

Guantánamo Bay: A Reflection On The Legal Status And Rights Of ‘Unlawful Enemy Combatants’

Terry Gill* and Elies van Sliedregt**

1. Introduction

The question of the status and treatment of the detainees held at the American naval base at Guantánamo Bay has generated a huge amount of controversy and has played and will continue to play a fundamental role in proceedings before United States Federal Courts.¹

Within this context, a number of questions require attention. These include whether the international humanitarian law of armed conflict, (hereinafter referred to as the law of armed conflict or as international humanitarian law) provides for the possibility of the detention and prosecution of persons as ‘unlawful combatants’ or ‘unlawful enemy combatants’ without granting them prisoner of war status. Another related question is to the extent such a possibility exists, whether this would signify that such unlawful combatants would fall outside the scope of the applicability of the Geneva Conventions and to at least some degree of legal protection which flows from them. Other related questions include what the requirements are under the Geneva Conventions in relation to the determination of an individual’s status as either a[n] (unlawful) combatant or a civilian, and whether or not the procedures put into place by the United States Government meet these requirements. Aside from these questions there are a number of issues relating to the scope of protection of the detainees by American courts which is required under both international and American constitutional law. In this context, a number of important cases, particularly those decided by the United States Supreme Court, relating to the status and treatment of the detainees will receive attention.

In order to answer these questions international humanitarian law and decisions of the United States Supreme Court will be set out and analysed. This article is divided into three parts. In

* Dr. Terry D. Gill is Associate Professor of Public International Law at Utrecht University and Professor of Military Law at the University of Amsterdam, Achter Sint Pieter 200, 3512 HT Utrecht, Netherlands, t.gill@law.uu.nl

** Dr. Elies van Sliedregt is Associate Professor of Criminal Law at Leiden University, Steenschuur 25, 2311 ES Leiden, Netherlands, e.vansliedregt@law.leidenuniv.nl

¹ The status and treatment of unlawful combatants of the Guantánamo detainees and United States policy towards the Geneva Conventions has been the subject of intense media coverage in major international newspapers and news programs, as well as in academic journals and in books and articles on current affairs. The subject has also come before United States courts, several of which are still pending a final outcome. See inter alia, Seymour M. Hersh, Chain of Command: the Road from 9/11 to Abu Ghraib (2004); K. Dörmann, “The Legal Situation of Unlawful/ Unprivileged Combatants” in *International Review of the Red Cross* (IRRC) Vol. 85, March 2003, 45; L. Bomann-Larsen, “License to Kill? The Question of Just vs. Unjust Combatants in *Journal of Military Ethics*, Vol. 3, issue 2 (2004) 142. The cases before the United States Supreme Court are commented upon in paragraph 6 below.

the first part, the questions relating to combatant or civilian status under international law and the relationship thereof to the Guantánamo Bay detainees will be addressed. In the second part, the questions relating to the scope of protection under domestic American law and the extent to which such protection has hitherto been exercised will be examined. To that effect the decisions in the *Hamdi*, *Padilla* and *Rasul* cases, issued by the United States Supreme Court in June of 2004 will be analysed. Having set out the international legal framework in part I and discussed the protection granted under national law in part II a reflection on the United States policy and judicial determinations *vis-à-vis* unlawful combatants will follow in part III. The article will be completed by a number of concluding observations.

PART I : PROTECTION UNDER INTERNATIONAL HUMANITARIAN LAW

2. Categorization

Much of international humanitarian law is concerned with the division of persons and objects into distinct categories which will determine in very large part their status and treatment, both during the actual conduct of hostilities, and in the event they fall into the power of the adversary during the course of the conflict. In fact, such categorization underlies the 'principle of distinction', which is one of the fundamental principles of international humanitarian law² upon which the more detailed rules which are contained and worked out in the various conventions and customary law are based. Examples of such categorizations include the division of persons, objects and/or territory into belligerent or neutral territory, military (objectives) or civilian (objects), protected or non-protected persons or objects and so forth. Many of these categories will often overlap, while maintaining at the same time a distinct importance which can be decisive in determining the treatment and status of a person or object which is required for particular purposes or within a given context.

For example, a wounded enemy soldier will retain the status of a member of a belligerent party's armed forces, while at the same time being entitled to the protection afforded by the relevant provisions of the First or Second Geneva Convention.³ If captured, he or she will become a prisoner of war and hence additionally entitled to the protection and treatment provided for under the relevant instruments of international humanitarian law, relating to prisoner of war status.⁴

² The fundamental principles of the law of armed conflict include the principles of military necessity, distinction, humanity, proportionality and honourable conduct or chivalry. Although they are sometimes given slightly different names and slightly varying classifications they are almost always seen as forming the foundation of this particular branch of international law and are usually given prominent treatment in handbooks and manuals on the subject. See, for example, L.C. Green; *The Contemporary Law of Armed Conflict* (2nd edition, 2000) Chapter 21 "Basic Rules of the Law of Armed Conflict" page 347 *et seq.*; A.P.V. Rogers, *Law on the Battlefield* (2nd edition, 2004), Chapter 1 "General Principles" pages 1-29; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) Chapter 1, "The General Framework" page 4 *et seq.*; *The Law of Land Warfare*, United States Department of the Army Field Manual FM 27-10 (1956), Chapter 1 "Basic Rules and Principles", pages 3-14; D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995), Chapter 1 "Historical Development and Legal Basis" page 1 *et seq.* etcetera.

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, (hereinafter referred to as the First Geneva Convention); Article 12, jo. Article 41, Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, hereinafter referred to as Additional Protocol I; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949 (hereinafter referred to as the Second Geneva Convention); Article 12 jo. Article 41 Additional Protocol I.

⁴ Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter referred to as the Third Geneva Convention) jo. Articles 14 and 16 of the First and Second Conventions respectively.

One of these distinctions in category and status is that between military personnel and civilians. This categorization largely coincides and overlaps with the distinction between combatants and non-combatants. This, in turn largely, if not completely, coincides with the distinction between those persons who are entitled to prisoner of war status upon capture and those persons who are not so entitled.⁵ Most of the members of the armed forces are combatants, but this does not apply to medical and religious personnel.⁶ Likewise a combatant is normally entitled to treatment as a prisoner of war upon capture, but there are certain exceptions to this general rule, as for example, in relation to captured combatant personnel who would be qualified as spies or mercenaries.⁷ In addition to spies and mercenaries there is the possibility that a person (or category of individuals) who falls into the hands of an adversary could fail to qualify as a prisoner of war or for treatment as such because he, she or they fail to meet the qualifications of (lawful) combatancy. We will now turn to those qualifications and their relationship to treatment as a prisoner of war.

3. Qualifications for and significance of combatant status

Since treatment as a prisoner of war is largely dependent upon whether or not one qualifies as a combatant, it is necessary to have a closer look at the notion of combatant status, in particular what the qualifications are for combatant status and what its overall significance is within the context of international humanitarian law.

The first point to be made is that combatant status, as well as prisoner of war status is only relevant within the context of an international armed conflict, as opposed to an internal or non-international armed conflict. International armed conflicts occur when the armed forces of one party are engaged in hostilities of a reasonably sustained nature against another party, or in cases of total or partial occupation of the territory of another party, irrespective of whether such occupation meets with forcible resistance. The designation of hostilities as an international armed conflict is not dependent upon a formal declaration or invocation of a state of war between two States. On the other hand, a rhetorical classification of a particular situation as an international armed conflict does not in itself suffice to qualify it as such. The question whether an international armed conflict exists, triggering the applicability of the humanitarian law of armed conflict, is essentially a pragmatic one. The international law of armed conflict becomes applicable when the armed forces of a State are engaged in reasonably protracted hostilities with a foreign adversary or are in occupation of (a portion of) another State's territory. Consequently, the 'War against Terror', whatever else it is, is not an international armed conflict in a legal sense. However, the military operations conducted against the Taliban government and organized units of Al Qaeda in Afghanistan and the war in Iraq, both of which are said to be part of the overall worldwide struggle against terrorism,

⁵ K. Ipsen, "Combatants and Non-Combatants" in D. Fleck (ed.) *op. cit. supra* note 2 pages 65-66. See also Article 4 Third Geneva Convention for stipulation of categories of persons entitled to Prisoner of War status upon capture.

⁶ Ipsen, in *id.*, pages 81-88. See also Article 33 Third Geneva Convention and Article 3 of the Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (hereinafter referred to as the Hague Regulations of 1907).

⁷ See Articles 46 and 47 of Additional Protocol I. See also Ipsen, *supra* note 5, pages 98-99.

do qualify as international armed conflicts to which the 'laws and customs of war', including the notion of combatant status, must be applied.⁸

When such a conflict occurs, the whole of international humanitarian law, including the above-mentioned categorizations becomes relevant. The purpose behind the notion of combatant status is twofold. The first of these is in fact to provide an authorization for participation in the hostilities and for the performance of belligerent acts, including in particular the killing or wounding of enemy combatants and the destruction and capture of enemy military objectives.⁹ Such acts are normally unlawful, but if carried out within the context of an international armed conflict by persons who possess combatant status and in accordance with the rules and principles of international humanitarian law, they are lawful actions.¹⁰ This is often referred to as 'combatant' or 'belligerent' privilege. In other words, actions which would normally qualify as serious crimes; such as murder, aggravated assault, arson, destruction of property etcetera, are lawful because they are covered by belligerent privilege. Only combatants possess this legally sanctioned license to kill and engage in organized violent acts; non-combatants do not have the right to engage in hostilities¹¹, although they retain the right of personal self-defense against criminal assault.¹²

The rationale behind the status of combatant and the notion of belligerent privilege is also related to the second of its basic purposes which is to ensure that hostilities are conducted solely between combatants and against military objectives, hence preserving the immunity of civilians and other non-combatants from attack and thereby preventing that civilians and civilian objects are harmed any more than is strictly necessary. This is reflected in the fundamental principles of international humanitarian law and can be seen as one of its cornerstones.¹³ Since non-combatants are not permitted to participate in hostilities, they correspondingly are presumed to pose no direct threat to combatant forces or the conduct of military operations. Consequently, there is no valid reason to deliberately target them as such, although it is recognized as inevitable and is within certain limits permissible, that civilians and other non-combatants will sometimes be injured or killed when attacks are carried out on combatants and military objectives, or within the context of the general confusion and possibility of error which results from the 'fog of war'. However, such inadvertent or unavoidable harm to non-combatants and civilian objects is subject to strict limitations and

⁸ Green, *supra* note 2, pages 54-60 and 196-97; common Article 2 of the four Geneva Conventions of 1949. The applicability of the law of armed conflict is treated in C. Greenwood, "Scope of Application of Humanitarian Law" in D. Fleck (ed.) *supra* note 2, p.39 *et seq.* See also T.D. Gill, "The 11th of September and the International Law of Military Operations", Inaugural Lecture on the Appointment to the Chair in Military Law at the University of Amsterdam (2002), pp.21-23.

