TITTLE

A CRITICAL EVALUATION OF SOME OF THE LEGAL IMPLICATIONS OF THE "WAR ON TERROR" IN INTERNATIONAL HUMANITARIAN LAW.

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THIS IS DEDICATED TO MY LATE MOM AND DAD TANTOH ELIZABETH AND TANTOH CHRISTOPHER.TO MY FAMIRLY TANTOH AUNT,TANTOH GLEN ,TANTOH RHONDA AND BARON.FINALY TO MY FRIENDS CHU FIDELIS, LOUIS MUSAKE AND THE REST OF THE CAMEROONIAN COMMUNITY IN CAPE TOWN.JUST TO THANK THAN FOR ALL THEIR SUPPORT

A CRITICAL EVALUATION OF SOME OF THE LEGAL IMPLICATIONS OF THE 'WAR ON TERROR' IN INTERNATIONAL HUMANITARIAN LAW

PREFACE

Since 11 September 2001, the issue of terrorism has influenced events on the international stage. However, the necessity to eliminate this phenomenon had been perceived long before the above date. World leaders at the League of Nations already realized the importance of putting in place laws geared at combating terrorism. Proposed laws however did not see the light of day owing to the overly ambitious nature of the legislation coupled with the involvement of States in events leading up to the Second World War. The proposed laws of the League of Nations, though signed by all the representatives (except Britain), was only ratified by India. Despite the failure of the League of Nations to get all representatives to agree on laws to safeguard against international terrorism, the international community has continued to look for ways and means of addressing this problem in a peaceful and diplomatic manner. This does not mean to say that the events after the declaration of the "War on Terror" marked the first time an aggrieved State has used force against another sovereign State suspected of harboring terrorists or financing terrorist activities. In fact, the 1996 and 1998 bombings of Tripoli and Sudan respectively, are instances where the US used force against another sovereign state suspected of sponsoring terrorist activities against America. There was, however, a difference in agenda for the previous two situations and the attacks on Afghanistan and Iraq after the World Trade Center attacks in 2001.

Before 11 September 2001 the aim of the US was to prevent countries from financing terrorist activities, pursuant to the 1999 International Convention for the Suppression of the Financing of Terrorism. The so-called "War on Terror" on the other hand has a more elaborate agenda. It is not only geared at preventing sovereign States from sponsoring terrorist activities, but is also considered by the US as a crusade for human rights and the establishment of democracy in "uncivilized" nations.[1] These so-called "uncivilized" nations are considered an 'axis of evil' and, as a result, a threat to civilization. This

[1] The term has often been used by the Bush administration to refer to nations, which it perceives as undemocratic and hence a threat to international order. The agenda of the US administration is to eliminate such governments and help instal democracy and respect for Human Rights in such countries. Thus the elimination of the Taliban regime in Afghanistan and the Iraqi regime led by Saddam Hussein.

crusade for democracy has seen the US go to war with Afghanistan. This war led to the overthrow of the Taliban regime in that country. The next phase of the crusade was against Iraq, which also led to the overthrow of the Iraqi regime led by Saddam Hussein. These events are widely regarded as the beginning of the so-called "War on Terror".[2]

The above two armed conflicts have been a subject of numerous debates in the fields of International Law in general, and International Humanitarian Law in particular. [3] So far, conceptualization of these wars has been a matter of controversy. First, an acceptable definition of the term terrorism has eluded International Law makers up till this point. It has proven more and more difficult to deal with the problem of terrorism without a general consensus on what will constitute these acts. Secondly, the definition of war itself is problematic. Thus it could be said that the notion of "War on Terror" is a controversy in itself. Thirdly, there are questions arising as to the nature of the so-called "War on Terror". Is this actually a war of the type contemplated by the drafters of the Geneva Conventions or just another phrase coined to indicate a global struggle against a societal plague, such as 'war against malaria' or 'war against polio'? The fourth and most controversial is the issue of the status of the captives of the war with Afghanistan and Iraq in particular, and the "War on Terror" in general. The legal status of those held in Guantanamo Bay and other detention camps around the world contrasts sharply with the notion of "enemy" combatant put forward by the US administration.

This mini-thesis intends to examine these questions. It does not pretend to discuss all the issues and debates raised by the so-called "War on Terror", neither does it intend to provide full answers to all the questions raised in this study. It is presented as a contribution to a highly complex debate.

To have a better understanding of the issues raised, it will be imperative to understand the history and development of terrorism before 11 September 2001 and how the international community approached the problem of terrorism prior to that date.[4] Also

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[2] According to the US administration, these are States that harbor terrorists, and in the "War on Terror", no distinction is made between these States and the terrorists.

[3] The most controversial of the debates is centered on the legal status of those captured and held at Guantanamo Bay and other prisons around the world. Whether they satisfy the criteria to be considered prisoners of war as laid down in the Geneva Conventions will be considered in another chapter.

[4] See Chapter one.

important will be the difficulties surrounding the definition of 'war' and 'terrorism'.[5] However, this mini thesis does not intend to propose any definition of the terms 'war' or 'terrorism'. It only intends to show how the lack thereof impacts on the current fight against terrorism. Since the fight against terrorism developed a new dimension after the attacks on the World Trade Center (WTC), the events of 11 September 2001 that led to the declaration of the "War on Terror" will be discussed briefly.[6] The context of the "War on Terror" in International Humanitarian Law will require a critical assessment of the wars in Afghanistan and Iraq. To this end, it will be necessary to examine the internal conflicts taking place in both countries prior to the US attacks. This is important, as it will help to determine the legal status of captives held at the island of Guantanamo Bay and other detention camps around the world. The legal bases of the attacks on Afghanistan and Iraq in the light of the decision in the *Nicaragua* case and the appeal court decision in the *Tadic* case will also be examined.

The issue of prisoners of war is the most controversial as far as the "War on Terror" is concerned. This being so, the debate surrounding this problem will constitute the main core of this mini-thesis.[7] In this regard, the provisions of the law pertaining to the protection of prisoners of war will be analyzed in juxtaposition with the notion of 'illegal' or 'enemy' combatant as put forward by the US administration. Chapter Six will be dedicated to two issues. The first of which will be the importance of the Geneva Conventions in the so-called "War on Terror": The second issue will be the relevance of these to the fight against terrorism in particular, and their adequacy in governing modern day conflicts in general.[8] Finally, there will be the conclusion and appropriate recommendations on the key issues raised in this mini-thesis.[9]

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[5] Chapter Two will examine these difficulties and the impact they have on the current fight against terrorism.

[6] See Chapter Three.

[7] The issue of prisoner of war in the framework of the "War on Terror" will extensively be elaborated on in Chapters Four and Fve.

[8] For the importance of the Geneva Conventions and their various protocols in the fight against terrorism, see Chapter Six.

[9] This will be the purpose of Chapter Seven.

CHAPTER ONE

1.1 Introduction

It would have been ideal to begin a mini-thesis of this nature with a definition of the term terrorism. This approach will however not be taken for three reasons. Firstly, there are disagreements inherent in the definition of the term due to the complexity of the issues involved.[10] Secondly, any attempt to define terrorism at this point will limit the ensuing arguments to such definition. The third reason why this mini thesis does not commence directly with a definition of terrorism is that it does not intend to dwell on the problem related to the definition of the term at this stage. The intention here is to show how the lack thereof impacts on the research question, namely, the conceptual difficulties surrounding the so-called "War on Terror". To this end, the problems of defining terrorism and the relevance thereof to the research question will be discussed in a subsequent chapter.[11] To facilitate an understanding of the subject matter and the challenges it poses today, it will be important to discuss the development of terrorism from a historical perspective and the early attempts by the international community to combat this phenomenon. Here again an attempt will not be made to scrutinize the various terrorist groups that have existed over the centuries. The reason being that they have been as numerous, as their motives have been diversified.[12] Thus it will be an endless task trying to identify each and every one of them. In this regard, it will be preferable to focus on the changing face of terrorism over the last century, making mention only of those terrorist acts that had a significant impact on International Law in general and International Humanitarian Law in particular. This chapter will thus focus on the developments in 20th century terrorism.

Terrorist activities during this period can be divided into two phases, namely

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[10] Terrorism is a loaded term fill with political and economic issues. Thus as will be seen later, any legislation aimed at its eradication is often met with strong opposition by groups or countries who feel such legislation will hamper their economic or political agenda

[11] The problem of defining the terms 'war' and 'terrorism' is dealt with in Chapter Two

[12] According to Walter Laqueur, in the book *Terrorism,* terrorist groups have appeared in Italy, France and Russia mainly depending on the challenges posed at the period of their formation. They suddenly disappear as soon as their goal has been reached.

-Terrorism in the first half of the 20th century,[13] a period noted for political assassinations and individual killings; and

-Terrorism in the second half of the 20th century.[14] Where terrorist activities moved from political assassinations to massive killings with total disregards for civilian lives. This Chapter also intends to investigate the reasons for the rapid development in modern day terrorism[15] and the earlier attempts by the international community geared at combating this phenomenon.[16] 11 September 2001 is an important date in the fight against terrorism. This is because after this date, the struggle against terrorism intensified with tremendous consequences in International Law in general, and International Humanitarian Law in particular. This chapter will examine the international community's approach to terrorism before,[17] and after this date[18]

1.2 Terrorism in the first half of the 20th century

There might be a lot of controversies and complexities in the formation of an internationally acceptable definition of terrorism. However, if there is one thing that is unanimously agreed upon, it is the fact that terrorism is not new. Terrorism is as old as history itself.[19]This, however, does not mean that the nature of terrorism have remained static. It has evolved over the years, even if the evolution process, still retained some of its typical characteristics, for example, contemporary practitioners are still driven by religious and political convictions, something that drove most of their earlier contemporaries.[20] The earliest terrorist acts were perpetrated by organizations such as the Sicari and the Zealots, both Jewish groups active during the Roman occupation of Palestine the 1st century.

Though acts of terrorism are as old as history itself, the terms 'terrorism' and 'terrorist' are relatively recent. The meaning given to 'terrorism' in the 1798 supplement to the

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[13] See chapter 1
[14] See 1.2
[15] See 1.3
[16] See 1.4
[17] See 1.5
[18] See 1.6
[19] Yonah Alexander, *International Terrorism: Political and Legal Documents*. (1992). pix.
[20] Ibid p.2

Dictionaire de l'Accedémie Français was: *system régime de la terreur.*[21] According to a French dictionary published in 1798, the Jacobins had on occasion used the term when speaking and writing of themselves in a positive sense.[22] Terrorism actually received the negative connotations we know of today during the time of Maximilien Robespierre and the Reign of Terror in France between 1793 and 1794.[23]

The 20th century witnessed the evolution of terrorist behavior with the assassination of the heir to the Austrian throne, Archduke Franz Ferdinand and his wife in Sarajevo.[24] It was at its highest during this era in Russia owing to the advent of social revolutionary groups aimed at eliminating the Czars. An assassination by militant groups in the first half of the 20th century that shocked the world was that of King Alexander of Austria.[25] In Russia the social revolutionaries in the early years of that century in launching their attacks deliberately intended to destroy the awe in which the population of Russia held the regime. They felt that as long as people feared the government and believed it to be omnipotent there was no possibility of a revolution. Thus the murder of government officials or supporters of government was an important step in causing the numerous glows surrounding the government to evanesce.[26] These assassinations prompted the formulation and adoption by the League of Nations of the 1937 Convention on the Prevention and Punishment of Terrorism. This was the first international attempt at dealing with this issue.[27]

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[21] This was a regime headed by Maximilien Robespierre. This regime ruled France for almost a year.
[22] Walter Laquer, *Terrorism*, 1978 p.16.
[23] For more on the history and development of terrorism, see Mark Burgess. *History of Terrorism*: which can be accessed at http://www.cdi.org. (Accessed on the 25th of July 2006)
[24] This was an assassination that set in motion a series of events culminating in the outbreak of the First World War.
[25] He was assassinated in the streets of Marsaille, France, together with the French Prime Minister Louis Bartou. Members of the Internal Macedonian Revolution (IMRO), claimed responsibility for this assassination.
[26] Richard Pipes. *The Roots of Involvement. International Terrorism: Challenges and Response.* in Benjamin Netanyawu (Ed). (1981)P.58.
[24] Marc A Celma. *Terrorism, US Strategies and Reagan's Policies.* (1987). p6. The relevant provisions of this Convention will be examined in greater detail in page 12

