinterpretation of the Geneva Conventions as regards the repatriation of prisoners of war (POWs) and the definition of ‘protected persons’ under the Fourth Convention.”<sup>192</sup> Therefore, there is a need to understand the progressive development of international humanitarian law and its applicability to the conduct of wars. Theodor Meron traces this progressive trend by stating that:

Human rights law has greatly influenced the formation of customary rules of humanitarian law, which is discernible in the jurisprudence of courts and tribunals and the work of international organizations. This trend began in Nuremberg and has continued through such cases before the International Court of Justice as *Nicaragua v. United States* and the *Nuclear Weapons* Advisory Opinion, the decisions of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, and the as-yet-unpublished ICRC study on customary rules of international humanitarian law. *Opinio juris* has proven influential in the form of verbal statements by governmental representatives to international organizations; the content of resolutions, declarations, and other normative instruments adopted by such organizations; and the consent of states to those instruments.<sup>193</sup>

The writings of Meron illustrate how the human rights movement has continually influenced the development of the rule of law in this area and its evolution into

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with the problems encountered in World War II, they were proved inadequate, the result was the adoption of the four Geneva Conventions in 1949.

<sup>191</sup> See Theodor Meron, *supra* note 134, at 239.

<sup>192</sup> See *id.* at 240. (In relation to this Meron illustrates that one of the examples concerning the reinterpretation of Geneva Convention (IV) is that the crime of rape was considered to be that of torture or inhuman treatment and therefore a violation of Article 147 dealing with graves breaches). See also Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (July 1993).

<sup>193</sup> Theodor Meron, *supra* note 118, at 244 (Apr. 2000). See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3-78 (1986). See also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996), reprinted in Theodor Meron, *The Normative Impact on International Law of the International Tribunal for Former Yugoslavia*, in WAR CRIMES LAW COMES OF AGE, Ch. 14 (1998); Oscar Schachter, *New Custom, Power, and Contrary Practice*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 539 (Jerzy Makarczyk ed., 1996).

customary norms. Customary law and its relevance in international humanitarian law will now be considered.

## B. Customary International Humanitarian Law

International custom is referred to in Article 38(1)(b) of the Statute of the International Court of Justice “as evidence of a general practice accepted as law.”<sup>194</sup> A norm or a rule evolves into customary law when two components are satisfied. The first is the existence of widespread state practice consistent with the norm or rule, and the second is the presence of *opinio juris* or acceptance of a legal obligation by States.<sup>195</sup> Therefore, not only should there be a rule that States’ practice is widespread, but a belief that the States’ activity is a legal obligation, is necessary.<sup>196</sup> Once those components are fulfilled, the norm or rule in question is therefore seen as a customary rule of international law.

The Permanent Court of International Justice has dealt with *opinio juris* in the *S.S. Lotus* case.<sup>197</sup> The Court opined that although there was practice by States maintaining that the flag flown on the ship of the accused has jurisdiction over it rather than the flag of the victim State, an evident legal obligation by States that such a rule is binding on them, does not exist.<sup>198</sup> Therefore, the norm was not seen as customary but merely as practice.

The International Court of Justice provided a conclusive judgment regarding the formation of new customary rules in the *Military and Paramilitary Activities* case.<sup>199</sup> It stated in its reasoning that “for a new customary rule to be formed, not only must

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<sup>194</sup> Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945.

<sup>195</sup> See LOUIS HENKIN ET AL., *supra* note 5, at 55; MALCOLM N. SHAW, *supra* note 5, at 65-66.

<sup>196</sup> MALCOLM N. SHAW, *supra* note 5, at 67.

<sup>197</sup> *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

<sup>198</sup> *Id.*

<sup>199</sup> *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).



the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitates*.<sup>200</sup> The Court in this case, further cited to the *North Sea Continental Shelf* cases<sup>201</sup> when it stated that:

[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*’.<sup>202</sup>

These authoritative statements indicate that the existence of both practice and *opinio juris* or legal obligation expressed by States are necessary to render a norm customary. Thus to summarize, in international humanitarian law the rules that have evolved into custom are required to have the two components discussed above being practiced and viewed as legally binding by States.

Furthermore, once a rule of law becomes part of customary international law, the Court has stated in the *Military and Paramilitary Activities* case,<sup>203</sup> that other multilateral treaty obligations or reservations do not prevent the application of the customary principles of law that might be identical to those found in multilateral treaties,<sup>204</sup> even the UN Charter. The Court was speaking specifically of Article 2(4) regarding the use of force.<sup>205</sup> It held that the use of force was prohibited by customary international law as well as by a treaty which the United States was a party, but which could not be applied because of reservations that had been entered.

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<sup>200</sup> *Id.* ¶ 207.

<sup>201</sup> *North Sea Continental Shelf* (F.R.G. v. Den. & F.R.G. v. Neth.), 1969 I.C.J. Rep. 3 (Feb. 20).

<sup>202</sup> *Id.* at 44, ¶ 77, in *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 207 (June 27).

<sup>203</sup> *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

<sup>204</sup> *Id.* ¶ 172-182.

<sup>205</sup> *Id.* ¶ 188.

In the same case, the International Court of Justice laid down the customary rules of international humanitarian law specifically referring to common Article 3<sup>206</sup> of the Geneva Conventions of 1949.<sup>207</sup> The Court stated that common Article 3 reflects customary international law and thus is binding on all parties to the conflict. Furthermore, although Article 3 is stated to apply to armed conflicts “not of an international character,” the Court held that “these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’.”<sup>208</sup> Additionally, in the Secretary General’s report on the Statute of the ICTY<sup>209</sup> he stated that:

In this context [of crimes against humanity], it is to be noted that the International Court of Justice has recognized that the prohibitions contained in common article 3 of the 1949 Geneva Conventions are based on ‘elementary considerations of humanity’ and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.<sup>210</sup>

Professor Theodor Meron notes that in Pictet’s Commentary on the Geneva Convention (I),<sup>211</sup> it is recognized that when a State refuses to apply one of the Geneva Conventions, it is still be bound to apply those principles that are considered

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<sup>206</sup> See Appendix D, for the full text of the article.

<sup>207</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 216-220 (June 27). It has also been decided by the Court, in paragraph 215 of this case, that provisions of the Hague Convention VIII reflect customary norms of humanitarian law. *Hague Convention (VIII) relative to the laying of Automatic Submarine Contact Mines*, 3 Martens Nouveau Recueil (ser. 3) 580, 205 Consol. T.S. 331 (entered into force Jan. 26, 1910).

<sup>208</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 218 (June 27).

<sup>209</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

<sup>210</sup> *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, ¶ 48, U.N. Doc. S/25704 (1993).

<sup>211</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 26 (Jean Pictet ed., 1952). The commentary further adds that ‘in the event of a Power failing to fulfil its obligations, the other Contracting Parties ... may, and should, endeavour to bring it back to an attitude of respect for the Convention.’ *Id.*, quoted in THEODOR MERON, *supra* note 193, at 28.

to be expressions of customary norms.<sup>212</sup> Where the reliance is that Article 43 of the Vienna Convention on the Law of Treaties provides that when a treaty is denounced by a State it “shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty,”<sup>213</sup> the principles that a State has the obligation to observe would be those expressing customary norms.

### C. Martens Clause

The Martens Clause in the Preamble of the Hague Conventions states:

The High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience...<sup>214</sup>

This was later reinstated to give the same meaning in the Geneva Conventions of 1949.<sup>215</sup> This clause deals with States’ recognition of the fact that nothing in the present agreed upon convention shall prevent them from being bound by general principles of law and thus, customary law continues to have effect.

The Russian delegate and jurist F. F. de Martens proposed this clause in the Hague Peace Conference. The clause was “articulated in strong language, both rhetorically and ethically, which goes a long way toward explaining its resonance and influence

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<sup>212</sup> THEODOR MERON, *supra* note 193, at 27.

<sup>213</sup> Vienna Convention on the Law of Treaties, art. 43, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980).

<sup>214</sup> Hague Convention (IV) of 1910, *supra* note 8, preamble. *See* Hague Convention (II) of 1899, *supra* note 7, preamble.

on the formation and interpretation of the law of war and international humanitarian law. These features have compensated for the somewhat vague and indeterminate legal content of the clause.”<sup>216</sup>

Theodor Meron further explains that the “clause was originally designed to provide residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories.”<sup>217</sup> Nowadays, this clause “is applicable to the whole of humanitarian law and it appears, in one form or another, in most of the modern treaties on humanitarian law.”<sup>218</sup> As seen from the first sentence of the Martens Clause quoted above, in its original context, the clause had the objective of addressing cases that the Convention does not deal with, and should not “be left to the arbitrary judgment of military commanders.”<sup>219</sup> Consequently, Meron argues that the Martens Clause has served an additional important goal, which is that “since all codifications omit some matters, especially those that prove to be contested, the Martens clause ... avoids undermining the customary law status of matters that were not included.”<sup>220</sup>

Greenwood’s analysis of the Martens Clause is similar to that of Meron. Most importantly, he illustrates that the fact that a treaty is silent on a matter “does not mean that international law should necessarily be regarded as silent on that subject,”<sup>221</sup> and that norms of customary international law that were not included in a

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<sup>215</sup> Found in Geneva Convention (I), *supra* note 6, art. 63, Geneva Convention (II), *supra* note 6, art. 62, Geneva Convention (III), *supra* note 6, art. 142, Geneva Convention (IV), *supra* note 6, art. 158. See Appendix D, for the full text of these articles.

<sup>216</sup> Theodor Meron, Symposium, *The Hague Peace Conferences: The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79 (Jan., 2000).

<sup>217</sup> *Id.* See FRITS KALSHOVEN, *supra* note 26, at 14; Christopher Greenwood, *supra* note 5, at 29.

<sup>218</sup> Christopher Greenwood, *supra* note 5, at 29. See Theodor Meron, *supra* note 216, at 79.

<sup>219</sup> Hague Convention (IV) of 1910, *supra* note 8, preamble. See Hague Convention (II) of 1899, *supra* note 7, preamble. See also Theodor Meron, *supra* note 216, at 79.

<sup>220</sup> Theodor Meron, *supra* note 216, at 80. See Georges Abi-Saab, *The Specificities of Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 265, 274 (Christophe Swinarski ed., 1984); Christopher Greenwood, *supra* note 5, 29.

<sup>221</sup> Christopher Greenwood, *supra* note 5, at 29.

treaty or convention, continue to apply. For example, when assessing a certain matter where the conventions that bind the parties did not directly have provisions related to this matter, then there is a reinstatement that “the laws of humanity, and the dictates of the public conscience,”<sup>222</sup> would still continue to apply. Therefore, the assessment of the matter would be along those lines. Understanding the context of the Martens clause is important in international humanitarian law. However, with respect to the issues dealt with in Chapter III of this thesis, it is the contention of the author that the imposition of the Martens clause is not necessary but serves as an elaboration on what would happen if a Convention or a treaty remains quiet on a matter.

#### D. Contemporary Developments in International Humanitarian Law

The status of international humanitarian law and customary law principles are of great importance and has been dealt with extensively. It is important to differentiate between treaty obligations by the parties in this respect and obligations arising from a customary norm of humanitarian law. In addition, the principles of humanitarian law establish that even if war is illegal, States have restraints on how to conduct those wars. Therefore, the illegality of the use of force does not negate the application of international humanitarian law.

Under international humanitarian law rules of law exist that States are obliged to respect - *jus in bello*. These rules relate to the conduct of hostilities (means and methods of warfare) and the protection of non-combatants. These rules are found in the Hague Conventions, the Four Geneva Conventions of 1949, as well as the two additional protocols adopted in 1977, referred to earlier.

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<sup>222</sup> See *supra* notes 214-215, for the illustration of the Martens Clause.

Of the instruments noted above, Afghanistan has ratified the Geneva Conventions of 1949. Consequently, it is required to demonstrate that some principles found in the Hague Convention (IV) and/or the Additional Protocol I to the Geneva Conventions reflect norms of customary international law which are to be adhered to by all States. Since, the United States ratified both the Hague Convention (IV) and the Geneva Conventions, when there is a treaty provision that binds the parties it will be used to elaborate the obligations of that instrument. When one of the parties to the conflict is not a party to the Convention or treaty, it will be shown that some of the principles embodied in the provisions of those Conventions or treaties, to which one or the other is not a party to, reflect norms of customary international law.

## CHAPTER III: International Humanitarian Law

### A. Nature of the Conflict in Afghanistan

This thesis argues and assumes throughout the text that the conflict in Afghanistan is that of an international armed conflict. However, it is worth noting that tribunals dealing with issues revolving around the commission of war crimes and crimes against humanity have extended many of the protections afforded to civilians in international armed conflicts to that of civilians in non-international armed conflicts.<sup>223</sup> Relevant to this discussion is the Statute of the International Criminal Tribunal of Rwanda (ICTR) that dealt with a non-international conflict in Rwanda. While the ICTR did not have the “jurisdiction to prosecute war crimes generally, it is empowered to prosecute domestic crimes against civilians in the form of crimes against humanity or violations of Common Article 3 of the Geneva Conventions.”<sup>224</sup>

The conflict in Afghanistan is not an internal matter; it is an international armed conflict to which the full scope of *jus ad bellum* and *jus in bello* should be applied. It is an international armed conflict because it involves two States: the United States of America and the State of Afghanistan.<sup>225</sup> An international armed conflict occurs when one or more States uses force against the territorial integrity of another State, which is

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<sup>223</sup> See Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 7.

<sup>224</sup> *Id.* See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda (ICTR), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

<sup>225</sup> See Press Release, Afghanistan: ICRC Calls on All Parties to Conflict to Respect International Humanitarian Law (Oct. 24, 2001), available at <http://www.icrc.org/> (where it recognizes that the existing conflict is that of an international armed conflict by stating that “Combatants captured by enemy forces in the international armed conflict between the Taliban and the US-led coalition must be treated in accordance with the Third Geneva Convention.”)

recognized by it as a belligerent act.<sup>226</sup> Protocol I, Additional to the Geneva Conventions of 1949, deals specifically with international armed conflicts.<sup>227</sup> Article 1(3) of that Protocol states that it applies to “the situations referred to in Article 2 common to those Conventions,”<sup>228</sup> which includes inter alia “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>229</sup>

The Preamble of Additional Protocol I of the Geneva Conventions of 1949 recalls Article 2(4) of the UN Charter by stating that States are under the obligation “to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>230</sup>

## B. Status of Combatants

In the Afghanistan, the following are the parties involved in the armed conflict: United States, its allies, and the opposition forces against Taliban and al-Qaida forces. Soldiers of the United States army, and all those serving as its allies, serving in Afghanistan clearly qualify as combatants in this conflict. The Taliban forces evidently qualify as combatants in accordance with Article 4(A)(1) of Geneva Convention (III), which refers to “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed

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<sup>226</sup> This is also seen in the wording of Common Article 2 to the Geneva Conventions in relation to defining what constitutes an international armed conflict. The criteria of which is the existence of a case of war or armed conflict, which arose between two or more State parties to the Conventions.

<sup>227</sup> Protocol I, *supra* note 6.

<sup>228</sup> *Id.* art. 1(3). See Appendix I, for the full text of this article.

<sup>229</sup> Geneva Convention (I), (II), (III), (IV), *supra* note 6, art. 2. See Appendix D, for the full text of this article.

<sup>230</sup> Protocol I, *supra* note 6.



forces.”<sup>231</sup> Article 4 specifically deals with who is to be considered as a lawful combatant, and thus prisoners of war once captured by the enemy forces.<sup>232</sup> The guidelines on who is to be regarded as a combatant are set in Article 4 in subparagraphs (1) to (6) of paragraph A. It is arguable whether al-Qaida forces qualify as combatants. The United States arguments regarding al-Qaida members not being regarded as combatants stems from the following arguments: first, that they do not have a fixed distinctive sign (in accordance with Article 4(A)(2)(b));<sup>233</sup> second, they did not carry arms openly (in accordance with Article 4 (A)(2)(c));<sup>234</sup> and third, they did not respect the laws of war (in accordance with Article 4(A)(2)(d)).<sup>235</sup> The assumption that al-Qaida forces qualify as combatants is based on Article 4(A)(3) which addresses “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>236</sup> Article 4 (A) states “[p]risoners 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,”<sup>237</sup> the keyword is “one”. The categories are demonstrated in subparagraphs (1) to (6); therefore, al-Qaida forces do not need to meet the requirements under subparagraph (2), as the United States contends, if they already meet the requirements of any of the other subparagraphs.

### C. Application of Treaty Law: the Geneva Conventions

The Geneva Conventions of 1949 entered into force on 21 October 1950. Parties to the conflict have ratified it, Afghanistan on 26 September 1956, and the United

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<sup>231</sup> Geneva Convention (III), *supra* note 6, art. 4(A)(1).

<sup>232</sup> *Id.* art. 4.

<sup>233</sup> *Id.* art. 4(A)(2)(b).

<sup>234</sup> *Id.* art. 4(A)(2)(c).

<sup>235</sup> *Id.* art. 4(A)(2)(d).

<sup>236</sup> *Id.* art. 4(A)(3).

States on 2 August 1955. This illustrates the parties' treaty obligations regarding the conflict. There is also the argument outlined in Chapter II of this thesis regarding certain articles within those Conventions that have been regarded as customary international law. The Geneva Conventions, as a whole, are also regarded as having reached the status of customary international law.<sup>238</sup> However, one should point out that since all parties to the conflict are party to the Geneva Conventions, the argument on their customary status is not needed.

The case involving Nicaragua and the United States, *Military and Paramilitary Activities*<sup>239</sup> demonstrates how international humanitarian law was violated by the United States. The International Court of Justice was of the opinion that the United States was not liable for violations of international humanitarian law. However, it was decided that by the production of a manual by the CIA entitled *Operaciones psicológicas en Guerra de guerrillas* (Psychological Operations in Guerrilla Warfare) and giving it out to the Contras, the United States has encouraged acts that are inconsistent with general principles of humanitarian law but was not found imputable to the acts. Those acts included killing, raping, wounding and kidnapping citizens of Nicaragua, yet the Court was of the view that financing, organizing, training, supplying and equipping the Contras was in itself insufficient (based on the evidence submitted) to attribute the acts. The Court pointed out, in paragraph 115 that all those acts do not show that "the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the Applicant State."<sup>240</sup> It further clarified that those kinds of acts could have been committed beyond the United States control. Thus, summing up to state that for the United States to be found

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<sup>237</sup> *Id.* art. 4(A).

<sup>238</sup> See, e.g., *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704 (1993).

<sup>239</sup> *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

legally responsible for the acts, proof that the United States exercised effective control of those operations (military or paramilitary) is needed, concluding that the Contras remain to be responsible for the acts they take. However, the Court had taken notice that the United States was obligated under Article 1 of the Geneva Conventions to ‘respect and ensure respect’ for those Conventions, “an obligation which, in the Court’s view, did not derive only from the Conventions themselves”<sup>241</sup> but in fact is derived “from the general principles of humanitarian law to which the Conventions merely give specific expressions.”<sup>242</sup> In the Court’s judgment it “ma[d]e a major contribution to consolidating the status of humanitarian law as it faces the challenges of the world today.”<sup>243</sup>

In relation to this, the Taliban could be viewed to have also encouraged acts contrary to the general principles of humanitarian law. The issue of importance is how much control did the Taliban have over al-Qaida? As previously mentioned in Chapter I, if they are distinguishable from one another, then the test of effective control in the above case could be applied.<sup>244</sup> Afghanistan could still be responsible for the acts under this test but the counter measures could still not justify the use of force. As previously indicated by reference to the *U.S. Diplomatic & Consular Staff in Tehran* case,<sup>245</sup> post hoc ratification of non-state activities could hold the state responsible for the acts.<sup>246</sup>

Finally, the Geneva Conventions will be used in this chapter concerning the section where the law is elaborated when discussing different violations of

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<sup>240</sup> *Id.* ¶115.

<sup>241</sup> Rosemary Abi-Saab, *The ‘General Principles’ of Humanitarian Law According to the International Court of Justice*, 259 INT’L REV. RED CROSS 374 (July-Aug. 1987).

<sup>242</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 220 (June 27).

<sup>243</sup> Rosemary Abi-Saab, *supra* note 241, at 375.

<sup>244</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 109-112 (June 27).

<sup>245</sup> *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

<sup>246</sup> *Id.* at 35.

international humanitarian law that took place, and continue to take place in reference to the armed conflict in Afghanistan.