⁹ Dörmann, *supra* note 1 at 45 referring to the "Inter-American Commission on Human Rights Report on Terrorism and Human Rights", OEA/Ser.L/V/11.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 68.

¹⁰ *Ibid.* See also Ipsen *supra* note 5 pages 66-67; H. Fisher "Protection of Prisoners of War" in D. Fleck (ed.) *op. cit. supra* note 2, pages 326-27 and Dinstein "The Distinction between Unlawful Combatants and War Criminals" in Y. Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 103 at pages 103-106.

¹¹ See the sources referred to in note 10 *supra*. In this respect Ipsen elaborates at pages 71-2 as follows: "On the level of international law, the members of these armed forces [i.e. persons designated as combatants T.G.] are entitled to take part directly in hostilities. This point deserves emphasis. With regard to the direct participation in hostilities, combatants are privileged solely by that entitlement, the lack of which makes them criminals liable to prosecution".

¹² *Id.* page 90; see also Article 22, First Geneva Convention, Article 33 (1) Second Geneva Convention and Article 13:2(a), of Additional Protocol I which allows medical personnel to be equipped with light personal weapons for personal self-defense and protection of those under their care. Likewise non-combatant civilians are allowed the right of personal self-defense against unlawful assault without forfeiture of their protected civilian status.

¹³ See in general note 2 *supra*. This is also reflected in both various provisions of treaty and customary law, *inter alia* Article 51:2 and Article 48 of Additional Protocol I, as well as in literature, for example, H.P. Gasser "Protection of the Civilian Population" in D. Fleck *op. cit. supra* note 2, pages 211-12; Dinstein, *op. cit. supra* note 2, pages 115-6 116. Direct deliberate attack upon civilians as such is categorized as a war crime under Art. 8:2b (i)-(ii) in the Rome Statute of the International Criminal Court reproduced in 37 *ILM*, 999 (1998).

there is a strong presumption of immunity from attack for civilian and civilian objects, as such, which permeates international humanitarian law.¹⁴ That is perhaps the most important reason behind the long established requirements for the possession of combatant status under the relevant provisions of conventional and customary international humanitarian law. It is not difficult to imagine what would likely occur under the conditions of combat if civilians and other protected non-combatant personnel were to take part in hostilities on anything approaching a significant scale. The obvious and inevitable result would be the erosion and even the disappearance of the restraints imposed by international humanitarian law, as well as by military doctrine and training, against the targeting of civilians and civilian objects.¹⁵

Taken together, these are the primary reasons behind the division and distinction between combatant and civilian or non-combatant status. Belligerent privilege underlies the idea behind the conferment of prisoner of war status, namely that once a combatant has been captured, he or she is to be protected and respected and not to be subject to prosecution simply for having participated in hostilities as a member of the opposing party's armed forces. Consequently, non-authorized participation in hostilities without the possession of combatant status has long been seen as a criminal act, because it poses a threat to the rationale behind the principle of distinction which is one of the cornerstone principles of the law of armed conflict and because it undermines the protection of civilians and other protected persons with non-combatant status.¹⁶

Despite the fundamental nature of the distinction between combatant and non-combatant status, there is little in the way of a detailed definition of combatant status and no explicit reference to the notion of unprivileged belligerency or the status of 'unlawful combatant' which is contained in the relevant provisions of the international humanitarian law treaties, although there is considerable treatment of these issues in the literature.¹⁷ The treaties themselves largely deal with combatant status within the context of the (provisions of these) instruments relating to prisoner of war status. This is essentially due to the previously mentioned very large degree of overlap between the status of combatant and that of prisoner

¹⁴ In addition to the sources and instruments cited in note 13 *supra*, see also Article 51:4 and :5(a), Article 51:5(b) and Article 57:2(a)(iii) and 57:2(b) of Additional Protocol I, which deal with indiscriminate and disproportionate attacks respectively. An indiscriminate attack is one which cannot be directed at a specific military objective, a disproportionate attack is one, which while directed against a specific military objective, is likely to cause excessive death, injury or destruction to civilians and civilian objects in relation to the direct military advantage which can reasonably be anticipated. These provisions of Additional Protocol I are generally considered to constitute customary law which is binding on both parties and non-parties to Additional Protocol I. See in this respect Rogers, *op. cit. supra* note 2, pages 103-119 and C. Greenwood, "Customary Law Status of the 1977 Geneva Protocols" in A.J. M. Delissen and G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead; Essays in Honour of Frits Kalshoven* (1991) 93 at page 109.

¹⁵ See notes 13 and 14 *supra*. See also R. Baxter "The Duties of Combatants and the Conduct of Hostilities (Law of The Hague) in *International Dimensions of Humanitarian Law* (Henri Dunant Institute, Geneva and UNESCO, Paris) (1988) 93 at 103-104. Baxter says in this respect: "The whole humanitarian law of war is grounded on the principle that force may be employed only against those persons who themselves use or threaten to use force ... those who use or have the immediate capacity to employ force. Those who are not combatants are in so far as possible to be spared from attack and violence ... Non-combatants are therefore the largest category of persons who fall under the safeguards of international humanitarian law. It is for their protection that prohibitions and limitations are placed on the use of violence". This notion is also reflected in military and doctrine under concepts such as "economy of force" which is one of the fundamental principles of military doctrine used in military training, education and operations. For an explanation of this concept see A. Jones, *The Art of War in the Western World* (1987) at 668-70.

¹⁶ Green, *op. cit. supra* note 2, pages 102-5.

¹⁷ The term "unlawful combatant" is used generally to denote a person who without meeting the conditions for being considered as a combatant or belligerent, nevertheless, directly participates in hostilities. It is a problematic, and especially since the detention of suspected Al Qaeda and Taliban personnel within the context of the hostilities in Afghanistan at Guantánamo and elsewhere, has become a controversial term. It is, nevertheless, widely referred to in the literature either directly as such or in an a contrario sense as someone who does not qualify as a "lawful combatant". See, for example, Green, *op. cit. supra* note 2, chapter 6 entitled "Lawful Combatants", page 102 *et seq.*; Dinstein, *op. cit. supra* note 2, Chapter 2 entitled "Lawful Combatancy", page 27 *et seq.*; Ipsen, *supra* note 5, pages 68-9; Baxter, *supra* note 15, pages 105-6, and Dörmann, *supra* note 1, pages 46-47.

of war.¹⁸ Since the possession of prisoner of war status is closely related to the question of whether or not an individual qualifies as a combatant; and since these are detailed provisions in international humanitarian law relating to the conferment of prisoner of war status and the treatment to which prisoners of war are entitled¹⁹, there is little separate attention for the concept of combatant status as such and no explicit reference to the notion of (un)privileged belligerency or the possible status of an individual as an (un)lawful combatant. Instead these notions are dealt with by implication within the context of the question of prisoner of war status. If an individual (or category of individuals) qualifies as a prisoner of war, he, she is (or they are) by implication presumed to possess combatant status. In the event the qualifications for prisoner of war status are not met, the automatic presumption will be that the individual concerned is a civilian. Anyone who is neither a combatant, nor someone falling within one of the specific categories of individuals entitled to treatment as a prisoner of war is presumed to be an ordinary civilian. However, if a civilian or other non-combatant engages in belligerent acts or participates directly in hostilities, he or she commits an offence and by implication becomes what is often referred to in the literature as an unlawful combatant.²⁰ Should any doubt arise concerning the status of an individual and the treatment he or she is entitled to, the relevant provisions of the international humanitarian law instruments relating to prisoner of war status and treatment make it unequivocally clear that the individual(s) concerned is (are) entitled to the protections afforded by those instruments until such time as the status thereof has been determined by a competent tribunal.²¹ The relevant provision of the Third Geneva Convention relating to prisoners of war does not specify what constitutes a competent tribunal, this is left to the individual State's national (military) law to determine.²² Since the determination of prisoner of war status is essentially a question of fact-finding rather than adjudication, it need not be carried out by a judicial body, and is often carried out by an administrative board or through a semi-judicial procedure conducted in the field in the proximity of the actual zone of operations where the individuals in question have been captured and are being held.²³ On the other hand, the tribunal in question must make its

¹⁸ See text preceding note 8 *supra*.

¹⁹ For example, the entire Third Geneva Convention referred to in note 4 *supra* deals with the status and treatment of prisoners of war.

²⁰ See note 17 *supra*. By implication there are several categories of persons who have been or could be qualified as "unlawful combatants" or "unprivileged belligerents":

(a) members of militias, volunteer corps, or other organized armed groups who directly participate in hostilities without meeting the conditions laid down in Article 1 of the Hague Regulations and Article 4:2 of the Third Geneva Convention;

(b) members of a *levée en masse* who do not meet the conditions laid down in Article 4 :6 of the Third Geneva Convention;

(c) individual civilians or groups of civilians who are neither members of groups (a) or (b) who directly participate in hostilities;

(d) non-combatant members of the armed forces who outside the context of personal defense of themselves and of persons under their care and protection take an active and direct part in hostilities;

(e) members of the armed forces who engage in acts of espionage and or sabotage behind enemy lines while out of uniform through the use of perfidy and deception and can therefore be treated as spies;

(f) mercenaries.

²¹ Article 5, Third Geneva Convention; Article 45 of Additional Protocol I.

²² Green, *op. cit. supra* note 2, page 112, including his footnote 51; Baxter, *supra* note 2, para. 71 page 30.

