WHETHER IHL OUTLAWS TERRORIST ACTS IN BOTH INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT; AND ADDRESSES COUNTER-TERRORISM MEASURES?

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INTRODUCTION

The laws applicable to armed conflicts may have a bearing on a wide range of issues involving counter terrorism measures but their such application has always been characterised as controversial on account of the nature of menace and relevance of such laws with the military operations carried out against the outlaws. Their critics have serious concerns about competence, adequacy and efficacy of the available laws in this context. The laws-of-war "*jus in bello*" primarily aim at guarding against civilian causalities, prohibiting use of certain weapons, conferring rights on prisoners of war (POWs), protecting those who are wounded and sick, giving respect to the peace keeping and humanitarian personnel, and protecting victims of the war who have no involvement in military operations. These principles of International Humanitarian law (IHL) are often taken into consideration for those who are accused of terrorism. Some critics also believe that such armed conflicts by the terrorists are merely a social problem like drugs and liable to be addressed by similar legal rules. They opine that if the laws-of-war were made applicable to those groups, the terrorist would be entitled to the legal status of lawful belligerents having rights as admissible under Geneva Convention, including the immunity for destruction that they brought about and the killings they perpetrated. These questions have far reaching implications vis-a-vis scope and application of IHL, therefore, there is need to examine as to whether a terrorist activities like the incident of September 11, 2001 are merely a crime or a war? And whether the laws-of-war apply to the incidents of identical character or not? We also need to examine that whether the terrorist acts violative of those laws in internal or international conflict ought to be viewed with reference to those international laws; particularly when these violations are envisaged by laws of the states and tried by domestic courts as such? For instance, such acts may constitute murder or crimes against humanity i.e. systematic killing of civilian population, under the domestic laws as well.

This paper is, therefore, an attempt to identify legal rules which can be applicable to the members of terrorist networks and groups. It also dilates upon the right or wrong application of available International Laws-of-war to combat terrorism in both International and non-international armed conflicts; the situations which have not been adequately contemplated by International agreements in such laws; and the imminent circumstances, if any, for initiating reforms in these laws in order to address contemporary legal issues to fight terrorism; inasmuch as many countries, with different legal contexts, are either instigating or have started military actions, like the one in Afghanistan by military coalition. A section of critics believes that no such use of force against terrorist groups is legal unless resorted to in self defence and sufficient evidence is required to arrest them for an alleged violation of law. It might also lead to the inference that captured terrorists can claim *Miranda* rights of silence and demand legal assistance of a lawyer, which may prevent interrogation in regard to future terrorist activities. To answer these questions, the nexus of "*jus in bello*" with "*terrorism*" assume greater significance to help analyse fresh approach to alike International Armed Conflicts (IAC) and Non-international Armed Conflicts (NIAC).

SCOPE OF THE APPLICATION OF LAWS-OF-WAR

The application of IHL is not confined to wars between the states but it applies to various situations. Common Article 1 of the Geneva Convention 1949 provides that the parties "undertake to respect and ensure respect for the present convention in all circumstances".[1] Article 2 defines the scope and specifies that the convention "applies to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them". Hence, it becomes abundantly clear that a formal declaration of war is not a pre-requisite for the application of the principles embodied in the Convention. Article 3 calls for applying minimum provision in armed conflict of non- international character[2] under the doctrine of proportionality. Such a term propounds for scales of humanitarian justice.[3] The distinction between IAC and NIAC emanates from situations involving elements of civil as well as international war in addition to the nature of various operations to counter terrorism. These operations are somewhat akin to civil war involving state- force to fight non-state actors but may not fulfil the criterion required for application of international law to NIAC. However, if those terrorists operate from armed units outside a particular country, the situation may require application of the principles of IHL for international war. It appears that in some cases the UN Security Council or belligerents deemed the rules of IAC applicable to them in situations different from war between states. The Standing Rules of Engagement issued by the US Joints Chief of Staff contemplates that during military operations the U.S. forces shall abide by laws-of-war irrespective of their character even if it conflicts with the International Law.[4]