1.3 Terrorism in the second half of the 20th century

Terrorism in the first half of the 20th century was aimed at specific targets. The assassinations of Russian Tsars, for example, were carried out by people who felt that a specific man in power represented or embodied political or social evil, and as a result must be eliminated. By contrast, international terrorist incidents of the 1970's and the 1980s were aimed at a wider spectrum of targets with little regard, or concern for injuries to innocent civilians.[28] This is not intended to mean that such disregard only began in the 70's and 80's. In fact, The Peoples Will Organization in Russia was the first to consider the enemy to be the whole system. Their anger was not only directed against autocracy but also against capitalism, religion, law and anything else that kept the existing system intact. This organization was responsible for the assassination of Tzar Alexander II. Though they had no political hostility towards him personally (some even admired him for liberating the serfs), they regarded him as an essential part of an inherently evil system that had to be destroyed.[29] Thus, as rightly argued by Pipes, the assertion that the difference between previous and modern acts of terrorism is that modern terrorism takes no account of the lives of innocent civilians is not completely true. He asserts that Tsar revolutionary groups like The People's Will Organization happily killed anybody that came in their way. But many of the central figures of one of the most notorious terrorist organization of the time, the *Varodnaya Volya*, [30] had a different view of the reason for terrorist activities. They emphasized that terrorism was ethically a better choice than allowing the carnage that would result from a mass insurrection. If innocent people died as a result of terrorist activities, it was to be accepted as the inevitable consequences of war, and was therefore preferable to the slaughter that would accompany a mass struggle.[31]

The age of modern terrorism however, might be said to have begun in 1968 when the Popular Front for the Liberation of Palestine (PFLP) hijacked an El Al airline en route from Tel-a-Vive to Rome. While hijacking of aircrafts had occurred before, this was the

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[28] Ibid
[29] Richard Pipes: p.58
[30] This was a small Russian organization initially consisting of thirty members with the intention of eliminating all the Russian Tzars.
[31] Grant Wardland. *Political Terrorism; Theory, tactics, and counter measures.* (1989). P23.

first time the nationality of the carrier (Israeli), and it's symbolic value, was a specific operational aim. In addition, it was the first time that passengers were deliberately used as hostages for demands made against the Israeli government.[32]

19th and early 20th Century terrorist acts were directed against individuals and politicians in power. By contrast terrorist activities during the latter part of the 20th Century most will agree, had little regards for innocent civilians. If terrorism is taking center stage in world politics today, it is due to this total disregard for civilian lives. What then are the reasons for the developments in modern day terrorism?

1.4 Reasons for the recent growth in terrorism

Terrorism is an old phenomenon, but until recently, actions by individuals that today would be described as "terrorist" were subsumed under different labels. In the case of murders of heads of states, for example, those responsible for the assassinations were glorified by the subjects of the despots, and greeted in other countries at the time. Western European folk-lore glorified tyrannicide in the past where it had been the only means of bringing to an end a hated despotic rule, especially one imposed by foreigners by force of arms.[33] The heroic status given to these assassins and their acts encouraged others to follow suit. This definitely planted the roots of terrorism that has grown over the years to what we know today.

Another element that helped sustain terrorism in its early stages was the cultural-historical background of western political ideas legitimizing the exercise of direct action and force of arms as an instrument of societal change. This happened in cases where the ordinary constitutional-governmental process, to which one might normally look up to, either did not exist or had become hopelessly clogged.[34]

In recent times, however, the growth of terrorism has been fostered by many factors.[35] Three of them will be considered at this stage.

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[32] Terrorism in The 20th Century. Can be accessed at http//www. Terrorism research. Comm. (accessed on the 25th of July 2006).

[33] See Edward McWhinney: *Aerial Piracy and International Terrorism, The Illegal Diversion of Aircraft in International Law.* (1987) P.128.

[34] Ibid.

[35] According to Antonio Cassese. *Violence and Law in the Modern Age*, (1986), the existence of harshly authoritarian structures amongst many states, profound social and economic inequalities amongst nations, progressive fragmentation of various centers of power in the International community and the continious

First, in an age of communication and media objectivity, it is sometimes argued that the media are tools used by terrorists for publicity purposes. The Chinese saying "kill one frighten ten thousand"[36] holds true in modern day terrorism. The press has become the unwilling, and in some cases willing, participant in terrorists' publicity campaigns. While some terrorists and terrorist organizations use the media to spread fear and their ideologies, others actually make publicity their sole objective.[37] The media has been accused not only of giving extensive coverage to such incidents but adopting their terminologies and arguments and transmitting them to the public uncritically and even sympathetically.[38] Furthermore, the press interviews terrorist and murderers thereby, according them the status of respectable politicians. In hostage takings, for example, it is argued that the presence of the media endangers the lives of the hostages, as a hostage taker is more likely to kill a hostage in front of the press to prove his point to the world. In a free society, however, this is unavoidable, though it will be a good idea to give terrorism coverage the same constraint that applies to pornography and other deviant behavior.[39]

The second element that has enhanced the growth of terrorism in recent years is the problem of state sponsorship. Terrorism in the early days used to operate on meagre funds and with no precise objectives. After the First World War it became the fashion among some governments to finance terrorist groups. The Italians and the Hungarians, for example, financially supported the Croatians and the IMRO. The IRA received contributions from the USA, while the Palestinian Arab terrorist groups have been

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proliferation of poles of interest owing to the fact that the international community is no longer crystallized into a few great blocks dominated by one power able to control any centrifugal tendency, the inability of the international community in its organized form, e.g. the UN, to offer an 'adequate' response to the request for greater justice and to the need for preventive mechanisms to defuse economic and social conflicts, the inability of oppressed groups to fight for their rights conventionally thus resolving to battle by way of terrorism, are some of the elements that have given impetus to the growth of terrorism in recent times. Yonah Alexander (1992) *International Terrorism, Political and Legal Documents.* adds further that, intensification of religious fundamentalism, rapid development in modern technology, communication facilities and inexpensive and convenient travel have greatly enhanced the growth of terrorism.

[36] Edward McWhinney *Aerial Piracy and International Terrorism* (1987) P.16

[37] As for example the Croatians who seized Yugoslav hostages and demanded only that the press publish their manifesto. See Charles Krauthammer: *Partners in Crime, Terrorism, How The West Can Win.* In Benjamin Netanyahu (ed). 1986.P.111.

[38] Ibid: Terrorism And The Media P.103.

[39] For an in-depth look at how the media has enhanced modern days' terrorism, see Alex P Shmid and Janny de Gaff: *Violence as Communication*; (1982). See also Gerard Chaliand: *Terrorism, From Popular Struggle To Media Spectacle.* (1985).

receiving hundreds of millions of dollars from oil producing countries.[40] Through out the Cold War the Soviet Union provided direct and indirect support to revolutionary movements around the world. Many anti-colonial movements found the revolutionary extremist against colonialism attractive. Also attractive was the advantage of free weapons and training coupled with the realization that assistance and patronage from the Eastern Bloc would amount to some international legitimacy.[41]

State support for international terrorism has not been the monopoly of the Soviet Union. Direct and indirect support has also been offered by Arab states to both Arab and non-Arab organizations.[42] The Popular Front for the Liberation of Palestine (PLO) has been a great beneficiary of such support. They have relied heavily on the support of other Arab states for the provision of weapons and munitions.[43] For Palestinian Arab terrorists outside the Middle East, these Arab states have provided passports and other official papers, and the use of diplomatic pouch not only for mail but also for weapons and explosives. They have also provided intelligence and miscellaneous on-the-spot assistance.[44] This has enabled terrorism to grow over the years from little groups of individuals who wanted to use terror to foster their ideas to the multi-million dollar operations we know today.

There is also a third factor: the creation of a terrorist network around the world. Terrorism could not have attained its present proportions without states support and the collaboration of terrorist groups throughout the world. There are numerous examples of terrorist groups collaborating with each other. The PLO, for example, played a pivotal role in terrorist collaboration over the years.[45] This role was in turn backed by the Soviet Union and the Arab world. For many decades the PLO was the only terrorist organization in existence to posses in Lebanon a quasi-independent state to which terrorists from all

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[40] Walter Laquer: *Terrorism*; (1978). P.111.

[41] Terrorism in the 20th century. Can be accessed at http://www.Terrorismresearch.com. (Accessed on the 25th of July 2006).

[42] According to Barry Rubin : *Israel, the Palestinian Authority and the Arab States* (1988), the Arab States were an indispensable base of support for terrorist organizations without which movements such as the PLO might have collapsed or be ignored.. Can be accessed at http//www.biu.ac.il/books/36pub.html#A

[43] According to the same source, Arab states treated the PLO more as a tool than partner neither consulting it nor respecting its interest when setting goals against Israel or the US.

[44] For an in-dept understanding of the role played by Arab states in international terrorism see Aharon Yariv. *International Terrorism: Challenges and Response; Arab State Support For Terrorism.* In Benjamin Netanyahu ed. (1981). Pgs.73-78.

[45] Haris O Shoenberg. *A Mandate for Terrorism. The United Nations and the PLO.* (1988) P605.

over the world were brought for training and, in many cases, indoctrination.[46] Another example of collaboration and a high standard of networking is provided by *Al-Qaeda*. With satellite branches all over the world,[47] each satellite carries out its own operation all in the name of the mother organization. It, however, remains unclear whether they receive orders from a central command.[48]

This network of support by states and terrorist organizations alike not only exists, but also is instrumental to the growth of modern terrorism. An effective struggle against international terrorism, thus, must begin by eliminating this network that is growing from day to day. As for the support of states, there is already the 1999 International Convention for the Financing of Terrorism geared at deterring States from sponsoring terrorist acts.

The above factors have greatly enhanced the growth of terrorism in recent years. But this does not mean that the threat to civilization posed by terrorism had not been realized by earlier statesmen. The next section will examine the earlier attempts by the international community to combat terrorism.

1.5 Earlier attempts by the international community to combat terrorism

While the main wave of 18th century terrorism might have taken place in imperial Russia with the Czars and their police chiefs as target and victims, the European royal dynastic houses were not spared. In the space of three decades leading up to the 19th century and the outbreak of the First World War in 1914, there were assassinations of monarchs and heads of states all over Europe and America. Apart from the assassination of Franz Ferdinand, heir to the Austro-Hungarian throne, and his wife as well as the Russian Tzars, there were the assassinations of the President of France, the wife of the Emperor of

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[46] Though the PLO lost its base in Lebanon, it continues to play through its various factions, its contacts, Its funds, and its world wide operations, a pivotal role in international terrorism. For a comprehensive look at the relations and collaborations between the PLO and other Arab and non-Arab revolutionary and terrorist groups around the world, see Benjamin Netanyahu.*The International Network. Terrorism, How The West Can Win.* In Benjamin Netanyahu (ed) (1987). Pgs 83-110.

[47] The US Congress in 2003 reported that this organization has 60 branches all over the world some operating within the US itself.

[48] According to an article by Desmond Butter in the New York Times London, before the war with Iraq, *Al-Qaeda* networks all over Europe were recruiting young people for Iraq presenting them with money and travel documents. This article can be accessed at http//www.smh.com.au/article/2003.

Austria, and the kings of Italy, Portugal, Serbia and Greece.[49] Lawmakers and statesmen realized then that terrorism if not brought under control, would became a threat to civilization.

The first attempt to design legislations geared at fighting terrorism was carried out by the League of Nations after the wave of assassinations preceding the First World War. This was known as the Convention for the Prevention and Punishment of Terrorism. Article 1(2) of this Convention defined terrorism as:

"Criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or group of persons or general public."