²³ See the sources referred to in note 22. United States Army practice in respect to "Article 5 Tribunals" is that such tribunals shall consist of boards of not less than three officers, one of whom will normally be a military lawyer of the Judge Advocate General's Corps (JAG). These tribunals normally operate in the field at or close to areas behind the front where prisoners of war and other persons captured on the battlefield are being held. Prior to the war in Afghanistan, the conducting of such tribunals was standard United States Army practice in relation to all captured persons of doubtful status. For example, over 1000 such tribunals were conducted in the 1991 Gulf War. See in this respect United States Army Regulation 27-13 of 7/2/1995, issued by United States Central Command pertinent to "Captured Persons: Determination of Eligibility for Enemy prisoner of war status" in *United States Army Law of War Workshop Manual* (2003) page 105 *et seq.* and cited in T.D. Gill, "

op.cit.supra note 8, pages 30-31 and accompanying notes.

determination of status on an individual basis, taking into account the available evidence and reasonable standards of objectivity and fair-play.²⁴

As stated, the status and treatment as a prisoner of war is the subject of detailed regulations within international humanitarian law and the question of whether one qualifies as a combatant entitled to participate in hostilities and to perform belligerent acts is largely subsumed within the context of those regulations and provisions dealing with prisoner of war status. It should be pointed out that there are some notable differences in this respect between States which are parties to Additional Protocol I of 1977 to the Geneva Conventions and States which are not parties to that instrument and consequently are still governed by the more traditional standards relating to status and treatment as a prisoner of war which are provided for in the Hague Regulations of 1907 and the Geneva Conventions of 1949, and which are generally considered to constitute customary international law.²⁵

Under the latter set of instruments (the Hague Regulations and Geneva Conventions), there are essentially two categories of persons which qualify as combatants and for prisoner of war status upon capture. The first of these categories is comprised of the regular armed forces of party to an armed conflict. These include, in addition to regular members of the armed forces, members of militias and volunteer corps which have been integrated into the armed forces and as such form part of the armed forces, irrespective of whether the government or authority to whom they profess allegiance is or is not recognized by the adversary party to the conflict.²⁶ Members of regular armed forces; including militias and volunteer corps which have been integrated into the armed forces, other than medical and religious personnel, are presumed to have the status of combatant with ‘belligerent privilege’ and thus to the status of prisoner of war if captured or upon surrender, unless they can be qualified as spies or mercenaries.²⁷ This applies irrespective of whether they are ‘on or off duty’, located in the front or rear, as long as they are a party to an armed conflict and are not located on the territory of a neutral or non-belligerent State.²⁸ A combatant is entitled to engage in hostilities and is consequently subject to attack at any time within the limitations provided for under international humanitarian law. The second category of recognized combatants is comprised of members of other organized militias, volunteer corps and resistance movements, which while not integrated into the regular armed forces, meet certain criteria.²⁹ These criteria are:

²⁴ The determination of status under Article 5 of the Third Geneva Convention is not in any sense a criminal trial. The Article 5 tribunals described in the previous note operate on the basis of a “preponderance of evidence” standard of proof, taking into account such facts as place and circumstances of capture, documentation, written or oral statements by the capturing personnel and captured prisoner(s), etcetera. Should charges, however, be brought for any alleged criminal acts, including unauthorized participation in hostilities, they must be heard by a regular military or civilian judicial tribunal in accordance with the provisions relating to juridical and penal proceedings under either: the Third Geneva Convention or the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention); or under Article 75 of Additional Protocol I, if the person concerned is determined not to qualify for the protection under either one of the former two instruments.

²⁵ The customary status of the Hague Regulations (insofar as not superseded by later instruments) is beyond doubt and was recognized already as customary law by the Nuremberg Tribunal. The Geneva Conventions of 1949 have likewise achieved customary status due to the virtual universal adherence of all States to them. See C. Greenwood “Historical Development and Legal Basis” in D. Fleck (ed.) *op. cit. supra* note 2, pages 23-25.

²⁶ Article 4:3 of the Third Geneva Convention. This would prima facie cover soldiers and militia of the Taliban Government of Afghanistan. It would not, however, cover the Al Qaeda personnel captured on the battlefield in Afghanistan unless they were operating within units which formed part of or were integrated into the Taliban armed forces. Members of Al Qaeda operating outside such units would have to meet the criteria enumerated in Article 4:2 of the Third Geneva Convention (see notes 29 and 30 *infra* and accompanying text for elaboration), in order to qualify for prisoner of war status. Needless to say, this does not appear to be likely - to say the least.

²⁷ Under Articles 46 and 47 respectively of Additional Protocol I.

²⁸ Neutral and non-belligerent territory may not be used for military operations by belligerents. See in this respect M. Bothe, “The Law of Neutrality” in D. Fleck (ed.) *op. cit. supra* note 2, page 485 *et seq.* and Green, *op. cit. supra* note 2, chapter 16 “Rights and Duties of Neutrals”, page 268 *et seq.*

²⁹ The criteria concerned are enumerated in the text above. For commentary see, for example, Dinstein, *op. cit. supra* note 2, page 35 *et seq.*

- (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.³⁰

It should be noted that the above-mentioned criteria are cumulative. In addition, members of a so-called *levée en masse*; that is to say the civilian inhabitants of non-occupied territory which is under invasion and who spontaneously take up arms to resist the invasion forces are also treated as combatants entitled to prisoner of war status, provided they carry their arms openly to distinguish themselves from the general civilian population and conduct their operations in accordance with the laws and customs of war.³¹

The situation that emerges concerning combatant and prisoner of war status and treatment under the relevant provisions of the Hague Regulations, Third Geneva Convention and customary law can be characterized as follows. Within the context of an international armed conflict involving the armed forces of two or more parties to these instruments, which results in any degree of sustained hostilities or other belligerent activity, all of the regular members of the armed forces of the parties to the conflict, with the exception of non-combatant medical and religious personnel, are considered as combatants which possess “belligerent privilege” and hence are entitled to engage in hostilities and other belligerent acts, as well as being subject to attack by the opposing party’s forces. If they fall into the hands of the adversary they enjoy prisoner of war status and must be treated and protected as such. In addition, members of organized militias, volunteer corps, resistance movements and civilians participating in a *levée en masse* who meet the criteria stipulated above also qualify for combatant status and consequently possess prisoner of war status if they fall into the hands of the enemy party. The possession of combatant status does not preclude the possible prosecution for violation of “the laws and customs of war”, or other criminal or disciplinary offences in accordance with the relevant provisions of the Third Geneva Convention³² however, this may not include membership of the adversary party’s forces or mere participation in hostilities in accordance with international humanitarian law, as these are covered by the notion of “belligerent privilege” which goes together with recognized combatant status. In the case of members of militias, resistance movements and so forth who do not constitute part of the regular armed forces, incidental violations of the laws of war by individual combatants do not divest them of combatant status, nor that of the group as a whole, although the individual(s) concerned may, as stated, be prosecuted for their specific offences.³³ However, if the group as a whole were to commit violations of the laws of war on a widespread or systematic scale, they would cease to fulfil one of the conditions for recognition as combatants and would forfeit their “belligerent privilege” and their status as prisoners of war if captured.³⁴ Should any doubt arise concerning the status of a captured (group of) individual(s), a determination concerning the status of the individual must be

³⁰ Note that individual or incidental violation of this criterion does not disqualify an individual member of such a militia or other organized group, or the group as a whole from treatment as a prisoner of war. However, widespread or systematic violation could result in such disqualification for the group as a whole. See in this respect Dinstein in *id.*, pages 43-44.

³¹ Article 4:6 of the Third Geneva Convention; jo. Art. 2 Hague Regulations.

³² Third Geneva Convention, Articles 82-88 jo. 99-108.

³³ See notes 30 and 32 *supra*.

³⁴ *Ibid.*

carried out by a competent administrative or (semi) judicial tribunal before any type of prosecution is undertaken. Pending such determination, the individual is entitled to the protection of the Convention until such time as determination of his or her status can be made.³⁵

If a person is found not to be entitled to prisoner of war status on the basis of such a determination, he or she will always be entitled to the fundamental guarantees provided for under Article 75 of Additional Protocol I, unless he or she is entitled to more favourable treatment from other provisions of humanitarian law.³⁶ It should be noted that this particular provision of Additional Protocol I is generally viewed as constituting customary law which would bind non-parties as well as parties to this instrument.³⁷

Once a determination has been made that an individual is not entitled to prisoner of war status, the next question which arises is whether he or she is nevertheless entitled to treatment as a prisoner of war or in any case treatment which is tantamount to the enjoyment of prisoner of war status. This is where the previously mentioned differences between States which are parties to Additional Protocol I and those which are not become most important. For States which are parties and are consequently bound to all of its provisions as a matter of treaty law, the situation is markedly different in relation to the treatment of persons who have engaged in belligerent acts without qualifying as combatants than it is for States which are not parties and consequently are still governed by the more traditional standards pertaining under the Hague Regulations on Land Warfare of 1907, the four Geneva Conventions of 1949 and under customary law, which would include those provisions of Additional Protocol I which have obtained customary status.³⁸

For the former group of States, Article 44 of Additional Protocol I provides for a considerable relaxation of the conditions for the possession of combatant status,³⁹ and moreover goes on to even more considerably broaden the entitlement of persons who fail to meet even those more relaxed conditions, to treatment which is “in all respects equivalent to that pertaining to

³⁵ This is clear from the text of Article 5 of the Third Geneva Convention. See also Baxter, *supra* note 15 at page 109.

³⁶ Such more favorable status can include treatment as a prisoner of war, notwithstanding an individual's not being entitled to prisoner of war status. This is required for certain categories of persons enumerated in Article 4:4 and 4:5 and Article 33 of the Third Geneva Convention. These refer to civilians performing certain functions while accompanying the armed forces, officers and crewmembers of captured enemy merchant vessels and medical and religious personnel respectively. There is, moreover, nothing in the Conventions which prevents extension of treatment as a prisoner of war to other [groups of] individuals, if this would provide them with a better standard of treatment than they would otherwise be entitled to and would be sound from a military perspective. This could be the case in relation to civilians who, while not meeting the conditions of Article 4:2, conducted themselves as regular combatants and observed the laws and custom of war as indicated by Gasser, *supra* note 13 at 233 (para. 518:5) where he states: “Experience from several conflicts ... has shown that such a measure can be justified not only from the humanitarian standpoint but also from the viewpoint of military considerations.”

In addition, with certain exceptions, civilians in the territory of a party to the armed conflict or in occupied territory will enjoy the status of protected person if they are in the hands of or in territory controlled by the adversary party. See in this respect Article 5 in conjunction with Article 4 of the Fourth Geneva Convention. For further elaboration, see Baxter *supra* note 15, pages 110-11, and especially Gasser in *id.* at pages 232-4. It should be noted that the majority of Al Qaeda personnel who were captured in Afghanistan and are held in Guantánamo probably would not qualify for protection under Article 5 of the Fourth Geneva Convention, since they are nationals of countries which maintain normal diplomatic relations with the Detaining Power. The suspected Al Qaeda personnel would fall under this provision of Article 5, since they are apparently nationals of such States as Australia, France, Egypt, Jordan, Morocco, Pakistan, the United Kingdom, etcetera; all of which maintain normal diplomatic relations with the Detaining Power, which is obviously the United States. Consequently, they would fall under the protection of Article 75 of Additional Protocol I and applicable Human Rights Law. See Paragraph 2.3 and accompanying notes.

³⁷ The customary status of Article 75 of Additional Protocol I is generally acknowledged. See *inter alia* Ipsen, *supra* note 5, pages 68-9; Greenwood, *supra* n.14 at 103. See also U.S. Navy, NWP9, “Annotated Supplement to the Commander's Handbook on the Law of Naval Operations” (1989), Section 5-3 where the customary status of Article 75 is acknowledged.