In an armed conflict, the law on the right to use force (*jus ad bellum*) is distinguishable from the law governing the way such force is used (*jus in bello*). Although scope of both the laws does not have a formal connection, their informal interaction in war-on-terrorism, in a certain manner, lead to perceptions of justice, in that, by observing recognised salutary principles and standards of fighting war against terrorists, the military operations can garner support of public at both national and international levels. Also, any breach of "*jus in bello"* would provide a flimsy gambit to the terrorists to resort to illegal force. The operations against terrorists always have moral distinction from those precipitated by the adversaries; and adherence to "*jus in bello"* would go a long way to reinforce such moral distinction. We also must not lose sight of the rule of proportionality in comparison with the

grievance, through informal linkage of "*jus ad bellum*" and "*jus in bello"* for there can be no moral justification in a military operation, of killing as many people as was the toll of causalities in an act of terrorism. Nor does such principle militate against taking a range of measures to pre-empt future terrorist activities, of the intensity of an initial attack and quantum of damage earlier caused as such.[5] If the attacker cannot justify his right of self defence against a justified defensive attack, even then all the defence force is not permissible.[6]

The term "counter-terrorism" means "offensive military operation designed to prevent, deter and respond to terrorism".[7] The laws-of-war unequivocally apply to military operations involving inter-state conflicts. However, it is all the more difficult to apply these laws in armed conflicts of any other character. Neither all the terrorists and counter terrorist actions are essentially between two or more states nor do all military operations fall within the purview of Geneva conventions of 1949 and Geneva Protocols I of 1977.[8] Also the Geneva Protocols have no express application of internal, isolated, and sporadic acts of violence.[9] The principle of attacking military forces often violated by the terrorists; who by and large direct their hostilities against civilian population and are not an organised military force; prima facie inhibits IHL from conferring status of Prisoners of War (POWs), in terms of the Geneva Convention III of 1949, on them. The past experience illustrates that such application may be difficult but it should not be downplayed altogether. The USA classified certain members of Viet Cong main force as POWs in Vietnam during the years 1967-8, when they were captured for their involvement in alleged sabotage and acts of terrorism. The provision of Article 5 of the Geneva Convention envisaged the establishment of tribunals to ascertain as to whether those detainees were entitled to the treatment of POWs.[10] Conversely, the Israel's invasion on refugee camps in Lebanon in the year 1982 witnessed killing of many innocent children and women. The Commission of Inquiry held that Israel bore responsibility.[11] Israel refused to grant a status of POWs to the detainees on the premise that they were terrorist and not entitled to be treated otherwise. Those detainees were kept in very poor conditions and meted out inhuman treatment in the camps of al-Khiam and al-Nasar.[12] The presence of Israeli military in Lebanon was vehemently criticised at the international level and culminated in its unilateral withdrawal in the year 2000. The war to counter terrorism, therefore, indubitably requires observing certain legal standards under prudential considerations.