#### D. Application of Customary International Law

##### 1. Hague Conventions

The 1899 Hague Convention (II) deals with regulations concerning the laws and customs of war on land and entered into force on 4 September 1900.<sup>247</sup> The United States ratified it on 9 April 1902. The 1907 Hague Convention (IV) dealing with also regulations concerning the laws and customs of war on land entered into force 26 January 1910.<sup>248</sup> The United States ratified it on 27 November 1909.

Those Conventions' provisions reflect customary and international humanitarian law. Regarding Afghanistan not being a party to those Conventions, and due to the inclusion of the 'general participation clause' discussed earlier,<sup>249</sup> it does not matter the rules contained within the Hague Conventions, with special reference to the Hague Convention (IV) have evolved into customary international law and thus binding on the parties to the conflict.<sup>250</sup>

##### 2. Protocol I to the Geneva Conventions of 1949

Neither the United States nor Afghanistan are party to Protocol I,<sup>251</sup> however, the argument is that certain provisions reflect norms of customary international law, and thus binding on all. Discussed in Chapter II, in the section dealing with 'Customary

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<sup>247</sup> Hague Convention (II) of 1899, *supra* note 7.

<sup>248</sup> Hague Convention (IV) of 1907, *supra* note 8.

<sup>249</sup> See *supra* note 185.

<sup>250</sup> See *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704 (1993). See also FRITS KALSHOVEN, *supra* note 26.

<sup>251</sup> Protocol I, *supra* note 6.

International Humanitarian Law', is a more in depth overview of the application of customary law.

Regarding the application of provisions from Protocol I that reflect customary law norms, it will be dealt with on a case-by-case basis when dealing with the six categories of violations that this thesis is focusing on. However, it is essential to note that Protocol I was the first instrument to codify the customary law principle of proportionality.<sup>252</sup>

Protocol I can also be applied to the armed forces of States that ratified it. Those include some of the allies of the United States in the conflict in Afghanistan, for example Canadian, British and Norwegian forces.

#### E. Violations of International Humanitarian Law by Parties to the Conflict

In this section, an elaboration on four possible violations of international humanitarian norms will be examined. The first two issues concerns the obligations on part of the United States and its allies in the conflict; the first regarding the alleged violation of the principle prohibiting the indiscriminate attacks of civilians (with the conditions outlined) in humanitarian law, the second relates to the treatment of prisoners of war by the United States. The second two issues concerns the alleged violations of international humanitarian law by the Taliban; first by placing civilians near military targets, and second by taking over hospitals for military purposes.

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<sup>252</sup> *Id.* art. 51(5)(b), art. 57(2)(a)(iii). See Appendix I for the full text of those articles. *See also* MIDDLE EAST WATCH, NEEDLESS DEATHS IN THE GULF WAR 41 (1991); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 170-171(1990) (both cited in Danielle L. Infeld, Note, *Precision-guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But is a Country Obligated to use Precision Technology to Minimize Collateral Civilian Injury and Damage?* 26 GEO. WASH. J. INT'L L. & ECON. 109, 118 (1992)).

## 1. Indiscriminate Attacks

Indiscriminate attacks or bombing involves the raiding of cities, towns or places with no distinction as to whether the object is civilian, military objective, civilian population or combatants.<sup>253</sup> In other words it refers to attacks where there is no distinction made.<sup>254</sup> While, the Hague Convention (IV) prohibits the bombing of places such as towns or villages, which are undefended in Article 25,<sup>255</sup> this was later developed to make the intentional attack on civilians illegal.<sup>256</sup> Geneva Convention (IV) further came to provide for a regime that specifically affords more protection to civilians in international armed conflicts.<sup>257</sup> Geneva Convention (IV) further prohibits the use of military force on civilian hospitals under all circumstances in Article 18.<sup>258</sup> Discussion on the status of hospitals and the protection that is afforded to them in international humanitarian law will appear in the last section of this chapter.

There are no specific treaty provisions related to carpet-bombing of cities or other damage techniques both being methods of indiscriminate attacks in the Geneva Conventions.<sup>259</sup> However, as stated by the ICTY in the *Kupreskic* case, “attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.”<sup>260</sup> Furthermore, the protection of civilian populations and sparing civilian casualties are within the norms of customary

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<sup>253</sup> Article 51(4) and (5) of Protocol I, elaborate on what indiscriminate attacks are. Further discussion on those provisions will be provided below.

<sup>254</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 620 (Yves Sandoz et al. eds., 1987).

<sup>255</sup> See generally KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 164-165 (2001).

<sup>256</sup> LEAGUE OF NATIONS, O.J. Spec. Supp. 182, at 15-17 (1938). See Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 6.

<sup>257</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 6.

<sup>258</sup> Geneva Convention (IV), *supra* note 6.

<sup>259</sup> Protocol I has provisions dealing with indiscriminate attacks. This will be discussed below.

<sup>260</sup> Prosecutor v. Kupreskic et al., Opinion and Judgment, Case No. IT-95-16, ¶ 524 (Jan. 14, 2000).

international law.<sup>261</sup> This is based on three main and interrelated concepts. The first dealing with the obligation to distinguish between military objectives or targets and civilians,<sup>262</sup> the second the prohibition of directly attacking civilians,<sup>263</sup> and the third that the attacks must be both necessary and proportional to advance a military objective that is legitimate.<sup>264</sup> Those concepts discussed are elaborated upon in different “international conventions, U.N. General Assembly Resolutions, U.S. military law, and other significant international efforts to codify the customary norms of humanitarian law. Notably, Additional Protocol I of the Geneva Conventions, which came into force in 1977, codifies in treaty form many of these customary international legal principles.”<sup>265</sup> Indiscriminate attacks of non-military objectives as a method of warfare is therefore a violation of customary international law.

Additionally, the *Kupreskic* case further illustrates that:

These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it

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<sup>261</sup> See, e.g., *id.*

<sup>262</sup> Lieber Code, *supra* note 167, art. 23; Protection of Civilian Populations Against Bombing from the Air in Case of War, Resolution of the League of Nations Assembly, League of Nations O.J. Spec. Supp. 182, at 15 (1938); Geneva Convention IV, *supra* note 6; G.A. Res. 2444, U.N. GAOR, 23<sup>rd</sup> Sess., Supp. No. 18, at 1(c), U.N. Doc. A/7218 (1968); G.A. Res. 2675, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 2, U.N. Doc. A/8028 (1970); Protocol I, *supra* note 6, art. 48; See also DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS (1988) (It contains those documents and other international law treaties and agreements).

<sup>263</sup> Lieber Code, *supra* note 167, art. 22; Protection of Civilian Populations Against Bombing from the Air in Case of War, Resolution of the League of Nations Assembly, League of Nations O.J. Spec. Supp. 182, at I(1) (1938); Geneva Convention (IV), *supra* note 6, arts. 6-7; G.A. Res. 2675, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 4-7, U.N. Doc. A/8028 (1970); Protocol I, *supra* note 6, art. 48. See generally S.C. Res. 540, U.N. SCOR, 38th Sess., 2493d mtg. at 3, U.N. Doc. S/RES/540 (1983); *Mission to Inspect Civilian Areas in Iran and Iraq Which Have Been Subject to Military Attack: Report of the Secretary-General*, U.N. Doc. S/15834 (1983), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 989-1002.

<sup>264</sup> HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1625), cited in FRITS KALSHOVEN, *supra* note 26, at 4; Geneva Convention (IV), *supra* note 6, arts. 6 & 7; Protocol I, *supra* note 6, art. 51. See also Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategies of Cities as Targets*, 39 VA. J. INT'L L. 353, 382-383 (1999) (where the author states that “although the Charter of the Nuremberg International Military Tribunal listed ‘indiscriminate bombings’ as a war crime, the United Nations War Crimes Commission rejected alleged cases so long as the bombarded cities could be construed as containing military objectives.”) *Id.*; W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 38 (1990).

<sup>265</sup> Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 443-444 (2001).

would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party. Nevertheless this is an area where the “elementary considerations of humanity” rightly emphasised by the International Court of Justice in the *Corfu Channel*, *Nicaragua* and *Legality of the Threat or Use of Nuclear Weapons* cases should be fully used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law.

More specifically, recourse might be had to the celebrated Martens Clause which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. True, this Clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.<sup>266</sup>

Additionally, the minimum standards that parties to the conflict have to ensure are outlined within common Article 3 to the Geneva Conventions. Regarding indiscriminate attacks this would violate the minimum standards that have to be observed by the Parties to the conflict, specifically referring to Article 3(1)(a) (dealing with violence to life and person in reference to those who are not taking an active part in hostilities, e.g. civilians) and 3(2) (dealing with the protection and care of the wounded and sick).<sup>267</sup>

The Hague Convention (IV) was referred to above as it further illustrates the treatment of civilians and further elaborates on the minimum protection that should be

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<sup>266</sup> Prosecutor v. Kupreskic et al., Opinion and Judgment, Case No. IT-95-16, ¶ 524-525 (Jan. 14, 2000). See Appendix I for the full text of Articles 57 and 58 of Protocol I.

<sup>267</sup> Geneva Convention (I), (II), (III), (IV), *supra* note 6, art. 3.



afforded under common Article 3 to the Geneva Conventions.<sup>268</sup> Although this article states that it is applied to ‘non international armed conflicts’ in different situations it was seen to apply to international armed conflicts as well.<sup>269</sup> Additionally, the trial chamber of the ICTY in the *Martić* case stated the following:

The prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare . . . emanate from the elementary considerations of humanity [which “also derive from the ‘Martens clause’”] which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.<sup>270</sup>

Evidently, this further indicates that death of civilian populations is a violation of customary international law. The nature of indiscriminate attacks is that it does not differentiate between what is a military objective and what is not. It indiscriminately attacks different objects.

Indiscriminate attacks become the subject of questioning since it explicitly affects the civilian population.<sup>271</sup> Humanitarian norms lay down that only military objectives can be bombarded,<sup>272</sup> and civilians attacked when the attack has a military advantage that outweighs the damage caused.<sup>273</sup> The important issue here is that of proportionality. As noted earlier Protocol I was the first instrument to codify the customary law principle of proportionality.<sup>274</sup>

Article 48 of Protocol I deals with the obligation to differentiate between military objectives and civilian objects and only allows States to direct their operations against

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<sup>268</sup> See Appendix D for the complete text of this article.

<sup>269</sup> *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>270</sup> *Prosecutor v. Martić*, Review of the Indictment Pursuant to Rule 61, Case No. IT-95-11, ¶ 13 (Mar. 13, 1996).

<sup>271</sup> See, e.g., Hague Convention (IV) of 1910, *supra* note 8, where Article 25 states that “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”. See generally Hague Convention IV of 1910, *supra* note 8, where Article 23 (e) “To employ arms, projectiles, or material calculated to cause unnecessary suffering”.

<sup>272</sup> See generally Protocol I, *supra* note 6, art. 48. See Appendix I for the full text of this article.

<sup>273</sup> *Id.* art. 57 (2) (b).

<sup>274</sup> See note 252.

military objectives.<sup>275</sup> The United States had held that Article 48 is a “codification of the customary practice of nations, and therefore binding on all.”<sup>276</sup> Attacks that do not differentiate between military and civilian objectives is a violation of the core principles of humanitarian norms prohibiting attacking civilian objects; with no military objective, and infrastructure essential for their existence.<sup>277</sup> Although Protocol I to the Geneva Conventions relating to the protection of victims in international armed conflict is not binding upon Afghanistan and the United States since they are not parties to it, some rules contained within it are considered to customary norms of humanitarian law. Article 51 (4) [concerned most with the means and method of warfare that is indiscriminate] and (5) [specifically directed towards what is known as carpet bombing and excessive effects in relation to the anticipated military advantage]<sup>278</sup> are one of those provisions that express the widely accepted protection that should be afforded to civilian populations in time of conflict.<sup>279</sup> Of specific relevance are Article 51(4) (c) and 51 (5) by stating the following:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

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<sup>275</sup> See Appendix I for the full text of this article.

<sup>276</sup> *Department of Defense Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1026.

<sup>277</sup> See Protocol I, *supra* note 6, art. 48.

<sup>278</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 625 (Yves Sandoz et al. eds., 1987).

<sup>279</sup> See Appendix I, for the text of the whole article.

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>280</sup>

The Geneva Conventions of 1949 and their 1977 additional Protocols are seen to “have provided the legal protection for the inviolability of civilians as part of the law of war.”<sup>281</sup> In the commentary on the Additional Protocols of 1977, one of the general remarks made regarding Article 51, is that it “is one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”<sup>282</sup> Furthermore, while there has been a controversy towards applying those kinds of protections to civilians in non-international armed conflicts, the tribunals in the 1990s has expanded the civilian protection law.<sup>283</sup> In the *Martic* Case, the Trial Chamber held that “the rule that the civilian population as such as well as individual citizens shall not be the object of attack is a fundamental rule of international law applicable to all armed conflicts ... irrespective of their characterization as international or non-international.”<sup>284</sup> This reinforces that civilian population shall not be the object of attack by the parties to the conflict, to which the Senior Legal Advisor in the ICTY Office of the Prosecutor stated that “attacks on [civilians and] civilian objects are prohibited as a matter of customary law in all conflicts.”<sup>285</sup>

With specific reference to paragraph 4 prohibiting indiscriminate attacks, and subsection (c) dealing with the employment of certain methods or means of combat

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<sup>280</sup> Protocol I, *supra* note 6, art. 51 (4) & (5). See Appendix I, for the full text of this article.

<sup>281</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 7.

<sup>282</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 615 (Yves Sandoz et al. eds., 1987).

<sup>283</sup> See Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 7.

<sup>284</sup> Prosecutor v. Martić, Initial Indictment, Case No. IT-95-11 (July 25, 1995), *cited in* Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 7. See also Prosecutor v. Kupreskic et al., Opinion and Judgment, Case No. IT-95-16, ¶ 521 (Jan. 14, 2000).

<sup>285</sup> William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 DUKE J. COMP. & INT'L L. 539, 557 (1997).

that are indiscriminate, it was generally recognized that some weapons used in conflicts “by their very nature have an indiscriminate effect.”<sup>286</sup> In addition, the power of the weapon itself is important when assessing whether there is a violation of indiscriminate attack where the example was given that “if a 10 ton bomb is used to destroy a single building, it inevitable that the effects will be very extensive and will annihilate or damage neighboring buildings, while a less powerful missile would suffice to destroy the building.”<sup>287</sup>

Accordingly, the use of cluster bombs is therefore a violation of this provision since it does not differentiate between military and civilian objectives and it has an inhumane nature of killing. It is documented that the United States and its allies are using cluster bombs in the conflict in Afghanistan.<sup>288</sup> Their usage poses grave dangers to the civilian population to which Human Rights Watch is of the position that cluster bombs should not used “until governments can establish either that a technical solution is possible or that new restrictions and requirements regarding their use can be effective. In the event that cluster bombs are used in Afghanistan, they should not be used near populated areas.”<sup>289</sup> Cluster bombs were first developed by the United States during the Vietnam War.<sup>290</sup> The civilian population is endangered by the usage of cluster bombs in two main ways. One that this bomb is considered,

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<sup>286</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 623 (Yves Sandoz et al. eds., 1987).

<sup>287</sup> *Id.*

<sup>288</sup> Open Letter from Kenneth Roth, Executive Director, Human Rights Watch, to NATO Defence Ministers, International Humanitarian Law Issue and the Afghan Conflict (Oct. 17, 2001), available at <http://www.hrw.org/press/2001/10/nato1017-ltr.htm>. See generally Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law*, 44 ARIZ. L. REV. 31, 34 (Spring 2002) (discussing the use of cluster bombs and their humanitarian impact in Kosovo, and the unfortunate continuation of their usage by the United States in Afghanistan conflict).

<sup>289</sup> Open Letter from Kenneth Roth, Executive Director, Human Rights Watch, to NATO Defence Ministers, International Humanitarian Law Issue and the Afghan Conflict (Oct. 17, 2001), available at <http://www.hrw.org/press/2001/10/nato1017-ltr.htm>

<sup>290</sup> See Michael Krepon, *Weapons Potentially Inhumane: The Case of Cluster Bombs*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW, THE CONCLUDING PHASE 267-268 (Richard A. Falk ed., 1976).

[A]n ‘area weapon,’ so called because a single dispenser can spread its cluster bombs over a huge area, from one to five football fields. Each of the small bombs contains over a hundred tiny pieces of shrapnel, which can cause physical injury at especially long distances. If dropped on a military target in a populated area, cluster bombs, because of their enormous footprint and because of each small bomb’s terrific destructive power, almost certainly will kill, maim, or otherwise wound a large number of innocent civilians.<sup>291</sup>

Second, around “five to thirty percent of the small cluster bombs are duds. But they can remain dangerous years after launch; a slight vibration can detonate them.”<sup>292</sup>

Besides poison gases, biological and nuclear weapons, cluster bombs “[are] perhaps more dangerous to civilians than any other weapon in modern warfare.”<sup>293</sup> The

United Nations Mine Action Coordination Centre (UNMACC) “indicated that [the] coalition forces provided information on 103 cluster bomb strikes and that 1,210 CBU-87B dispensers were dropped on 78 of these sites, totaling 244,420 cluster bomblets.”<sup>294</sup> With the assumption that the dud rate is seven percent 17,109 cluster bombs remain on the grounds of Afghanistan and continue are considered to remain dangerous.<sup>295</sup>

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<sup>291</sup> Thomas Michael McDonnell, *supra* note 288, at 42. See Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Law*, 22 MICH. J. INT’L L. 85, 89 (2000). The United States Air Force’s Air University defines cluster bombs by the following:

Cluster munitions (CBUs) fall into the dumb bomb or unguided category with the exception of sensor-fuzed weapons. CBU’s combine dispensers, fuzes, and submunitions into a single weapon with a specialized or general-purpose mission. Once released, CBUs fall for a specified amount of time or distance before their dispensers open, allowing the submunitions to effectively cover a wide area target. The submunitions are activated by an internal fuze and can detonate above ground, at impact, or in a delayed mode.

Air University, *Cluster Bomb List*, at 2 (1996), available at <http://www.au.af.mil/au/database/projects/ay1996/acsc/96-004/hardware/docs/cluster.htm> (last visited Aug. 9, 2002), *quoted in* Thomas Michael McDonnell, *supra* note 288, at note 43.

<sup>292</sup> Thomas Michael McDonnell, *supra* note 288, at 42. See Paul Beaver, *Unexploded Ordnance Proves a Problem in Kosovo*, 3 JANE’S MISSILES & ROCKETS, Aug. 1, 1999, at 8, available at 1999 WL 7271366.

<sup>293</sup> Thomas Michael McDonnell, *supra* note 288, at 50. See Michael Krepon, *supra* note 290, at 269.

<sup>294</sup> Thomas Michael McDonnell, *supra* note 288, at 54. See *UN to Clear Coalition Cluster Bombs in Afghanistan*, BBC WORLDWIDE MONITORING, Jan. 3, 2002, at 6, available at LEXIS, News Library.

<sup>295</sup> Thomas Michael McDonnell, *supra* note 288, at 54-55. “Some de-miners on the ground in Afghanistan have reported dud rates for CBU bomblets of twenty percent. The Pentagon itself apparently is claiming a ten percent dud rate.” *Id.* at note 86. See Elizabeth Neuffer, *Fighting Terror After the Battle/Civilian Casualties*, BOSTON GLOBE, Jan. 20, 2002, at A23, available at LEXIS, News Library.

Finally, the provisions from Protocol I quoted above,<sup>296</sup> illustrate what indiscriminate attacks encompass. Article 51(4)(c) is especially important as it addresses the usage of a ‘method or means of combat’ that have the ‘nature to strike military objectives and civilians or civilian objects without distinction’.<sup>297</sup> It would appear that cluster bombs fall into this category.

Furthermore, in a report by the United States Department of Defense to the Congress regarding the conduct of war in the Persian Gulf, it was stated that:

While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to non combatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives... Hague IV was found to be part of customary international law in the course of war crimes trials following World War II, and continues to be so regarded. An uncodified but similar provision is the principle of proportionality.<sup>298</sup>

The United States is therefore aware of its obligation under international humanitarian law. However in this report the United States recognized that the Iraqi government had intentionally installed civilian populations and objects as ‘shields for military objects’. Consequently, further recognition by the United States is seen that certain principles of customary law are codified in Protocol I, special reference to Article 48 and 49(1).<sup>299</sup> Finally, in the report it is stated that although the United States in 1987 had declined to become a State party to Protocol I, nor has Iraq, “the language of Articles 48 and 49(1) (except for the erroneous use of the word ‘attacks’)

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<sup>296</sup> See *supra* note 280.