³⁸ The sharp distinction between States which are parties to Additional Protocol I and those which are not with respect to the status of persons deemed as unlawful combatants is elaborated upon in *inter alia* Dinstejn, *op. cit. supra* note 2, pages 44-47; Green, *op. cit. supra* note 2, page 109 *et seq.* and Baxter in *id.* page 106. For an indication of which provisions of Additional Protocol I have obtained customary status, see Greenwood *supra* note 14.

³⁹ See Dinstejn in *id.* pages 45-6.

prisoners of war".⁴⁰ In other words, although unauthorized participation in hostilities still constitutes a criminal offence which is subject to prosecution, Additional Protocol I virtually does away with any meaningful distinction between lawful and unlawful combatant status, except in the case of spies and mercenaries, by firstly relaxing the conditions for combatant status and secondly providing for treatment as a prisoner of war even for persons who fail to meet those less stringent conditions.⁴¹

This situation is viewed by a variety of authors on the subject to be unsatisfactory in that it weakens the underlying rationale behind the principle of distinction and poses a heavy burden on armed forces which confront an adversary who does not have to meet the conditions for lawful participation in hostilities, thereby potentially diminishing the protection that innocent civilians are entitled to in a conflict.⁴² More to the point, this relaxation of the conditions for the possession of combatant status and treatment as a prisoner of war is one of the chief reasons why a number of States, including the United States, have declined to ratify Additional Protocol I, or have done so with reservations to this provision.⁴³

For States which are not parties to Additional Protocol I, the situation is quite different. They are still governed by the more traditional standards relating to combatant and prisoner of war status and treatment as a prisoner of war. Under those standards there is, without doubt, still room for the designation of persons who nevertheless directly participate in hostilities as unlawful combatants. This has long been recognized in the literature on the subject, in judicial decisions and in the military manuals and practice of a significant number of States.⁴⁴

This division in interpretation and practice is one, but not the only reason behind the conflicting views relating to the status and treatment of the persons detained in Guantánamo as unlawful combatants. For States which are parties to Additional Protocol I, there is little or no room for the designation of persons as unlawful combatants, and no meaningful category of unlawful combatants which would fall between that of prisoners of war and that of civilians. For States which are not parties, particularly for States which have motivated their refusal to ratify that instrument at least partially the basis of objections to the relaxation of the conditions for affording combatant and prisoner of war status, there is in contrast a considerable and plausible basis for designating persons who do not meet the conditions for combatant status as unlawful combatants and withholding treatment as a prisoner of war to such persons, so long as this is done in conformity with the Geneva Conventions and with other applicable humanitarian and human rights standards. There is considerable doubt and controversy as to whether such standards have been adhered to in relation to the Guantánamo detainees⁴⁵, but that is a separate issue from the question whether there is a legal basis for a

⁴⁰ Article 44:4, Additional Protocol I.

⁴¹ See notes 36-38 *supra*.

⁴² For instance, Rogers, *op. cit. supra* note 2 page 40.

⁴³ Some States which have ratified Additional Protocol I have entered reservations in relation to this provision, for example, the United Kingdom as indicated by Rogers in *id.* at pages 41-2. Other States have indicated that this relaxation of combatant status and extension of prisoner of war status to groups which do not meet the conditions for combatant status as grounds for non-ratification of Additional Protocol I. See in this regard, Greenwood *supra* note 14 at 102-3.

⁴⁴ See notes 17 and 20 *supra* for references to the status of "unlawful combatant" or "unprivileged belligerent" in the literature and indications to which categories of persons such a status would apply under the pre-Additional Protocol legal regime. Case law relating to the question of unlawful combatancy is commented upon in *inter alia* Rogers, *op. cit. supra* note 2, pages 31-2, and Dinstein, *op. cit. supra* note 2, at page 30 and pages 36-41. The cases involved were heard by the United States Supreme Court and the Privy Council in the U.K., as well as courts in Israel and Malaysia.

⁴⁵ See *inter alia*, Hersh *op. cit. supra* note 1 and the statements on the conditions and lack of legal safeguards under the regime in force established for the prosecution of those detainees who have been charged with offences which have been made by organizations such as Amnesty International and Human Rights Watch.

distinct designation or categorization of persons who fail to meet the criteria for combatant status as unlawful combatants, notwithstanding the absence of a specific reference to such a category in the Geneva Conventions or other instruments. Aside from the reasons given above, it would make little sense to lay down strict criteria for the possession of combatant and prisoner of war status and to refuse to ratify Additional Protocol I at least partially because of objections to the relaxation of these criteria; and then to deny that failure to meet those criteria has no legal consequences. That is what is meant by stating that unlawful combatancy is implied within the context of the Hague Regulations and the Third Geneva Convention.

4. Legal position of unlawful combatants

If there is room under traditional international humanitarian law for unlawful combatant status under the Hague Regulations of 1907 and Geneva Conventions of 1949, what does this signify in terms of the status, treatment and protection which they are entitled to on the basis of those instruments and under other applicable humanitarian and human rights standards?

As stated previously, in the event of any doubt concerning an individual's status, it is absolutely necessary to make a determination of status by a competent tribunal before proceeding with any other steps, including in particular prosecution for unauthorized belligerency or any other offence.⁴⁶ Until such time as a tribunal is convened, the person(s) concerned are granted protection under the Third Geneva Convention relative to prisoners of war.⁴⁷

Once this has been done and a [group of] person(s) has been determined to be an unlawful combatant, such full protection ceases as a matter of law, however, this does not mean that they fall outside the scope of international humanitarian law and the protection which it, alongside applicable international human rights law provides. The persons in question will either fall within the protection provided for under Article 75 of Additional Protocol I; which in contrast to the provisions relating to the relaxation of the criteria for combatant status and treatment as a prisoner of war referred to previously, are widely acknowledged as constituting customary international law which binds all States, including non-parties to that instrument⁴⁸, or will benefit from a more favourable status.⁴⁹

Article 75 of Additional Protocol I provides for far-reaching guarantees of humane treatment and respect for the fundamental rights of the prisoner, including the rights of due process and fair trial by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure". In addition, non-derogable human rights law of both a customary and conventional nature reinforces these protections against torture or other inhumane treatment and improperly conducted or inadequate criminal proceedings.⁵⁰

Prisoners held as unlawful combatants are subject to the inspection regime of the International Red Cross (ICRC) and must be repatriated at the close of hostilities, unless they are still

⁴⁶ See notes 23-24 *supra* and accompanying text.

⁴⁷ See note 21 *supra*.

⁴⁸ See note 38 *supra*.

⁴⁹ See note 36 *supra*.

⁵⁰ Article 75:2 and 4 of Additional Protocol I. The applicable human rights law in question would include at a minimum those rights enumerated in Article 4(2) of the International Covenant on Civil and Political Rights of 1966 which include the right to arbitrary deprivation of life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and other similar fundamental rights.

servicing penal sentences after being convicted for criminal activity, including unlawful participation in hostilities or other offences under international humanitarian law in which case they would remain under the protection of the provisions and instruments referred to above.⁵¹

PART II : PROTECTION GRANTED UNDER NATIONAL LAW

On 28 June 2004 the United States Supreme Court decided three cases that arose from the detention of 'unlawful enemy combatants' at the Guantánamo Naval Base, Cuba. Two of these decisions effectively terminated *incommunicado* detention of enemy combatants at Guantánamo Bay and persons held in military custody in the United States. The long-awaited decisions have been hailed by opponents of the Bush administration as an important defeat for the administration and a victory for the civil and human rights movement. Upon close analysis, the three decisions deserve a less enthusiastic reception.⁵² Be that as it may, the importance of the decisions in the *Padilla*, *Rasul* and *Hamdi* cases should not be underestimated; for the first time the United States Supreme Court passed judgement on the constitutionality of the American anti-terrorism policy towards unlawful enemy combatants.

5. Background

In reaction to the events of 11 September 2001 United States Congress adopted the 'Authorization for Use of Military Force' (AUMF) authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [or] harboured such organizations, or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons".⁵³ The President asserted broad powers on the basis of this Congressional authorization. Executive detention of hundreds of foreign nationals captured in Afghanistan and held outside United States borders and of United States citizens seized abroad but detained within the United States was deemed lawful under the AUMF.

In his Military Order of 13 November 2001 entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' President Bush authorized the Secretary of Defence to set up military commissions to try non-nationals who have (allegedly) committed acts of terrorism.⁵⁴ The procedural rules of these military commissions lack the usual constitutional safeguards and evoked criticism of the civil rights movements and lawyers from within the military.⁵⁵ As a result these Spartan procedural rules have been modified in two subsequent Military Orders.⁵⁶ In the meantime Attorney General Ashcroft

⁵¹ Article 75:6 of Additional Protocol I.

⁵² See also R. Dworkin, 'What the Court Really Said', *The New York Review of Books*, Vol. 15, Nr. 13, available at www.nybooks.com/articles/17293.

⁵³ Authorization for Use of Military Force, 115 Stat. 224, 18 September 2001, available at www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm.

⁵⁴ Military Order of 13 November 2001, 66 Fed. Reg. 57, 833 (Nov. 16, 2001), available at www.law.cornell.edu/background/warprisoner_of_warer/fr1665.pdf.

⁵⁵ For instance, the death penalty can be imposed by a two-third majority. *Ibidem*, section 4(a) and 4(c)7.

⁵⁶ Department of Defense, Military Commission Order No. 1, 21 March 2002 and Military Commission Order No. 2, 20 April 2003.

launched an anti-terrorism campaign taking as its focal point the prevention of terrorism; in October 2001 the United States Patriot Act was adopted granting the executive broad powers with regard to search, seizure and wiretapping.⁵⁷ National security seemed to prevail over civil rights and constitutional safeguards.⁵⁸

The United States launched its policy towards ‘unlawful combatants’ in late 2001. In the course of the fighting in Afghanistan the United States captured several hundred men on the ground and transported them to the American military base in Guantánamo Bay. The United States refused to grant the captured men the status of prisoner of war. Instead, the government justified detention by classifying them as ‘unlawful enemy combatants’ captured on the battlefield. The fact that these persons had been (allegedly) fighting alongside the Taliban, the *de facto* government of Afghanistan and/or had ties with the Al Qaeda network, made them unlawful combatants.⁵⁹ As from early 2002 these persons were held at Guantánamo Bay, a naval base which extends over 45 square kilometres along the South East coast of Cuba. This territory has been leased by Cuba to the United States in 1903.⁶⁰ The lease had been renewed in the treaty of 1934.⁶¹ The United States has “complete jurisdiction and control” over the area leased as long as it occupies it and uses it as a military base. Cuba has “ultimate sovereignty” over the area.⁶²

6. The supreme court trilogy

In 2002, on behalf of the detainees, detention was challenged before United States federal courts and eventually before the Supreme Court. Two of the three cases heard by the Supreme Court concerned Americans who were detained within the United States. The third case concerned fourteen foreign detainees who were (or had been) held at Guantánamo Bay.