CHALLENGES TO IMPLEMENT LAWS IN THE WAR-ON-TERROR

From the very onset, the implementation of laws-of-war posed serious problems to the Allied forces during the operation of "Enduring Freedom" in Afghanistan.[13] These problems included operations against elusive terrorist groups; the conduct of adversary forces to execute the coalition prisoners; the reluctance of enemy personnel to surrender their weapons while confronting capture; the detainees not meeting status of POWs under the prescribed standards; the pressing need of humanitarian relief operations; and maintenance of order by avoiding revenge killings and looting while liberating towns. The languishing conflict between the Northern Alliance forces[14] and the Taliban, before the horrific incident of September 11, 2001, had already obliged the UN Security Council to call upon both the parties to abide by obligations under IHL. It reaffirmed that the parties must comply with all the principles as envisaged under Geneva Convention, 1949 in particular[15] instead of only recourse to Article 3 dealing with civil war only. The above referred conflict at the local level in Afghanistan is an epitome of the application of rules both in international and civil wars.[16] The relevant resolution 1368 further recognised the right of self-defence in individual and collective spheres while international terrorism was condemned as a threat to peace and global security. The Resolution 1373 delineated dimensions for struggle against terrorism.[17] After defeating the Taliban regime the role of coalition powers was confined to aiding the Afghanistan Transitional Government to establish its writ; but Al-Qaida's continuing hostilities, without its structure of a nation-state, were regarded as International Armed Conflict (IAC). The coalition military separated its operations against Al-Qaida; through International Security Assistance Force (ISAF),[18] from its assistance for maintenance of security by the Afghan Transitional Government in Kabul. The coalition forces and the Taliban were obliged to operate under the effect of the 1907's Hague Convention IV on land warfare owing to its character as customary law binding all states whether or not parties to the treaty in addition to the 1925's Geneva Protocol on Gas and Bacteriological Warfare; the 1948 Genocide Convention; and the fourth 1949 Geneva Conventions. Some of the states involved were, or later became, parties to certain additional agreements.[19]

The armed conflict between the Taliban and the Coalition became a moral certainty soon after the tragedy of World Trade Canter (WTC) in the year 2001. The ICSR sent messages to the relevant governments as a reminder of their obligations under IHL to rescue innocent people.[20] The rivals were also sensitised to abstain from use of nuclear weapons.[21] Although the IHL tolerates collateral damage of civilian population[22] but it should not be allowed to escalate beyond a reasonable proportion. It was indicated in the message to Afghan government that civil war in Afghanistan was primarily to be governed under the provisions applicable to non-international armed conflicts.[23] The situation divulged two types of conflicts in Afghanistan and two branches of international law were applicable as such. The statement of ICSR unequivocally suggested that the conflict between Taliban and the Coalition forces was to be treated as International form of terrorism; implying that those captured as accused of some other forms of terrorism were not entitled to the degree of protection as enjoyed by the IAC.[24] It means that article 2 of the fourth Geneva Convention applies to a war when two or more member states are parties to IAC.[25] There is no denying the fact that actions of terrorist groups are, at times, controlled or directed by a particular state for attack in another state.[26] Those groups cannot be regarded as initiating IAC under IHL unless they are identifiable under a responsible command with distinctive sign and openly carry arms to conduct operations.[27]

The terrorist attacks on World Trade Centre (WTC) were well-organised set of appalling actions to wreak havoc of such a gravity which is far beyond threshold. Those attacks could not be branded as internal "riots, isolated or sporadic acts of violence and other acts of similar nature", which according to the 1980 UN Convention, do not merely constitute an "armed conflict".[28] It was a sustained expedition carried out by terrorist in order to jolt the very stability of United States. Thereafter, the decision of USA to militarily respond to those terrorist attacks

involved a situation which attracted common article 3 of the Geneva Convention.[29] There are some people who believe that not being a state, laws-of-war cannot be applicable to Al-Qaida. The 1996 Amended Protocol II to the 1980 UN Convention on Prohibitions and Restrictions on the use of Certain Conventional Weapons, does not apply to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature" because these are not "armed conflicts".[30] The terrorist networks now collect enormous funding while they are based in and operate from many countries simultaneously. Some of the terrorist organisations have emerged with much more military capacity than wielded by many states individually; therefore, these non-state actors should not escape their obligations under the laws-of-war merely for the reason that they do not possess status of lawful belligerents. If the terrorist networks like Al-Qaeda grow their military power to the level of a nation-state but remain exempted from the ambit of IHL, other terrorist groups with identical ambitions would feel prompted to follow suit.