<sup>297</sup> Protocol I, *supra* note 6, art. 51(4)(c).

<sup>298</sup> *Department of Defense Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1022-1023. See Appendix J, for the full text of Article 23.

<sup>299</sup> Regarding Article 49(1) which states “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence,” the U.S. is of the opinion that the word ‘attack’ in this context is inconsistent with its usage in the languages of the Protocol. It points out that it has historically and continues to be referred to offensive operations only. However, the U.S. is of the position that this article applied to both the attacker and defender. *Department of Defense Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1025. See Appendix I, for the complete text of Articles 48 and 49.

is generally regarded as a codification of the customary practice of nations, and therefore binding on all.”<sup>300</sup>

The United States argues that in the language of Protocol I, specifically Article 52(3)<sup>301</sup> stating that “[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used,”<sup>302</sup> is not codified as customary international law. It further states that this provision:

Shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.<sup>303</sup>

Human Rights Watch’s position regarding dual-use objects is that “in determining whether dual-use objects are valid military targets, the impact on civilians must be carefully weighed against the military advantage served; all ways of minimizing the impact on civilians must be considered; and attacks should not be undertaken if the civilian harm outweighs the definite military advantage.”<sup>304</sup> Therefore, leaving a way for the assessing of civilian harm by the attacking party. This could indicate that if civilian harm does not outweigh that of the military advantage, thus attacks on civilians are permissible in this sense only if there exists a military objective.

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<sup>300</sup> *Id.* at 1026.

<sup>301</sup> See Appendix I, for the complete text of Article 52.

<sup>302</sup> Protocol I, *supra* note 6, art. 52(3).

<sup>303</sup> *Department of Defense Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1028 (1999).

<sup>304</sup> Open Letter from Kenneth Roth, Executive Director, Human Rights Watch, to NATO Defence Ministers, International Humanitarian Law Issue and the Afghan Conflict (Oct. 17, 2001), *available at* <http://www.hrw.org/press/2001/10/nato1017-ltr.htm>

Facts of violations that took place and applicability of the law:

The following incidents are used to show some United States attacks that involved the loss of civilian lives in Afghanistan. The common aspect between the incidents is their location away from military objects. Carpet-bombing the suburbs of Kabul and Kandahar that involved the below mentioned incidents, violated the prohibition of indiscriminate attacks on civilian populations and objects with no evident military objectives. It is worth noting that the United States did not defend its position in most of these cases.

- a. The bombing of a village near Kabul's airport on 13 October 2001.<sup>305</sup>

The United States 2,000-pound smart bomb missed a target at Kabul's airport and instead hit a nearby village.<sup>306</sup> The Pentagon admitted that it was a mistake on behalf of its forces that had led to the death of four civilian lives.<sup>307</sup> A statement made by the Defense Department expressed regret for the loss of civilian life and that "preliminary indications are that the accident occurred from a targeting process error."<sup>308</sup> The bomb that was guided by a satellite had missed the intended target "because incorrect coordinates for the position of the helicopter were entered into a targeting system, a Pentagon source said."<sup>309</sup>

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<sup>305</sup> BBC News, *Summary of Reported Afghan Civilian Deaths* (Oct. 29, 2001), available at [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1626000/1626464.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1626000/1626464.stm)

<sup>306</sup> Brian Kates, *Smart Bomb Makes a Deadly Miss*, DAILY NEWS (New York), Oct. 14, 2001, at 4, available at LEXIS, News Library. See *id.*; *Civilian Hit Accidentally*, THE HINDU, Oct. 14, 2001, available at LEXIS, News Library; Julie Mason, *Another Errant Raid Kills Civilians*, THE HOUSTON CHRONICLE, Oct. 14, 2001, at A1, available at LEXIS, News Library; Paul Richter, *Errant Bomb Hits Housing Row in Kabul*, LOS ANGELES TIMES, Oct. 14, 2001, at A1, available at LEXIS, News Library; Bradley Graham, *U.S. Bomb Misses Its Target, Hits Residential Area; As Many as Four Civilians Killed; Defense Officials Blame Human Error*, THE WASHINGTON POST, Oct. 14, 2001, at A19, available at LEXIS, News Library.

<sup>307</sup> Brian Kates, *Smart Bomb Makes a Deadly Miss*, DAILY NEWS (New York), Oct. 14, 2001, at 4, available at LEXIS, News Library.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*



- b. The bombing of the ICRC compound in Kabul, containing food for the disabled and widows, on 16 October 16 2001.<sup>310</sup>

The United States air force bombed an International Committee of the Red Cross (ICRC) compound in Kabul causing the injury to one of its employees.<sup>311</sup> According to ICRC sources, the compound is located two kilometers away from the airport and is “like all other ICRC facilities in the country, it is clearly distinguishable from the air by the large red cross painted against a white background on the roof of each building.”<sup>312</sup> The Pentagon admitted that the bombing was done mistakenly “which military planners had thought was being used by the Taliban.”<sup>313</sup>

The reaction of the ICRC was furious stating that compound was clearly marked as a facility for civilian in which Robert Moni, the head of the Red Cross delegation in Kabul stated that “it is definitely a civilian target. In addition to that, it is clearly marked ICRC warehouse.”<sup>314</sup> Parties to a conflict are under the obligation to respect the emblems of the Red Cross and Red Crescent and to take all the necessary precautions to avoid harming civilians under international humanitarian law.

- c. Civilian homes bombed on 18 and 28 October 2001.<sup>315</sup>

The 18 October incident relates to the series of raids the United States Air Force has been engaged in connection with striking at residential areas in Kabul.<sup>316</sup> Five

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<sup>310</sup> Press Release, ICRC Warehouses Bombed in Kabul (Oct. 16, 2001), *available at* <http://www.icrc.org/>. See BBC News, Summary of Reported Afghan Civilian Deaths (Oct. 29, 2001), *available at* [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1626000/1626464.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1626000/1626464.stm).

<sup>311</sup> *Id.*

<sup>312</sup> Press Release, ICRC Warehouses Bombed in Kabul (Oct. 16, 2001), *available at* <http://www.icrc.org/>. See Luke Harding, Attack on Afghanistan Blunders: US Accused of Bombing Red Cross Building; Afghans Claim Civilian Toll Has Reached 300, THE GUARDIAN (London), Oct. 17, 2001, at 2, *available at* LEXIS, News Library.

<sup>313</sup> Michael Kranish, *Fighting Terror The Military Campaign*, THE BOSTON GLOBE, Oct. 17, 2001, at A1, *available at* LEXIS, News Library.

<sup>314</sup> *Red Faced; Aid Urged as Red Cross Warehouse is Bombed*, HERALD SUN, Oct. 17, 2001, at 2, *available at* LEXIS, News Library; See Leyla Linton, *Red Cross Says Bomb Destroyed Food Supplies*, THE INDEPENDENT (London), Oct. 17, 2001, at 7, *available at* LEXIS, News Library.

<sup>315</sup> BBC News, *Summary of Reported Afghan Civilian Deaths* (Oct. 29, 2001), *available at* [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1626000/1626464.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1626000/1626464.stm)

members whom belong to the same family were killed when the United States bombed six houses in the South Eastern area of Kalae Zaman Khan.<sup>317</sup> The incident on 28 October involved further air raids on Kabul that led to the death of at least ten civilians, eight of which were children.<sup>318</sup> Other sources indicate there were at least thirteen civilians,<sup>319</sup> and others say that more than ten civilians were killed.<sup>320</sup>

d. The bombing of a Red Crescent medical clinic, in Kandahar, on 31 October 2001.<sup>321</sup>

The above relates to the incident in Kandahar, where at least eleven civilians were killed as a result of the air raids by the United States where the bombs hit a Red Crescent medical clinic.<sup>322</sup> As much as fifteen have been reported dead according to other sources.<sup>323</sup> One of the physicians who survived, Dr. Obaidullah stated that, “this building has nothing to do with the Taliban and the military.”<sup>324</sup>

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<sup>316</sup> See *id.*; Said Mohammad Azam, *Civilian Toll Mounts as Bush Signals Switch to Ground Assault*, AGENCE FRANCE PRESSE, Oct. 19, 2001, available at LEXIS, News Library. See also *Civilians Killed Claim As US Jets Pound Afghan Capital*, BELFAST NEWSLETTER, Oct. 19, 2001, at 2, available at LEXIS, News Library, *U.S. Strikes Hit Capital's Homes*, BRISTOL EVENING POST, Oct. 19, 2001, at 4, available at LEXIS, News Library.

<sup>317</sup> Said Mohammad Azam, *Civilian Toll Mounts as Bush Signals Switch to Ground Assault*, AGENCE FRANCE PRESSE, Oct. 19, 2001, available at LEXIS, News Library.

<sup>318</sup> *Civilian Bomb Death Toll Mounts*, THE AUSTRALIAN, Oct. 29, 2001, at 8, available at LEXIS, News Library.

<sup>319</sup> See Douglas Birch, *U.S. Strikes Stray into Civilian Areas; Errant Missiles Reported to Have Killed 13 in Kabul*, THE BALTIMORE SUN, Oct. 29, 2001, at A7, available at LEXIS, News Library; Russ Buettner, *Stray U.S. Bomb Kill 13 Friends and Foes Angered*, DAILY NEWS (New York), Oct. 29, 2001, at 14, available at LEXIS, News Library.

<sup>320</sup> See BBC News, *Summary of Reported Afghan Civilian Deaths* (Oct. 29, 2001), available at [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1626000/1626464.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1626000/1626464.stm)

<sup>321</sup> *Id.*

<sup>322</sup> See *id.*

<sup>323</sup> See *Bomb Killed 15 at Clinic, Says Doctor*, THE HERALD (Glasgow), Nov. 1, 2001, at 8, available at LEXIS, News Library; Lee Hancock, *Taliban Claim More Civilian Deaths, Reporters Tour Area Hit by U.S. Bombers*, THE SEATTLE TIMES, Nov. 1, 2001, at A4, available at LEXIS, News Library.

<sup>324</sup> Robert Nickelsberg & Barry Bearak, *A Nation Challenged: Kandahar*, THE NEW YORK TIMES, Nov. 1, 2001, at B1, available at LEXIS, News Library; See also Brian Denny, *Missile Attacks Level Dispensary; Red Crescent Premises Destroyed*, MORNING STAR, Nov. 1, 2001, at 3, available at LEXIS, News Library.

- e. The bombing of a village, Chowkar Karez, around 40 Km away from Kandahar that caused the death of at least 25 persons.<sup>325</sup> (Reported by Human Rights Watch)<sup>326</sup>

The events in the village of Chowkar Karez on 22 October 2001, involved more United States bombs that were raided on the village and caused the substantial loss of life. Human Rights Watch interviewed witnesses none of whom “knew of Taliban or Al-Qaida positions in the area of the attack.”<sup>327</sup> Sidney Jones, the Asia Director of Human Rights Watch made the following statement: “if there were military targets in the area, we’d like to know what they were,”<sup>328</sup> he further stated that “this is the second instance in less than a week in which we’ve documented substantial civilian casualties from U.S. bombing raids. The Pentagon has got to do more to avoid these deaths.”<sup>329</sup> The United States did not reply to this enquiry.

All those incidents referred to above deal with civilian casualties and evident non-military objects and objectives present. As discussed earlier Articles 25 of the Hague Convention (IV)<sup>330</sup> prohibit the bombing of towns or villages, which are not defended. Regarding the argument that those towns or villages were situated next to military targets, Human Rights Watch (a U.S. based human rights organization) has asked the United States to state what those targets were in a couple of incidents.<sup>331</sup>

Mentioned above is Article 18 of Geneva Convention (IV),<sup>332</sup> which prohibits the use of force, in all circumstances, on civilian hospitals. By bombing villages, homes,

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<sup>325</sup> BBC News, *Summary of Reported Afghan Civilian Deaths* (Oct. 29, 2001), available at [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1626000/1626464.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1626000/1626464.stm).

<sup>326</sup> Human Rights Watch, *Afghanistan: New Civilians Death Due to U.S. Bombing* (Oct. 30, 2001), available at <http://www.hrw.org/press/2001/10/afghan1030.htm>

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> See Appendix J, for the full text of this article.

<sup>331</sup> Human Rights Watch, *Afghanistan: New Civilians Death Due to U.S. Bombing* (Oct. 30, 2001), available at <http://www.hrw.org/press/2001/10/afghan1030.htm>

<sup>332</sup> See Appendix H, for the full text of this article.

Red Crescent medical center and Red Cross compound and warehouse the United States is in violation of its obligations under those instruments. Furthermore, international humanitarian law puts an obligation that all parties to the conflict respect Red Crescent and Red Cross and to “take all the precautions needed to avoid harming civilians.”<sup>333</sup> The minimum standards that should be adhered to, elaborated in common Article 3, have been breached. This is since those raids and bombs that have resulted in deaths and injuries caused ‘violence to life and person’<sup>334</sup> and put the wounded and sick at risk while Article 3(2) obligates States to collect and care for them.<sup>335</sup>

As previously established, attacks are considered indiscriminate if used on civilian populations with no military objective present. As indicated civilians can only be attacked if the military advantage outweighs that of the damage caused. Although the United States argues that it does not intend to harm or kill civilians, they are still violating international humanitarian law by bombing locations with no evident military objectives and causing civilian deaths. This is seen through the incidents above where civilian villages and homes were bombarded.

The United States was obligated to distinguish between the military objectives they want to attack and ensure that those attacks were necessary and proportional for the advancement of a military objective that is legitimate. As discussed earlier there is evidence that sparing civilian casualties is a customary international law norm, to which there is an obligation to distinguish between military and civilian targets, of prohibiting the direct attacks on civilians and of ensuring that there is a legitimate

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<sup>333</sup> Press Release, ICRC Warehouses Bombed in Kabul (Oct. 16, 2001), *available at* <http://www.icrc.org/>

<sup>334</sup> Common Article 3(1)(a). See Appendix D, for the complete text of this article.

<sup>335</sup> Common Article 3(2). See Appendix D, for the complete text of this article.

military objective to be advanced by the attack, thus ensuring that both necessity and proportionality exist.<sup>336</sup>

Those incidents discussed above indicate that indiscriminate attacks or bombings with no evident military objective were being carried out. There was no indication on part of the United States to show that its forces attacked those areas because there was a legitimate military objective.<sup>337</sup> Consequently, the United States is responsible for violating international humanitarian law by indiscriminately attacking targets with no military objectives. The United States Supreme Court had previously acknowledged that civilians are to be afforded special protections in armed conflicts,<sup>338</sup> to which it noted that the Japanese commander of the forces in the Second World War had had an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners and the civilian population.”<sup>339</sup> As outlined earlier on, the jurisprudence of the ICTY has expanded significantly and strengthened the protection of civilians during armed conflicts.<sup>340</sup>

The *Martić* case for example, stated a clear rule that “the prohibition on attacking the civilian population as such, or individual civilians [is] part of this corpus of customary law.”<sup>341</sup> The *Kupreskić* case made another pioneer statement that “the protection of civilians” during armed conflicts is “the bedrock of modern

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<sup>336</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8) (the ICJ stated that “collateral damage to civilians, even if proportionate to the importance of the military target, must never be intended”).

<sup>337</sup> In an ICRC press release in 1983, the ICRC had insisted “on the fact that the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.” Press Release, Fighting in Tripoli: Appeal From the ICRC (Nov. 4, 1983), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 889 (1999). See generally Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and Republic of Iraq (May 7, 1983), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 978-982.

<sup>338</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 8.

<sup>339</sup> Application of Yamashita, 327 U.S. 1, 16 (1946).

<sup>340</sup> See Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 8.

humanitarian law.”<sup>342</sup> Although in the incidents mentioned above the argument that they were direct attacks can not be made due to the current insufficient evidence, the issue of relevance to the cases cited above is the special protection that is due to civilians in armed conflicts, and the reinstatement of “the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”<sup>343</sup>

Finally, almost all of the ICTY judgments concluded that “the victims are part of a civilian population and individuals are then held criminally responsible for attacks on those civilians, either as crimes against humanity or war crimes.”<sup>344</sup> In the *Martic* case, he was accused of bombing civilians in Zagreb,<sup>345</sup> while in the *Karadzic and Mladic* case, they were being indicted for bombing civilians in Sarajevo.<sup>346</sup> In relation to the conflict in Afghanistan, Harvard Law School Professor and president of the American Society of International Law, Anne-Marie Slaughter, argues that United States “targeting decisions must have included specific restrictions to protect civilians and avoid civilian objects, even at the potential cost of U.S. casualties.”<sup>347</sup> It

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<sup>341</sup> Prosecutor v. Martić, Review of the Indictment Pursuant to Rule 61, Case No. IT-95-11 (Mar. 13, 1996).

<sup>342</sup> Prosecutor v. Kupreskić et al., Opinion and Judgment, Case No. IT-95-16, ¶ 521 (Jan. 14, 2000).

<sup>343</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 615 (Yves Sandoz et al. eds., 1987).

<sup>344</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 8. *See, e.g.*, Prosecutor v. Delalić, Opinion and Judgment, Case No. IT-96-21, ¶ 439 (Nov. 16, 1998) (tribunal found Delalić had “the necessary intent required to establish the crimes of willful killing and murder, as recognized in the Geneva Conventions . . . where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life”); Prosecutor v. Kunarac, Opinion and Judgment, Case No. IT-96-23, ¶ 425 (Feb. 22, 2001) (tribunal found victims were part of the “civilian population”); Prosecutor v. Tadić, Opinion and Judgment, Case No. IT-94-1, ¶ 638 (May 7, 1997) (established that the victims are required to be part of a civilian population).

<sup>345</sup> Prosecutor v. Martić, Initial Indictment, Case No. IT-95-11 (July 25, 1995).

<sup>346</sup> Prosecutor v. Karadžić & Mladić, Initial Indictment, Case No. IT-95-5 (July 24, 1995).

<sup>347</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 16. They further point out that “while the U.S. Rules of Engagement in Afghanistan are classified, a report produced by the ICTY Office of the Prosecutor after investigating NATO bombing in Kosovo found that concrete steps had been taken to protect civilians, including: relaxing the 15,000 foot height restriction; the decision not to use cluster bombs after May 7, 1999; and the decision not to attack potentially civilian objects, such as bridges, when civilians were near. *See* William Fenrick, *Targeting and Proportionality during the*

is further pointed to the statements made by Amnesty International that calls on the United States to “demonstrate that all possible steps were taken to protect against civilian casualties.”<sup>348</sup>

## 2. The Issue of Prisoners of War at Guantanamo Bay (Camp X-Ray)

The Geneva Convention (III) specifically deals with the treatment of prisoners of war.<sup>349</sup> In accordance with Article 5 of the Convention, if doubt arises as to whether individuals captured would qualify as prisoners of war within the meaning of Article 4 of the Convention, then until a competent tribunal determines their status, they are to enjoy the protections afforded to them under the convention.<sup>350</sup> Having examined the status of combatants in this conflict at the beginning of this Chapter and once they fall prisoners of war, this section further illustrates the treatment that should be afforded to them until their status is determined, which is a process they must not be denied.

In relation to the possibility that a treaty or convention does not protect certain individuals, the Martens Clause discussed in Chapter II becomes important. Its objective was to address cases that the convention did not deal with insisting that it should not “be left to the arbitrary judgment of military commanders.”<sup>351</sup> It further leaves the protection of those individuals to be under “the rule of the principles of the law of nations, as they result from the usages established among civilized peoples,

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*NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489, 501 (2001). Such confirmations in relation to the conflict in Afghanistan, to date are not provided.

<sup>348</sup> Press Release, Amnesty International, US Obligated to Avert Civilian Casualties in any Missile Attack (Oct. 25, 2001) (on file with Harvard International Law Journal).

<sup>349</sup> Geneva Convention (III), *supra* note 6. See Appendix G, for the full text of this article.

<sup>350</sup> Geneva Convention (III), *supra* note 6, art. 5. See Appendix G, for the full text of this article.