Hamdi v. Rumsfeld

Esam Hamdi, a 24 year-old American citizen who had moved with his family to Saudi Arabia as a child, was seized by members of the Northern Alliance in Afghanistan and handed over to the United States military. He was transferred to Guantánamo Bay where he was interrogated. Upon learning that Hamdi is an American citizen authorities transferred him to a naval brig in Virginia and later to a brig in South Carolina.

In June 2002 Hamdi’s father filed a petition for a writ of *habeas corpus* under Title 28 of the United States Code § 2241 naming as petitioners his son and himself as next friend. He denied his son had been fighting alongside the Taliban; he had been in Afghanistan to do relief work. Hamdi’s father further argued that his son’s detention was a violation of Title 18 of the United States Code, § 4001(a) which determines that: ‘No citizen shall be imprisoned

⁵⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, H.R. 3162, 24 October 2001.

⁵⁸ See for instance, C.P. Banks, ‘Protecting (or Destroying) Freedom through Law: The USA Patriot Act’s Constitutional Implications’, in D.B. Cohen and J.W. Wells (eds.), *American National Security and Civil Liberties in Era of Terrorism*, (New York: Pelgrave Macmillan, 2004), pages 29-70; L.T. Lee, ‘USA Patriot Act and telecommunications: Privacy under Attack’, 29 *Rutgers Computer & Technology Law Journal* 371 (2003), N.B. Fletcher, ‘The Rule of Law, Terrorism and Countermeasures including the USA Patriot Act of 2001’, 16 *Florida Journal of International Law* 43 (2004).

⁵⁹ Interview with vice-president Dick Cheney in Fox News Sunday, 27 January 2002, available at www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20_020127-1.html.

⁶⁰ Available at http://www.nsgtmo.navy.mil/gazette/History_98-64/hisapxd.htm.

⁶¹ *Ibidem*.

⁶² 1903 lease, Article III

or otherwise detained by the United States except pursuant to an Act of Congress'. In response, the government submitted a declaration from one Michael Mobbs (hereinafter 'Mobbs Declaration'), a civil servant in the Department of Defense, stating that Hamdi had been affiliated with a Taliban military unit and during the time when Northern Alliance forces were engaged in battle with the Taliban that he had surrendered to those forces.⁶³ The allegation that he had been fighting alongside the Taliban was based upon his (alleged) handing over of a Kalashnikov assault rifle to the Northern Alliance troops.

The District Court held that the Mobbs Declaration fell "far short" of supporting Hamdi's detention.⁶⁴ It criticized the generic and hearsay nature of the affidavit and ordered the government to turn over more materials which would be necessary for a meaningful judicial review of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the constitutional due process requirement. The District Court seemed to have sought a process that approached that of a criminal trial. The Fourth Circuit Court of Appeals rejected the District Court ruling.⁶⁵ Hamdi's father lodged an appeal.

The Supreme Court announced its decision as a 6-3 plurality, albeit in its outcome it was an 8-1 decision. The plurality opinion was written by Justice O'Connor with Rehnquist, Kennedy and Breyer joining. Justices Souter and Ginsburg issued an opinion, concurring in part, dissenting in part, and concurring in the judgment. Justices Scalia and Stevens dissented, but still supported Hamdi's position. Justice Thomas dissented. The "threshold" question the court was called to answer was whether the executive has the authority to detain citizens who qualify as 'enemy combatants'.⁶⁶

The threshold question essentially comprises two questions: (i) does the executive have the authority to detain enemy combatants without any judicial review and outside the criminal law system, and if so (ii) how can a detainee challenge the qualification of enemy combatant? As to the first question, the plurality held that the AUMF is explicit congressional authorization for the detention of individuals, thus satisfying § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress".⁶⁷ After all, the Supreme Court reasoned "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force Congress had authorized the President to use".⁶⁸ The majority opinion referred to the Third Geneva Convention on the Treatment of Prisoners of War and held that "detention may last no longer than active hostilities".⁶⁹ Apparently the Third Geneva Convention was considered relevant with regard to detention of enemy combatants that do not have combatant/ prisoner of war status. With regard to Hamdi's complaint that the AUMF does not authorize indefinite detention, the majority was of the view that as long as American troops were engaged in active combat in Afghanistan such detentions are authorized as part of the exercise of

⁶³ *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 5

⁶⁴ *Hamdi v. Rumsfeld* ___ F.Supp.2nd ___ (EDVA2002); Civil action nr. 2:02CV439.

⁶⁵ *Hamdi v. Rumsfeld* 296 F.3d 278 (CA 4th2002); Nr 02-6895

⁶⁶ *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 8.

⁶⁷ *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 10.

⁶⁸ *Ibidem*.

⁶⁹ *Ibidem*, page 12.

“necessary and appropriate force”. By relying on the controversial and probably obsolete *ex parte Quirin* case the majority held that this equally applies to American citizens.⁷⁰

The answer to the second question, *how* should the qualification of enemy combatant be contested, resulted in a balancing exercise. Central to answering this question is the due process clause of the Fifth and Fourteenth Amendments: ‘no person shall be (...) deprived of life, liberty, or property without due process of law’. Rephrased the question is, ‘what process is constitutionally due to a citizen who disputes the enemy combatant status?’ The plurality held that since Hamdi had not been permitted to speak for himself or even through counsel the “facts” underlying the classification as enemy combatant were “insufficient”.⁷¹ On the other hand, the standard applied by the District Court, requiring ‘proof beyond reasonable doubt’ that Hamdi was an enemy combatant was considered too high. The plurality was sympathetic to the government’s argument that a trial-like process and discovery into military operations would impose burdens on the military and distract them from doing their work.⁷² The public/government interest was weighed against the private interest of Hamdi, the interest in being free from physical detention by one’s own government. This ‘balancing test’ stems from the *Mathews v. Eldridge*⁷³ case, known as the ‘Mathews calculus’. In this particular case social security benefits had been withdrawn without having heard the interested person. The Supreme Court in *Mathews v. Eldridge* rejected the claim that due process had been violated after weighing the private interest against the government interest. As a result of such a weighing of interests the Supreme Court in *Hamdi* decided that “[a] citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual assertions before a neutral decisionmaker”.⁷⁴ The process that Hamdi received was thought not “[t]hat to which he is entitled under the Due Process Clause” since Hamdi did not have the opportunity to contest the Mobb declaration.⁷⁵

Scalia’s dissenting opinion to the *Hamdi* decision merits attention. It may come as a surprise that this ‘conservative’ judge known for his jurisprudence of strict construction of the Constitution, sides with the (progressive) civil rights movements in arguing that the AUMF does not grant the executive authority to detain enemy combatants. In his view the denial of judicial review over orders of detention is a *de facto* suspension of the writ of *habeas corpus*. He then goes on to say that such a suspension is not permissible because the Constitution stipulates that only Congress may suspend the writ, which is only in “in cases of rebellion or invasion [when] the public safety may require it”.⁷⁶ Whilst the 11 September attack may qualify as an invasion there was no Congressional finding to this effect and therefore the suspension was in his view unconstitutional.⁷⁷ According to Scalia, Hamdi had been detained on the basis of non-existing war powers.⁷⁸ The only other option available to the executive would have been to detain enemy combatant citizens as suspects in a criminal trial.

⁷⁰ 317 U.S. 1 (1942). This case involved a group of saboteurs who had been tried by a military tribunal for spying during wartime. At least one and possibly two of the eight saboteurs tried were American citizens. They argued that if they were to be tried at all, they should be tried for treason before a federal court. The Supreme Court dismissed the argument and affirmed that defendant Haupt was subject to being charged along with the other German saboteurs.

⁷¹ *Ibidem*, page 19.

⁷² *Ibidem*, pages 24-25.

⁷³ 424 U.S. 319 (1976).

⁷⁴ *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 26.

⁷⁵ *Ibidem*, page 31.

⁷⁶ U.S. Constitution, Art. I, S. 9, Clause 2.

⁷⁷ *Hamdi v. Rumsfeld*, 542 U.S. (2004), dissenting opinion Justice Scalia, pages 21-22

⁷⁸ *Ibidem*.

Rumsfeld v. Padilla

Jose Padilla, a United States citizen, returned to the United States after having lived in the Middle East for four years. Upon return in Chicago he was apprehended by federal agents executing a material witness warrant issued by the District Court for the Southern District of New York in connection with its investigation into the Al Qaeda terrorist attacks of 11 September 2001. His counsel issued a motion to vacate the warrant. Padilla's motion was still pending when the President issued an order to Secretary of Defense Rumsfeld designating Padilla an enemy combatant and directing that he be detained in military custody. Padilla was then moved to a Navy brig in South Carolina where he was held *incommunicado* for more than two years. His counsel then filed a *habeas petition* in the Southern District of New York, alleging that Padilla's detention violates the Constitution, and named as respondents the President, the Secretary, and the brig's commander. The government moved to dismiss, arguing that the District Court in New York lacked jurisdiction over Padilla's immediate custodian, the brig's commander. The District Court rejected the government's argument and held that the personal involvement of the Secretary of Defense rendered him a proper respondent and that it could assert jurisdiction over the Secretary under New York's long-arm statute. On the merits the District Court accepted the government's contention that the President had authority to detain enemy combatants citizens. On appeal the Second Circuit Court of Appeals affirmed the District Court's findings. The appeals court reversed on the merits, holding that the President lacked authority to detain Padilla militarily.

The Supreme Court was divided 5-4 with Chief Justice Rehnquist delivering the opinion in which O'Connor, Scalia, Kennedy and Thomas joined. Kennedy filed a concurring opinion in which O'Connor joined while Stevens filed a dissenting opinion in which Souter, Ginsburg, and Breyer joined.

This time the government's argument of lack of jurisdiction was successful and the Court, as a result, did not decide on the merits.⁷⁹ The plurality held that a proper respondent in a habeas action is the "immediate custodian" in the "district of confinement" which is the commander of the naval brig.⁸⁰ This follows from the language of § 2242 and 2243 of Title 28 United States Code and longstanding practice.⁸¹ Padilla's counsel should have brought the habeas petition in the District of South Carolina, not the Southern District of New York.⁸² The judgement of the Court of Appeals was accordingly reversed.

Stevens *c.s.* condemned the plurality opinion as a "[s]lavish application of a "bright-line rule" in a case that "[r]aises questions of profound importance to the Nation".⁸³ The dissenters held that Secretary of Defense Rumsfeld could be regarded as 'custodian' and favoured a more functional approach, focusing on the person with the power to produce the body.⁸⁴ Moreover, the dissenters felt that the decision to suddenly remove Padilla to South Carolina without informing counsel, indicating that the executive attempted to circumvent judicial review,

⁷⁹ *Rumsfeld v. Padilla*, 542 U.S. (2004), page 1.