Mere application of such laws in a conflict with terrorist groups does not entitle them to the status of POWs rather their status as illegal combatants is immutable, be it Al-Qaeda, ISIS or any other terrorist network. Only a nation- state can become a signatory to the Geneva Conventions and Al-Qaeda is bereft of such status. Hence, members of Al-Qaeda cannot benefit themselves with the privileges admissible under special laws-of-war. The US Supreme Court had drawn this distinction sixty (60) years earlier "*between those who are lawful and unlawful combatants*".[31] Such a distinction is also necessitated by solemn objective of diminishing human loss and sufferings.[32] The enforcement of these laws enjoins upon rival forces to give a treatment of certain character to the civilians in sharp contrast to the one administered to the combatants. Also customary laws make it obligatory upon combatants to forbear from targeting civilian population[33] and to adopt measures so as to obviate any damage to the life and properties of civilians during their military operations.[34] It is also incumbent upon combatants to distinguish themselves from civilians in order to help rival military personnel avoid harm to the civilians.[35] But terrorist organisations like Al-Qaeda often contravene with these laws as they are not subservient to any nation-state which could hold them to account for such violations of law. It is not far-fetched to state that their intrinsic quest to target civilian population with a view to occasion enormous causalities renders their status as illegal belligerents even if they could become party to the Geneva Conventions.

THE STATUS OF POWs AND TERRORIST DETAINEES

The claim of Taliban militia to form a *de facto* government in Afghanistan and become a party to the Geneva Convention might sound persuasive, yet their gross conduct disentitles them to the safeguards under Geneva Convention relative to the Treatment of Prisoners of War (GPW) which contemplate that the protection and status of POWs extends to the members of militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including well organized resistance movements fulfil four conditions. These conditions as spelled out in a draft declaration of 1874's Conference in Brussels are: (i) "they must have at their head a person responsible for his subordinates, (ii) "wear some fixed distinctive badge recognizable at a distance, (iii) carry arms openly, and (iv) conform to the laws and customs of war in their operations.[36] It was emphasised by the Central Intelligence Agency that certain tribal militias had factionalised to form various groups.[37] As a result, they fall short the four pre-requisites in order to qualify for the status of POWs as lawful combatants under the relevant provisions of GPW. The claim of the Taliban to be a regular army cannot be tenable under article 4 (A) (1) or (3) without complying with afore referred customary conditions required for a lawful combat. The Taliban failed to distinguish their identity from the Afghan civilian population and deliberately supported the objective of terrorism by Al-Qaeda. Their operations to target civilian populations were also conducted in utter breach of the customary laws-of-war. The claim of status as regular military force by Taliban could not hold good without meeting the criterion of four conditions. These four conditions conspicuously distinguish civilians from the combatants and help soldiers of a particular army to recognise enemy forces. The second and third of such distinctions help protect civilians from undue sufferings.[38] The first and fourth conditions ensure effective enforcement of substantive rules qua prohibition on targeting the civilians.[39] Only those fighting in an army complying with four conditions can be licensed to engage in military hostilities.[40] The Taliban fighters do not meet these prescribed standards. The immunity under customary war laws extends to only lawful belligerents.[41] The acts of forces like Taliban, Al-Qaeda and ISIS also attracted individual criminality for every member of such unlawful combatants under both domestic and international laws. Such captured troops are not protected under war usages.[42] They are also vulnerable, unlike civilians, to direct attack in military hostilities.[43]

The military operations by the Allied Forces were claimed to be consonant with long established principles of war.[44] However, there were reports of civilian causalities like the episode of hitting the ICRC ware house, followed by an investigation by the Pentagon.[45] Many villagers died when bombing was carried out by the Allies on December 1, 2001 in a village of eastern Afghanistan not far from Torah Bora.[46] Therefore, it is imperative for those fighting terrorist organisations to make sure that there is no poor intelligence which may result in the erroneous targeting of civilians instead of terrorists. The illegality of wilful and intentional attacks on and killing of civilians cannot be countenanced under IHL. Article 57 of the 1977's Geneva Protocol makes it obligatory upon commanders of a military force to exercise due care and caution in order to protect both civilian population and civilian objects.