<sup>351</sup> Hague Convention (IV) of 1910, *supra* note 8, preamble. See Hague Convention (II) of 1899, *supra* note 7, preamble. See also Theodor Meron, *supra* note 216, at 79.

from the laws of humanity, and the dictates of the public conscience.”<sup>352</sup> Article 142 of Geneva Convention (III) expressed the same general idea of the Martens Clause.<sup>353</sup> The laws of humanity should be the guidance in case the argument is made that the Geneva Conventions do not cover the detainees at Guantanamo Bay.

Common Article 3 of the Geneva Conventions lay down the minimum standards of protection that extends to “members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.”<sup>354</sup> Those individuals are to be treated humanely in all circumstances under this provision.<sup>355</sup> In reference to the same Article, there is a prohibition of cruel treatment, torture, and humiliating and degrading treatment.<sup>356</sup> Furthermore, in order for a sentence over any individual to be made it has to be passed by a competent Court or tribunal “affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>357</sup>

There are also guidelines when evacuating prisoners of war, where it “shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.”<sup>358</sup> While in internment they are to enjoy a climate that is not injurious to them,<sup>359</sup> and shall be “quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same

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<sup>352</sup> Hague Convention (IV) of 1910, *supra* note 8, preamble. See Hague Convention (II) of 1899, *supra* note 7, preamble.

<sup>353</sup> See also Geneva Convention (I), *supra* note 6, art. 63, Geneva Convention (II), *supra* note 6, art. 62, Geneva Convention (IV), *supra* note 6, art. 158. See Appendix D, for the full text of the articles.

<sup>354</sup> Common art. 3(1). See Appendix D, for the full text of this article.

<sup>355</sup> *Id.*

<sup>356</sup> Torture is also prohibited by the Convention Against Torture, which the U.S. ratified Oct. 21, 1994. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987). See Geneva Convention (III), *supra* note 4, art. 17 (this article prohibits physical and mental torture of prisoners of war). See Appendix G for the full text of this article.

<sup>357</sup> Common art. 3(1)(d). See Appendix D, for the full text of this article

<sup>358</sup> Geneva Convention (III), *supra* note 6, art. 20. See Appendix G for the full text of this article.

<sup>359</sup> *Id.* art. 22.



area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.”<sup>360</sup>

Finally, Article 118 of the Geneva Convention (III) guides the time when the prisoners of war are to be released or repatriated. It provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>361</sup> As illustrated earlier, and in accordance with Article 5 of Geneva Convention (III), detainees being held by the detaining power shall be afforded the protections of the convention until their status is determined to be that of a prisoner of war or not. Those protections that should be afforded to them most importantly are to be treated humanely, as expressed in common Article 3, and specifically Article 13 of the same convention.<sup>362</sup> Other protections include the entitlement of respect to their persons and honor in all circumstance.<sup>363</sup>

Facts of violations that took place and applicability of the law:

The Pakistani authorities surrendered those captured and held in their prisons, from Taliban and al-Qaida fighters to the United States. On 7 January 2002, a claim was brought forward to the Supreme Court in Peshwar that Pakistan’s surrendering of Arabs to the United States is a violation of Islamic law, Pakistani constitution and human rights.<sup>364</sup> Before the Court had the chance to deal with the case, the Americans flew those captured fighters to Guantanamo Bay,<sup>365</sup> and where they remained held at

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<sup>360</sup> *Id.* art. 25.

<sup>361</sup> *Id.* art. 118.

<sup>362</sup> *Id.* art. 13.

<sup>363</sup> *Id.* art. 14.

<sup>364</sup> *Seree lel Ghaya* (Highly Confidential): *Asraa Taliban wa Al Qaeda fee Quantanamo Al Amerikiya* (Taliban and Al Qaeda prisoners in American Quantanamo) (Al Jazeera Net, Apr. 9, 2002), available at [http://www.aljazeera.net/programs/top\\_secret/articles/2002/4/4-9-1.htm](http://www.aljazeera.net/programs/top_secret/articles/2002/4/4-9-1.htm).

<sup>365</sup> Cuban land under the military jurisdiction but not the laws of the United States. *See Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (where the U.S. District Court for the District of Columbia found that Guantanamo Bay “outside the sovereign territory of the United States ... [where] writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States”). *Id.* *See also* Coalition of Clergy, et al. v. George Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (holding the

“Camp X-Ray”. By the end of February 2002 around three hundred detainees remained to be held at Camp X-Ray.<sup>366</sup> By September 2002 the figure reached around six hundred. Guantanamo is not on United States territory and therefore the detainees are not automatically provided with basic constitutional rights.<sup>367</sup>

Regarding the treatment of those detained, while they were being transported, and the humane treatment that they are supposed to be receiving under international humanitarian law in general and the Geneva Conventions of 1949 in specific,<sup>368</sup> officials from the Pentagon, who spoke on the condition of anonymity, stated that:

A large contingent of military police -- outnumbering the prisoners two to one -- was on the flight armed with stun guns and authorized to sedate any prisoners, if necessary. The detainees were to be chained to their seats for the entire flight, they said. ‘After September 11th, a little paranoia is a good thing,’ said Steve Lucas, a spokesman for the U.S. Southern Command in Miami, which oversees the base at Guantanamo Bay.<sup>369</sup>

The treatment of the prisoners was objected to by international organization such as Amnesty International.<sup>370</sup> Amnesty International Secretary General Irene Khan sent a letter to Secretary of Defense Rumsfeld stating, “‘the hooding of suspects in detention generally may constitute cruel treatment.’ The organization also said that sedating prisoners for other than medical purposes would be a breach of international standards.”<sup>371</sup> In a statement made by the organization regarding this issue, it said:

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same view that the United States does not have sovereignty over Guantanamo Bay but that sovereignty over it remains with Cuba).

<sup>366</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 461, 475 (Apr. 2002). See Katharine Q. Seelye, *Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002, at A10.

<sup>367</sup> See note 365.

<sup>368</sup> Refer above to humane treatment under Articles 3, 13, 14 of Geneva Convention (III). See Article 20 of the same convention dealing with the humane evacuation of prisoners of war. See Appendix G, for the full text of the articles.

<sup>369</sup> Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, THE WASHINGTON POST, Jan. 11, 2002, at A10, available at LEXIS, News Library.

<sup>370</sup> Amnesty International, *Afghanistan/USA: Prisoners Must Be Treated Humanely* (Jan. 10, 2002), available at <http://web.amnesty.org/>.

<sup>371</sup> Steve Vogel, *supra* note 369. See *id.*; Geneva Convention (III), *supra* note 6, art. 3, 13, 14, 20. See Appendix G, for the full text of the articles.

Hooding suspects in detention may violate international standards prohibiting ‘cruel, inhuman or degrading’ treatment. The standards emphasize that the term ‘cruel, inhuman or degrading’ covers mental as well as physical abuse, including holding detainees in conditions that deprive them, even temporarily, of the use of any of their natural senses such as sight or hearing or awareness of time or place. The hooding or blindfolding of suspects during interrogation also violates international standards.<sup>372</sup>

In the letter mentioned above to Donald Rumsfeld, Irene Khan further pointed out that the States that are parties to the Convention against Torture<sup>373</sup> are obligated to observe its provisions. She made a special reference to one of the Committee Against Torture’s recent statements that condemned the 11 September attacks. In this statement, the Committee reinstated the non-derogable provisions on the convention and that States that are parties to it have to adhere to those provisions.<sup>374</sup> She further comments that:

The Committee cited in particular Articles 2 (whereby ‘no exceptional circumstances whatsoever may be invoked as a justification of torture’), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer) and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) as three such provisions which must be observed in all circumstances. We trust that you will take all necessary measures to ensure that these provisions are fully adhered to in the treatment of those in US custody following military operations in Afghanistan, and that no one will be subjected to interrogation techniques which breach such standards. We would also appreciate receiving clarification of the legal status of those detained.<sup>375</sup>

As for the International Committee of the Red Cross (ICRC), although on 18 January 2002, delegates from the ICRC were allowed to visit the detainees, it was the position of the organization that they will not “comment publicly on the treatment of

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<sup>372</sup> Amnesty International, *Afghanistan/USA: Prisoners Must Be Treated Humanely* (Jan. 10, 2002), available at <http://web.amnesty.org/>

<sup>373</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

<sup>374</sup> Statement of the Committee against Torture 22/11/2001 (CAT/C/XXV11/Mis.7), in Letter from Irene Khan, Secretary General, Amnesty International, to Donald Rumsfeld, Secretary of Defense, U.S. (Jan. 7, 2001), available at <http://web.amnesty.org/>

<sup>375</sup> *Id.*

detainees or on conditions of detention. The ICRC delegates will discuss their findings directly with the detaining authorities, submit their recommendations to them, and encourage them to take the measures needed to solve any problems of humanitarian concern.”<sup>376</sup> Furthermore, officials from the Pentagon had given orders to different news agencies “not to transmit pictures of the hooded detainees being moved onto the plane, citing concern that such images may be violations of the dignity of the prisoners under international laws governing the treatment of prisoners.”<sup>377</sup> Those agencies had agreed not to do so until permission was given to them.<sup>378</sup>

Those transported to Guantanamo Bay were being shackled and had goggles, earmuffs, masks, and gloves on. This technique is called ‘sensory deprivation’, which received contempt internationally and from human rights organization.<sup>379</sup> Jim West, Amnesty International’s Chief medical officer stated that the photographs showing this ‘sensory deprivation’ technique being used “were reminiscent of torture methods used in Eastern Europe in the 1970s.”<sup>380</sup> The United States justified the goggles and earmuffs usage by stating that it was for security measures. West further stated that, “there is no obvious explanation of these measures except an attempt to degrade the man.”<sup>381</sup> According to BBC News “another human rights group said that not being able to see, hear, smell or touch would leave the prisoners feeling disorientated and

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<sup>376</sup> Press Release, First ICRC Visit Guantanamo Bay Prison Camp (Jan. 18, 2002), *available at* <http://www.icrc.org/>

<sup>377</sup> Steve Vogel, *supra* note 369. *See Pentagon Censors Pictures of Afghan Prisoners*, CHICAGO TRIBUNE, Jan. 11, 2002, *available at* LEXIS, News Library.

<sup>378</sup> *Id.*

<sup>379</sup> *See* BBC News, *Prison Camp Pictures Spark Protests* (Jan. 20, 2002), *available at* [http://news.bbc.co.uk/hi/english/world/americas/newsid\\_1771000/1771687.stm](http://news.bbc.co.uk/hi/english/world/americas/newsid_1771000/1771687.stm); Gitau Warigi, *Treatment of Prisoners Exposes America*, 49 WORLD PRESS REV. 4 (Apr. 2002), *available at* <http://www.worldpress.org/africa/0402eastafican.htm>.

<sup>380</sup> BBC News, *Prison Camp Pictures Spark Protests* (Jan. 20, 2002), *available at* [http://news.bbc.co.uk/hi/english/world/americas/newsid\\_1771000/1771687.stm](http://news.bbc.co.uk/hi/english/world/americas/newsid_1771000/1771687.stm).

<sup>381</sup> *Quoted in id.*

suffering from hallucinations.”<sup>382</sup> Those measures violate principles of humanity and those found in Geneva Convention (III), namely Articles 3, 13, 14 and 20.<sup>383</sup> Although as will be indicated later by official statements that the United States had refused to grant those detained the status of prisoners of war it argued that the standards laid down in the Geneva Conventions are being adhered to.

Another issue of utmost concern is that of the cells that the detainees were being held in at Camp X-Ray<sup>384</sup> before being transferred to cells in Camp Delta that arguably provide for more humane conditions. In Amnesty International’s own comments, at Camp X-Ray “at eight-by-eight feet, the cells are below US standards for ordinary prisoners.”<sup>385</sup> The iron cells are out in the open space allowing the sun rays all throughout the day and guards to view the detainees from all four sides, while American officials call them cells, American journalists are referring to them as ‘animal cages’.<sup>386</sup> Douglass W. Cassel, Director of the Center for International Human Rights at Northwestern University’s School of Law, comments that the treatment of the prisoners by the United States is mixed.<sup>387</sup> That although they are being offered medical care, food, sanitation and provided with towels to pray on “the prisoners live and sleep in wire mesh cages, eight feet square, albeit with metal roofs. How would Americans react if our soldiers were kept in cages?”<sup>388</sup> He further states that “Rumsfeld’s next words were even more poorly chosen. ‘They will be handled not as prisoners of war, because they’re not, but as unlawful combatants.’ This legal

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<sup>382</sup> *Id.*

<sup>383</sup> Geneva Convention (III), *supra* note 6. See Appendix G, for the full text of the articles.

<sup>384</sup> See Appendix C, for a sketch of how the cells looked like.

<sup>385</sup> BBC News, *Prison Camp Pictures Spark Protests* (Jan. 20, 2002), available at [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1771000/1771687.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1771000/1771687.stm).

<sup>386</sup> *Seree lel Ghaya* (Highly Confidential), *supra* note 364.

<sup>387</sup> Douglass W. Cassel Jr., *Tempest in a Cage, Not a Teapot*, CHICAGO DAILY LAW BULLETIN, Jan. 24, 2002, at 6, available at LEXIS, Legal News Library.

<sup>388</sup> *Id.*

conclusion was, at the very least, premature.”<sup>389</sup> The United States President commented the same when he stated that the detainees at Guantanamo “will not be treated as prisoners of war; they’re illegal combatants.”<sup>390</sup>

The conditions of the cells that the prisoners are currently being held in are an evident violation of Articles 22 and 25 of Geneva Convention (III).<sup>391</sup> The former dealing with internment of prisoners of war to be in a favorable climate, while the latter specifically states that, “prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area.”<sup>392</sup> Are the United States forces quartered in the same conditions as those of the prisoners at Guantanamo Bay? The answer is evidently to the negative. The internment conditions of the prisoners are in violation of the United States’ treaty obligations. As stated earlier on, the detainees are to enjoy the protections afforded to them under the Convention until their status is determined in accordance with Article 5 of the Geneva Convention (III).<sup>393</sup>

Those captured in Guantanamo Bay, Cuba, who fought against the United States and its allies in Afghanistan, have the right to enjoy the protection afforded to them under international humanitarian law. Article 3 common to the Geneva Conventions applies also to members of the armed forces who have laid their arms, which then would apply, to prisoners of war. This article, as previously outlined, lays down the minimum standards that should be adhered to and further recognizes the obligation to observe humanity. The rules governing the treatment of *hors de combats* in this article refers to an obligation on the parties to humanely treat them without distinction, to not

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<sup>389</sup> *Id.*

<sup>390</sup> President George Bush, Remarks Prior to Discussions With Chairman Hamid Karzai of the Afghan Interim Authority and an Exchange with Reporters (Jan. 28, 2002) (transcript *available at* <http://www.access.gpo.gov/nara/nara003.html>).

<sup>391</sup> See Appendix G for the full text of the articles.

<sup>392</sup> Geneva Convention (III), *supra* note 6, art. 25. See Appendix G, for the full text of this article.

violate their right to life and person, not to torture or treat them cruelly, not to degrade, humiliate or perform acts that would violate their personal dignity and further more not to pass sentences and carry out executions without a recognized court order.<sup>394</sup> Furthermore, humane treatment and respect of ones person and honor is further protected in Articles 13 and 14 of Geneva Conventions (III).<sup>395</sup>

A more specific treaty obligation in Geneva Convention (III) is that of Article 4.<sup>396</sup> It lays down the guidelines as to who qualifies to be declared a prisoner of war. The main arguments put forward by the United States relate to the conditions in Article 4 (A)(2)(b) and (c).<sup>397</sup> They state that militias or organized resistance movements have to fulfill certain conditions to be recognized as prisoners of war, one of which is laid down in (b) “that of having a fixed distinction sign recognizable at a distance,”<sup>398</sup> and (c) “that of carrying arms openly”.<sup>399</sup> The United States argues that those who fought against them in Afghanistan do not fulfill these conditions. Therefore, it further argues that those held in Guantanamo Bay do not qualify as prisoners of war but are considered to be terrorists or illegal combatants. However, in response to the international criticism that the United States received after it declared that prisoner of war status will not be given to the prisoners at Guantanamo, the United states modified its position in early February and stated that those who fought for Taliban would be covered by the Geneva Conventions.<sup>400</sup>

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<sup>393</sup> *Id.* art. 5.

<sup>394</sup> *See also* Hague Convention (IV) of 1910, *supra* note 8, art. 4. See Appendix J, for the full text of this article.

<sup>395</sup> Geneva Convention III, *supra* note 6, art. 13 & 14. See Appendix G, for the full text of the articles.

<sup>396</sup> *Id.* art. 4.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* art. 4 (A) (2) (b).

<sup>399</sup> *Id.* art. 4 (A) (2) (c).

<sup>400</sup> *See* Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations under the Geneva Conventions*, 9 HUM. RTS. BR. 6, 6 (Spring 2002).

While questioning this provision would only be in relation to al-Qaida group, the Taliban would fit under Article 4 (A) (1) & (3).<sup>401</sup> Those sub-paragraphs specifically states that the status of prisoner of war shall be granted to “[M]embers 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... [and to] [m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>402</sup> Therefore, whether or not the Taliban is recognized as the *de facto* government of Afghanistan is not important, the armed forces of the Taliban would still have the right to enjoy a prisoner of war status.

As for al-Qaida fighters they were considered by the United States as members of ‘other militias and members of other volunteer corps’, however the conditions laid down in Article 4(A)(2) have to be met. While the United States have been questioning the fulfillment of the conditions laid down in parts (b) and (c), part (d) could further be used against al-Qaida. It states that a prisoner of war status shall be granted if they were “conducting their operations in accordance with the laws and customs of war.”<sup>403</sup> The question then asked is if al-Qaida was in fact responsible for the incidents on 11 September 2001. A question that will not be dealt with since proper attention to this issue could be best examined in a more extensive study.

The United States President had commented the following “I am looking at the legalities involved with the Geneva Convention. In either case, however I make my decision, these detainees will be well-treated. We are not going to call them prisoners

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<sup>401</sup> Geneva Convention III, *supra* note 6, art. 4 (A) (1) & (3). See Appendix G, for the full text of this article.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* art. 4 (A) (2) (d). See *supra* note 110 and section titled “Status of Combatants” of this thesis, for a discussion on the controversial status of al-Qaida members.



of war, in either case, and the reason why is al-Qaida is not a known military.”<sup>404</sup> He further stated that the prisoners “won’t be afforded prisoner-of-war status. I’ll decide beyond that whether or not they can be noncombatants under the Geneva Convention, or not. I’ll make that legal decision soon.”<sup>405</sup> All of those held in Guantanamo have not been brought before a tribunal, to which the Secretary of Defense has commented that there was no need for such a procedure since President Bush had determined the lawfulness of their detention.<sup>406</sup> Even if those arguments are feasible, the United States cannot unilaterally determine that those detainees do not qualify as prisoners of war, until a competent and impartial tribunal renders such a decision.<sup>407</sup> Looking at Article 5 of the above-mentioned Convention where it 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 enumerates 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>408</sup>

Additionally, Antonella Notari from the International Committee of the Red Cross comments that the conflict in Afghanistan is that of an armed conflict, which means that the Geneva Conventions apply to the conflict.<sup>409</sup> She further states that this also means that any combatant that was captured has the right to be treated as a prisoner of war, at least until proven otherwise.<sup>410</sup>

Therefore, under the conditions set forth in this Convention and under the United States’ treaty obligations, it has a duty to afford all those captured the protection that is due to them in accordance with the Convention until their status is determined. The

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<sup>404</sup> President George Bush, Remarks Prior to Discussions With Chairman Hamid Karzai of the Afghan Interim Authority and an Exchange with Reporters (Jan. 28, 2002) (transcript *available at* <http://www.access.gpo.gov/nara/nara003.html>).

<sup>405</sup> *Id.*

<sup>406</sup> Douglass W. Cassel Jr., *supra* note 387.

<sup>407</sup> See also Erin Chlopak, *supra* note 400, at 7.

<sup>408</sup> Geneva Convention (III), *supra* note 6, art. 5. See Appendix G, for the full text of this article.

<sup>409</sup> Translated from Arabic by myself. This comment is found in *Seree lel Ghaya* (Highly Confidential), *supra* note 364.

United States has the obligation to ensure that a competent tribunal is established to determine the status of those captured to be that of a prisoner of war or not. Until such time, they are to enjoy the protections of the Convention. The minimum international protection that should be given to them is obscured, in which they should be granted protection as prisoners of war until their status is determined relying on the humanitarian norm not to humiliate an enemy after a battlefield.<sup>411</sup> Additionally, if it is determined that the detainees are not covered by the Convention as claimed by the United States, they are to be treated within ‘the laws of humanity, and the dictates of the public conscience’ as elaborated upon earlier on by the inclusion of the Martens Clause and its customary status.