⁸⁰ *Ibidem*, page 14.

⁸¹ *Ibidem*, pages 6-7. The federal habeas statute provides that the respondent to a habeas petition is "[t]he person who has custody over [the petitioner]". The 'immediate custodian rule' was relied upon by referring to *Wales v. Whitney* 114 U.S. 564, 574 (1885).

⁸² *Ibidem*, page 23.

⁸³ *Rumsfeld v. Padilla*, 542 U.S. (2004), dissenting opinion Justice Stevens, Souter, Ginsburg and Breyer, page 1.

⁸⁴ *Ibidem*, page 7.

should prompt a flexible interpretation of the habeas statute, where the petition is considered “as having been filed in the Southern District”.⁸⁵

By remanding *Rumsfeld v. Padilla* on technical grounds, the court avoided dealing with the merits of a case in which the government asserted the most far-reaching powers. If the administration is right it, it could capture US citizens on American soil – far from the battlefield, unconnected to any traditional armed conflict – and detain them indefinitely without charge

Rasul v. Bush

The decision in *Rasul v. Bush* has been perceived as the most revolutionary of the Supreme Court’s trilogy. The case centred on the question whether enemy combatants detained at Guantánamo Bay may bring a habeas petition in federal courts in the United States. Petitioners in this case, two Australians and twelve Kuwaitis, filed suits with the District Court of Columbia under federal law challenging the legality of their detention, alleging that they had never taken up arms against the United States or engaged in terrorist acts. They complained about the fact that they had never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or tribunals. The District Court dismissed the petition for want of jurisdiction, holding that under *Johnson v. Eisentrager*⁸⁶ aliens detained outside the United States, namely in then-occupied Germany, may not invoke *habeas corpus* relief in American federal courts.⁸⁷ The Court of Appeals affirmed.⁸⁸

The Supreme Court dismissed the Court of Appeals decision. Justice Stevens delivered the 6-3 plurality opinion. He was joined by O’Connor, Souter, Ginsburg, and Breyer. Kennedy filed a concurring opinion. Scalia filed a dissenting opinion in which Rehnquist and Thomas joined, representing the ‘conservative voice’ of the Supreme Court.

As in *Padilla* the case centred on the interpretation of the *habeas corpus* statute (Title 28 of the United States Code), more specifically, how to interpret ‘[w]ithin their respective jurisdiction’ in § 2241 sub a. After having determined that the federal courts’ power to review applications for habeas relief had been extended in a wide variety of cases by the Supreme Court in the past, the plurality had to decide whether the habeas statute confers a right to judicial review for aliens detained in a territory over which the United States exercises exclusive jurisdiction, but not “ultimate sovereignty”⁸⁹?

The plurality answered the question in two ways. First by distinguishing the precedent of *Johnson v. Eisentrager*. Stevens c.s. held that the petitioners in the case before it differ in important respects from those in *Eisentrager*.⁹⁰ Moreover, *Johnson v. Eisentrager* had been overruled by the *Braden v. Kentucky*⁹¹ case. A prisoner’s presence within the territorial

⁸⁵ *Rumsfeld v. Padilla*, 542 U.S. (2004), dissenting opinion Justice Stevens, Souter, Ginsburg and Breyer, page 6.

⁸⁶ 338 U.S. 763.

⁸⁷ 215 F. Supp.2d 55.

⁸⁸ 321 F. 3d 1134.

⁸⁹ Art. III of the 1903 Lease Agreement.

⁹⁰ “They are not nationals of countries at war with the United States, and they deny that they have been engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with an convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercised exclusive jurisdiction and control”. *Ibidem*, pages 7-8.

⁹¹ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

jurisdiction of the district court is no longer “an invariable prerequisite”.⁹² A second reason for broadening the scope of the *habeas corpus* statute was found in legal history.⁹³

Scalia in the dissenting opinion deplored the setting aside of *Johnson v. Eisentrager* and has little difficulty in targeting the weak points in the justification by the plurality. It was up to Congress to change § 2241 not to the judiciary. Most remarkable is the observation that the majority ruling “has a potentially harmful effect upon the Nation’s conduct of war” since “the Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantánamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs”.⁹⁴ By this statement he acknowledges and accepts the government’s detention regime created in Guantánamo Bay.

PART III : REFLECTIONS ON THE SCOPE OF PROTECTION

Having outlined the protection of unlawful enemy combatants under international law in part I and having discussed the protection granted by the United States Supreme Court under domestic law in part II, it is now time to put the two together and to reflect more critically on the United States policy of detaining unlawful enemy combatants and the rights accorded to these persons by the Supreme Court in the trilogy, *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, and *Rasul v. Bush*.

7. Due process

The most interesting question the Supreme Court was called to answer in the *Hamdi* case was the scope of due process. Due process is a flexible concept.⁹⁵ Justice Holmes phrased it as follows: “What is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation”.⁹⁶ According to Galligan each context, or situation is like a magnetic field with different poles exerting different influences.⁹⁷ One pole is the paradigm of the judicial trial with good procedures; another is the necessity of clear and settled procedural rules; and the third is the concern for flexibility in moulding procedures according to the context.⁹⁸ Within this field of competing forces the ‘Mathews calculus’ of balancing private interests against public interests⁹⁹, provides guidance in deciding whether a particular procedure satisfies due process. Interests vary and depending on the nature and weight of interests at stake the scales may be tipping in favour of private interest in one situation and in favour of the public interest in another. The accused being tried for a criminal offence and the prisoner whose parole is revoked have the same right to the appropriate legal standards being applied in deciding on their liberty, the interests at stake, however, are

⁹² *Ibidem*, page 10.

⁹³ *Ibidem*, pages 13-14.

⁹⁴ *Rasul v. Bush*, 542 (2004), dissenting opinion of Scalia, Rehnquist, and Thomas, page 19.

⁹⁵ D.J. Galligan, *Due Process and Fair Procedures. A Study of Administrative Procedures*, (Oxford: Clarendon Press 1996), pages 197-198.

⁹⁶ *Moyer v. Peabody*, 212 U.S. 78 (1909), page 84.

⁹⁷ Galligan, *supra* note 94, page 201

⁹⁸ *Ibidem*.

⁹⁹ See *supra*, note 74.

significantly different.¹⁰⁰ The accused has a stronger interest in not being wrongly convicted than the prisoner in having parole revoked.¹⁰¹

Hamdi argued that his detention was a violation of his due process rights, since he had not been given the opportunity to rebut the government's case against him. The majority of the Supreme Court agreed that the procedure given to Hamdi fell short of what due process requires. On the other hand, the majority was sympathetic to the Government's arguments (national security, protection of sensitive information) and as a result attached much weight to the public interest. It held that hearsay evidence may be accepted as the most reliable available evidence from the Government. Moreover, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence. The plurality was of the view that "[t]he Constitution would not be offended by a presumption in favour of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided".¹⁰² Plainly such a procedure would not respect the presumption of innocence and did not require government to prove beyond reasonable doubt that Hamdi was an unlawful enemy combatant. These trial-like standards had been applied by the District Court in first instance as the appropriate standard of judicial review.

What to think of this? Does the 'Mathews calculus' in *Hamdi* satisfy the Constitutional due process requirement? The application of this test in *Hamdi* seems misplaced when one compares the facts of the latter case to those of the *Mathews v. Eldridge* case. As Scalia in his dissenting opinion observed: "[i]t (the majority) claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*... a case involving *the withdrawal of disability benefits!*"¹⁰³ Since the essence of the 'Mathews calculus' is flexibility and the fact that it can be applied in any context and to various situations, Scalia's observation is better understood as an expression of his general aversion against broad judicial discretion.

Judicial balancing may provide solutions when (statutory) law does not hold the answers. Yet, one wonders whether the outcome of judicial balancing in *Hamdi*, *i.e.* the procedural rules governing review of detention, could not have been a different one. This question is even more pertinent when we bear in mind that the idea of flexibility in setting procedures has not changed the adversarial nature of the American trial. The adversarial process remains entrenched in the American legal mind and as Galligan observes "the lens through which process is viewed".¹⁰⁴ He illustrates this by pointing out that due process in the involuntary transfer of a prisoner to a mental hospital requires: notice of the intended transfer to the prisoner; notice of his rights to contest it; time for the prisoner to prepare his case; a hearing and the opportunity to cross-examine witnesses; an independent adjudicator and a reasoned written statement.¹⁰⁵ In this context case law regarding the qualification of juveniles as 'delinquents' during the adjudicatory stage, the administrative phase preceding a (possible) criminal trial, deserves closer enquiry. The Supreme Court *In Re Winship*¹⁰⁶ decided that because of the interests at stake (committal to a state institution as a result of the act being considered a crime) the presumption of innocence should apply already in the adjudicatory

¹⁰⁰ Galligan, *supra* note 94, page 202.

¹⁰¹ *Ibidem*.

¹⁰² *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 27.

¹⁰³ *Ibidem*, dissenting opinion Justice Scalia, page 23.

¹⁰⁴ Galligan, *supra* note 94, page 200.

¹⁰⁵ *Ibidem*.

¹⁰⁶ 397 U.S. 358 (1970). See also *In Re Gault*, 387 U.S. 1 (1967).

stage; the delinquent status should be proved beyond a reasonable doubt. A comparison with *Hamdi* does not seem far-fetched. As with the delinquent status serious interests are at stake, deprivation of freedom for the duration of hostilities, which in the words of the Supreme Court is as long as “[t]he record establishes that United States troops are still involved in active combat in Afghanistan”.¹⁰⁷ Against this background the scope of due process protection granted by the Supreme Court in the *Hamdi v. Rumsfeld* case, despite its encouraging rhetoric, seems to fall short of what the Constitution requires.¹⁰⁸ After all, who knows when the war in Afghanistan ends?

8. Habeas corpus, citizenship and personhood

In *Rasul v. Bush* a revolution seems to have taken place. The *habeas corpus* statute of the United States Code received extraterritorial application and as a result habeas petitions can be submitted by non-citizens detained outside U.S. borders. On 8 July 2004 the Ninth Circuit Court of Appeals ordered that the District Court of Columbia receive such petitions.¹⁰⁹ Scalia in his dissenting opinion found the idea that “[a]n alien captured in a foreign theatre of active combat to bring a § 2241 petition against the Secretary of State” “breathhtaking”.¹¹⁰ He feared that “[f]rom this point forward, federal courts will entertain petitions from...others ..around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive’s conduct of a foreign war”.¹¹¹ This seems a somewhat premature fear. *Rasul* is only of consequence in situations where no other option for judicial review is available and only in those territories where the United States exercise “complete jurisdiction and control”.