Article 2 of the Convention listed examples of acts that will be considered as acts of terrorism. These included, *inter alia*, acts causing death or grievous bodily harm or loss of liberty to heads of states, their heirs or successors; their wives or husbands, persons charged with public functions or holding public positions, wilful destruction of, or damage to public property belonging to, or subject to the authority of a high contracting party; and, lastly, any wilful act calculated to endanger the life of the public.

The Convention was opened for signature in November 1937.[50]It was to be registered by the Secretary General of the League of Nations and was to come into force after the receipt of the third instrument of ratification. In other words, only three of the twenty-four signatories needed to ratify for this document to come into force. Despite the limited number of ratification required, only one country India, bothered to ratify. It seemed that the Convention was a victim of the tense international atmosphere extant on the eve of World War II. Its overly ambitious scope and lack of agreement on the scope of terrorism were also factors responsible for the failure of the Convention. Moreover, while many governments were genuinely opposed to terrorism, as seen above,[51] it served the purpose of others, which were therefore less inclined to take steps to curb the problem by ratifying the Convention.[52] Thus McWhinney is rightly of the opinion that:

"The Conventions highly particularistic fixation upon crimes against heads of states and their immediate families- symbolizing the maintenance of a particular status-quo in the case of too many states in a rather limited world community of the pre-World War II era, whose constitutional authority rested upon mastery

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[49] Edward McWhinney: *Aerial Piracy and International Terrorism.* (1987) P.128.
[50] This was according to Art. 26 of the Convention.
[51] See State sponsorship of terrorism at 1.4
[52] Joseph J Lambert: *Terrorism and Hostage in International Law.* (1990). P.29.

of police power and not popular consensus explains the lack of interest and enthusiasm for the project even on the part of western governments normally opposed to violence as a means of achieving political ends".[53] The failure of the League of Nations and the 1937 Convention did not end the quest of the international community to enact anti-terrorism legislation. The next heading then will be examining the manner in which the international community approached the issue of terrorism before the 11 September 2001 attacks on the World Trade Center.

1.6 The fight against terrorism before 11 September 2001

In the period since World War II, during which the phenomenon of international terrorism has become prevalent and its manifestations increasingly sophisticated, the difficulties in reaching agreements on steps to control terrorism have become more acute. However, the United Nations reached a fairly early agreement to the effect that States have a responsibility not to conduct, support or encourage terrorist activities against other States.[54] It should be mentioned that the United Nations has always favored a diplomatic approach to the fight against international terrorism. This has not been very easy owing to the fact that at one time or another aggrieved states have had to pursue terrorist right across their borders into the territory of other states in circumstances that could arguably be considered as Self-defense.[55] That said, it should also be mentioned that beyond the achievements of the 1974 Resolution and the 1970 Declaration, there has been little achievement by the United Nations in the fight against terrorism. It should be realized that the endeavors of the United Nations to come up with guidelines on terrorism coincided with the struggle of most third world countries against colonial rule. Thus efforts to control terrorism were often looked upon with suspicion by the developing nations believing that they were designed to weaken those seeking to get rid of their oppressors.[56]

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[53] Other pre-World War II instruments drafted with the intension of combating terrorism included: The Air Transport Convention and Additional Protocols of 12 December 1929, and also, The Convention On international Civil Aviation of 17 December 1944. For a look at the provisions of these Conventions, see Yonah Alexander: *International Terrorism, Political and Legal Documents*. (1992)P.5-44.

[54] Such prohibitions are contained in the 1974 resolution defining aggression and the 1970 declaration on International Law.

[55] According to Yehuda Z Blum in: *The legality of State Response to Terrorism*: *Terrorism. How The West can win* in Benjamin Netanyahu (ed) (1987). P.134, all the permanent members of the United Nations Security Council have on occasion used force at circumstances hardly to be characterized as self-defense.

[56] Edward Mc Whinney Aerial Piracy and International Terrorism (1987). P 30.

In the ensuing struggle between colonies and their colonizers, the question of 'means' and 'ends' featured prominently in all debates.[57] The West, for example, advocated that certain forms of violence, like the hijacking of civil aircraft and the taking of hostages, are always impermissible regardless of the cause pursued by the perpetrators. The developing nations and other nations under oppressive or colonial regimes, on the other hand, relied on the right to Self-determination, a right accorded to them by the UN charter. The right to Self-determination is to the effect that "people" have a "right" to determine for themselves the form of state under which they choose to live. This right is also supported by the UN Declaration on Principles, which is to the effect that States have the duty to promote Self-determination, *inter alia*, by assisting the UN in eliminating colonization. The developing States argue that Self-determination is a legitimate justification for the use of force. Moreover, since national liberation groups are poorer and less well armed than their oppressors, they must be allowed to use the type of strategies and ammunitions available to them. Put differently, the means used to achieve national liberation had to be measured in context of the choice of means at their disposal. Finally, some States like Cuba, accused western States of condemning revolutionary violence but at the same time tolerating the violence used by colonial, occupying or racist powers.[58]

Some writers seem to be of the opinion that the right to Self-determination cannot be construed as a warrant to use unorthodox means to achieve independence. As aptly argued by Combs:

"[t] he "right" to "Self-determination" cannot be more fundamental than the right to life, nor does it supercede the right of a State to try and protect itself and to provide to its citizens a safe and stable system of government. Thus as in other armed struggles, there should be limits within which the right to "Self-determination" must operate in order to limit the adverse effect of such a course of action on the rights of others."[59]

Suffice to say, that the results of the efforts of the General Assembly of the United Nations did little since the 1970's to come up with a universally accepted approach to the problem of international terrorism. It seemed to accept the use of certain forms of

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[57] Most colonies were poor and less equipped. Thus they advocated that they should be allowed to use any means available to them to fight against the usually well equipped oppressors.

[58] Ibid p.30-31.

[59] Cindy C Combs: *Terrorism In The Twenty-First Century.* (1997)P.42.

violence, including terrorism, provided they passed the limited test of 'the struggle for national liberation'. But after the attacks on the World Trade Center in 2001, the fight against terrorism took a different phase. The approach has now shifted from the right to "Self-determination" to the right to "Self-defence". The effects of this shift will be chronicled under the next heading.

1.7 The fight against terrorism after 11 September 2001

The difference between the struggle against terrorism in the 1970's and 1980's and the struggle after 2001, lies in the fact that before 2001 small and developing States favored any means at their disposal including terrorism to achieve their ends (Self-determination). By contrast, western nations after the above date are willing to use any means at their disposal including pre-emptive strikes to achieve their ends (Self-defence). The reason for the change in the approach by western states is summarized by Laqueur's description of modern day terrorism:

"[t]he driving force is hate not love, ethical considerations are a matter of indifference to them and their dreams of freedom, of national and social liberation are suspect. Nineteenth-Century nationalist terrorist were fighting for freedom from foreign domination. More recently, appetites have grown and Basque has the design of Galicia, the Palestinians not only want the West bank, but also intent to destroy the Jewish State, and the IRA will like to bomb the Protestants into a united Ireland".[60]

The "growth of appetites" has made terrorism a greater threat to society. The struggle for its eradication today has taken the form of a world-wide civil war with most western states, being the usual target, resorting to means that were not thought of before in other to defend themselves. This is mainly due to the fact that most terrorist groups today resemble of militias and possess sophisticated weapons capable of putting up a fierce resistance against any adversary.[61] Since 11 September 2001, the most renowned major taken by States to fight terrorism has been to first of all identify certain organizations as 'terrorist organizations' by their nature.[62] The next step has been to impose both criminal and non-criminal sanctions against the act of providing funds to these organizations.

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[60] Walter Laqeure Ibid p. 65.

[61] According to Aharon Yariv, terrorist groups have became so powerful because of their reliance on Arab States for weapons and ammunition. Benjamin Netanyahu adds further that, because of such support, the PLO was able to possess a quasi-independent state in Lebanon.

[62] For example the identification of organizations such as Hamas, Al-Qaeda, Hezbolla etc as terrorist organizations and imposing sanctions on any State supporting them financially.

American federal statute for example leaves the determination of a 'terrorist organization' to an administrative decision and imposes direct penalties on acts of financing. On the other hand, the UN General Assembly Resolution on the financing of terrorism focuses on the financing of terrorist acts rather than of organizations.[63]

Apart from punitive sanctions, western nations have resorted to pre-emptive strikes as a measure of Self-defense. The principle of Self-defense[64] is an exception to the general rule that, States should refrain from using force.[65] It allows for the use of force (principally counter force) under conditions prescribed by International Law. Pre-emptive or preventive war, on the other hand, is not intended to achieve any positive aim but to prevent some other action being taken. This kind of action has a lot in common with anticipatory breach. It implies an assumption that some other party is about to resort to war. A war is thus started in the belief that, because of acute danger, action provides the only safe route.[66] The notion of pre-emptive strike for the purpose of Self-defense presents some difficulties in the fight against terrorism. It necessitates the question: how far and for what duration can one State encroach upon the territory of another sovereign State for the purpose of Self-defense?

The acts of 11 September 2001 can no doubt be regarded as a threat to international peace.[67] This in turn has paved the way for the activation of Chapter VII of the UN Charter calling for collective measures under Articles 41 and 42 of the Charter. The call for collective action might require some degree of Self-defense. Recourse to Self - defense against aggression being a right of a State recognized under Article 51 of the UN Charter, it becomes problematic when such aggression comes from across the borders carried out by non-state agents or an entity that is not a subject of International Law. If the aggrieved State has to repel such attacks and make sure that it eliminates the possibility of future attacks of that nature, Abi-Saab is of the opinion that Self-defensive measures of this nature, can only be taken with the approval of the terrorist hosting

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[63] See General Assembly Resolution 54/109/, 9 December 1999. For an in-dept study read George P Fletcher: *The Indefinable Concept of Terrorism. Journal of International Criminal Justice.* (2005) 4

[64] Article 51 of the UN Convention.

[65] Article 2(4) UN Convention.

[66] Ingrid Detter: *The Law of War*; (2000) P.57.

[67] This was confirmed by the UN Security Council Resolution of 12th September 2001 followed by Resolution 1313 of 28th September 2001.

nation.[68] In the absence of such approval, pursuing terrorists into the territory of a subject of International Law will amount to an act of aggression, except where such a State can be held liable for the acts of the terrorists. In such situations it will be permissible to use force against that State.[69] That said, while the war against Iraq can be construed as an erroneous or intentional manipulation of the situation (creation of non-existent weapons of mass destruction),[70] it is debatable whether the war against Afghanistan can be considered a pre-emptive or punitive war for the part it is accused of playing in the 11 September attacks. This is due to the fact that, as will be discussed in a latter stage, the connection between *Al-Qaeda* and the Taliban government has not been established.

1.8 Conclusion

Terrorism is not a new phenomenon. Though a proper and acceptable definition of the term and its constituent elements still eludes international law makers today, it is a phenomenon that can be traced as far back in history. Acts of terrorism have evolved over the years, even if in the evolution process they still maintain some of their original characteristics. Terrorism in the first half of the 20th century was characterized by individual assassinations. By contrast, terrorist acts in the second half of the 20th century, focuses on mass destruction with little regard for civilian lives. Many reasons have been advanced for the escalation of terrorist activities, but financial and material support from other states, coupled with the publicity enjoyed from the media have been fundamental. Moreover, the networking of terrorist groups today has only made the problem of eradicating terrorism more complicated.

The threat posed by terrorism to world order today had been foreseen by statesmen since 1937, but efforts to draft laws geared to punishing such acts were rendered short lived, mainly due to the over ambitious nature of the proposed legislation and events leading up to the Second World War. These efforts were continued after the Second World War by the United Nations, but were, however, hindered by the growing nationalistic ideas of developing nations who advocated the use of any means at their disposal (including

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[68] Also see *The Right to Hot Pursuit.*

[69] George Abi-Saab: *The Proper Role of International Law in Combating Terrorism. Enforcing International Law Norms Against Terrorism.* In Andrea Bianchi (ed) 2004. Pgs XIII-XXII.