So far as issues of refugees and Humanitarian relief are concerned, the war to counter terrorism is often and likely to be fought in weak states where movements of terrorists may court human misery. Mere fact of state of such war should not impinge on humanitarian work and rehabilitation of refugees. The basic duties of the parties to the armed conflict, for humanitarian relief, are embodied in 1949 Geneva Convention IV. The operations against terrorists must not circumvent the relief work carried out by humanitarian organisations. The call for bombing pause by the UN High Commissioner for Refugees (UNHCR) was indicative of tensions between the said Agency and the US government. Although terrorist have least regard for operations of humanitarian relief but such situation would not relieve the contracting states of their basic obligations in this regard. Similarly, there were reports of a defective

approach of Northern Alliance concerning the treatment towards Taliban prisoners dying in shipping containers and many beaten by their the detainers. The shocking conditions below international standards attracted enormous criticism leading to inquiries and interviews of detainees at Guantanamo by the International Committees of Red Cross in the year 2002. Rumsfeld's suggestion that Geneva Convention gave no rights to those prisoners was changed subsequently when he came out with a viable and judicious version that even the unlawful combatants were entitled to the humane treatment under the Geneva Convention.[47] Although any terrorist organisation including Al-Qaeda cannot satisfy the criterion as a nation-state and there detainees may not be proclaimed as POWs under existing provisions of IHL, yet Article 75 of 1977's Geneva Protocol 1 can be made applicable for their treatment as "unlawful combatants". The fundamental norms and traditions ought to be taken into account and those prisoners must be tried for their involvement in terrorism as such under domestic as well as international laws.

CONCLUSION

The drastic measures are imminently required for reforms in IHL to combat a fast increasing distinct scourge of global terrorism through a common approach. The high incidence of terrorist strikes requires a treatment of such atrocious outlook as an international crime. The situation posing challenges to the existing legal provisions essentially require supplementary laws. Such a war on terrorism was not envisaged at the time when Geneva Conventions were being negotiated. The suggestions to update existing laws is often looked by suspicion on account of furore by many humanitarian organisations over revision of legal provisions as they term it as a way to purportedly abdicate solemn obligation to carry the existing laws into effect against terrorists. Those proponents, who are adamant to change, must realise that the law is always bound to evolve in view of changed circumstances of a new era. A long practice of a certain legal norm may assume recognition as a customary law but international consensus on these legal issues is also indispensible. There are cogent reasons for this approach with regard to a war of altogether distinct character. A variety of dimensions like the application of existing laws on newly emerged scenario of terrorism, the status and nature of treatment of the detainees, possible ways to deal with suicide attacks, procedure and conditions for legitimate response against an international or non-international terrorist attack, measures for safety of civilians in the absence of a distinctive mark of terrorist hidden in dwelling areas of the general public, the types of warfare weapons to be used for military purposes against terrorist groups in public places, and operations for humanitarian relief etc; cannot be adequately catered to in the present dispensation of IHL. The quest for legal exploration of supplemental provisions is a dire need due to unforeseeable contingencies that surfaced during the war on a large scale against terrorist networks in Afghanistan. Although such a character of war is not altogether different from earlier ones yet certain above mentioned issues necessitate greater clarity, certainty and cohesion.