From a human rights point of view the extension of jurisdiction beyond a State’s territory or nationals is hardly sensational. Human rights are universally recognised and inalienable rights of every individual and can be invoked against the authority/State in whose control this individual finds itself, which is not necessarily the state whose citizenship one holds. In this respect it is interesting to look at the jurisprudence of the European Court of Human Rights. One particular case stands out, *Loizidou v. Turkey*.¹¹² In this case the Court ruled that Turkey could be held responsible for violating rights of Cypriots living in Turkey occupied Northern Cyprus. The Court was of the view that “[t]he responsibility of a Contracting party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory”.¹¹³ This citation serves to illustrate a certain ‘mentality’. The central idea in international human rights and domestic constitutional law is the person, the human being as an abstraction from membership in a political community.

The human rights tradition of putting ‘personhood’ at the basis of legal standing stands in stark contrast to the tradition of citizenship and nationality deeply rooted in the law of war

¹⁰⁷ *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 14.

¹⁰⁸ For a critical reflection on the *Hamdi*, *Padilla* and *Rasul* cases and the (lack of) respect for due process and the rule of law in wartime and periods of grave danger, see S.J. Schulhofer, ‘Checks and Balances in Wartime: American, British and Israeli experiences’, 102 *Mich. L. Rev.* 1906.

¹⁰⁹ *Gherebi v. Bush*, 374 3d 727 (9th Cir. 2004).

¹¹⁰ *Rasul v. Bush*, 542 U.S. (2004), dissenting opinion Justice Scalia, page 11.

¹¹¹ *Ibidem*, page 12.

¹¹² 23 March 1995, series A No. 310.

¹¹³ *Ibidem*, para. 62.

which, according to Fletcher, “[t]akes nationality and citizenship to be critical markers for the distinction between friends and enemies at war”.¹¹⁴ As noted previously, much of international humanitarian law is concerned with categorization of persons which determines their status and treatment during the actual conduct of war and in the event they fall into the hands of the adverse party. This categorization runs along lines of nationality as well. Article 4 of the Fourth Geneva Convention provides that civilians who do *not* have the same nationality as their captors may be accorded protected status.¹¹⁵ However, as a result of the changed nature of armed conflict since 1945 (the context in which the Geneva Conventions were drawn up), the fact that present-day conflicts are based on ethnic and religious rather than on nationality grounds, and the object and purpose of international humanitarian law which is directed towards protection of civilians to the maximum extent possible, the nationality requirement has been given a new meaning. In the – not uncontroversial – jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in the Statute of the International Criminal Court (ICC) the protected status now stems from belonging to an adverse party to the conflict rather than having a different nationality.¹¹⁶

Bearing in mind the relaxation of the nationality requirement in international humanitarian law and the focus on personhood in international human rights law, the *Rasul* decision may be welcomed but not necessarily as revolutionary. Moreover, its scope is limited: it is only concerned with jurisdiction of American Courts over the Guantánamo Bay detainees; not with the substance of their cases, namely the legality of their detention.

Fletcher convincingly criticizes the dissenting opinion in *Rasul* by pointing out that there is no apparent basis, either in the text of habeas statute nor in the historical tradition, for limiting the writ of *habeas corpus* to citizens.¹¹⁷ After all, the due process clause explicitly refers to ‘persons’. Moreover, a contextual reading of the habeas statute and an analysis of the leading case *Ex parte Milligan* demonstrates that a distinction between citizens and persons is not in line with the protection these instruments afford.¹¹⁸

9. Enemy combatants

As was made clear earlier, the protection under international humanitarian law which is afforded to prisoners deemed unlawful combatants, while falling short of those applicable to prisoners of war, are fairly comprehensive and are far from being tantamount to “falling outside the Geneva Conventions” or constituting a “legal limbo” as has been claimed by both

¹¹⁴ G.P. Fletcher, ‘Citizenship and Personhood in the Jurisprudence of War. Hamdi, Padilla and the detainees in Guantánamo Bay’, 2 *Journal of Int’l Crim. Justice* 953 (2004), page 954.

¹¹⁵ This is most clearly illustrated by Article 4 of Geneva Convention IV:

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.

¹¹⁶ For ICTY case law: *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, 15 July 1999, paras. 166-168; *Prosecutor v. Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 151; *Prosecutor v. Mucić et al. (Čelebići case)*, Judgement, Case No. IT-96-21-A, 20 February 2001, para. 73. See further footnote 33 to Article 8(2)(a)(i) element 3, Finalized draft text of the Elements of Crime of the ICC, Un Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000, page 18. For Commentary and Critique on the ICTY case law in this context see T. Gill in: A. Klip and G. Sluiter (eds.) *Annotated Leading Cases IV*, Antwerpen-Oxford-New York: Intersentia, pages 874-875; M. Sassoli and L.M. Olsen, ‘Prosecutor v. Tadić’, 94 *AJIL* (2000), pages 571-578.

¹¹⁷ Fletcher, see *supra* note 115, page 958.

¹¹⁸ *Ibidem*, pages 958-960.

the United States Government and its critics in relation to the Guantánamo detainees. The problem is that to date, United States policy towards and treatment of these detainees falls considerably short of the standards that are required under these instruments. The prisoners have been held for a long period under conditions which have been widely described as being inhumane and physically and psychologically damaging. Criticisms of this regime by the representatives of the International Red Cross, human rights organizations, journalists and the military counsel assigned to defend those who have been charged to date, have not resulted in significant improvements in this respect.

The Supreme Court rulings have not fully remedied these shortcomings. Instead of recognising the unlawful combatant status and awarding the Guantánamo detainees the rights unlawful combatants have under customary international law, its rulings seem to have given way to creating a third category of combatants (alongside prisoner of war/combatants and unlawful combatants); that of enemy combatants who have no rights under international humanitarian law, and as it appears hardly any under national constitutional law either.

Unlike the United States government the Supreme Court did not use the word 'unlawful combatant'. Instead, the justices referred to the (former) Guantánamo detainees as 'enemy combatants'. Whilst the plurality in *Hamdi* did not express its view on the issue clearly, it seemed to imply that Hamdi did not have prisoner of war status and the accessory rights. This appears, for instance, from the fact that the plurality did not impose any restriction on the interrogation of Hamdi¹¹⁹, which is one of the prerogatives of a prisoner of war, codified in the Third Geneva Convention and implemented by Army Regulation 190-8.¹²⁰ It is interesting to see how the Supreme Court in *Hamdi* relied on international humanitarian law in a selective way. The *detention* of Hamdi was justified on the basis of AUMF by an analogous application of the prisoner of war regulation of the Third Geneva Convention.¹²¹ However, with regard to his *treatment* this same set of rules was deemed not applicable. This 'picking and choosing' resulted in an application by analogy of only the disadvantages, and not the advantages of the prisoner of war status.

As a follow-up to the ruling in *Hamdi* the United States Department of Defense set up 'Combatant Status Review Tribunals'.¹²² This way the government felt it complied with the due process requirement under the United States Constitution and the status determination procedure required by Article 5 of the Third Geneva Convention. The procedural rules of the Combatant Status Review Tribunals are modelled on those of Army Regulation 190-8 (the prisoner of war regulation) but deviate on a few conspicuous points. For instance, under Army Regulation 190-8 the evidentiary standard is 'preponderance of evidence'.¹²³ This Rule has been copied into the procedural rules of the Combatant Status Review Tribunals, however the following clause was added: '[b]ut there shall be a rebuttable presumption in favor of the Government's evidence'¹²⁴, a clause that derives directly from the *Hamdi* decision. The '*Hamdi*-inspired' status determination procedure for enemy combatants was modelled on Army Regulation 190-8, yet providing for an enemy combatant presumption instead of a

¹¹⁹ O'Connor c.s. held: "[c]ertainly we agree that indefinite detention *for the purpose of interrogation* is not authorized". *Hamdi v. Rumsfeld*, 542 U.S. (2004), page 13. Italics added.

¹²⁰ Article 17 Geneva Convention and Section 2-1(d) Army Regulation 190-8.

¹²¹ See para. 6 above and *Hamdi v. Rumsfeld*, 542 U.S. (2004), pages 12-13.

¹²² 'Memorandum for the Secretary of the Navy, Subject: Order Establishing Combatant Status Review Tribunal', 7 July 2004.

¹²³ Army Regulation 190-8, section 1-6(9).

¹²⁴ Memorandum, *supra* note 110, page 3.

prisoner of war presumption. It seems that the United States Department of Defense interpret *Hamdi* as an onset to create a category of enemy combatants as a negative mirror image of the prisoner of war status.

10. Post – supreme court proceedings

It appears from the previous paragraph that the procedures of the Combatant Status Review Tribunals do not qualify as status determination under the Third Geneva Convention. This has had severe consequences in practice; it has led to a virtual standstill of the ‘military commission machinery’ that had been set up to try enemy combatants for war crimes and other offences.

The fact that no status determination had taken place according to the Third Geneva Convention was sufficient reason for a judge from the District Court of Columbia dealing with a habeas petition, to stay proceedings before a military commission. Judge Robertson in *Hamdan v. Rumsfeld*¹²⁵ held that the Third Geneva Convention, which he considered self-executing, had not been complied with since a Combatant Status Review Tribunal could not be considered a ‘competent tribunal’ pursuant to article 5 of the Third Geneva Convention.¹²⁶ Combatant Status Review Tribunals were established to review the status determination of enemy combatants; that status, however, was not under review. According to Robertson the prisoner of war status and enemy combatant status do not exclude one another. The judge, therefore, rejected the Government’s argument that ‘[t]he ...determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan’s prisoner-of-war status’.¹²⁷ The government argued that the president had already determined that detained Al Qaeda members are not prisoners of war under the Geneva Conventions. Robertson ruled that such determination was not relevant since “[t]he president is not a ‘tribunal’”.¹²⁸ Until proper determination had taken place Hamdan was to be treated as a prisoner of war.¹²⁹ As a consequence, the military commission procedure itself was thought not to meet the requirements of the Third Geneva Convention. Hamdan was entitled to the protections of the latter Convention as a prisoner of war and could, therefore, only be tried “[a]ccording to the procedure as in the case of members of the armed forces of the Detaining Power”¹³⁰ which would be a court-martial convened under the Uniform Code of Military Justice. Procedures before military commissions do not meet the standards of court-martials and for that reason were considered unlawful.¹³¹

Shortly after the District Court’s decision in the *Hamdan* case two other decisions were issued by federal judges that merit attention, not in the least for their opposing results. *In re Guantanamo Detainees*¹³², Judge Green heard a petition in eleven coordinated cases filed by

¹²⁵ No. 04-1529, 9 November 2004 (Judge Robertson).