[70] Manipulation because till date no weapons of mass destruction has been found.

terrorism) to fight oppressive and racist regimes. The West on the other hand, believed that no matter how justified the course might be, certain methods should be declared unlawful. This position, however, was reversed after the events of 11 September 2001. The West, after this date insists on the use of any means including pre-emptive attacks for the purpose of Self-defense while most smaller States consider the idea of a pre-emptive strike with suspicion. To better understand the problem inherent in the conceptualization of the "War on Terror", the next Chapter will examine some of the difficulties inherent in the definition of war[71] and terrorism,[72] and the problem of 'terrorism' versus 'freedom fighter'.[73] It will also endeavor to analyze some of the difficulties this creates for International Law.[74]

[71] See 2.1.
[72] See 2.1.1.
[73] See 2.1.2.
[74] See 2.1.3.

CHAPTER TWO

WAR AND TERRORISM: DIFFICULTIES IN DEFINITION

2.1 Introduction

The historical evolution of terrorism and attempts by the international community geared at its eradication have been discussed.[75] Before the WTC attacks in 2001, the international community believed the problems posed by terrorism could be solved diplomatically. The events of 11 September 2001 forced the Western powers to change their approach. The change in the approach to fight terrorism adopted by the US administration and its NATO allies after the declaration of the "War on Terror" raises certain questions. First, the term 'war'[76] and 'terrorism'[77] are void of a universally accepted definition. Secondly, it is debatable whether the term 'war' should be understood in its legal sense in which case it would have various legal implications. Finally, the absence of accepted definitions of 'war' and 'terrorism' has led to the apparent confusion between a 'terrorist' and a 'freedom fighter'[78]. This chapter is thus dedicated to the difficulties raised in the definition of the above words and the bearing it has on the fight against terrorism.

2.2 Difficulties in the definition of 'war'

The word 'war' is open to various interpretations. It can be used as a figure of speech heightening the effect of an oral argument or a news story in the media. This is different from 'war' as a legal term. In ordinary conversation, press reports or even literary publications, 'war' may appear to be a flexible expression suitable for an allusion to any serious strife, struggle or campaign. For example, 'war against the traffic of narcotics', 'class war' or 'wars of nerves'. In legal parlance, the term is invested with a special meaning and consequences. In the domestic law of a State, war, especially a lengthy one,

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[75] See Chapter 1
[76] See difficulties in the definition of 'war' at 2.2.
[77] See difficulties in the definition of terrorism at 2.3.
[78] The difference between a 'terrorist' and a 'freedom fighter' is discussed at 2.3.

is likely to have a serious effect on the internal legal system of the belligerent State. A decision whether war has commenced at all, is going on, or has ended, has far-ranging repercussions in the domain of both private and public law.

In International Law, there is no definition of 'war' *stamped* with the *imprimatur* of a multilateral convention in force. In its place, we have a few scholarly attempts to depict the practice of States and to articulate, in a few choice words, an immensely complex idea.[79] Thus from the perspective of political science, international relations and sociology, there are good reasons to understand any form of terrorism, and of combating terrorism, as a kind of war. In International Law, as in all law, terms are used for normative purposes, that is, to make certain rules applicable and to provoke certain legal effects.[80] The Geneva Conventions and their Protocols are not very helpful as far as the definition of war is concerned. Instead, they prefer to use the now often used term 'armed conflict'. Whether 'war' and 'armed conflict' are synonymous is a debatable matter, which falls outside the scope of this mini-thesis. Suffice it to say that most writers on the subject seem to be of the opinion that 'war' is a broader concept to 'armed conflicts'. Moreover, while 'armed conflicts' can be restricted to actions on the battlefield, 'war' can take different dimensions for example, psychological warfare, industrial warfare, guerilla warfare etc.[81]

These available attempts at a definition, unfortunately, duels mostly on one or some of the constituent aspects of war. Clausewitz's statement for example that; "war is an act of force to compel our enemy to do our will"[82] only concerns the motives of war. It only answers the question why a war is waged. This assumes that there is a will with which another state does not comply voluntarily. According to Verdross,"War is the state of force between States with the suspension of all peaceful relationships".[83] But this is not often the case. As was held in *Dalmia Cement ltd v National Bank of Pakistan*, states can engage in hostilities of warlike dimensions, but as long as they preserve or display the intention of preserving some rudimentary peaceful relationship, it will be considered as if no war existed between the States. Thus in the above case it was considered that no war

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[79] Yoran destein: *War, Aggression and Self-defense* (1998) P.3.
[80] Marco Sassòli: *Terrorism and War. Journal of International Criminal Justice* (2005). 4
[81] See Fritz Karlshoven. *The Law of Warfare*: (1973) Pp.9-17.
[82] See Ibid P. 14.
[83] Ibid P.17.

existed between India and Pakistan during the hostilities in 1965.[84] In *R v De Berenger*,[85] an indictment that alleged a war to be in existence was objected to, as the fact of the existence of the war was not proven. This same reasoning was followed in *Janson v Driefontein Consolidated Mines*.[86]

Oppenhein provides one of the often-quoted definitions of the term "war". It is defined as "A contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases".[87] Dintein identifies four elements in this definition, namely:

(1) There has to be a contention between at least two States;

(2) The use of the armed forces of those States is required;

(3) The purpose must be to overpower the enemy (as well as imposing peace on the victor's terms); and

(4) Both parties are expected to have symmetrical although diametrically opposed goals.[88]

There is no disputing the fact that 'war' is a contention between two or more States. It should, however, be mentioned that other conflicts like civil wars do not necessarily require the involvement of two States. It might be between a State and a single dissident group or different groups within the same State. Such conflicts will be governed by somewhat deferent rules in International Law.[89]

The second element requiring the use of armed forces has been criticized as being too narrow. This requirement only relates to war in the technical sense of the word, that is, from the point of commencement (with a declaration of war) to the point of termination (with a peace treaty or some other formal step indicating that the war is over).[90] This is not often true. Experience has shown that formal measures are not always required to

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[84] See Ingrid Diatta. The Law of War. (2000). P.7.
[85] *R v Berenger* 3M &S 67,69.
[86] Janson v Driefontein Consolidated Mines [1902] AC484,493.
[87] Oppenhein: *2 International Law; War and Neutrality 7th* edition in H Lauterpatch (ed).; (1952) P 202.
[88] Yoran Destein War, Agression and Self-Defense (1998) P.34.
[89] The law governing intra-State wars is contained in Protocol I of 1977, which is an additional Protocol to the Geneva Conventions of 1949.
[90] War in the technical sense can occur without any actual combat, for example, not a single shot was fired between a number of allied States especially in Latin America and Germany in either World War. Never the less, *de jure*, by virtue of the issuance of the declaration of war, those countries were in a state of war in the technical sense.

indicate the commencement or the termination of war. This is what is often referred to as war in the material sense where what counts is not a *de jure* state of war but a *de facto* combat.

The third component of Oppenhein's definition that the purpose must be that of overpowering the enemy postulates what is known today as 'total' war. Though many wars today can be termed 'total' wars due to the fact that they are conducted with total victory in mind, that is, the capitulation of the enemy following the overall defeat of it's armed forces or the conquest of it's territory, which in turns, enables the victor to dictate peace terms to the vanquished, not all wars are aimed at total victory. In limited wars for example (which are of considerable frequency today), the goal may be confined to the defeat of some segment of opposing armed forces, the conquest of a certain portion of the opponent's territory, the coercion of an enemy government to give up a certain policy etc. The last component of the definition seems to suggest that both parties necessarily need to have a corresponding objective *viz.* "overpowering each other and imposing such conditions of peace as the victor pleases". Sometimes the aims of one party do not always reflect the intentions of another. There are situations where only the attacking State aims at total victory. In the first Gulf War for example, the intention of Iraq was to eliminate Kuwait, but the intention of Kuwait was to drive Iraqi forces out of its territory. As soon as this was achieved with the aid of the allied forces, hostilities were suspended.[91] Still on this issue, Ingrid comments that today, a victor is no longer allowed to impose whatever conditions he wishes. More still, the concept of war cannot depend on it's own consequences. Ingrid proposed the following definition of war:

"A Sustained struggle by armed forces of a certain intensity between groups of a certain size, consisting of individuals who are armed, who wear distinctive insignia, and who are subject to military discipline under responsible command."[92]

This definition imports the notion of combatants as defined in contemporary laws of war. If this were to be accepted as a definition of the term 'war', how then will situations of *levée en masse* be categorized? In this situation, one party is not required to wear a

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[91] Based on the above analysis, Yoran Dinstein proposed as a definition that, war is a hostile interaction between two or more states, either in a technical or a material sense. War in a technical sense is a formal status produced by a declaration of war. In the material sense, war is generated by an actual use of force, which must be comprehensive to at least one party to the conflict.

[92] Ingrid Dietta. *The Law of War* (2000) P.26.

distinctive sign or uniform.[93] That said, the term 'war' in legal parlance, gives rise to a multitude of definitions and no one definition is serviceable for all purposes.[94] It should also be mentioned that in determining whether a war has broken out or not, the intention of the parties involved is very important. Also important is the degree of coercion. Such coercion should be sufficient to distinguish the insurgence from a sporadic struggle or an incident short of war. In the "War on Terror", for example, since some countries do not possess the military might to resist the coalition forces, it will be difficult to categorize certain incidents as war for it may lack the sufficient degree of coercion to amount to an armed conflict.[95] Thus decisions will have to be made in any given case before the relevant line can be drawn.

It should however be mentioned that though common Article 2 makes mention of cases of "declared war", the key concept in the application of the 1949 Conventions is the fact of "armed conflict", in the ordinary sense of hostilities rather than the ambiguous notion of war. That the factual rather than technical definition of circumstances of application of International Humanitarian Law is more important is aptly illustrated in the Korean War. This is a situation that can be likened to the present "War on Terror". In this instance China refused to admit that a technical state of war existed in Korea during the period 1950 to1953, and thus members of the USAF personnel held by China were refused prisoner of war status. Instead, they were treated by the Chinese military as spies. This decision was criticized by the United Nations in Resolution 906(ix).[96] This war was given different interpretations by all the parties involved. While North and South Korea recognized the state of war, China and the US had different interpretations of the situation in other to avoid the application of International Humanitarian Law.[97]

Having discussed the difficulties surrounding the definition of war and the distinction between "war" and "armed conflicts", it remains to discuss the difficulties around the definition of 'terrorism'.

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[93] This situation in provided in Article 4 Convention III.

[94] Yoran Dinstein. *War, Aggression and Self Defense* (1998). P. 15.

[95] The US attacks in Yemen for example fall short of a war though if considered as part of the "War on Terror", will be considered a battle thus warranting the application of the laws of warfare.

[96] H.McCoubrey: *International Humanitarian Law; The Regulation of Armed Conflicts.* (1990). P.22. For another illustration of this issue see the English position in the 1982. Falkland conflicts. Ibid.

[97] The Chinese interpretation was that it was a "war to resist US aggression and to aid Korea". The US, on the other hand, in order to avoid a congressional declaration of war termed it a "police action".