The manner of handling prisoner in terms of their status and treatment by the United States during this war drew overwhelming criticism and became a significant legal issue in limbo which also potentially jeopardised unity of the coalition partners. The absence of clear provisions to deal with emerging issues in such war may encourage arbitrary unilateral actions by any military force pleading such farcical ground; like the way the Bush administration was reluctant during first year of their Afghan war, in applying the laws-of-war and eventually it was international criticism which helped persuade the USA to review its action despite its partly righteous stance as regards the above referred uncertain and ambiguous aspects of the law. There is no general doctrinal document to bring home as to which laws-of-war ought to be applied to the like complex situations of the war-on-terror, which is why there were serious tensions on the issues of application of laws-of-war, especially in relation to prisoners, between the United Stated and International Humanitarian rights bodies including ICRC during war-on-terror in Afghanistan. Of course, treaties of IAC for inter-state conflict are applicable to counter terrorism, but such laws are liable to be revised for greater coherence of their minimum or maximum application in a NIAC. The suggestions that existing laws are outdated to respond to challenges of the war-on-terror does not ring true but their evolutionary reforms as supplementary set of rules are imminently required. Certain situations, of course, differ from those envisaged by laws-of- war; nevertheless the persistent attempts, despite difficulties, to apply these laws in the war-on-terror are a rational approach unless such a revision of laws is accomplished. But the afore-mentioned shortcomings of relevance in the existing framework of law are essentially liable to be addressed in such a distinct manner as the war-on-terror is distinguishable from ordinary inter- state war.

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In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those who suffering from sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria .....

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[9]. 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, *reprinted in* Documents on the Laws-of-war, p 48.

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[14]. "Northern Alliance" is a colloquial term for the "United Islamic Front for the Salvation of Afghanistan." This organization was formed in 1996-7. *See Afghanistan and the United Nations* (Jan. 6, 2003), *available at* http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml (last accessed on 11.09.2019).

[15]. UN Security Council Resolution 1193 of 28 August 1998, passed unanimously. *See* S. C. Res. 1193, U.N. SCOR, 53d Sess., U.N. Doc. S/1193/(1998). Identical wording had been used in S. C. Res. 764 of 13 July 1992 on the war in Bosnia and Herzegovina. *See* S. C. Res. 764, U.N. SCOR, 47th Sess., U.N. Doc. S/764/ (1992). This wording implied that the prisoners should receive humane treatment in accord with international standards.

[16]. G. Hans-Peter, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon"* 33 AM. U. L. REV. 1 (Fall, 1983) pp 145–61.

[17]. G. Hans-Peter, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AM. U. L. REV. 1 (Fall, 1983) 145–61.

[18]. ISAF was established in Afghanistan in January 2002 on the basis of UN Security Council Resolution 1386 of December 20, 2001, passed unanimously. *See* S. C. Res. 1386, U.N. SCOR, 53d. Sess., U.N. Doc. S/1386/(2001). Details of the Military Technical Agreement between ISAF and the Interim Administration, plus annexes, are *available at* http://www.operations.mod.uk/isafmta.doc (last accessed on 11.09.2019).

[19]. On 11 September 2002, Afghanistan acceded to the Ottawa Convention on Anti-personnel Mines. *See* "UN Committed to Ridding World of Landmine Threat, Annan tells Treaty Meeting" (Sep. 16, 2002), *available at* UN Security Council Resolution 1386 of December 20, 2001? NewsID =4724&Cr=mines&Cr1= (last accessed on 11.09.2019).

[20]. Thomas Nagel, "War and Massacre", in International Ethics, ed. Charles R.Beitz: Prinston University Press, 1985), p 69.

[21]. Memorandum from ICRC to Governments of the US and the UK (Sep. 28, 2001). This memorandum was amended and corrected on October 5 by the ICRC. *See* Memorandum from ICRC to Governments of the US and the UK (Oct. 5, 2001).

[22]. T. Meron, "The Humanisation of Humanitarian Law", 94 AJIL (2002) pp. 239-40.

[23]. Memorandum from ICRC to Government of Afghanistan (Sep. 2001).

[24]. Press Release 01/47, ICRC, Afghanistan: ICRC calling on all parties to conflict to respect international humanitarian law (Oct. 24, 2001), *available at* http://www.icrc.org/Web/eng/ siteeng0.nsf/iwpList74/0E80282C0A643B05C1256B6600607E00 (last accessed on 11.09.2019).

[25]. Geneva Conventions 1949 and Additional Protocols 1977. Available at: https://www.icrc.org/ ihl.