¹²⁶ Article 5 Geneva Convention III: (...) 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.

¹²⁷ *Hamdan v. Rumsfeld*, page 18.

¹²⁸ *Ibidem*.

¹²⁹ *Ibidem*, page 19.

¹³⁰ Article 102 Geneva Convention III.

¹³¹ The exclusion of the accused from proceedings and the treatment of classified information do not accord with procedural rules of court-martials under the UCMJ. See *Hamdan v. Rumsfeld*, page 33.

¹³² Civ. No. 02-CV-0299 (CKK) (D.D.C. 01/31/05) (Judge Green).

Guantánamo detainees. Like Judge Robertson she found in favor of the detainees, also by applying international humanitarian law that was considered self-executing. Judge Green determined that Guantánamo detainees were entitled to Fifth Amendment due process protection since Guantánamo was tantamount to sovereign U.S. territory. However, the procedures provided in the regulations of the Combatant Status Review Tribunals failed to satisfy constitutional due process requirements.¹³³ Particularly the latter finding is of interest since it can be regarded as an indirect rejection of the Supreme Court findings in *Hamdi*. The *Khalid*¹³⁴ case came before a different judge, Judge Leon. He decided in favor of the Government and held that the court did not have jurisdiction, that the conventions were not self-executing, and that there was no private right of action under them.

On 15 July 2005 a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit overturned Judge Robertson's decision in *Hamdan*.¹³⁵ The panel held that the military commissions were not unlawful and that the president indeed had the power, mandated by Congress, to establish such commissions. The president had relied on Congress's joint resolution authorizing the use of force as well as two congressionally enacted laws that allow for trials before a military commission (Article 15 of the Articles of War and 10 U.S.C. § 821 and § 836(a)). Judge A. Raymond Randolph wrote for the panel that "nothing in the regulations, and nothing Hamdan argues, suggests that the president is not a 'competent authority' for these purposes."¹³⁶ The panel further held that the 1949 Geneva Conventions do not confer rights upon individuals that are enforceable in federal courts and even if they would this could not assist Hamdan as the 1949 Geneva Conventions did not apply to al Qaeda and its members.¹³⁷

This decision is not only a blow to Hamdan but also to the petitioners in the *In re Guantanamo* case. While the *Hamdan* appeal decision does not go into the constitutionality of the Combatant Status Review Tribunals, leaving that part of Judge Green's findings untouched, the part of the *In re Guantanamo* decision on the self-executing nature of the Geneva Conventions has been overturned. The United States administration welcomed the *Hamdan* appeals decision. The ruling supports the government's policy to try enemy combatants by military commissions.

Be that as it may, the *Hamdan* appeal decision lacks persuasiveness on the point of the inapplicability of the Geneva Conventions. Without discussing the issue of self-executing treaties at length, it serves to recall here that with regard to treaties that are found *not* to be directly enforceable in United States courts, a reservation is adopted stipulating exactly that. With regard to the Geneva Conventions no such reservation exists. Moreover, the provisions of the Geneva Conventions that are relevant in this context are sufficiently clear and precise to be directly applicable. Even if the Geneva Conventions would not be regarded self-executing one could argue that at least the Third Geneva Convention applies, namely via implementation in Army Regulation 190-8. It is the Third Geneva Convention that requires a court-martial rather than a trial before a military commission.¹³⁸

¹³³ *Id.* at 44

¹³⁴ Civ. No. 1:04-1142 (RJL) (D.D.C. 01/19/05) (Judge Leon)

¹³⁵ *Hamdan v. Rumsfeld*, United States Court of Appeal for the District of Columbia Circuit, No. 04-5393, 715 July 2005.

¹³⁶ *Idem*, page 19.

¹³⁷ pp. 10-17

¹³⁸ Article 102 Geneva Convention III.

Hamdan's lawyers are expected to appeal and take the case to the Supreme Court. It will be interesting to see what the Supreme Court says on the direct applicability of the Geneva Conventions. The Court will have the opportunity to more clearly than in the *Hamdi* case - where O'Connor writing for the majority, referred to the Third Geneva Convention a number of times implying it to be applicable law - express its views on the self-executing nature of the Geneva Conventions.¹³⁹

Many assumed that issues had been resolved in the Supreme Court's rulings in *Hamdi*, *Padilla* and *Rasul*, particularly since the *Rasul* ruling gave foreigners held at Guantánamo Bay the right to file *habeas corpus* petitions in United States federal courts. The *Rasul* Court, however, left open the precise nature of how those rights would be exercised. Judges from the District Court of Columbia, entrusted with hearing these petitions, have issued sharply conflicting decisions. Judges Leon and Green came to different conclusions on issues of jurisdiction and application of international humanitarian law. With the recent *Hamdan* appeal, overruling not only judge Robertson but also judge Green (at least on the issue of the self-executing nature of the Geneva Conventions), the issue of the applicability of the Geneva Conventions is now on the plate of the Supreme Court.

11. Concluding observations

In the introduction questions were raised with regard to the status and protection of unlawful combatants under international humanitarian law. At this point the following answers can be given. First of all, there is indeed room under international humanitarian law for the detention and prosecution of persons as 'unlawful enemy combatants'. Secondly, in terms of the status, treatment and protection, unlawful enemy combatants do not fall outside the scope of the Geneva Conventions and international customary law. They have a right to undergo a status determination procedure pursuant to Article 5 of the Third Geneva Convention and to be treated humanely and with respect for fundamental rights as required by Article 75 of the First Additional Protocol (which constitutes customary law). With regard to the third question, whether the United States policy meets these requirements, it can be said that to date the treatment of these detainees falls considerably short of the standards required under these instruments. The most important areas of concern in this respect include the following:

- None of the detainees have undergone a status determination in accordance with Article 5 of the Third Geneva Convention. The Combatant Status Review Tribunals do not qualify as 'competent tribunals' under this provision. Moreover, the detainees have not been granted the protection of the Third Geneva Convention pending the determination of their status as is required.

¹³⁹ The recent nomination of Judge John G. Roberts Jr. as Supreme Court Justice is noteworthy since he sat on the panel in the *Hamdan* appeal and is to replace Justice O'Connor.

- The military commissions that have been established to try persons accused of war crimes and other offences do not meet the standards required under international humanitarian law.¹⁴⁰
- The treatment of the detainees falls far short of that which international humanitarian law requires.¹⁴¹ The prisoners have been held for a long period under conditions, which have been widely described as being inhumane and physically and psychologically damaging. Criticisms of this regime by the representatives of the International Red Cross, human rights organizations, journalists and the military counsel assigned to defend those who have been charged to date, have not resulted in significant improvements in this respect.
- Finally, there has been little or no indication as to how long the detention of those still held may last, of how many of the detainees will be charged with an offence and ultimately brought to trial, or other matters relating to the duration of their captivity and conditions for possible release.¹⁴²

The problem in the authors' view is not that the United States has decided to designate those captured on the battlefield in Afghanistan as 'unlawful combatants' who (allegedly) fall outside the scope of international humanitarian law. International humanitarian law has long recognized the existence of such a category. The problem is rather that international humanitarian law has been sporadically and selectively applied and in many respects has been ignored or violated with respect to the detainees held in Guantánamo and elsewhere within the context of the 'war on terror'. A related problem is the application of the unlawful combatant status beyond its legal ambit. It has become a 'catch-term' to justify executive detention. The authors seriously question the lawfulness under international humanitarian law of the capture and detention of persons such as Padilla who was apprehended *outside* the battlefield. The selective and sporadic application of international humanitarian law has not only damaged the image of the United States, which hitherto had enjoyed a reputation as a State with an overall good record of compliance with the law of armed conflict, but does little to advance the cause of respect for international humanitarian law or the fight against international terrorism itself.

With regard to the rights of Guantanamo detainees under national law, analysis of *Hamdi*, *Padilla* and *Rasul* justifies a less euphoric reaction than the one displayed by critics of the Bush Administration who embraced the Supreme Court trilogy as a defeat for the President and a victory for civil rights. The Court's decisions have not yet provided any clear guidance in relation to the applicability of the Geneva Conventions. Moreover, by remanding *Rumsfeld v. Padilla* on technical grounds, the court avoided dealing with the merits of a case in which the government asserted the most far-reaching powers. Furthermore, from an international

¹⁴⁰ See Article 102 of the Third Geneva Convention (when the detainee is treated as a prisoner of war prior to status-determination) and Article 75 of the First Additional Protocol, constituting customary international law (when it has been - properly - determined that the detainee is an unlawful combatant).

¹⁴¹ Article 75 of the First Additional Protocol.

¹⁴² See *inter alia*, Amnesty International, Public Statement; "Guantánamo: Military Commissions – an International Observer's notes" No. 2, AI Index AMR 51/155/2005 (Public) News Service No: 279, 5 November 2004, available on www.amnesty.org; "Combatant Trials Cannot Continue in Current Form, Judge Orders" by C.D. Leonnig, *Washington Post* Staff Writer, 9 November 2004 on www.washingtonpost.com; Human Rights Watch Report by S. Zarifi, Associate Director of Human Rights Watch Asia Division, "A Few Good Men at Gitmo", issued on 17 September 2004, available on www.hrw.org/english/docs/2004/09/13/usdom9344.htm

human rights perspective, the Court's decisions break little new ground. The notion that jurisdiction is not limited to a State's territory, but applies in areas where a State exercises effective control is not new.

Analysis of the Supreme Court decisions, particularly in *Rasul* and *Padilla*, goes to show that the justices were seriously divided. This disunity made it impossible to pass an unambiguous and clear judgement on the United States policy towards unlawful enemy combatants. There are strong indications that the Bush Administration's policy of classification and detention of persons designated as unlawful enemy combatants is based on a presumption that the Geneva Conventions and Constitutional safeguards are an obstacle in the pursuit of the 'war on terror'. Instead of strongly condemning the administration's attempts to circumvent judicial review, the Supreme Court has adopted a cautious approach in reviewing executive detention trying to reconcile the benefits and dangers of constraints on executive power in wartime.¹⁴³

The *Hamdi* decision provided for review procedures that do not meet the Constitutional due process standard and fall short of protection under international humanitarian law.

In the Court's advantage, however, we should point out that it has at least indicated that the President's authority in relation to the detainees is not unlimited, nor wholly outside the purview of judicial review. While this a welcome development, it is a fairly modest one in view of the significance of the issues involved and the controversy they have raised.

¹⁴³ Schulhofer concludes that, in comparison to Israeli and British judicial review of executive power in wartime situations, the United States Supreme Court in *Hamdi*, *Padilla* and *Rasul* assumed a modest role in reviewing and restraining executive and military power. Schulhofer, *supra*. n. 108