2.3 Difficulties in the definition of 'terrorism'

Terrorism is not a new phenomenon. It is however surprising to see that to date there is no internationally accepted definition for the term. As aptly put by Bassiouni,

"[t] here is, however, no international agreed methodology for the identification and appraisal of what is commonly referred to as 'terrorism'. [t]there is no international consensus as to the appropriate reactive strategies of states and the international community, their values, goals, and outcomes. All of this makes it difficult to identify what is sought to be prevented and controlled, why and how. As a result, the pervasive and indiscriminate use of the often politically convenient label of 'terrorism' continues to mislead this field of study".[98]

Fletcher on his part is rightly of the opinion that the facet of terrorism fulfills multiple functions thus better way to think of it is not as a crime, but a more dangerous version of crime or a super-crime incorporating some of the characteristics of warfare.[99] There are at least eight primary factors that bear on terrorism[100] however, until an internationally accepted definition of the term is established, the problem of State sponsored terrorism and terrorism versus freedom fighter will not be resolved. As soon as nations can agree on who is a terrorist and what constitutes terrorism, can the extradition of persons accused of acts of terrorism proceed. This in turn will result in the reduction of tension between nations. At present, there are about 109 different definitions of the term.[101] The absence of a universally acceptable definition of the term is due to the complexity of the subject coupled with the interplay of many other forces. Because of the complexity of the subject, one cannot draw a single definition of terrorism for the simple reason that not all the factors identified as its constitutive elements apply at all times. Any proposed definition thus produces counter-examples. Steps have, however, been taken at an

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[98] On Bassiouni's and other attempted definition and commentaries on the subject, see Geoff Gilbert: *Trans-National Fugitives Offenders in International Law. Extradition and Other Mechanisms.* (1998) P.252.

[99] George P Fletcher: *The indefinable Concept of Terrorism.* Journal of International Criminal Justice. (2005). 4

[100] This consist of the factor of violence; the requirement of intention; the level of organization; the nature of the victim; the element of theater and the absence of guilt etc. See Fletcher Ibid.

[101] Pierre Antoine Hilbrand: *International Humanitarian Law and 21st Century Conflicts*; in Roberta Anold Ed. (2005)

international level towards determining a widely accepted definition of terrorism as a basis for international conventions. One basic distinction in this context is between state-sponsored 'official' terrorism and 'individual' terrorism directed against those in power. 'Individual terrorism' thus refers to acts or threats of violence with the intention to intimidate a population in furtherance of some non-economic goal.[102]

However, the lack of definition has little consequences for the application of the provisions of International Humanitarian Law to terrorism or to a violent situation of that nature. This is because International Humanitarian Law responds only to one set of rules namely, those contained in the Geneva Conventions of 12 August 1949 and its various Protocols of 1977. Given that the term 'terrorism' does not express a legal concept (though constituting a criminal act), but a combination of goals, propaganda, and violent acts designed to achieve objectives, International Humanitarian Law does not define the term either, though it prohibits indiscriminate acts of violence considered to be of a terrorist nature in times of peace.

The Geneva Conventions recognizes two kinds of conflicts namely, international and non-international conflicts. This branch of law has as its goal the protection of all categories of people in a situation of armed conflict; thus once it is assessed that the disturbance is of sufficient gravity and coercion to bring into play Article 3 common to the Geneva Conventions, International Humanitarian Law applies irrespective of whether it is terrorism or a conflict of an international or non-international nature.[103] Though the Conventions and their Protocols do not contain a definition of the term 'terrorism', they contain provisions geared at protecting civilians and combatants in the event of hostilities. Protocol I, for example, prohibits acts of violence the primary purpose of which is to spread terror among the civilian population.[104] It also prohibits indiscriminate attacks. Such kinds of attacks are mentioned in Article 51(4). Furthermore, Protocol 1 prohibits attacks on works or installations like dams, dykes, and nuclear electric

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[102] Thomas Weigend: *The Universal Terrorist Journal of International Criminal Justice* (2005) 4.

[103] The determination of whether an armed conflict is in progress is not left in the hands of the parties to the conflict. The reason for this being that, states in an effort to avoid the intervention of the international community, are quick to downplay the effects or the gravity of the conflict. Thus the assessment is done by other States or the international community in it's unified form, like the UN. An impartial humanitarian body can also do this assessment the ICRC for example.

[104] Protocol I Article 51(2).

generating stations containing dangerous forces.[105] These are all protections given to the civilian population against acts of terrorism. However, for these acts to be considered acts of terrorism, it must be shown that the acts were committed with the intention of spreading terror among the civilian population. As correctly observed by Rodriguez, in an armed conflict civilians may logically be terrified by the side effect of bombardments directed towards a legitimate military objective.[106]

International Humanitarian Law does not only protect civilians. It also extends its protective status to those taking a direct part in the hostilities against acts that will be considered terrorist in nature. Though taking an active part in hostilities and, by virtue of this, being legitimate military targets, they are protected against the use of weapons, projectiles, materials and methods of warfare which cause superfluous injury or unnecessary suffering.[107] The prohibition of acts of perfidy[108] can also be regarded as a measure of protection given to those taking an active part in hostilities. The Geneva Convention also grants protection to civilians in the hands of the enemy, whether in their own territory or in the territory of the enemy State. Special protection is also given to war victims and those *hors de combat.*[109] They are protected from all measures of intimidation or terrorism.[110] In situation of conflicts not of an international nature, the second paragraph of common Article 3 provides adequate protection against acts of terrorism.[111]

From the above, it suffice to say that though the definition of terrorism poses difficulties in International Law, International Humanitarian Law will operate notwithstanding the absence of this definition. Acts of terrorism are prohibited in various provisions of the Conventions and their Protocols, but it is generally understood that all of the provisions will operate provided the hostilities reach the threshold set in common Article 3.

2.4 The problem of 'terrorism' versus 'freedom fighter'

[105] Ibid Article 56.
[106] José Luis Rodriguez: Terrorist Act; Armed Conflicts and International Humanitarian Law. *The New Challenges of International Humanitarian Law*: in Pablo Antonio Fernandez Sanchez (Ed).(2005)Pp13-45.
[107] Protocol 1 Article 35.
[108] Ibid Article 37.
[109] See Article 12 (2) Protocol 1&II and also Article 13(2) of Convention IV.
[110] See Article 33 of Convention IV.
[111] This provision protects against violence to life, in particular murder of all kinds, cruel treatment, torture as well as taking of hostages.

As discussed above,[112] terrorist acts in the early phases were directed against individuals. In other words, it was aimed only at eliminating those individuals whom the terrorists believed were the source of the problem. In the 60s and the 70s the United Nations in its endeavour to fight against colonialism and oppression turned a blind eye to certain acts, though terrorist in nature, provided these acts were carried out for the purpose of self-determination.[113] The result of this today is the apparent confusion between a terrorist and a freedom fighter. It should be mentioned that, in the world, people will always feel oppressed and dictatorial governments will always exist. Moreover, no single government can have the support of all. Thus no matter how democratic and how liberal a government tries to be, it will always meet with criticism from individuals and other governments who feel sidelined or neglected.[114] This being so, the difference between a terrorist and a freedom fighter will more and more depend on the individual or government whose purpose is being served on the one hand, and who stands at the receiving end of terrorist acts on the other hand.[115] It is for this reason that the popular adage "one mans terrorist is another mans freedom fighter" has always been the argument put forward by supporters of particular terrorist acts or terrorist organizations. But who is a terrorist and how is he different from a freedom fighter? To answer this question, the proceeding paragraphs will outline the main difference between the two. This will be done by giving the profile of a terrorist and then contrasting this with that of a true freedom fighter. Three kinds of terrorists will be profiled in this regard: crazies, criminals and crusaders.

Crazies[116] are emotionally disturbed individuals who are driven to commit terrorist act for reasons of their own. His or her reasons often do not make sense to anybody. On the other hand, criminals are those who commit terrorist acts for reasons that are understood by most, and usually for personal gain. Such individuals deliberately transgress the laws

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[112] See 1.2

[113] During this period, most developing countries were struggling for independence. Those who championed the course of independence were labeled as terrorist by their oppressors. South Africa is a perfect example of one of such countries that needed liberation. Thus the popular adage "one mans terrorist is another mans' freedom fighter.

[114] Some of those responsible for the attacks in the US and the UK are nationals of those countries. Thus no single government can have the support of all.

[115] A glaring example is Hamas in Palestine. Though considered a terrorist organization by the West, it still have the support of most Palestinians.

[116] The term 'crazies' is used to indicate the mental condition of the terrorist in question. Thus in dealing with such a situation, those responsible should understand that they are dealing with an unstable person and the situation should be handled accordingly.

of society. Both their goals and motives are usually clear, though they may seem deplorable to mankind.[117] Lastly, crusaders are those who commit acts of terrorism for reasons that are unclear both to themselves and to those witnessing the acts. Their goals are even less understandable. While such individuals are usually idealistically inspired, their idealism tends to be a rather mixed bag of half understood philosophies. Unlike criminals, they do not seek personal gain, but prestige and power for a collective cause. They commit terrorist acts in the believe that they are serving a "higher cause."[118] This is the category that is prominent today. What separates this type of terrorist from criminals is the fact that they are far less likely to be talked out of carrying out their threats by an inducement of personal gain, since doing so will be betraying the "higher cause" for which they are committing the action. Captivating propagandas are a typical characteristic of this category of terrorist. In making a distinction between a terrorist and a freedom fighter Banzon wrote,

"Terrorists are crafty individuals and potent enemies who operate not only with physical but psychological weapons, persuasive arguments and captivating slogans. In an attempt to delude the people of the free world, the terrorist appears to be a bearer of their ideals, a champion of the oppressed, a critic of social ill, and a fighter for freedom. Since in the past freedom fighters have also used violence in their struggles, and freedom is so dear to freemen, they could easily gather support and sympathy from the free World."[119]

The above is the profile of persons whose actions are likely to be considered terrorist. What is common among them is the fact that they are prepared to go to any length, including sacrificing the lives of innocent civilians to achieve their goal.

On the other hand, though the objectives of a terrorist and a freedom fighter might be similar, that is, freedom, liberation, and the struggle for personal survival or the survival of a people,[120] the difference between the two can be deduced from the means employed to achieve these ends. While a freedom fighter will respect the laws of war, and more

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[117] A terrorist who highjacks a plane and demands a huge ransom for his captives is an example of a criminal

[118] It is very important to understand the profile of a terrorist. This is more so with the police or those on rescue missions as understanding the kind of terrorist in a particular situation helps determine the manner of approach to be taken. For more on the terrorist profile see. Cindy Combs: *Terrorism in the Twenty-First Century.* (1997) P.56.

[119] Banzion Netanyahu: Terrorist and Freedom Fighters; *Terrorism, How The West Can Win.* In Benjamin Netanyahu Ed. (1986) P. 26.

[120] The struggle of the Israeli against the Palestinians is the fight for the survival of a people, as Palestine will like to see the complete disappearance of Israel in the Middle East.

especially civilian lives, a terrorist lacks such respect and makes civilians his main target. The target of a terrorist usually has little or nothing to do with the ends he hopes to achieve. Since civilians are the most vulnerable, he uses them with the intention of drawing world attention and the attention of his main target. The distinction between a crusader and a true freedom fighter is aptly manifested in this speech by Mohamed Sidique Khan:[121]

"I and thousands like me have forsaken every thing for what we believe. Our drives and motivation doesn't come from tangible commodities that this world has to offer. Our religion is Islam obedience to one true God Allah and following the footsteps of the final prophet messenger. *Your democratically elected governments continuously perpetuate atrocities against my people all over the world and your support for them makes you directly responsible just as I am directly responsible for protecting and avenging my Muslim brothers and sisters.*[122] Until we feel security, you will be our target and until you stop the bombing, gassing, imprisonment and torture of my people, we will not stop the fight. We are at war and *I am a soldier*. Now you too will taste the reality of this situation."[123]

It can be deduced from the above that the vulnerability of civilians is not the sole reason for their being targeted by terrorists. Another reason for this is that they are responsible for putting the democratic governments of the west in power, thus they are vicariously liable for the policies of such democratic governments. One more peculiarity of terrorists that is portrayed in the above speech is the fact that most of them will like to regard themselves as soldiers. This would mean that upon capture, they should be considered prisoners of war and treated according to the provisions of the Third Convention. Unfortunately, their focus on civilian as opposed to military targets makes them criminals in times of peace. In times of war, they could be liable for war crimes.