[26]. *Sassòli M.* Terrorism and War // J. of international criminal justice. 2006. Issue 5. Available at: http://jicj.oxfordjournals.Org/content/4/5/959. (last accessed on 11.09.2019).

[27]. *Saul B., "Terrorism and International Humanitarian Law. Research Handbook On International Law And Terrorism"* 2014. Research paper # 14/16. Available at: http://papers.ssrn.com/sol3/Papers.cfm?abstract_id= 2394300. (last accessed on 11.09.2019).

[28]. Art. 1(2), S. Treaty Doc. No. 105-1, at 39 (1997).

[29]. 3 U.S. Practice § 2, at 3443 (1995). *See also* G.I.A.D. Draper, *The Red Cross Conventions* 15-16 (1958) (under common Article 3, "armed conflict" exists when the government is "obliged to have recourse to its regular military forces").

[30]. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, 6 U.S.T. at 3518. 22 Art. 1(2), S. Treaty Doc. No. 105-1, (1997) p 39.

[31]. Ex parte Quirin, 317 U.S. 1, 30-31 (1942).

[32]. W. Thomas Mallison & Sally V. Mallison, "*The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*" 9 Case W. Res.J. Int"l L. 39, 43 (1977).

[33]. J. S. Pictet, ed., *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*, at 61 (1960) ("GPW Commentary").

[34]. Lieber Code art. 19 (Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences); *ibid.* art. 22 (The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.); *ibid.* art. 23 (the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war); *ibid.* art. 25 (protection of the inoffensive citizen of the hostile country is the rule).

[35]. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 527 (1987) ("1977 Protocols Commentary").

[36]. Translation of the Draft of an International Declaration concerning the Laws and Customs of War adopted by the Conference of Brussels, 27th August, 1874, art. 9, *reprinted in* A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* 274 (1909).

[37]. Central Intelligence Agency, *The World Factbook 2000*, p 3 (complete entry for military branches of Afghanistan states: "NA; note – the military does not exist on a national basis; some elements of the former Army, Air and Air Defense Forces, National Guard, Border Guard Forces, National Police Force (Sarandoi), and tribal militias still exist but are factionalized among the various groups"). *See also* www.bartleby.com/151/a116.html (listing similar entry in 2001 edition of CIA *Factbook*). (last accessed on 11.09.2019).

[38]. R. Allan, "*The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts'* 341 (1976) (stating that purpose of these two conditions is "the need to protect the civilian population from attack and to ensure a certain fairness in fighting").

[39]. U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, pp 11-13 n.49, NWP 9 (Rev. A), FMFM 1-10 (1989).

[40]. *Military Commissions*, 11 Op. Att'y Gen. 297 (1865).

[41]. *Lindh*, 212 F. Supp. 2d at 553-54; *see also D.v. Johnson*, 100 U.S. 158, 165 (1879).

[42]. Mallison & Mallison, 9 Case W. Res. J. Int'l L. p 41.

[43]. D. Ingrid, *The Law of War* (2d ed. 2000) p 148.

[44]. The principle of discrimination, which is about the selection of weaponry, methods and targets, includes the idea that non-combatants and those hors de combat should not be deliberately targeted.

[45]. *L.* Vernon, *"Friendly Fire" Probed in Death; Airstrike May Have Hit Afghan Convoy*, WASH. POST, Mar. 30, 2002, p 14.

[46]. *L.P.* Richard & H. Justin, *Village Air Raid: Error or an act of terror?*, The Independent, Dec. 2, 2001, *available at L.P.* Richard & H. Justin, (last accessed on 11.09.2019).

[47]. Secretary of Defense Donald Rumsfeld, DOD News Briefing, (Jan. 22, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01222002_t0122sd. html ((last accessed on11.09.2019). 105. Office of the White House Press Secretary, *Fact Sheet: Status of Detainees at Guantanamo* (Feb. 7, 2002),*available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13. html (last accessed on 11.09.2019).