It is thought to be unclear how the United States perceives those held in its custody at Guantanamo Bay. Although the Secretary of State, Colin Powell stated that both Taliban and al-Qaida detainees are enjoying benefits afforded to them by the Geneva Convention, he outlines that as a matter of international law, the Taliban are covered by the Geneva Convention while al-Qaida are not because of their terrorist nature and origin.<sup>412</sup> However, he further pointed out that they are both being treated humanely in accordance with the Geneva Convention.<sup>413</sup> Yet, as seen previously, different organizations and entities have been questioning such humane treatment.

Moreover, it is the position of the United States, expressed through its Secretary of State, that both Taliban and al-Qaida detainees are not entitled the status of prisoners of war.<sup>414</sup> In the words of the Secretary of State his remarks were as follows: “both categories, al-Qaida and Taliban, we believe are not entitled to prisoner-of-war

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<sup>410</sup> *Id.*

<sup>411</sup> *See, e.g.*, Geneva Convention (III), *supra* note 6, art. 3, 13 & 87. See Appendix G, for the full text of the articles.

<sup>412</sup> *Be Heard: An MTV Global Discussion with Colin Powell* (Feb. 14, 2002), available at <http://www.state.gov/secretary/rm/2002/8038.htm>.

<sup>413</sup> *Id.*

status; we believe they are entitled to be called unlawful combatants under the terms of the Convention and generally accepted international law.”<sup>415</sup> However, it is important to stress the American position regarding the treatment of the detainees in which he stated that:

We will treat all human beings that we are responsible for in our custody in a way that is dignified, without abusing them, without humiliating them, and making sure that they get the health care they need, access to religious activities, good nutrition, consistent with the Geneva Convention, although there are debates as to what we are actually required to do under the Convention with respect to Taliban and al-Qaida.<sup>416</sup>

The United States has therefore formally acknowledged the existence of those humanitarian rules relating to the treatment of those under its captivity.<sup>417</sup> It is though seen to further questioning whether such humane treatment should be afforded to those not recognized as prisoners of war. Consequently, it is further reinstating its position that the Taliban and al-Qaida members held in Guantanamo Bay are not recognized as prisoners of war. Interestingly enough, while the Secretary of State was seen questioning the humane treatment requirement for unlawful combatants, the Secretary of Defense has stated three weeks before him that he was being advised, “under the Geneva Convention, an unlawful combatant is entitled to humane treatment. Therefore, whatever one may conclude as to how the Geneva Convention may or may not apply, the United States is treating them -- all detainees -- consistently with the principles of the Geneva Convention.”<sup>418</sup> This illustrates that the American administration is confused regarding the application of the Geneva Conventions to the situation they are facing and has been issuing conflicting

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<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* See also Donald Rumsfeld, Department of Defense News Briefing (Jan. 22, 2002), available at [http://www.defenselink.mil/news/Jan2002/t01222002\\_t0122sd.html](http://www.defenselink.mil/news/Jan2002/t01222002_t0122sd.html).

<sup>417</sup> See, e.g., Donald Rumsfeld, Department of Defense News Briefing (Jan. 22, 2002), available at [http://www.defenselink.mil/news/Jan2002/t01222002\\_t0122sd.html](http://www.defenselink.mil/news/Jan2002/t01222002_t0122sd.html).

statements. As stated earlier on though, the American administration altered its position by stating that only the Taliban detainees are to enjoy the protection of the Geneva Conventions.<sup>419</sup> However, President Bush decided “that the Taliban’s actions in violating the laws of war and closely associating itself with al-Qaida had the effect of stripping Taliban members of their rights to prisoner-of-war status.”<sup>420</sup>

As illustrated, United States officials continue to refer to some of the detainees in Guantanamo as ‘unlawful combatants’. Initially all detainees were considered ‘unlawful combatants’ and therefore the United States concluded that none are privileged to enjoy the protection of the Geneva Conventions. Later on, al-Qaida detainees were the ones referred to as ‘unlawful combatants’. This referral term has been the cause of generating confusion to the international community.<sup>421</sup> Article 4 of Geneva Convention (IV) provides for a broad protection of individuals “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>422</sup> The only requirement seems to be that the prisoner be a national of a State party to the Convention.<sup>423</sup> Therefore, although the United States argues that al-Qaida do not represent a State, this argument would be flawed since in the words of the above Convention, it is likely that it covers nationals of State parties to the Conventions. All those detained belong to countries that have ratified the Geneva Conventions.<sup>424</sup> In relation to the interpretation of Geneva Conventions (III) and (IV),

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<sup>418</sup> *Id.*

<sup>419</sup> See Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A15; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

<sup>420</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 461, 477 (Apr. 2002). *See id.*

<sup>421</sup> See Erin Chlopak, *supra* note 400, at 7.

<sup>422</sup> Geneva Convention (IV), *supra* note 6, art. 4. See Appendix H, for the full text of this article.

<sup>423</sup> See Erin Chlopak, *supra* note 400, at 7.

<sup>424</sup> *See id.*

the International Committee of the Red Cross (ICRC) and the ICTY have interpreted it:

To embrace all persons who fall into enemy custody during an armed conflict, and neither had recognized an exception for so-called unlawful combatants...Human Rights Watch (HRW) explained that 'nobody in enemy hands can fall outside the law,' and prisoners detained by an enemy in an armed conflict either are protected by the Third Convention as prisoners of war, or by the Fourth Convention as civilians.<sup>425</sup>

Until today, the United States refuses to apply the Geneva Conventions to al-Qaida detainees, refuse to grant prisoner of war status to any of the detainees, and continues to deny the detainees the right to have their status determined by a competent tribunal in accordance with Article 5 of Geneva Convention (III).<sup>426</sup>

There has been discussions where the United States Secretary of Defense proposed the setting up of military commissions to consider charges against those held at Guantanamo Bay for their alleged terrorist activities.<sup>427</sup> It was further stated that those commissions would be like a military court martial, allowing the suspects the enjoyment of their rights and privileges.<sup>428</sup> Consequently, the Secretary of Defense outlined that:

The accused will enjoy a presumption of innocence; will not be required to testify or incriminate themselves at the trial. They will have the ability to discover information and to obtain witnesses and evidence needed for trial and be present at public trial. Cannot be tried for the same offense twice. Will be provided with military defense counsel at government expense, and will also be able to hire defense counsel of their choosing at their expense.<sup>429</sup>

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<sup>425</sup> *See id.*

<sup>426</sup> *Id.*

<sup>427</sup> CNN, *Military 'Commissions' will try Detainees* (March 21, 2002), available at <http://www.cnn.com/2002/US/03/21/ret.military.commissions/index.html>. See Donald Rumsfield, Department of Defense News Briefing on Military Commissions (March 21, 2002), available at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html).

<sup>428</sup> *Id.*

<sup>429</sup> Donald Rumsfield, Department of Defense News Briefing on Military Commissions (March 21, 2002), available at [http://www.defenselink.mil/news/Mar2002/t03212002\\_t0321sd.html](http://www.defenselink.mil/news/Mar2002/t03212002_t0321sd.html).

He further stressed that the tribunals will be impartial and fair, and that there is a requirement of a two-thirds of the majority of the commission for the conviction of individuals, while a unanimous vote (seven members of the commission) for the imposition of the death penalty.<sup>430</sup>

The commentary to Geneva Convention (III) refers to Article 5 of this Convention that states ‘responsible authority’ which initially some States made the suggestion that it should read ‘military tribunal’. However, it was not accepted unanimously since “it was felt that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention.”<sup>431</sup> Furthermore, another stipulation was added in this Article indicating that a ‘competent tribunal’ and specifically not a military tribunal would decide regarding the status of a person.<sup>432</sup> Courts and tribunals that afford fewer standards than those given by the International Criminal Court, it may be said, to be a regression to what the international community has achieved.<sup>433</sup> Consequently, the order of the White House in November “to try suspected terrorists in military tribunals with standards inconsistent with the ICC, the 1949 Geneva Conventions, and the 1977 Geneva Protocols must therefore be treated with serious apprehension and regrets.”<sup>434</sup> In addition, Amnesty International stated, “denying prisoners their internationally

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<sup>430</sup> It is interesting that the United States has a history of criticising such tribunals in Burma, China, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan, and Turkey. See Press Release, Past U.S. Criticism of Military Tribunals (Nov. 28, 2001), available at <http://www.hrw.org/press/2001/11/tribunals1128.html>.

<sup>431</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONER OF WAR 77 (Jean Pictet ed., 1960). See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, at 270.

<sup>432</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONER OF WAR 77 (Jean Pictet ed., 1960).

<sup>433</sup> See Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 FORDHAM INT’L L.J. 750, 759 (Mar. 2002).

<sup>434</sup> *Id.* The author of this article further states that this order included the following features: “to operate largely in secret, a two-third majority of presiding officers sentencing defendants to death, decisions being final with no appeal, and assigned legal assistance but not subject to the choice of the defendant.” The author referred to Press Release, Office of the Press Secretary of the United States, President Issues Military Order (Nov. 13, 2001), available at

recognized rights -- including the right to a fair trial -- can constitute a war crime under the Geneva Conventions and other international humanitarian law.”<sup>435</sup>

Under the norms of international humanitarian law governing the treatment of prisoners of war, the only kind of punishments that they could face, while in captivity, is disciplinary sanctions articulated in Article 89 of Geneva Convention (III).<sup>436</sup> Those disciplinary punishments referred to encompass one or more of the following: payment of a fine, suspending privileges that were granted to the prisoner over the required treatment that is provided by the Convention, ‘fatigue duties’ that do not exceed a two hour daily period, and confinement. Article 89 further provides that under no circumstances the disciplinary punishments be “inhuman, brutal or dangerous to the health of prisoners of war.”<sup>437</sup>

Furthermore, humanitarian norms establish that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>438</sup> Prisoners of war may not be punished or tried for participating in the armed conflict.<sup>439</sup> It therefore becomes evident, that by the setting up of the military commissions by the United States for trying those detained at Guantanamo Bay, the United States is continuing in its policy of not acknowledging that those detained have prisoners of war status, but actually attempting to try them. Prisoners of war can only be tried for the commission of war crimes or crimes against humanity.

Finally, whether or not those detainees are in fact prisoners of war is not what is being contested here. Alternatively, the issue at hand deals with the fact that under

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<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

<sup>435</sup> Amnesty International, *USA: Amnesty International Requests Access to Guantanamo Base* (Jan. 22, 2002), available at <http://web.amnesty.org/>

<sup>436</sup> Geneva Convention (III), *supra* note 6, art. 89. See Appendix G, for the full text of this article.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* art. 118. See also Hague Convention (IV) of 1910, *supra* note 8, art. 20. See Appendix J, for the full text of this article.

<sup>439</sup> See Erin Chlopak, *supra* note 400, at 8.

humanitarian norms, they are to be treated as prisoners of war until a determination is made regarding their status by a competent tribunal. Although the United States has repeatedly stated that it is humanely treating the detainees, they failed to observe their obligations under Article 5 of the Geneva Convention (III) dealing with the determination of the status of the captive. Leading to the fact that until this date no competent tribunal was set up to make such a determination, moreover, the President has unilaterally decided that their detention is lawful. Who is to decide on such issues? The President or a tribunal? Article 5 clearly states ‘a competent tribunal’.<sup>440</sup> A spokesman for the International Committee of the Red Cross (ICRC) stated that the ICRC reaction to the decision by President Bush on determining the status of the detainees was 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>441</sup>

The Inter-American Commission on Human Rights recently issued provisional measures for a case brought by the Center for Constitutional Rights based in New York. It found that “doubt exist as to the legal status of the Guantanamo detainees.”<sup>442</sup> Those measures were issued where the commission asked the United States to “take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.”<sup>443</sup> It further gave the United States thirty days to comply with this measure. The Commission considered the importance of issuing such measures in the current circumstances “in order to ensure that the legal

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<sup>440</sup> See Douglass W. Cassel Jr., *supra* note 387. Author further states, “This is the public view of the International Committee of the Red Cross and of the United Nations High Commissioner for Human Rights.”

<sup>441</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 461, 479 (Apr. 2002). See *U.S. POW Decision Criticized*, WASH. POST, Feb. 9, 2002, at A22.

<sup>442</sup> See Douglass W. Cassel Jr., *supra* note 387.

<sup>443</sup> Quoted in *id.* See also Human Rights Watch, *OAS Urges U.S. to Reverse Detainees Decision*, (Mar. 15, 2002), available at <http://www.hrw.org/press/2002/03/oas031502.htm>.



status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights.”<sup>444</sup> It is on this basis that the Commission directed the above request to the United States. There has been no indication yet that the United States complied with this request. On the contrary, the United States responded by claiming that the Inter-American Commission does not have jurisdiction to apply international humanitarian law and that its provisional measures were unnecessary due to the clear status of the detainees not to be that of prisoners of war since they do not meet the required criteria to be recognized as lawful combatants.<sup>445</sup>

Finally, it is suggested that the United States is setting a dangerous precedent, by selectively applying the Geneva Conventions, “for the future application and interpretation of the Geneva Conventions. In the interest of its own credibility, as well as the future safety of its own armed forces, the U.S. government would be well advised to reconsider its position and comply with all of its obligations under the Conventions.”<sup>446</sup>

### 3. Placing Civilians Near Military Targets

Just as international humanitarian law prohibits the intentional attack on civilians and destruction of civilian objects, so is the placement of civilians near military

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<sup>444</sup> Detainees in Guantanamo Bay, Inter-Am. C.H.R. (Mar. 12, 2002), *cited in Judicial and Similar Proceedings, Inter-American Commission on Human Rights (IACHR): Decision on Request for Precautionary Measures*, 41 I.L.M. 532 (May 2002) (mistranslated from Spanish to be “precautionary” instead of “provisionary”).

<sup>445</sup> *Developments in International Law: Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba*, AM. SOC’Y INT’L L. (June 4, 2002). See Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, *cited in Reports and Other Documents, United States: Response of the United States to Request for Precautionary Measures*, 41 I.L.M. 1015 (July 2002).

<sup>446</sup> See Erin Chlopak, *supra* note 400, at 13.

targets to render them immune is prohibited.<sup>447</sup> Thus, international humanitarian law “prohibits abuse of this prohibition: civilians and the civilian population and civilian objects may not be used to shield a military objective from attack.”<sup>448</sup> Even if the State is a victim of aggression, it shall “in no way be exempted from the obligations incumbent upon it under treaty or customary rules of law.”<sup>449</sup>

In the report by the United States Department of Defense following Operation Desert Storm, the United States clarified in the report that Protocol I has provisions that reflect principles of customary law. It specifically made reference to Articles 48 and 49(1),<sup>450</sup> by stating that they are “generally regarded as a codification of the customary practice of nations, and therefore binding on all.”<sup>451</sup>

This technique further violates the right of civilian populations, which puts them at risk of being bombarded by the enemy’s armed forces. Therefore, the principles found in Article 25 of the Hague Convention (IV) prohibiting the bombing of towns or villages which are not defended are being violated by such techniques.<sup>452</sup> Furthermore, there is an obligation on all parties to the conflict to avoid harming civilians. Provisions of the Hague Convention (IV) and Protocol I to the Geneva Convention are used in the footnotes to further elaborate on the minimum requirement that could be deduced from common Article 3 to the Geneva Conventions regarding

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<sup>447</sup> See Geneva Convention (IV), *supra* note 6, art. 28. See Appendix H, for the full text of this article; Protocol I, *supra* note 46 art. 51(7). See Appendix I, for the full text of this article. See also Danielle L. Infeld, Note, *Precision-guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm: But is a Country Obligated to use Precision Technology to Minimize Collateral Civilian Injury and Damage?* 26 GEO. WASH. J. INT’L L. & ECON. 109, 120 (1992).

<sup>448</sup> MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, 167.

<sup>449</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 620 (Yves Sandoz et al. eds., 1987).

<sup>450</sup> For a discussion on the controversial term ‘attacks’ in the context of this article see note 299.

<sup>451</sup> *Department of Defence Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1026.

<sup>452</sup> Hague Convention (IV) of 1910, *supra* note 8, art. 25. See Appendix J, for the full text of this article. See, e.g., Geneva Convention (IV), *supra* note 6, arts. 28 (see Appendix H, for the full text of this article); Hague Convention (IV) of 1910, *supra* note 8, art. 23 (g) (see Appendix J, for the full text of this article); Protocol I, *supra* note 6, art. 48, art. 51-56 (see Appendix I, for the full text of the articles).

the protection of those who are not party to the conflict or have fallen out of it as their status have become one of an *hors de combats* to be applied to civilian populations as well.

As previously exercised by other regimes,<sup>453</sup> the Taliban was alleged to having placed civilians near military targets to hide behind the civilian population and avoid being attacked. The action by the Taliban of moving civilians near military targets, or moving themselves to shield within the civilian population, which in turn increased civilian casualties is a violation of not only international humanitarian law but also a State's responsibility to protect its own nationals.

Reports from Amnesty International indicated that Taliban forces risked the safety of their own civilian population by stationing their troops in civilian areas that includes residential areas.<sup>454</sup> Amnesty International further indicated that such measures of hiding behind the civilians would cause difficulty for the United States and its allies from avoiding civilian casualties when raiding and specifically targeting Taliban troops.<sup>455</sup> The head of the Amnesty delegation present on the Afghan border, Carl Soderbergh stated that, "many people are reporting that the Taliban are moving into civilian locations, with the risk of drawing enemy fire and militarizing civilian

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<sup>453</sup> MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, at 1000-1002. (The authors include the report of the Secretary General on the mission to inspect civilian areas in Iran and Iraq that have been subject to military attack. The cited pages are letters from the Iraqi deputy permanent Representative of Iraq to the UN to the Secretary General and another from the Secretary General to the Presidents of Iran and Iraq dealing with the establishment of military targets near civilian populations and the usage of civilian centers for military purposes which are violations of international humanitarian law). See also *Department of Defence Report to Congress on the Conduct of the Persian Gulf War*, 31 I.L.M. 612-644, (1992), in MARCO SASSOLI & ANTOINE A. BOUVIER, *supra* note 27, 1022-1028 (the report specifically makes reference to the intentional planting of civilians as 'shields for military objects' by the Iraqi government).

<sup>454</sup> Martin Bentham, *Militias Use Civilians as a Shield*, SUNDAY TELEGRAPH (London), Nov. 11, 2002, at 16, available at LEXIS, News Library. See also William Branigin, *Taliban's Human Shields: Refugees Say Fighters Hide in Schools, Mosques*, THE WASHINGTON POST, Oct. 24, 2001, at A01, available at LEXIS, News Library.

<sup>455</sup> Martin Bentham, *Militias Use Civilians as a Shield*, SUNDAY TELEGRAPH (London), Nov. 11, 2002, at 16, available at LEXIS, News Library.

areas. This is quite serious.”<sup>456</sup> Evidently, there is the intention on part of the Taliban forces to use the civilian population as shield. This violates all the rules, discussed in this section and in the previous one dealing with “indiscriminate attacks”, regarding the inviolability of civilians and the utmost protection that should be afforded to them.

#### 4. Taking Over Hospitals for Military Purposes

Article 18 of Geneva Convention (IV) relates to the protection of hospitals to which it states that hospitals under “no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.”<sup>457</sup> Furthermore, it is noted in the commentary to this article that, “if a hospital is to enjoy special protection under the Convention, it may under no circumstances be used for non-medical purposes.”<sup>458</sup>

Taking over the hospital at Kunduz by the Taliban fighters is a violation for the protection granted to hospitals, intended solely for the care of the wounded and sick. Regarding the incident that took place at Kunduz and in relation to Article 19 of Geneva Convention (IV)<sup>459</sup> dealing with the discontinuance of protections of hospitals, the United States and its allies acted in accordance with this provision.

When the Taliban fighters took over the hospital at Kunduz for strategic purposes and began to use it to launch military attacks on the United States and its allies, the United States responded in this situation in conformity with its obligation under international humanitarian law. Knowing that the hospital was being used for belligerent acts, there was still the possibility that within it there would be wounded

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<sup>456</sup> *Id.*

<sup>457</sup> Geneva Convention (IV), *supra* note 6, art. 18. See Appendix H, for the full text of this article.