2. 5. **The impact of this absence of definition on the "War on Terror"**

As discussed above,[124] the definition of the term 'terrorism' has been a subject of controversy through the years. Also controversial is the absence of any international treaty or document defining the term 'war'.[125] The absence of these definitions has made

[121] Sadique Khan was a London suicide bomber who detonated a rucksack bomb in a tunnel near Edgware road station in 2005 killing himself and seven others. This bomb injured a hundred, 10 so seriously that they will be permanently maimed.
[122] Emphasis added
[123] This speech can be accessed at *http://www.enwikipedia.org/wild/7 (*Accessed on the 30th of July 2006).
[124] See Difficulties in the Definition of Terrorism. P 22.
[125] See Difficulties in the Definition of War. P 18.

the so- called "War on Terror" a contradiction in terms. At best, it can be described as a struggle against the unknown. On the definition of terrorism, the US Department of State acknowledges that the broad range of definitions is particularly influenced by the definer's perspective on any given conflict or group. The absence of an internationally accepted definition of terrorism has become a serious problem in International Law, as in court terrorists often argue that they are being prosecuted for supporting certain political or religious courses and that the prosecution is a political rather than a criminal one. This raises concerns among law enforcement personnel and security executives who find it difficult to plan for contingencies.[126] The lack of such a definition has persuaded some US State officials to argue against the applicability of International Humanitarian Law in the "War on Terror". A discussion on this has been reserved for another chapter.[127] That not withstanding, the lack of definition of 'terrorism' is of little or no bearing for the application of the rules of International Humanitarian law strictly speaking. This is because while other branches of International Law deal with the causes of war (*jus ad bello)*, International Humanitarian Law deals with the manner in which wars should be conducted (*jus in bello*). Thus an act of terrorism will bring into operation the rules of International Humanitarian Law with or without a definition of the term terrorism provided the struggle reaches the threshold set by common Article 3. The requirement of reaching the threshold of Article 3 creates another problem.[128] The ambiguous nature of this Article makes its application even harder. As noted by Sassoli and Bouvier:

"[T]he most difficult problem regarding the application of Article 3 is not at the upper end of the spectrum but rather at the lower end. The line separating an especially violent situation of internal disturbances from the lowest level of article 3 conflicts can sometimes be blurred and thus not easily determined. When faced with making such a determination, what is required at the final analysis is good faith and objective analysis of the facts in each particular case."

The effect of this on the "War on Terror" is that in an act of terrorism of an internal nature, governments are given some flexibility as they are allowed to interpret the gravity

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[126] Frank Bolz Jr. *The Counter Terrorism Handbook. Tactics, Procedures and Techniques*. CRC Press LLC 2000 P.79.

[127] See Chapter Six on the application of the Geneva Conventions to the "War on Terror"

[128] In the event of a conflict not of an international nature, for example, it is particularly difficult to draw the line separating mere riots, isolated or sporadic acts of violence etc (acts falling within the domestic jurisdiction of a State), and to determine when such acts attain sufficient gravity and coercion to bring into operation common Art. 3

of the situation as they see fit. To prohibit the operation of International Humanitarian Law, governments are given the possibility of labeling potentially grave terrorist acts as mere riots or isolated acts of violence falling under the jurisdiction of domestic law.[129] On the other hand, there is the possibility of states using excessive police or military action on a potentially minor incident with the excuse that it is part fight against terrorism.

2. 6 Conclusion

The words "war" and "terrorism" present a lot of controversies in terms of their definitions. The absence of a universally accepted definition of these two words makes the fight against terrorism, better known as the "War on Terror", a contradiction in terms. This absence of definition is not particularly felt in the domain of International Humanitarian Law. This is because this branch of law is less concerned with the causes of hostilities but rather with the manner in which such hostilities are conducted. However, in the domain of International Law generally, it has resulted in the apparent confusion between a terrorist and a freedom fighter. While accepting the fact that a terrorist and a freedom might have the same goals, the difference between the two lies in the means employed to achieve these goals. A genuine freedom fighter will respect the rules of combat as set forth by the laws of warfare. Terrorists on the other hand, conduct their activities in total disregard of such rules. Their particularly captivating propaganda and the assistance they get from the media, give the public, in particular, difficulties in drawing the line between the two. Thus for the so-called "War on Terror" to be successful, the international community needs to define who is, and what acts should be considered terrorists. Until such a definition is reached, the problem of terrorist versus freedom fighter will not be solved.

This Chapter has discussed the manner in which the International community approached the problem of terrorism before 11 September 2001, and the change in their approach after this date. It has also examined the difficulties posed in the definition of "war" and "terrorism", the confusion inherent in the distinction between a terrorist and a

[129] Though the determination of the operation of Article 3 does not rely on the parties to the conflict, governments reserve the right to determine if the intervention of the International community will not amount to a violation of their sovereignty.

freedom fighter, and lastly, the impact of the lack of definitions on the fight against terrorism. For a better understanding of the conceptual difficulties posed by the so-called "War on Terror", it will be necessary to give a brief recap of the events of 11 September 2001[130] as this will help determine the nature of the so-called "War on Terror" in International Humanitarian Law.[131] Moreover, the arguments submitted in this mini-thesis, require an examination of the legal bases for the war against Afghanistan and Iraq.[132] Furthermore, the internal situation of both Afghanistan[133] and Iraq[134] before the war will briefly be reviewed in the following chapter in other to ease the comprehension of the concept of 'prisoner of war' reserved for the fourth chapter.[135]

[130] See 3.1
[131] See 3.1.1
[132] See 3.1.2
[133] See 3.1.3
[134] See 3.1.4
[135] Chapter IV.

CHAPTER THREE

THE EVENTS OF 11 SEPTEMBER 2001 AND THE DECLARATION OF THE "WAR ON TERROR"

3.1 Introduction

Because of the effect the terrorist attacks on the WTC had on the lives of innocent civilians, terrorist activities of this nature have become a major concern in International Humanitarian Law. The subsequent US military operations against Afghanistan and Iraq, which signaled the beginning of the "War on Terror", were as a result of these terrorist acts. However, prior to the US attacks, both countries were in a state of civil war. This Chapter will highlight the events of 11 September 2001 and the effect they had on civilian lives. Owing to the fact that in International Humanitarian Law international and non-international armed conflicts are governed by different regimes, the discussion also will be assessing the nature of the so-called "War on Terror" in International Humanitarian Law. This will be done in the light of the war with Afghanistan and Iraq. Furthermore, this Chapter intends to investigate whether the US was justified in carrying out military operations against Afghanistan and Iraq in the absence of any documentary link between these countries and *Al-Qaeda*. Finally, the internal situation in Afghanistan and Iraq will be reviewed. This is important for the purpose of the applicability of the Third Convention relative to the protection of prisoners of war, to be examined in a subsequent chapter.[136]

3. 2 A brief analysis of the events of 11 September 2001

The date 11 September 2001 marked a turning point in the fight against terrorism in International Humanitarian Law in particular, and International Law in general. On this day America witnessed the worst internal catastrophe in its entire existence, when four passenger planes crashed into significant landmarks in what was apparently a coordinated terrorist attack against the US.US intelligence linked these attacks to Osama bin Laden and the terrorist group *Al-Qaeda*. Bin Laden is a Saudi millionaire believed to be living at the time in Afghanistan. He has always been blamed for terrorist attacks against US

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[136] See Chapter four on P. 44.

interests.[137] The four planes that were highjacked consisted of American Airline flight 11 carrying 81 passengers and 11, crewmembers, which was flown into the North Tower of the World Trade Center in Manhattan; the second plane, United Airlines 175 from Boston to Los Angels, crashed into the South Tower with 56 passengers and 9 crewmembers; while American flight 77 en route from Washington to Los Angels with 56 passengers and 6 crewmembers crashed into the Pentagon; and The fourth plane, United Aircraft from New York to New Jersey, crashed near Shanks Ville in Pennsylvania. It is speculated that the highjackers intended to crash this plane into the White House.[138] These four planes thus claimed the lives of 266 innocent civilians. The death toll of these attacks reached 3000, the worst the US has ever experienced on its soil. Following these attacks, the US President George W Bush declared "War on Terror". In this war, the president declared:

"[t] he US government will make no distinction between the terrorists who committed the acts and those who harbor them."[139]

This is widely considered the immediate cause of the war with Afghanistan.[140] Questions however arise as to the nature of this war. First, should it be interpreted as 'war' in the legal sense of the word? Secondly, did the attacks on the World Trade Center constitute a declaration of war by *Al-Qaeda*? Lastly, should the war against Afghanistan be considered as a conflict of an internal or international nature?

3. 3 **Nature of the "War on Terror" in International Humanitarian Law**

Undoubtedly, terrorists take inspiration from different sources.[141] President Bush in his speech marking the fourth anniversary of 11 September said terrorist form a single unitary enemy.[142] The US President argues that what unites these seemingly desperate entities isn't merely "means" but "ends" which is "The right of a self appointed few to

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[137] In the Detention of 'Enemy Combatant' Act passed by the US Congress in 1992, Bin Laden and *Al-Qaeda* were accused of the embassy bombings in Africa particularly in Kenya and Tanzania.

[138] Terror attacks hit US. Can be accessed at http://www.cnn.com/terrorattacks. (Accessed 15 September 2006)

[139] September 11. *Chronicle of Terror.* Can be accessed at http://C nn.com/us Accessed 20 September 2006

[140] The US blamed Afghanistan for hosting Al-Qaeda fron the UN to hand over its leaders for trial. Moreover, these attacks were planned and coordinated from that country. It is however unclear whether the Taliban regime was connected to the plot. Evidence of this has not been established.

[141] reasons for terrorist acts over the years have varied from political to religious and even personal gains

[142] This was once a common view but today, does not seem so true. In Iraq for example, Al-Qaeda is literally at war with proxies of Iran which in turn is a sworn enemy of the Taliban

impose their fanatical views on all the rest".[143] This therefore means that Bush considers all terrorists as a unified unit, and that, therefore, the "War on Terror" is a war against this unified unit. Moreover this 'war' is not only directed against terrorists, but, as indicated above, it is also against those who harbour them. The US administration had always maintained that the conflict with *Al-Qaeda* was international, but not governed by the Geneva Conventions applicable to the High Contracting Parties.[144] In the *Handam* case Justice, Stevens however, argued that since the conflict with *Al-Qaeda* was not between nations, it was not international, and, therefore, it was governed by Article 3 common to the Geneva Conventions. This Article imposes duties on all parties to conflicts that take place on the territory of a signatory party, in this case, Afghanistan.[145]

It should, however, be mentioned that war in the legal sense of the word comes with a lot of implications, and if the "War on Terror" is regarded as war in this sense, then all of the legal implications will follow. This will also require a strict adherence to the provisions of the Geneva Conventions.[146]

That said, a general consideration of the "War on Terror" indicates that some of the events since 11 September 2001 qualify as, and fit the definition of an international conflict.[147] This notwithstanding, to categorize the "War on Terror", in general, as a war in the legal sense would be problematic. This is because some of the events since the above date do not satisfy the requirements necessary for the activation of common Article 3, which will in turn activate the laws of war. Moreover, considering the "War on Terror" as a war in the legal sense will entail that there is a period of commencement, the course of the war, and finally an end of the war with the exchange of prisoners. It is difficult to pinpoint this with certainty in the struggle against terrorism.

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[143] Andrew Furgerson. *'Bush Shouldn't 'Play Politics' with the War on Terror.* Can be accessed at http://www.bloomberg.comm/terrorism. (Accessed on the 10th of August 2006).

[144] George P Fletcher *'Guantanamo Revisited, The Handam Case and Conspiracy as a War Crime. A New Beginning for International Law in the US'. Journal of International Justice* (2006) 4.

[145] One of these duties is to guarantee that judgment will be passed by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people".

[146] This will include the granting of prisoner of war status to those captured, even outside the battlefield.

[147] The wars against Afghanistan and Iraq, for example, can be classified as conflicts of an international nature as they involved two States who are both High Contracting Parties. Their armed forces also satisfied the requirements of Article 4 of the Third Convention. Thus are to be treated as prisoners of war upon capture by an adverse party.