<sup>458</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 145 (Jean Pictet ed., 1958).

<sup>459</sup> Geneva Convention (IV), *supra* note 6, art. 19. See Appendix H, for the full text of this article.

and sick from the armed forces who qualify as *hors de combat*<sup>460</sup> or those who no longer are part of the armed conflict, by reason of sickness, wounds, detention or so forth and therefore protected by the Geneva Conventions.<sup>461</sup> Article 19 of Geneva Convention (IV) puts on the adversary state the obligation not to attack hospitals unless they issue a warning with a reasonable time limit to the other party.<sup>462</sup> In accordance with its obligation the United States issued a warning that it will attack and gave the forces in the hospital a time limit of two days. The wounded and sick were evacuated from the hospital, and it was then that the United States and its allies attacked the hospital and therefore ensuring to not violate their obligation under international humanitarian law.

The special protection afforded to civilian hospitals under Article 19 of Geneva Convention (IV),<sup>463</sup> would cease under certain conditions, if the hospitals were “used to commit, outside their humanitarian duties, acts harmful to the enemy.”<sup>464</sup> In the *Kupreskic* case, the ICTY looks at the ceasing of protection to hospitals and further refers to the article above giving an example of a non-humanitarian duties consisting of “if an artillery post is set up on top of the hospital.”<sup>465</sup>

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<sup>460</sup> Common Article 3 to the Geneva Conventions defines who is an *hors de combat*. See Appendix D, for the complete text of this article.

<sup>461</sup> See Geneva Convention (IV), *supra* note 6, art. 19, where it is outlined that even though the sick and wounded who are members of the armed forces maybe nursed in the hospital this shall not be considered as acts harmful to the enemy and therefore they continue to enjoy the protections afforded to them. See Appendix H, for the full text of this article.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> Geneva Convention (IV), *supra* note 6, art. 19.

<sup>465</sup> Prosecutor v. Kupreskic et al., Opinion and Judgment, Case No. IT-95-16, ¶ 523 (Jan. 14, 2000)

## CHAPTER IV: Remedies Due as a Consequence to Violations of International Law

The following chapter will assess the possible remedies that may be relevant. The conflict being an ongoing one adds to the complexity of this thesis. However, possible redress to violations of international humanitarian law in future conflicts with the establishment of the International Criminal Court will be briefly examined.

State responsibility arises when a State commits an international wrongful act.<sup>466</sup> In order to establish that there is an international wrongful act of a State, whether it is an action of that State or an omission, there are two main elements that have to be sufficed.<sup>467</sup> First, that the act or omission is attributed to the State under international law and second that this act or omission constitutes a breach of the State's international obligation.<sup>468</sup> A State that is aggrieved by such a breach has different ways to obtain remedy, notably by bringing action against the responsible State before the International Court of Justice to obtain reparations.

### A. General Remedies for States Under International Law

Reparations are due when a State has committed an international wrongful act.<sup>469</sup> The Permanent Court of International Justice in the *Chorzow Factory* case stated "it is a principle of international law, and even a greater conception of law, that any breach

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<sup>466</sup> *Draft Articles on State Responsibility*, *supra* note 31, art. 1. See Appendix K, for the full text of this article.

<sup>467</sup> *Id.* art. 2.

<sup>468</sup> *Id.*

<sup>469</sup> In the *Factory at Chorzow* case the Court ruled in favor of this principle. *Factory at Chorzow* (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17 (Sept. 13).

of an engagement involves an obligation to make reparations.”<sup>470</sup> This was subsequently recognized as a rule of customary international law “every internationally wrongful act of a State entails the international responsibility of that state.”<sup>471</sup> Article 1 of the *Draft Articles of State Responsibility* reiterates the existence of this general rule.

The Court further outlined the basic principle regarding the question of reparations. It stated that reparations, which are recognized through international practice and arbitration tribunals, “must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>472</sup> The purpose of reparations is therefore to eliminate all injury caused by an illegal act of one State towards another, given that the former was responsible for the illegal act.<sup>473</sup> Therefore, a State is responsible to make the necessary reparations for violations of its international obligation.

Professor Ian Brownlie stated that one of the “sources analogous to the writings of publicists, and at least as authoritative, are the draft articles produced by the International Law Commission...”<sup>474</sup> Theodor Meron further illustrates that the work of the International Law Commission should not only be seen as manifesting the writings of publicists but that “it constitutes a stage in the UN work of codification

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<sup>470</sup> *Id.* at 29.

<sup>471</sup> *See Draft Articles on State Responsibility, supra* note 31, art. 1. *See* Appendix K, for the full text of this article. *See also* S.S. Wimbledon Case (Fr., Italy, Japan and U.K. v. Ger.), 1923 P.C.I.J. 25 (ser. A), No. 1, at 15; Phosphates in Morocco Case (Preliminary Objections) 1938 P.C.I.J. (ser. A/B), No. 74, at 28 (June 14); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 23 (Apr. 9); Reparations for Injuries suffered in the Service of the United Nations, 1949 I.C.J. 174, at 184 (Apr. 11).

<sup>472</sup> *Factory at Chorzow* (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17, at 47 (Sept. 13). *See also Draft Articles on State Responsibility, supra* note 31, art. 31 & 34. *See* Appendix K, for the full text of the articles.

<sup>473</sup> *See Report of the International Law Commission 2001, supra* note 81, at 224, ¶ 3.

<sup>474</sup> IAN BROWNLIE, *supra* note 32, at 25.

and progressive development of international law and as such it may demonstrate practice of states and of international organizations.”<sup>475</sup>

The International Law Commission’s *Draft Articles on State Responsibility* deal with remedies in its Chapter II titled ‘Reparation for injury’.<sup>476</sup> Just before this chapter is Article 31 of the draft, stating that the State responsible for the illegal act is obligated to “make full reparation for the injury caused by the internationally wrongful act.”<sup>477</sup> It further clarifies what constitutes injury by saying that it “includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”<sup>478</sup> The formulation of such an obligation in this article illustrates that reparations are not the right of the State injured but rather an obligation of the State responsible as a result of its breach.<sup>479</sup> As observed reference is made to both material, that which can be assessed financially, and moral damage. The forms of reparation for such damages are dealt with in Chapter II of the ILC Draft Articles on State Responsibility, introduced above, titled ‘Reparation for Injury’.

In the 2001 *Report of the International Law Commission on State Responsibility* further illustration is perceived regarding the question of the necessity of a material damage to exist for reparations to be made. Where the Commission is of the opinion that there is no general requirement that material damage has to exist for a State to seek a form of reparations. The Commission cited to the *Rainbow Warrior* arbitration, where it took notice of the original arguments of one of the parties that for a State to be liable to make reparation, damage has to have existed. But it was later agreed to

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<sup>475</sup> THEODOR MERON, *supra* note 134, at 137.

<sup>476</sup> *Draft Articles on State Responsibility*, *supra* note 31. See, e.g., James Crawford, Pierre Bodeau & Jacqueline Peel, Comment, *The ILC’s Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 AM. J. INT’L L. 660, 667-8 (Oct. 2000).

<sup>477</sup> *Draft Articles on State Responsibility*, *supra* note 31, art. 31(1). See Appendix K, for the text of this article.

<sup>478</sup> *Id.* art. 31(2).

<sup>479</sup> See *Report of the International Law Commission 2001*, *supra* note 81, at 224, ¶ 4.



that “unlawful action against non-material interests, such as acts affecting the honor, dignity, or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.”<sup>480</sup> The commission notes that the Tribunal further held that France’s breach had “provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage... of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.”<sup>481</sup>

The different forms of reparations are outlined in Article 34, under Chapter II, that includes one or all of the following: restitution, compensation and satisfaction. Those forms combined together or alone are for the full reparation for the injury that was caused by the wrongful act of one State towards the other. For example, damage was found to be a material one in the *Factory at Chorzow* case where the Court dealt with restitution and compensation, as the only two forms of reparation possibly due.<sup>482</sup> Therefore depending on the injury caused, the type of reparations due are assessed. Restitution for example is not enough if material damage has been caused and therefore monetary compensation is due.<sup>483</sup> Restitution though cannot give the State injured more than what it would be entitled to if the violating State has performed its obligation.<sup>484</sup> In all different forms of reparation, the issue of proportionality is crucial. Thus, the 2001 *Report of the International Law Commission on State Responsibility* briefly illustrates the proportionality element by stating:

Thus restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party. Compensation is limited to damage actually suffered as a result of the

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<sup>480</sup> *Rainbow Warrior (N.Z. v. Fr.)*, 20 R.I.A.A. 217, at 267, ¶ 109 (1990).

<sup>481</sup> *Id.* ¶ 110.

<sup>482</sup> *Factory at Chorzow (Ger. v. Pol.)*, 1928 PCIJ (ser. A) No. 17, at 47 (Sept. 13).

<sup>483</sup> See *Report of the International Law Commission 2001*, *supra* note 81, at 235-6, ¶ 4.

<sup>484</sup> See *id.* at 236, ¶ 4.

internationally wrongful act, and excludes damage which is indirect or remote. Satisfaction must 'not be out of proportion to the injury',<sup>485</sup> <sup>486</sup>.

Therefore, the issue of proportionality is taken into consideration in the different forms of reparations under Article 34 of the draft. Where reparations are aimed to be proportional to the injury caused.

When considering the possible forms of reparation that could be due as a consequence to the conflict in Afghanistan, the most relevant one under this category is reparation to States, mainly concerning the possible remedies due to Afghanistan by the United States. This directly relates to the prohibition of the use of force, and as this thesis attempted to show that the use of force in this instance by the United States is a violation of international law, as it is not justified as a measure of self-defense. The first and primary remedy that is due is the need for a State to refrain from continuing the violation. By establishing that the use of force by the United States is a violation of international law, the United States should end its use of force.

Following is theoretically the possible forms of remedies that are due when a State has committed an international wrongful act towards another State. With the conflict at hand this would relate to the possible remedies that the United States is obligated to make for its illegal use of force on another State, Afghanistan.

### 1. Restitution

Restitution as a form of reparation is dealt with in Article 35 of the *ILC Draft Articles on State Responsibility*. The aim behind this form of reparations is "to re-establish the situation which existed before the wrongful act was committed."<sup>487</sup>

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<sup>485</sup> See *Draft Articles on State Responsibility*, *supra* note 31, art. 37 (3). See Appendix K, for the full text of this article.

<sup>486</sup> *Report of the International Law Commission 2001*, *supra* note 81, at 236-7, ¶ 5.

<sup>487</sup> *Draft Articles on State Responsibility*, *supra* note 31, art. 35. See Appendix K, for the text of this article.

Those would concern for example the returning of different types of property that was seized wrongly or of individuals detained in a wrongful manner and so forth. Therefore the changes that took place would have to be traced to the act by the violating State.<sup>488</sup> Concerned with the issue at hand, restitution is one of the most difficult forms of reparation to determine regarding the illegal use of force or the consequent violations of humanitarian norms during the conduct of hostilities or after the end of hostilities, dealing with the issue of prisoners of war at Guantanamo Bay.

However, in the ranking of the different forms of reparations, restitution comes first. This could also be seen in the decision of the Court in the *Factory at Chorzow* case where the State responsible for the injury is obligated “to restore the undertakings and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible,”<sup>489</sup> adding further in reference to the case that “the impossibility, on which the Parties are agreed, of restoring the Chorzow factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution.”<sup>490</sup> Therefore, compensation is only considered when there is a conclusion that restitution cannot be granted.<sup>491</sup>

Reference to restitution in Article 35 “has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.”<sup>492</sup> It is therefore, that its importance as the first

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<sup>488</sup> *Report of the International Law Commission* 2001, *supra* note 81, at 237-8, ¶ 1.

<sup>489</sup> *Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, at 48 (Sept. 13), *in id.* at 238, ¶ 3.

<sup>490</sup> *Id.*

<sup>491</sup> *See Report of the International Law Commission* 2001, *supra* note 81, at 239, ¶ 3. *See, e.g.*, *British Property in Spanish Morocco* (U.K. v. Spain), 2 R.I.A.A. 615, at 621-5, 651-742 (1925); *Walter Fletcher Smith* (U.S. v. Cuba), 2 R.I.A.A. 913, at 918 (1927).

<sup>492</sup> *Report of the International Law Commission* 2001, *supra* note 81, at 241, ¶ 5.

form of reparation is due to the fact that the breached obligation has a ‘continuing character’.<sup>493</sup>

As pointed out above regarding the complexity of the situation in this case, it is possible that restitution cannot be afforded, by the responsible State, since the situation present cannot be restored back to the original status quo.<sup>494</sup> However, if for example the United States offer to rebuild Afghanistan still stands, then one might wrongfully view this as a form of restitution on part of the United States. However, reparations in its different forms, restitution being one of them, are due when a State has committed an international wrongful act. In this case, the United States does not recognize that it has been acting illegal; on the contrary it claims that it is justified in its action. Therefore, the responsible State for the wrongful act does not recognize that it acted illegally and thus, it does not intentionally build up the country that it raided and bombed as an act of restitution for the wrongful act it committed. Rather, the assistance that the United States is willing to provide regarding helping with the rebuilding of Afghanistan, is one of its own will and is not viewed as an obligation incumbent upon them as a result of a breach of an international obligation.

Regarding the issue of the prisoners of war and the violation of their protected rights under the Geneva Conventions, it could be argued that their transfer back to their respective countries is a restitution mean for the injury caused, that of violating their right to have their status determined by a tribunal under Article 5 of the Geneva Convention (III). However, if restitution is deemed impossible because of the nature of the injury and the effects it had, compensation should be looked at next.

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<sup>493</sup> *See id.* ¶ 6.

<sup>494</sup> *See id.* at 239, ¶ 4.

## 2. Compensation

As pointed out earlier on, compensation is considered when restitution cannot be fulfilled. Article 36 (1) of the *ILC Draft Articles on State Responsibility* clearly points this out by stating “...insofar as such damage is not made good by restitution.”<sup>495</sup> The damage would also include any moral or material damage as outlined in the discussion of Article 31 above. However, as laid down by Article 36 (2) only “financial assessable damage” shall be compensated. Therefore this is “intended to exclude compensation for what is sometimes referred to as ‘moral damage’ to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons,”<sup>496</sup> which is what Article 37 concerning satisfaction deals with.

In the decisions of the International Court of Justice, of the different forms of reparations, compensation is what commonly is sought for.<sup>497</sup> The Court declared in the *Case Concerning Gabčíkovo-Nagymaros Project*:

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it... the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.<sup>498</sup>

However, it is important to point out that compensation in this aspect, as illustrated, has to be assessable and therefore, it is not regarded as means of punishing the responsible State. Moreover, international courts do not award punitive

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<sup>495</sup> *Draft Articles on State Responsibility*, *supra* note 31, art. 36 (1). See Appendix K, for the full text of this article.

<sup>496</sup> *Report of the International Law Commission 2001*, *supra* note 81, at 244, ¶ 1.

<sup>497</sup> *Id.* ¶ 2.

<sup>498</sup> *Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Solvk.)* 1997 I.C.J. 7, at 81, ¶ 152 (Sept. 25).

damages.<sup>499</sup> Another well-established principle is that international courts, that already have jurisdiction regarding claims of State responsibility, as part of this jurisdiction has also “the power to award compensation for damages suffered.”<sup>500</sup>

Applying this to the situation at hand, compensation could only be possible if for example, a company or maybe a Red Cross compound was bombarded by one of the parties to the conflict. The responsible State would then be required to pay compensation for the damages it caused, bearing in mind that the facility was not used to conduct military operations. Compensation is also possible for moral damages. And thus, for example the families of the journalists who were killed by the then representative of Afghanistan, the Taliban government, could be entitled to receive compensation. Furthermore, civilians whose houses and belongings were bombarded, by the United States and its allies, would be entitled to monetary compensation. The prisoners of war would further be entitled to compensation for the violation of their right to due process.

The offer made by the United States that it is committed to assist in the restructuring of Afghanistan included what the U.S. President referred to that,

The United States Overseas Private Investment Corporation will provide an additional \$50 million line of credit for Afghanistan to finance private sector projects. This announcement builds on the United States’ pledge in Tokyo earlier this month to provide \$297 million this year to create jobs and to start rebuilding Afghanistan’s

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<sup>499</sup> *Report of the International Law Commission* 2001, *supra* note 81, at 245-6, ¶ 4.

“The expression ‘fair compensation,’ used in Article 63 (1) of the Convention to refer to a part of the reparation and to the ‘injured party,’ is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.”

Velasquez Rodriguez, *Compensatory Damages*, Inter-Am. Ct.H.R. (ser. C) No. 7, at 52, ¶ 38 (1989).

<sup>500</sup> *Report of the International Law Commission* 2001, *supra* note 81, at 244, ¶ 2; *Factory at Chorzow* (Germany v. Poland), *Jurisdiction*, 1927 P.C.I.J (ser. A) No. 9, at 21 (Sept. 13); *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175, at 203-205, ¶ 71-76; *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, at 142 (June 27).

agricultural sector, its health care system, and its educational system.  
Yet these efforts are only the beginning...<sup>501</sup>

Again, this commitment could wrongfully be seen as a form of compensation. However, the United States does not recognize that it acted illegally and thus the intention of this commitment is not compensation to an illegal act, but that of assistance to a new regional friend.

### 3. Just Satisfaction

The last form of reparation available, in the wording of Article 34, is that of satisfaction which is only required if the other two forms did not provide for the full reparation for the damage caused.<sup>502</sup> The ways in which satisfaction may be carried out is outlined in Article 37 (2) stating that it “may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”<sup>503</sup>

While as pointed above that compensation is for damages financially assessable, satisfaction is due for those kinds of damages that cannot be assessed financially. This kind of remedy was dealt with in the *Rainbow Warrior* arbitration where the tribunal was of the opinion that:

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<sup>501</sup> President George Bush, Remarks Prior to Discussions With Chairman Hamid Karzai of the Afghan Interim Authority and an Exchange with Reporters (Jan. 28, 2002) (transcript *available at* <http://www.access.gpo.gov/nara/nara003.html>). The United States also provided civilians food across Afghanistan. *See, e.g.*, Associated Press, *Planes Drop 35,000 More Rations* (Oct. 28, 2001). The United States had also committed itself to \$32 million to Afghan Refugees during the month of October. Press Release, Department of State, Response to the Refugee Crisis in Afghanistan (Oct. 26, 2001), *available at* <http://www.state.gov/r/pa/prs/ps/2001/index.cfm?docid=5767>. It also provided for a Special Fund for Afghan Children to help them survive. Press Release, White House, President Announces ‘America’s Fund for Afghan Children’ (Oct. 11, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/10/20011011-8.html>. *See generally*, Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 17 (Winter 2002).

<sup>502</sup> *See Draft Articles on State Responsibility, supra* note 31, art. 37(1). *See* Appendix K, for the full text of this article.

<sup>503</sup> *Id.* art. 37 (2).

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.<sup>504</sup>

The violation of sovereignty or territorial integrity, as what occurred in the *Rainbow Warrior* arbitration, is an example where satisfaction is due since there was a non-material injury by the responsible State towards the injured State.<sup>505</sup>

One of the forms of satisfaction that could be made is a declaratory judgment by a competent tribunal or court. The International Court of Justice emphasized this in the *Corfu Channel* case by stating “to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.”<sup>506</sup> This declaration came after the Court found that the ‘mine-sweeping operation’ by the British Navy that took place after the explosion, was unlawful.<sup>507</sup>

Another form of satisfaction is that of an apology or the expression of regret of the responsible State towards the injured State. In the *Rainbow Warrior* arbitration an apology was required, while it was further offered in different cases such as the *Vienna Convention on Consular Relations*<sup>508</sup> case and the *LeGrand*<sup>509</sup> case.

Since currently the issue dealt with is not considered in an international court or tribunal, the reparations under this form, mainly satisfaction, could be expressed by a formal apology or expression of regret for injuries that are not assessable financially.

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<sup>504</sup> *Rainbow Warrior* (N.Z. v. Fr.), 20 R.I.A.A. 217, at 272-273, ¶ 122 (1990).

<sup>505</sup> See *Report of the International Law Commission* 2001, *supra* note 81, at 264-265, ¶ 4.

<sup>506</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, at 35 (Apr. 9), *in id.* at 266, ¶ 6.

<sup>507</sup> *Report of the International Law Commission* 2001, *supra* note 81, at 266, ¶ 6.

<sup>508</sup> *Vienna Convention on Consular Relations* (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, ¶ 29 (Apr. 9).



In relation to the conflict, those would include for example the ill treatment of persons with immunity or protected persons.<sup>510</sup> Other kinds of incidents where an apology would be due would be the unintentional injury caused to civilians while targeting military objectives.

#### B. Remedies for Violations of *jus ad bellum*

In the wording of Article 31, reparations are to be made only to the injury that resulted from the wrongful act by the State.<sup>511</sup> Applying this to the case at hand, it would be in reference to the violation of the prohibition of the use of force. Since the argument of resorting to self-defense fails to stand as outlined in Chapter I, the United States is therefore obligated to make the necessary reparations to the injured party, Afghanistan, the first of which is to bring to end using force.

The use of force could be argued to result in both material and moral damages. However, as illustrated earlier, with special reference to the *Rainbow Warrior* arbitration, material damage does not have to exist for reparations to be due. Therefore, the existence of one form of damages or both would hold the responsible State liable to make reparations for such damages incurred.

Different factors could lead to the causation of damages, where in the *Corfu Channel* case both the action of a third State that laid the mines and the Albanian action of not notifying or warning the British ships of the existence of the mines led to the damage to the ships.<sup>512</sup> Dealing with reparations for concurrent causes, the 2001 *Report of the International Law Commission on State Responsibility*, clarifies that

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<sup>509</sup> LaGrande (Ger. v. U.S.), ¶ 123 (June 27, 2001), available at <http://www.icj-cij.org> (however the Court was of the opinion that an expression of apology by the United States is not enough to repair the injury caused in this case).

<sup>510</sup> See *Report of the International Law Commission 2001*, *supra* note 81, at 265, ¶ 4.

<sup>511</sup> *Draft Articles on State Responsibility*, *supra* note 31, art. 31.

when a combination of factors cause an injury and “only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.”<sup>513</sup>

Consequently, in relation to the conflict in Afghanistan the argument is that if as established earlier that the use of force as a resort to self-defense by the United States is a violation of international law, it could be argued that the United States by engaging in such an illegal resort to force is responsible for all the damages resulting from its initial and continuing, till this day, use of force alongside those allies whom fought with it. This is applied to the case at hand as an analogy to what was applied in the *Corfu Channel* case, where the United Kingdom received all its claim for reparations from Albania for failing to notify the British ships of the mines although Albania did not plant the mines itself.<sup>514</sup>

In this case, the resorting to the illegal use of force by the United States had led to the involvement of its different allies who fought along its side, e.g. the United Kingdom and the opposition (Northern Alliance), and therefore, the United States is obligated to make reparations for all the damages caused as a consequence to its illegal act of using force and inviting others to assist it. Those damages could be both material and moral damages incurred on part of Afghanistan.

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<sup>512</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, at 17-18, 22-23 (Apr. 9) in *Report of the International Law Commission 2001*, *supra* note 81, at 229, ¶ 12.

<sup>513</sup> *Report of the International Law Commission 2001*, *supra* note 81, at 229-230, ¶ 12. See *Corfu Channel (U.K. v. Alb.) (Assessment of the Amount of Compensation)*, 1949 I.C.J. 244, at 250.

<sup>514</sup> See *Corfu Channel (U.K. v. Alb.) (Assessment of the Amount of Compensation)*, 1949 I.C.J. 244, at 250 in *Report of the International Law Commission 2001*, *supra* note 81, at 230, ¶ 12.

### C. Remedies for Violations of *jus in bello* or International Humanitarian Law.

There was no vision for reparation for damages in the language of specifically the Geneva Conventions and more generally international humanitarian law. This is not the case however with “Article 3 of the Hague Convention No. IV and Article 91 of Protocol I... [in which] humanitarian instruments generally focus on rules applicable during hostilities, not on reparation for damage.”<sup>515</sup> Thus, what is apparent in both these articles is the rising liability by the violating state to pay compensation for the damages caused, one concerning breaches of the Hague Convention, and the other dealing with those of the Geneva Conventions and Protocol I. This issue was looked upon in Theodor Meron’s book,<sup>516</sup> where he focuses on the possible remedies to violations of humanitarian norms by States, and their responsibility to remedy the situation.

However, the inclusion of a reparation clause in the Convention is not necessary as seen in the decision of the Permanent Court in the *Chorzow Factory* case, where it states that:

It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.<sup>517</sup>

This further highlights the generally recognized principle concerning the consequences of an international wrongful act by a state towards another, regardless of whether or not the convention, outlining the obligation, had clauses dealing with reparations. Therefore, the fact that a compensation clause is lacking from the Geneva

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<sup>515</sup> THEODOR MERON, *supra* note 134, at 222.

<sup>516</sup> *Id.*

<sup>517</sup> *Factory at Chorzow (Ger. v. Pol.)*, Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 21.

Conventions of 1949, this does not mean that compensation for a violation of the provision is not due or cannot be granted. Lastly, the provisions of Hague Convention IV were recognized to be rules of international humanitarian law, which evolved into customary international law.<sup>518</sup> As mentioned, Hague Convention IV had a compensation clause stating that, “a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”<sup>519</sup>

On a different tone, the grave breaches provisions found in Geneva Convention (I) Articles 49, 50,<sup>520</sup> Geneva Convention (II) Articles 50, 51,<sup>521</sup> Geneva Convention (III) Articles 129, 130,<sup>522</sup> and Geneva Convention (IV) Articles 146, 147,<sup>523</sup> puts an obligation on States parties to enact legislation to punish perpetrators and those who give orders for the commission of such crimes. This is another possible remedy, where investigations or fact-finding missions would be sent to investigate the crimes that might have taken place and holding individuals, at whatever command level they are, liable for the grave breaches provision. In this case, it is evident that the violations discussed on part of the United States were a result of operations carried out by State organs with the knowledge and approval of the State. Those individuals who gave such orders should be tried for grave breaches of the Geneva Conventions where they would be criminally responsible for the orders or actions they took.

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<sup>518</sup> See *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704 (1993).

<sup>519</sup> Hague Convention (IV) of 1910, *supra* note 8, art. 3. See Appendix J, for the full text of this article.

<sup>520</sup> Geneva Convention (I), *supra* note 6, arts. 2, 49 & 50. See Appendix D & E, for the full text of the articles.

<sup>521</sup> Geneva Convention (II), *supra* note 6, arts. 2, 50 & 51. See Appendix D & F, for the full text of the articles.

<sup>522</sup> Geneva Convention (III), *supra* note 6, arts. 2, 129 & 130. See Appendix D & G, for the full text of the articles.

<sup>523</sup> Geneva Convention (IV), *supra* note 6, arts. 2, 146 & 147. See Appendix D & H, for the full text of the articles.

Universal jurisdiction exists over individuals who commit or order the commission of crimes that are grave breaches of the respective conventions, in international armed conflicts in relation to Common Article 2 to the Geneva Conventions.<sup>524</sup> In the *Tadic* case, there was an attempt by the trial chamber to extend the universal jurisdiction to apply to non-international armed conflicts as well.<sup>525</sup> However, the appellate chamber later reversed this decision.

The grave breaches provisions indicate that there is an obligation on State parties to the Conventions to try and prosecute those who commit grave breaches. Thus, this obligation establishes that there is no discretion by the State on this matter but it is responsible to ensure that the individual perpetrators of the crimes are either punished or extradited.<sup>526</sup> However, universal jurisdiction over grave breaches only applies with respect to international armed conflicts.<sup>527</sup> That includes violations of common Article 3 with respect to international armed conflicts.<sup>528</sup>

Trying individuals under the grave breaches provisions of the Geneva Conventions is not novel, but was actually applied before. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>529</sup> and the

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<sup>524</sup> Universal jurisdiction extends to slave trade, piracy, genocide, torture, crimes against peace, war crimes, crimes against humanity. See Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 815-39 (1988). States, like Belgium, also enacted domestic laws to be able to prosecute individuals under the universality principle for the most serious international crimes. See also MARC WELLER & WILLIAM BURKE-WHITE, *NO PLACE TO HIDE: NEW DEVELOPMENTS IN THE EXERCISE OF INTERNATIONAL CRIMINAL JUSTICE*, Ch. 2 (2002).

<sup>525</sup> Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1, ¶ 49-51 (Aug. 10, 1995). See Madeline Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 LAW & CONTEMP. PROBS. 13, 13-66, at 31 (2001).

<sup>526</sup> This inclusion in the Geneva Conventions of 1949 was a reaction to the atrocities committed in WWII, to which States had previously continuously failed to stop individuals from committing such heinous crimes.

<sup>527</sup> As mentioned earlier, in the *Tadic* case the appellate chamber of the ICTY rejected the extension of universal jurisdiction over those who commit or order grave breaches to non-international armed conflicts.

<sup>528</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27) (In the Military and Paramilitary Activities case, the court held that Common Article 3 applied to international armed conflicts as well since those rules constitute the minimum protections).

<sup>529</sup> ICTY Statute, *supra* note 209.

International Criminal Tribunal for Rwanda (ICTR)<sup>530</sup> tried individuals for crimes against humanity and for grave breaches of the Geneva Conventions. In the case *Prosecutor v. Tadic*,<sup>531</sup> Tadic was found guilty of crimes against humanity and importantly of 'cruel treatment' of civilians in violation of the laws and customs of war pursuant to Article 3 common to the Geneva Conventions of 12 August 1949. As discussed in Chapter II, common Article 3 to the Geneva Conventions is considered as a rule of customary international law. Chapter II discusses the development of international humanitarian law. The development of humanitarian law is also seen throughout the principles that were used by the ad-hoc tribunals that tried war criminals, and finding them in violations of international humanitarian law principles.

As established in the Charter of the Nuremberg Tribunals<sup>532</sup> criminal responsibility could extend to individuals regarding the perpetuation of certain types of crimes. In this Charter, the principle of individual criminal responsibility was established to which it also offers a definition of the three main crimes in international law then: crimes against peace, war crimes and crimes against humanity.<sup>533</sup> Those are nowadays outlined in Article 5 of the International Criminal Court's statute.<sup>534</sup> In the current situation, there are crimes to which individual criminal responsibility could arise. Consequently, this is another form of remedy that is possible in this situation, which is trying those in violation of international humanitarian norms. Other precedents exist where individuals, including heads of state and officials, have faced criminal prosecutions for crimes against humanity and

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<sup>530</sup> ICTR Statute, *supra* note 224.

<sup>531</sup> *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT-94-1 (May 7, 1997).

<sup>532</sup> Charter of the Nuremberg Tribunal, *supra* note 23.

<sup>533</sup> Tae-Ung Baik, *A War Crime Against an Ally's Civilians: The No Gun Ri Massacre*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455, 459 (2001).

<sup>534</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, (entered into force July 1, 2002), *available at* <http://www.un.org/law/icc/statute/romefra.htm> (last visited Apr. 14, 2002)[hereinafter I.C.C. Statute].

grave breaches of the Geneva Conventions. The main precedent referred to are those of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Depending on what crime one is alleged to have committed and the existence of an international armed conflict, the provisions dealing with grave breaches in the Geneva Conventions of 1949 provide States with universal jurisdiction.<sup>535</sup> In the *Tadic* case, the trial chamber had attempted to extend the universal jurisdiction over grave breaches of the Geneva Convention to non-international armed conflict.<sup>536</sup> It did so by looking at Article 2 of the Statute of the ICTY, which states “the tribunal shall have the power to prosecute persons committing or ordering to committed grave breaches of the Geneva Conventions of 12 August 1949...”<sup>537</sup> and further ruling that when such grave breaches are committed, the acts may be prosecuted by the ICTY whether or not those acts took place in an international armed conflict.<sup>538</sup> The trial chamber was of the opinion that “the requirement of international conflict does not appear on the face of Article 2...” of the ICTY Statute, and that “there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention[s] to international conflicts...”<sup>539</sup> However the appellate chamber of the ICTY reversed the decision of the trial chamber rejecting it and its argument that universal jurisdiction over grave breaches of the Geneva Conventions of 1949 apply

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<sup>535</sup> See Geneva Convention (I), *supra* note 6, arts. 2, 49 & 50; Geneva Convention (II), *supra* note 6, arts. 2, 50 & 51; Geneva Convention (III), *supra* note 6, arts. 2, 129 & 130; Geneva Convention (IV), *supra* note 6, arts. 2, 146 & 147. See Appendixes D, E, F, G, and H respectively, for the full text of those articles.

<sup>536</sup> Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1, ¶ 49-51 (Aug. 10, 1995). See Madeline Morris, *supra* note 525, at 31.

<sup>537</sup> ICTY Statute, *supra* note 209, art. 2.

<sup>538</sup> See Madeline Morris, *supra* note 525, at 31.

<sup>539</sup> Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1, ¶ 49-51 (Aug. 10, 1995) in Madeline Morris, *supra* note 525, at 31.

to non-international armed conflicts as well.<sup>540</sup> As Morris points out in her article, the appellate chamber of the ICTY reversed the decision of the trial Court “on a very basic question of international criminal law.”<sup>541</sup> She further clarifies that such issues are still in the process of being agreed to as demonstrated in the case above. However, the most concerning principles here is that universal jurisdiction over grave breaches of the Geneva Conventions of 1949, subject that the acts were committed in an international armed conflict, is not questioned by the before mentioned case.

The Geneva Conventions of 1949 as outlined above “reinforces this universal jurisdiction by making it a duty for states to identify, prosecute, and punish all persons, whatever their nationality, who have committed particularly serious war crimes (‘grave breaches’).”<sup>542</sup> Exercising its right to universal jurisdiction, a Belgian Court issued an arrest warrant in April 2000 for the Minister for Foreign Affairs of Congo for grave breaches of the Geneva Conventions and their protocols and crimes against humanity. The latest decision by the International Court of Justice comes as a setback for universal jurisdiction over, heads of states and those with diplomatic immunity, whom are deemed responsible for inciting the commission of war crimes, genocide, or crimes against humanity or even for grave breaches of the Geneva Conventions.<sup>543</sup> The Court was of the opinion that the Congolese Minister of Foreign Affairs, whom the Belgian authorities had an arrest warrant issued for, was immune from jurisdiction for any of the crimes he is alleged to have committed while in office.

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<sup>540</sup> Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶ 80-83 (Oct. 2, 1995) in Madeline Morris, *supra* note 525, at 31-32.

<sup>541</sup> Madeline Morris, *supra* note 525, at 32.

<sup>542</sup> Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 43-46, 44 (Dinah Shelton ed., 2000).

<sup>543</sup> Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Feb. 14, 2002), available at <http://www.icj-cij.org>.



The Court ordered the Belgian government to cancel the arrest warrant that it had issued on 11 April 2000.

Paragraph 60 of the decision clearly points out “that immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.”<sup>544</sup> The following paragraph lays down four different scenarios when a person with diplomatic immunity could face criminal prosecution (Special reference in the case is made to ‘incumbent or former’ Minister of Foreign Affairs). The first, they are not immune under international law in their own countries and could therefore face prosecution under the relevant domestic laws.<sup>545</sup> Second, if the State they have represented or still represent waives the immunity, then they are not immune from foreign jurisdictions.<sup>546</sup> Third, after the person ceases to be in office, he/she is not immune from foreign jurisdiction for prior or subsequent acts committed or for those acts he/she commits while in office but in a private capacity.<sup>547</sup> Last, the immunity is lost if they are subject to an International Criminal Court or tribunal where it has jurisdiction.<sup>548</sup> The Court further gives examples to illustrate this last point by pointing to the ICTR and the ICTY, both of which were established by Security Council resolutions under Chapter VII. It also points to the prospective International Criminal Court (ICC), which came into force, 1 July 2002 as announced by the UN Office of Legal Affairs.<sup>549</sup> Special emphasis is added to Article 27(2) of the ICC statute stating “Immunities or special procedural rules which may attach to

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<sup>544</sup> *Id.* ¶ 60.

<sup>545</sup> *Id.* ¶ 61.

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> Press Release, UN Office of Legal Affairs, Rome Statute of International Criminal Court to Come Into Force; Treaty Even to be Held at UN Headquarters on 11 April, L/T/4365/Rev.1 (Apr. 1, 2002), available at <http://www.un.org/News/Press/docs/2002/LT4365Rev1.doc.htm>.

the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>550</sup>

In the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal,<sup>551</sup> they provide a historical survey on how universal jurisdiction has been perceived by States. They summarized the findings by stating that there exists broad treaty-based extraterritorial jurisdiction,

[I]n addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found, shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as ‘universal jurisdiction’, though this is really an obligatory territorial jurisdiction over persons, albeit in relations to acts committed elsewhere.<sup>552</sup>

Furthermore, although they agree that the exercise of universal jurisdiction is not established by State practice, “this does not necessarily indicate, however, that such a exercise would be unlawful ... [where] there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction.”<sup>553</sup> They further elaborate that indications show that over certain international crimes, a universal criminal jurisdiction is evidently not considered as unlawful,<sup>554</sup> “[where] the duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crimes rather than on links of territoriality or nationality (whether as perpetrator or victim).”<sup>555</sup> At this stage of their opinion they point to the Geneva Conventions of 1949, which “lend

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<sup>550</sup> I.C.C. Statute, *supra* note 534, art. 27(2). See Appendix L, for the full text of this article.

<sup>551</sup> Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Feb. 14, 2002), *available at* <http://www.icj-cij.org>. (separate opinion of Judges Higgins, Kooijmans and Buergenthal).

<sup>552</sup> *Id.* ¶ 41.

<sup>553</sup> *Id.* ¶ 45.

<sup>554</sup> *Id.* ¶ 46.

<sup>555</sup> *Id.*

support to this possibility, and are widely regarded as today reflecting customary international law.”<sup>556</sup>

Concluding, the grave breaches provisions in the Geneva Conventions which applies, as mentioned above, to international armed conflicts “place affirmative duties on states to suppress such breaches and to search for an extradite or prosecute violators.”<sup>557</sup> It is thus that States are obligated to try or extradite individuals who are responsible for the commission or the ordering of crimes, to which a legal regime for such exists.

#### D. Future Role of the International Criminal Court

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you...to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflict know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”<sup>558</sup>

Kofi Anan, United Nations Secretary General.

The Secretary General of the United Nations had made this statement before the signing of the Rome Statute of the International Criminal Court in 1998. His statement reflects the outcome he had hoped for and that is an establishment of an International Criminal Court (ICC). On 1 July 2002, the Statute of the International Criminal Court came into force.

Neither Afghanistan nor the United States are parties to the ICC Statute. However, in order to illustrate how the ICC could be a possible remedy for future similar situations, let us hypothetically say that all parties to the conflict have ratified the

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<sup>556</sup> *Id. See, e.g.*, CHERIF BASSIOUNI, 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 228 (2d ed. 1999); Theodore Meron, *Internationalization of Internal Atrocities*, 89 AM. J. INT’L L. 576 (1995).

respective Statute; and that the latter has come into force before the conflict took place in Afghanistan.

Under the individual criminal responsibility provision in the statute of the ICC, not only does the ICC have jurisdiction over individuals who commit the acts punishable by the statute but also those who order or induce others to commit such acts.<sup>559</sup> The Court's jurisdiction also extends to an individual who:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission....<sup>560</sup>

These categories thus involve not only armed forces actually engaging in combat, but also those who give orders, including Commanders in Chief, Defense Ministers, or Heads of States. As outlined in Article 27(2) of the ICC statute, the Court is not even barred from exercising its jurisdiction over persons with special immunities. Furthermore, as pointed out in the *Arrest Warrant of 11 April 2000* case, the Court was of the opinion that immunity is lost if the individual with immunity is subject to the jurisdiction of an international criminal Court.<sup>561</sup> Therefore, individuals from both sides as well as those officials who gave the orders, including heads of State are liable to prosecution.

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<sup>557</sup> Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 6.

<sup>558</sup> *Overview of Rome Statute of the International Criminal Court*, at <http://www.un.org>.

<sup>559</sup> I.C.C. Statute, *supra* note 534, art. 25(3). See Appendix L, for the full text of this article. See also Charter of the Nuremberg Tribunal, *supra* note 23 (establishes that criminal responsibility extends to individuals regarding the perpetuation of certain types of crimes).

<sup>560</sup> I.C.C. Statute, *supra* note 534, art. 25(3).

<sup>561</sup> *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, ¶ 61, (Feb. 14, 2002), available at <http://www.icj-cij.org>.