The terrorist attacks on The World Trade Center and the subsequent military attacks in Afghanistan and elsewhere have raised certain problematic questions as to the applicability of International Humanitarian Law to the "War on Terror". Although US authorities pledge that detainees are treated humanely, that humanity does not derive from the Geneva Conventions. This is because the Geneva Conventions do not cover every situation in which people may be captured or detained by military forces.[148] Admittedly the Afghan and Iraqi conflicts were conflicts of an international nature. This is because all the parties involved were sovereign States and are parties to the Geneva Conventions. Moreover, some of the prisoners held in various camps around the world were members of the arm forces of participating States. They were under responsible command and subject to a system of internal discipline. Furthermore, both Afghan and Iraqi soldiers wore distinctive uniforms, thus satisfying the requirements of Article 4 of the Third Convention. [149]

However, the period of commencement of these conflicts (especially that against Afghanistan) is subject to diverse views. It is argued that the attacks on the Twin Towers, that triggered the subsequent US attacks against Afghanistan, should be considered a declaration of war by *Al-Qaeda* on the US.[150] This argument is, however, mute due to the difficulty of considering the acts of civilians of different nationalities forming part of an internationally affiliated terrorist group with no fixed territorial base, using a civilian object on a civilian target as an act of war.[151] Moreover, these acts cannot be directly attributed to a State, and do not fulfill the requirements to trigger the applicability of the Geneva Conventions and their Protocols.[152] Thus it could be argued that the attacks of 11 September did not constitute a declaration of war by *Al-Qaeda*. The subsequent attack on Afghanistan, though an international conflict, did not constitute an act of Self-defence by

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[148] This is contained in a statement by the US Press Secretary on the Geneva Convention on 7 May 2003. This statement is available online at www.whitehouse.gov/news/releases2003/05/20030507-18html. Visited 8 March 2007.

[149] In case of capture, thus, they should be treated as prisoners of war; see Article 4(1)(2) and (3) of Third Convention.

[150] According to the proponents of this view a continues attack on US targets fulfills the requirement of protract required for the activation of common Art.3.

[151] The Pentagon, however, can arguably be considered a military target.

[152] For the Geneva Conventions to apply it is requires that the conflict involve two of the High Contracting Parties. See Art. 2.

the US. This is so because according to the UN Charter, Self-defence is something that only States can carry out in response to acts of aggression by other States.[153]

The above assertion is contrary to the view held by some in the aftermath of the attacks against the US. They argue that these attacks constitute part of a continuing armed terrorist campaign against western states (especially the US) which started a long time ago, thus fulfilling the requirement of "protracted" armed conflict necessary to trigger the application of Article 3.[154] If one were to accept this view, it would mean that International Humanitarian Law was applicable on 11 September 2001. This will also have the effect of giving an international group of terrorists recognition in International Law. An advantage, however, will be the characterization of the acts of 11 September as war crimes and thus punishable under another branch of International Law.

A general consideration of the so-called "War on Terror" reveals that though part of the events will qualify as conflicts of an international nature, certain aspects of the events since 11 September 2001 are difficult to categorize as international or non-international, or even as a conflict at all.[155] It should, however, be mentioned that though the attack by the US on Afghanistan and Iraq by all definitions were conflicts of an international nature, it does not interfere with the fact that conflicts taking place within the territories of both countries before the US attacks remained conflicts of a non-international character, in which case the rules governing non-international conflicts applied.

It will now be important to examine the US attacks on Afghanistan and Iraq with a view to ascertaining the legal bases of such attacks in International Humanitarian Law.

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[153]Luigi Condorelli and Yasmin Naqvi. *The War Against Terror and jus in bello; Enforcing International Law Norms Against Terrorism*. In Andrea Bianchi (ed) (2004). P.31.

[154] In the *Tadic* case, the I.C.T.Y in *para 70.* laid down as a criterion for the application of common Article 3 that the conflict should be " protracted". This requirement of "protracted" was further laid down in Art. 8(2) of the Rome Statute.

[155] An incident in 2002 in Yemen where an alleged terrorist was killed in his car together with five other passengers though constituting part of the "War on Terror", would not amount to an armed conflict in any sense. For more on the 'Yemen' scenario, read Noèlle Quenevette. *International Humanitarian Law and 21st Century Conflicts*. In Roberta Arnold ed. (2005) P 46.

3.1.4 **Were there any legal justifications for the US attacks against Afghanistan and Iraq?**

Admittedly State sponsorship of terrorism has always been a major obstacle to the fight against international terrorism. Some commentators on this topic are of the opinion that without State support terrorism would disappear.[156] Though there is legislation in place prohibiting State sponsorship of terrorism,[157] it is not uncommon for aggrieved States to go on the offensive against other States suspected of sponsoring terrorist acts. In fact, if terrorism is State sponsored, other nations can direct their response to terrorist attacks at the sponsoring State and the terrorist group jointly.[158] In the last decade there have been numerous occasions were States have reacted to terrorist attacks by striking down a particular building situated in another sovereign State believed to be harbouring the terrorists.[159]Thus it can be said that the targeting of training camps and headquarters has long been US and Israeli policy. These situations, regardless of how protracted they are and the number of casualties involved, are regarded as international armed conflicts, and thus subject to the total application of International Humanitarian Law except in a situation of hot pursuit.

Hot pursuit on land or ground hot pursuit, can be defined as, the uninterrupted continuation in a 'no man's land' or into the territory of another state, following an explicit agreement with the state in question, permitting an exercise of the right to hot pursuit in its own territory-of the pursuit of an offender or a group of offenders started by the authority immediately after the commission of an offense. In these situations, the express agreement by both states prevents the operation of International Humanitarian Law.[160]

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[156] Writers such as Benjamin Netanyahu and Barry Rubin share this view. They are of the opinion that if terrorist organizations could survive this long, it is because of the support they get from States. For more on this, read Benjamin Netanyahu *Terrorism, How the West can Win.* In Benjamin Netanyahu ed.

[157] See the International Convention for the Financing of Terrorism

[158] John Cohen; "Formulation of a State's response to terrorism and State sponsored terrorism", *Pace International law Review.* (2002) 14.P.87

[159] In 1982 Israel targetted the PLO headquarters in Tunisia; the US bombed Tripoli in 1998; the US destroyed the Al-Shafa pharmaceutical building in Sudan in1998; the US struck against terrorist camp in Afghanistan in 1998; Israel destroyed of a training camp in Syria in 2003; These are all instances illustrating the use of force by aggrieved States on the territory of another State accused of harboring or sponsoring terrorist activities.

[160] See Nicolas Poulantzas: *The Right of Hot Pursuit in International Law.* (2002). P.11

Though aggrieved States have usually taken up arms against other States suspected of promoting terrorism, there is no legislation allowing such single-handed action. It is understood that the attacks on the Pentagon were prepared in Afghanistan and Germany. The question here is: whether the US was justified in carrying out military operations against Afghanistan despite the absence of any documentary link between the Taliban and *Al-Qaeda*. Jurisprudence might shed some light on this question.

According to the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case, the presence of an international element renders a conflict international, provided one could ostensibly point a link between the individuals who carried out the attack and a foreign State not involved in the original conflict. While the International Court of Justice propounded the 'effective control' test to gauge whether the acts could be attributed to the State,[161] the ICTY, on the other hand, preferred the criterion of "overall control" as more relevant to characterize the legal nature of a conflict in a case where there is an organized group hierarchically structured.[162] The ICTY added that mere financial and logistical support does not prove that the State standing accused wields overall control. To amount to overall control it must be proved that the foreign State coordinated or helped in the general planning of the military activities of the paramilitary group.[163] As regards individuals or groups not organized according to a military hierarchy, a stricter test is applied. It requires conclusive evidence of "specific instructions or directives aimed at the commission of the specific acts or have required public approval of these acts following their commission".[164] Applying this decision to the "War on Terror", and especially the war against Afghanistan, the following observations could be made;

(a) *Al-Qaeda* not being a recognized entity in International Law, it is incapable of declaring war on another State. This being so, an authentic link with the Taliban is required. The absence of this link renders moot the argument that the attack on the WTC was a declaration of war; and

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[161] See the *Nicaragua* case Merits judgment ICJ reports (1986) Para. 109.

[162] The requirement of overall control will require that the State providing such finance actually directs how these finances are to be used. Thus, only providing money and accommodation will not be enough to hold a host State for the acts of terrorists.

[163] Noèlle Quènevette; *International Humanitarian Law and 21st Century's Conflicts, Changes and Challenges*. In Roberta Arnold ed. (2005) P.54.

[164] See the *Tadic* Appeal judgment paras.132 and 137.

(b) following this same decision, it will be difficult to justify the US attack on Afghanistan. The ICTY decision requires specific instructions or directives aimed at the commission of specific acts. According to this decision, the fact that *Al-Qaeda* was based in, and planned their acts from, Afghanistan and Germany, does not render any of these countries accountable for their actions. This will be so even if they received financial support from these governments, unless it can be proved that such finance was provided for those specific acts and with specific directives by the Afghan or German government. This link, of course, has never been established.

The attacks on Afghanistan and Iraq by the US, however, went ahead. There is no doubt that during the conflicts none of the parties involved objected to the application of the laws of war as prescribed by the Geneva Conventions and the various Protocols. The problem, however, relates to the applicability of the Third Convention relative to the protection of prisoners of war. The US for various reasons insists that this section of the Convention should be set aside as far as the "War on Terror" is concerned. It is questionable whether, in a war of this nature, nations could decide on which part of the Convention to respect and which part to ignore. However, the merits and demerits of the US view must be assessed. This will, therefore, require a brief examination of the internal disturbances going on in Iraq and Afghanistan before the US attacks. As a matter of re-iteration, only those soldiers captured as a result of the US attacks merit protection under the Third Convention. Thus the aim of the next section is to be able to decipher which of the captives are, and which are not, entitled to such protection

3.5 **The internal situation in Afghanistan and Iraq before the US attacks**

Since 1978 Afghanistan has moved from one stage to another of civil war and political disintegration without seeming to get any closer towards peace, political order or sustainable development. The combination of inimical regional development, characterized by unsustainable strategic and economic competition, with the destruction of most of the country's elites, institutions and infrastructures, assured the continuation of war among forces based in different regions of the divided country. In August 1998 the Taliban (Islamic students) of Afghanistan took over control of Nazar-I-Sharif, the last city remaining outside their control. In their campaign the Taliban succeeded in gaining

control of nearly all those parts of the country's territory that had remained outside their control after they marched into Kabul in 1996. The victory of the Taliban might have put an end to open warfare, but ultimately resulted in continuous commando activities. Such activities often came from its main opposition, known generally as the "United Front". The Front consists of several groups controlling different portions of the country mostly inhabited by the Tajics, the Uzbeks and the Hazaras. After the main Taliban offensive elements of this group controlled only a few mountainous areas.[165] The area under Taliban control included more than half of the country's population.[166] This not withstanding, the two largest population centers, Harat and Kabul, were largely hostile to them and the requirement of controlling these two areas probably made them more of a drain to Taliban personnel than a source of recruitment. It should be mentioned here that both sides to the conflict relied heavily on outside support.[167]

Internal division and conflicts also characterized Iraq before the attacks by the US in 2003. The Shia majority, who lived mainly in the southern parts of Iraq and also in parts of Iran, were subjected to discrimination by the minority Sunni tribe. Rivalry between these two religious groups made it impossible to form a government of national unity. Though the Shia constitute an estimated sixty percent of the Iraqi population, the Iraqi central government was drawn from the more prosperous Sunni tribe. The Sunni (Saddam Hussein's tribe) have often sought to marginalize the Shia politically by claiming that they have conflicting allegiance to both Iraq and Iran, a charge the Shia rejected. According to the Shia discrimination against them reached a peak under Saddam who encouraged rivalries between Iraqi's major groups (Shia, Sunni and Kurds) as a way to diminish threats against his regime. Saddam, a Sunni by origin, consolidated power on clan and family loyalties. He purged the Shia from the secular Ba'th party and excluded them from the bureaucratic and security forces. The Iraqi armoured fighting units and the

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[165] Even before the main offensive, the Talibans appeared to control at least two thirds of Afghanistan, though their own estimates ranged as high as eighty five percent.