The ICC may exercise jurisdiction over all crimes generally defined in Article 5 of its Statute.<sup>562</sup> This includes the most serious grave breaches of the Geneva Conventions of 1949, which are crimes against humanity and or war crimes. Furthermore, “many of the customary rules and laws are now embodied in the Rome Statute and will become enforceable when the new court comes into operation.”<sup>563</sup>

Although the ICC has been met with opposition by many States, its existence is essential for not only deterring the commission of future grave crimes, but for bringing about remedies for grave violations of international humanitarian law.<sup>564</sup> Most important, immunities for officials of States that has prevented the exercise of universal jurisdiction over people who are at the top of the command hierarchy will no longer be allowed in most cases. The ICC is thus a mechanism that will enhance world peace and security by bringing to justice those who perpetrate or order acts that are contrary to principles of international humanitarian law.

A former Nuremberg prosecutor stated that, “there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstances.”<sup>565</sup> As demonstrated in this thesis, the law that governs the conduct of wars and the protection to be afforded to individuals already exists. It is its enforcement that remains weak. The ICC is seen to have “brought enforcement to international criminal law and international humanitarian law,” and “while we have numerous rules and laws protecting civilians, regulating the treatment of prisoners and prohibiting the use of certain weapons and instruments, they have rarely been enforced and violators have hardly been

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<sup>562</sup> I.C.C. Statute, *supra* note 534, art. 5. See Appendix L, for the full text of this article.

<sup>563</sup> Roy S. Lee, *supra* note 433, at 753.

<sup>564</sup> *Id.*

<sup>565</sup> *Overview of Rome Statute of the International Criminal Court*, at <http://www.un.org>.

punished.”<sup>566</sup> The ICC is seen as a possible effective remedy to future conflicts, if not to some of the alleged violations that took place throughout the course of the war in Afghanistan, as discussed above.

The ICC would apply the principle of complementary, where the jurisdiction of the ICC is only applicable when a State is unwilling or unable to exercise jurisdiction over a certain case involving an individual accused of committing a crime.<sup>567</sup> The ICC would therefore serve as a basis to encourage national courts and tribunals to exercise jurisdiction, to which they have the priority to exercise jurisdiction over the ICC.<sup>568</sup> Applying this to the situation at hand, States are encouraged to try and punish those individuals who have committed crimes in breach of the Geneva Conventions, and international humanitarian law in general. If States fail or are not able to do so, then the ICC could have jurisdiction to deal with such violations. In the present conflict in Afghanistan, since the principle of non-retroactivity is included in the ICC statute, the jurisdiction of the ICC over crimes committed in the conflict before July 1, 2002 does not hold. However, crimes that are committed and continue to take place after July 1, 2002 fall within the jurisdiction of the Court. Furthermore, the Security Council is given the right to refer cases to the ICC. Due to the nature of the composition of the Security Council, and the veto power of the United States, which is a party to this conflict, this process will not be possible if American soldiers or any soldiers from the allied forces are subject to proceedings for committing or ordering the commission of crimes within the jurisdiction of the ICC.

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<sup>566</sup> Roy S. Lee, *supra* note 433, at 753

<sup>567</sup> I.C.C. Statute, *supra* note 534 (noting that the jurisdiction of the Court “shall be complementary to national criminal jurisdictions). This system was argued to be the ideal in giving the priority for national jurisdictions and then to an international jurisdiction. *See id.* at 751; Anne-Marie Slaughter & William Burke-White, *supra* note 44, at 15.

<sup>568</sup> *See* Roy S. Lee, *supra* note 433, at 751-752.

## CONCLUSION

“From now on, all potential warlords must know that, depending on how a conflict develops there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law... Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defence that the suspects were not aware of the law will not be permissible.”<sup>569</sup>

Hans Corell, United Nations Under-Secretary General for Legal Affairs.

The conflict in Afghanistan is still ongoing and violations of international law continue to take place. However, this thesis is fixed to the time period of the respective violations discussed in Chapters I and III. The discussion above has argued that the use of force by the United States and the consequences of such use of force constituted violations of international law.

As indicated in Chapter I of the thesis, and in line with the available evidence,<sup>570</sup> the use of force by the United States against Afghanistan is not justified as means of self-defense. In Chapter VI, State responsibility was touched upon, where such a responsibility arises when an international wrongful act is committed by a State. The act has to be attributed to the State and constitute a breach of its international obligation.<sup>571</sup> Once this is determined, reparations are due by the State that committed the international wrongful act.<sup>572</sup> The use of force by the United States against Afghanistan is attributed to the United States; it also constitutes a violation of its

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<sup>569</sup> *Overview of Rome Statute of the International Criminal Court*, at <http://www.un.org>.

<sup>570</sup> There is no evidence that Taliban officials and al-Qaida members are indistinguishable. As argued in Chapter I, it is only this qualification, if proved to have been the situation that could permit the use of force under the scope of Article 51 of the UN Charter.

<sup>571</sup> *See supra* note 468.

international obligation. The United States is internationally responsible for violating the prohibition on the use of force, required by its treaty obligations and customary international law. Since the conflict did not cease to exist, the United States continues till today to be liable for the use of force, and its consequences, it had instituted against Afghanistan on 7 October 2001. Reparations on part of the United States are thus due to Afghanistan for the illegal use of force, which is the international wrongful act committed by the United States. The first form of reparations that is due is for the United States to cease from continuing the use of force. Furthermore, trying individuals responsible for grave breaches of the Geneva Conventions is due.

It is unfortunate that the Conventions applicable during armed conflicts lack effective enforcement mechanisms to deter and punish individuals committing crimes within the scope of those Conventions. As illustrated in this thesis the international community has attempted to address such crimes by the Security Council establishing the ICTY and the ICTR. With the ICC becoming a reality on 1 July 2002, crimes that take place after this date may also be punishable by a court. Therefore, the continuation of violations of humanitarian law, with specific reference to crimes against humanity and war crimes will become an issue if one of the parties to the conflict ratifies the Court's Statute.

One of the countries with the major amount of forces in Afghanistan after the United States, the United Kingdom, is party to the Statute of the ICC since it submitted its ratification 4 October 2001. Article 12 of the ICC statute extends the jurisdiction of the court to non-state parties. This is seen where the court would have jurisdiction over crimes that are committed a) over the territory of a state party b) or

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<sup>572</sup> In the *Factory at Chorzow* case the Court ruled in favour of this principle. *Factory at Chorzow* (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17 (Sept. 13).



the person accused being a national of a state party.<sup>573</sup> In the first instance, if for example Afghanistan accepts the jurisdiction of the Court within the context of Article 12(3)<sup>574</sup> or becomes a state party to the statute, then any violation of the crimes punishable by the Court that occurs on its territory could be brought forward to the Court, whether or not the State, whom the individual who committed the act belongs to, ratified or even consented to such a jurisdiction.

The effectiveness of the ICC in punishing individuals responsible for the commission or ordering for war crimes, genocide and crimes against humanity remains to be seen.<sup>575</sup> The definition of the crime of aggression, as outlined above, is crucial by which States could be held liable for committing a crime of aggression. This would be an unprecedented step that an international court will have the ultimate jurisdiction in determining whether or not a State is committing aggression. However, how States will define the crime of aggression remains to be seen in the coming years.

Although the ICC will only deal with crimes that are committed after its entry into force in accordance with Article 11,<sup>576</sup> the ICC will be a reminder to heads of States, military commanders, officers and individuals that none of them is immune from prosecution, for their actions. It is the hope that the ICC will serve as deterrence for the commission of future violations,<sup>577</sup> and as a mean of remedy. In the context of this conflict, the ICC, in theory, could still deal with cases regarding individuals responsible for the commission of crimes under which the ICC has jurisdiction over, if the Security Council refers the matter to the ICC. However, with the veto power of

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<sup>573</sup> I.C.C. Statute, *supra* note 534, art. 12 (2). See Appendix L, for the full text of this article.

<sup>574</sup> *Id.* art. 12 (3).

<sup>575</sup> Unfortunately, once the ICC entered into force last July the U.S. threatened to pull out its peacekeepers from UN missions if the UN does not grant US soldiers immunity from being prosecuted under the ICC statute. Member states of the UN, in fear for the failure of peacekeeping missions, agreed to grant US soldiers a one-year immunity from the Court's jurisdiction.

<sup>576</sup> I.C.C. Statute, *supra* note 534, art. 11. See Appendix L, for the full text of this article.

<sup>577</sup> Under Article 75 of the I.C.C. Statute reparation to victims is also recognized.

the United States this would not be possible. Furthermore, crimes that took place after 1 July 2002 or continues to take place after that date fall within the jurisdiction of the court. Thus, ideally now that the ICC is a reality, members of the allied forces, including the United Kingdom, who are party to the ICC Statute as well, could refer the cases of the Guantanamo prisoners to the ICC.<sup>578</sup> In addition, the Security Council could make such a referral, however since it is subject to a veto; it would “be difficult in view of the likely U.S. position in the Council.”<sup>579</sup> Such a referral would be with the presumption that some of those detained could be charged with crimes against humanity or war crimes.<sup>580</sup> In reference to the international character of the situation “it would seem best for the ICC to exercise jurisdiction over such cases. Such trials by the ICC would demonstrate the spirit of coalition, give international legitimacy, and avoid criticism about below-the-standards military tribunals.”<sup>581</sup>

Finally, as envisioned by Cherif Bassiouni, we witnessed the entry into force of the ICC statute and later setting up of the ICC. An excerpt of Bassiouni’s speech at the Rome Ceremony on July 18, 1998, states the fundamental reasons for the establishment of the ICC and what it can do for the generations yet to come. He addressed the world leaders and communities by the following:

The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted. It asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated. In that respect it fulfills what Prophet Mohammad said, that ‘wrongs must be righted’. It affirms that justice is an integral part of peace and thus reflects what Pope Paul VI once said, “If you want peace, work for justice”. These values are clearly reflected in the ICC’s Preamble.

The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, or restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some

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<sup>578</sup> See Roy S. Lee, *supra* note 433, at 763.

<sup>579</sup> *Id.* at 764.

<sup>580</sup> *Id.* at 763.

<sup>581</sup> *Id.*

conflicts, prevent some victimization, and bring to justice some of the perpetrators of these crimes. In so doing, the ICC will strengthen world order and contribute to world peace and security. As such, the ICC, like other international and national legal institutions, will add its contribution to the humanization of our civilization.<sup>582</sup>

The ICC is seen in this context to be the true representation of remedies of violations of international humanitarian law. While such violations have been dealt with in the International Court of Justice, in the *Nicaragua* case for example, it still does not serve the ultimate purpose of eradicating the commission of heinous crimes during armed conflicts. Again, with the far reach that the ICC will have, especially over individuals, it will have a stronger reminder to parties involved in armed conflicts.

This thesis has attempted to describe the application of international humanitarian law to the international armed conflict; specifically, its application to the recent conflict in Afghanistan, and the possibility of remedies that could be due. Under the existing international regime, such remedies could be sought upon the agreement of the parties to the conflict. The author is of the opinion, that the most effective mean of remedy available is the establishment of a similar tribunal, that of the ICTY and the ICTR, to try and punish individuals, however high up in the chain of command, who were involved in committing or the order of commission, of violations addressed in Chapter III. However, notice should be made to the fact that those tribunals were established by Security Council resolutions. One of the parties to the conflict that this thesis has addressed is a permanent member of the Security Council with a right to veto. Thus, the establishment of the ICC is crucial, as it will be a Court functioning to deal with the crimes it has jurisdiction over, not for a specific conflict, but for all conflicts. It is the hope that this will end the impunity of superpowers.

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<sup>582</sup> Cherif Bassiouni, Speech at the Rome Ceremony (July 18, 1998), in M. Cherif Bassiouni,

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## **APPENDIX A: Excerpts from the UN Charter**

### ***Article 1***

The Purposes of the United Nations are:

- (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
- (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- (3) To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- (4) To be a center for harmonizing the actions of nations in the attainment of these common ends.

### ***Article 2(3)***

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

### ***Article 2(4)***

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

### ***Article 39***

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

### ***Article 41***

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of

rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

***Article 42***

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

***Article 43***

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

***Article 44***

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

***Article 45***

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

***Article 46***

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

***Article 47***

There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

***Article 48***

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

***Article 49***

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

***Article 51***

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

## **APPENDIX B: Table showing the development of international humanitarian law instruments since 1864**

This table is taken word by word from the following source (between brackets are the inclusion of the author of this thesis):

MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 101-104 (1999).

### **Development of International Humanitarian Law**

3000 [BC] Customs, Bilateral treaties, Customary law [also included are customs derived from the Asian, African, and Islamic context described in Chapter II].

1859 Henry Dunant assists the wounded on the battlefield of Solferino

1863 Lieber Code (Instructions for the Government of Armies of the United States in Field)

1863 Foundation of the ICRC and the first National Societies

1864 First Geneva Convention

1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles

1880 Oxford Manual on The Laws of War on Land

1899/1907 Hague Conventions

1913 Oxford Manual of the Laws of Naval War

### **First World War**

1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

1929 First Geneva Convention on prisoners of war

[1928-1929 Pact of Paris (Kellogg Briand Pact) that outlawed the use of force as an instrument of foreign policy and has a significant impact on the movement to restrict States' ability to wage war without limitations].

### **Second World War**

1945/1948 Establishment of the International Military Tribunals in Nuremberg and Tokyo for the Prosecution and Punishment of the Major War Criminals

1949 Geneva Conventions:

I on Wounded and Sick in the Field

II on Wounded, Sick and Shipwrecked at Sea

III on Prisoners of War

IV on Civilians (in the hands of the enemy)

Common Article 3 on non-international armed conflicts

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

### **Decolonisation, guerilla wars**

1977 Protocols Additional to the Geneva Conventions

Protocol I: applicable in international armed conflicts (including national liberation wars)

- Contents:
- Development of the 1949 rules
  - Adaptation of International Humanitarian Law to the realities of guerrilla warfare
  - Protection of the civilian population against the effects of hostilities
  - Rules on the conduct of hostilities

Protocol II: applicable to non-international armed conflicts

- Contents:
- Extension and more precise formulation of the fundamental guarantees protection all those who do not or no longer actively participate in hostilities
  - Protection of the civilian population against the effects of hostilities

1980 UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons

1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

### **Ethnic cleansing in the Former Yugoslavia and genocide in Rwanda**

1993/1994 Establishment of International Criminal Tribunals for the Former Yugoslavia (in The Hague) and Rwanda (in Arusha)

1995/96 Protocols to the 1980 Weapons Convention

- Protocol IV on Blinding Laser Weapons
- New Protocol II on Anti-Personnel Land Mines

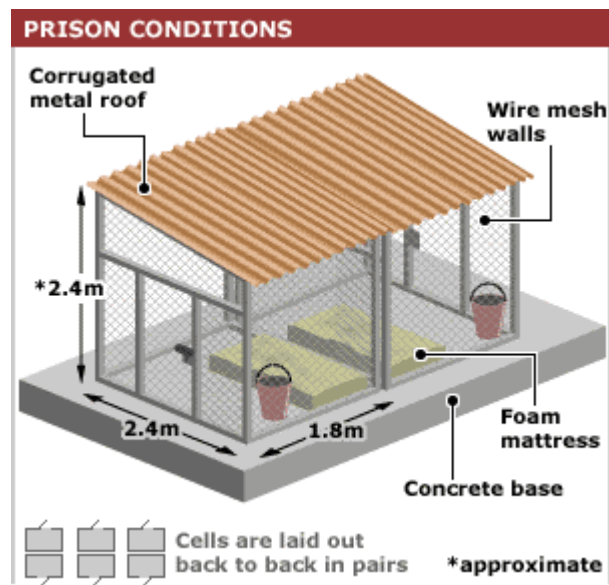
1997 Ottawa Convention Banning Anti-Personnel Land Mines

1998 Adoption in Rome of the Statute of the International Criminal Court

## APPENDIX C: Diagram showing prison cells at Camp X-Ray

BBC News, *Prison Camp Pictures Spark Protests* (Jan. 20, 2002), available at [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1771000/1771687.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1771000/1771687.stm).

**Note:** This is how the cells looked like until April 2002, the prisoners have moved since then to more permanent facilities (in Camp Delta), that arguably provide for more humane conditions.



**APPENDIX D: Common Articles 2 + 3 of the Geneva Conventions of 1949 &  
(Common Article 63, 62, 142, 158 in their respective order)**

***Article 2***

In addition to the provisions which shall be implemented in peace time, 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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

***Article 3***

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.



The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

***Article 63 (GCI), 62 (GCII), 142 (GCIII), 158 (GCIV)***

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

## **APPENDIX E: Excerpts from Geneva Convention (I)**

### ***Article 49***

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

### ***Article 50***

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

## **APPENDIX F: Excerpts from Geneva Convention (II)**

### ***Article 50***

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

### ***Article 51***

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

## **APPENDIX G: Excerpts from Geneva Convention (III)**

### ***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.

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

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

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

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.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally

liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

#### ***Article 5***

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

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.

#### ***Article 13***

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

***Article 14***

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

***Article 17***

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. AS far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

***Article 20***

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

***Article 22***

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

***Article 25***

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

***Article 87***

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

***Article 89***

The disciplinary punishments applicable to prisoners of war are the following:

1. A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.
2. Discontinuance of privileges granted over and above the treatment provided for by the present Convention.
3. Fatigue duties not exceeding two hours daily.
4. Confinement.

The punishment referred to under (3) shall not be applied to officers. In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

***Article 118***

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.



In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

#### ***Article 129***

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

*Article 130*

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

## **APPENDIX H: Excerpts from Geneva Convention (IV)**

### ***Article 4***

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

### ***Article 18***

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

***Article 19***

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

***Article 28***

The presence of a protected person may not be used to render certain points or areas immune from military operations.

***Article 146***

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

***Article 147***

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing,

torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

## **APPENDIX I: Excerpts from Protocol I to the Geneva Conventions**

### ***Article 1-General principles and scope of application***

(3) This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

### ***Article 48-Basic rule***

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.

### ***Article 49-Definition of attacks and scope of application***

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

### ***Article 51-Protection of the civilian population***

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) Those which are not directed at a specific military objective; (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

***Article 52-General protection of civilian objects***

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective

contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

***Article 53-Protection of cultural objects and of places of worship***

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) To use such objects in support of the military effort;
- (c) To make such objects the object of reprisals.

***Article 54-Protection of objects indispensable to the survival of the civilian population***

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
  - (a) As sustenance solely for the members of its armed forces; or
  - (b) If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a



Party to the conflict within such territory under its own control where required by imperative military necessity.

***Article 55-Protection of the natural environment***

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

***Article 56-Protection of works and installations containing dangerous forces***

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(a) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(c) For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph I is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

***Article 57-Precautions in attack***

(1) In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

(2) With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

***Article 58-Precautions against the effects of attacks***

The Parties to the conflict shall, to the maximum extent feasible:

(a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) Avoid locating military objectives within or near densely populated areas;

(c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

## **APPENDIX J: Excerpts from Hague Convention (IV)**

### ***Article 3***

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

### ***Article 4***

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

### ***Article 19***

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

### ***Article 20***

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

### ***Article 22***

The right of belligerents to adopt means of injuring the enemy is not unlimited.

### ***Article 23***

In addition to the prohibitions provided by special Conventions, it is especially forbidden (a) To employ poison or poisoned weapons;

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

(d) To declare that no quarter will be given; (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;

(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

***Article 25***

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

## **APPENDIX K: Excerpts from ILC Draft on State Responsibility (2001)**

### ***Article 1: Responsibility of a State for its internationally wrongful acts***

Every internationally wrongful act of a State entails the international responsibility of that State.

### ***Article 2: Elements of an internationally wrongful act of a State***

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the state under international law; and
- (b) Constitutes a breach of an international obligation of the State.

### ***Article 31: Reparation***

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

### ***Article 34: Forms of reparation***

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either single or in combination, in accordance with the provisions of this Chapter

### ***Article 35: Restitution***

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

### ***Article 36: Compensation***

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

***Article 37: Satisfaction***

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

## **APPENDIX L: Excerpts from the International Criminal Court Statute**

### ***Article 5-Crimes within the jurisdiction of the Court***

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

### ***Article 12-Preconditions to the exercise of jurisdiction***

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

### ***Article 25-Individual criminal responsibility***

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.



3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

***Article 27-Irrelevance of official capacity***

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

*Article 75-Reparations to victims*

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.