[166] The population of Afghanistan is currently estimated at over 25 million.

[167] While theTaliban were supported militarily and technically by Pakistan, with financial support from official and unofficial sources in Saudi Arabia and the Gulf States, the northern groups received aid from Iran, Russia and, to a lesser extent, Uzbekistan and Tajikistan. For more, see Dr. Barnett R Rubin; *'Testimony on the Situation in Afghanistan Before the United States Senate Committee on Foreign Relations'*. Can be accessed on http://www.crf.org/publications (Accessed on 12th August 2006).

republican guards were almost exclusively composed of Sunni officers. The poorly equipped regular army was made up mostly of Shia infantry and Sunny officers.[168]
From the above it can be deduced that, even before the US attacks, both Afghanistan and Iraq were involved in internal disputes.
International Humanitarian Law does not make provision for prisoner of war status in instances of internal armed conflict.[169] This therefore means that all those captured and held as a result of these internal armed conflicts in Afghanistan and Iraq could not claim protection as prisoners of war in International Humanitarian Law. The attack by the US though incontestably a conflict of an international character, did not alter the legal characterization of prior conflicts as conflicts of a non-international character. Thus in discussing the concept of prisoners of war in the next Chapter, those soldiers involved only in the internal conflicts of these two states will not be considered.

3.6 Conclusion

Though throughout the last decade States like Israel and the US have attacked buildings and other terrorist training grounds situated in foreign States as measures of reprisal, waging a full war on Afghanistan can be considered as taking the notion of reprisal to the extreme. This is mainly due to the fact that the requirement of "effective control" propounded by the Appeal Chambers of the ICTY in the *Tadic* case was not met, and the link between the terrorists and the Afghan government has not been established. This renders moot the argument that the war against Afghanistan was a war of self-defence. This notwithstanding, the conflicts in Afghanistan and Iraq are without doubt conflicts of an international nature thus the application of International Humanitarian Law to its fullest. However, the international nature of these attacks did not alter the characterization of the prior armed conflicts raging within the respective; territories thus the application of laws relative to non-international armed conflicts only.

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[168] For more on the internal situation of Iraq, see Charles Recknagel; '*Shia Majority Hopes for Greater Share of Power After Saddam*'. Can be accessed at http://www.religioscope.info/Article. Also see; Declaration of Shia of Iraq. Can be accessed at http://www.al.bab.com/arab/docs/iraq. (Both accessed on the 17/8/06)

[169] The basic principle is that only persons regarded as combatants under the Third Convention are entitled to the benefits accorded to prisoners of war. Persons falling within this category are enumerated in Article 4 of the Third Convention. However, for such benefits to be accorded to such captives, they must fulfill the conditions stipulated in Articles 4(1) to (3) of the same Convention.

If it is accepted that the attacks by the US on Afghanistan and Iraq were conflicts of an international character, it will therefore mean that persons captured in these conflicts are entitled to protective status under International Humanitarian Law. Who then should be considered a prisoner of war and how are they protected in the current fight against terrorism. This is the focus of the next Chapter of this mini-thesis. It will seek to answer the following questions: who is a prisoner of war?[170] How are they protected in International Humanitarian Law?[171] What protection is given to captives on the "War on Terror"?[172] This mini-thesis will further endeavour to explore the guarantees that are given to these captives by the Geneva Conventions.[173] This will be done by determining the legal status of the Taliban and Iraqi soldier,[174] and, lastly, the legal status of other terrorist groups, with particular reference to *Al-Qaeda.*

[170] 4.1
[171] 4.2
[172] 4.3
[173] 4.4
[174] 4.5

CHAPTER FOUR

PRISONER OF WAR STATUS AND THE GUARANTIES PROVIDED IN INTERNATIONAL HUMANITARIAN LAW

4.1 Introduction

The US led fight against terrorism has produced two conflicts that can be termed conflicts of an international nature.[175] Legally, captives from these conflicts are to be considered as prisoners of war and treated as such.[176] This Chapter discusses the concept of prisoner of war in International Humanitarian Law, with special reference to the legal status of Taliban and Iraqi soldiers still in US captivity. This Chapter will also examine the debates surrounding the legal status of members of other terrorist groups, also in US custody.

4.2 Who is a prisoner of war?

The so-called "War on Terror", has given rise to a lot of controversies. Most debates, however, centres around the question of the legal status of those captured in the various US led military operations. The US administration amidst opposition from international lawyers and human rights activists has been very hesitant to accord persons it perceives to be terrorists the protection contained in the Third Convention. Before examining the merits or demerits of the US position on this issue, it is of prime importance to discuss the concept of prisoner of war in International Humanitarian Law.

Admittedly, not all persons captured in the course of an armed conflict are entitled to the status of prisoner of war, and the legal protection associated therewith.[177] The basic principle is: that persons who are recognized as combatants under the Third Convention are entitled to be treated as prisoners of war upon capture by an adversary party in an armed conflict. Article 4 of the Third Convention enumerates persons belonging to such category. These will be:

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[175] The conflicts against Afghanistan and Iraq undoubtedly can be termed international conflicts. For more on this see page 3.3.

[176] This is according to the provisions of the Third Convention.

[177] Only those captured in the course of an international conflict can benefit from the protections accorded by the Third Convention

"Members of the armed forces of a party to the conflict, as well as members of military or volunteer corps forming part of such armed forces.

There are, however, certain conditions to be fulfilled for such persons to be recognized as prisoners of war under the Third Convention:

(1) "They must be under responsible command"

This means meaning a hierarchic chain of command answerable to the party upon which it depends for the conduct of the war.

(2) "It must also be subject to a system of internal discipline, which *inter arlia*, enforces the laws of armed conflict".

(3) "They are also required to wear a uniform or some other 'distinctive sign' and carry arms openly".[178]

Also entitled to the status of prisoner of war according to Article 4 A would be:

-"Members of militia and volunteer corps, including resistance movements, whether operating inside or beyond their territory or whether or not the latter is under adverse occupation. Such bodies must, however, satisfy the same qualificatory criteria as regular armed forces". [179]

-"Members of the crew of merchant ships and civil aircraft of parties in a conflict who do not otherwise benefit from more favorable treatment".[180]

-"Civil support staff accompanying armed forces, including labour units, welfare staff and accredited war correspondents."[181]

-"Members of a *levée en masse* acting in immediate response to invasion".

These are people of a non-occupied territory who rise in arms to resist invasion without actually having the time to organize in regular units. They must, however, carry arms openly and respect the laws of war.[182]

Protocol I provides for cases where the nature of the conflict precludes combatants from distinguishing themselves from civilians.[183] In that case members of a fighting force will none the less retain 'combatant' status, and be entitled to 'prisoner of war' status upon capture, so long as they 'carry arms openly' during actual military engagement and whilst visible to the enemy deployment preparatory to such engagement. Where these

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[178] H Mc Coubrey; *International Humanitarian Law. The Regulation of Armed Conflicts.* (1990).
[179] Article 4A(2).
[180] Article 4A(3).
[181] See Article 4A(4). However, to qualify for such protection, such a person must be authorized to act in their stated capacity by the armed forces which they accompany, and must be presented with an identity card of a form set out in Annex IV of the Convention.
[182] The 1977 Protocol I specially provides for the incorporation into the regular armed force of paramilitary or armed law enforcement agencies. Such incorporation must, however, be notified to the other parties to the conflict. The Protocol I also extends prisoner of war status to captured members of civil defence units by Art.67.
[183] See Article 44(3) of Protocol 1.

requirements are met there will be no grounds for charges of 'perfidy' under the Conventions or Protocols.[184]

Persons who satisfy the criteria laid down in Article 4 of the Third Convention will be considered to be prisoners of war. The next section will examine the protection provided to them in International Humanitarian Law.[185]

4.3 Protection of prisoners of war

The Third Convention does not only enumerate the category of persons who require protection in the event of their falling into the hands of the enemy. It also makes provisions for the manner in which these persons are to be treated by the detaining power.[186] It is important to begin by mentioning the fact that according to Article 12 of the Third Convention prisoners of war are the responsibility of the detaining power, and not that of the individual or the military unit that captured them.[187] Such responsibility begins from the moment of captivity and only ceases at the end of the war and final repatriation of captives. Because of the importance of these guarantees and the intention to curtail abuse, the Third Convention stipulates that in case of any doubt as to whether the captive belongs in any of the categories mentioned in Article 4,[188] such person shall enjoy the protections contained in the Third Convention until such time as a competent tribunal has determined his/her status.[189] Defiance of this provision may amount to unlawful confinement, which is defined by Article 147 of the Fourth Convention as a grave breach there-of. This offense explicitly features in the Statute of the ICTY,[190] the ICC Statute,[191] and the Statute for the Iraqi, Special Court.[192]

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[184] This provision has however raised a lot of controversy as it is viewed in certain quarters as protecting people who carry out unlawful acts.
[185] Article 12 Third Convention .
[186] Due to the limited scope of this mini thesis, it will be impossible to reproduce all the provisions of the ThirdConvention. But for the purpose at hand only the relevant provisions will be made mentioned of.
[187] Article 12 of the Third Convention is to the effect that irrespective of the individual responsibilities that may exist, the detaining power is responsible for the treatment given to the prisoners.
[188] See 4.1 above.
[189] See Article 5 the Third Convention. The creation by the US of military tribunals to determine the status of captives is clearly in breach of this provision.
[190] See Article 2 (9) of the Third Convention.
[191] See Article 8 (2)(a) viii of the ICC Statute.
[192] See Article 13 (a)(7) of the Statute for the Special Iraqi Court.

The Third Convention further forbids the detaining power committing acts or omissions causing death or seriously endangering health.[193] In this regard, it is forbidden to make prisoners of war subjects of physical or scientific mutilation of any kind, unless justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Any act of violence, intimidation, insult, public curiosity and acts of reprisals are forbidden against prisoners of war.[194] They are entitled in all circumstances to respect for their person and honour. Women must be treated with all due regards to their sex.[195]
As regards the maintenance of a prisoner of war: they shall be provided for, free of charge, by the detaining power. The same applies in respect of the medical attention required by their state of health.[196] To avoid any kind of molestation during the interrogation process, the Convention provides that the captive is only bound to provide his surname, first name, rank, date of birth and army regiment, personal or serial number; failing this, equivalent information. *Physical or mental torture or any kind of coercion for the purpose of extracting information from the prisoner is prohibited, even if the said prisoner refuses to answer the questions put to him or her.*[197]
Beyond protecting the physical person of the prisoner, the Third Convention also protects his personal effects, like his feeding,[198] identity card, decorations and other possessions having a sentimental value for him. These must all remain in the possession of the captive. To avoid a situation of forced labour by the detaining power, Section III of the Third Convention regulates the labour relations of a prisoner of war.[199] His financial resources are protected in Section IV of the same Convention.[200] Sums of money carried by the captive also must remain in his possession and collection of such sums by agents of the protecting power is subject to procedures laid down by the law.[201]

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[193] Any such acts or omission will be considered as a serious breach to the Convention.
[194] See Art 13 Third Convention.
[195] Article 14 Third Convention.
[196] Article 15 of the Third Convention
[197] Emphasis added. Article 17. This provision has proved to be the most problematic in the fight against terrorism. The US contends that it hinders them from getting information that is essential for that purpose. It is because of this provision that arguments have been raised against the applicability of the Conventions in the fight against terrorism.
[198] See chapter II Third Convention , Arts. 25-28.
[199] The labour relations between a captive and the detaining power is contained in Section III Convention III Arts. 49-57.
[200] See Arts. 58-68.
[201] This procedure is provided in Art. 18.

In other to guarantee the safety of the captive, the protecting power is obliged to evacuate them as soon as possible after their capture to camps situated in an area far enough from the combat zone except in situations where they are too ill that evacuating them will run a greater risk than leaving them where they are. In such situations, they can temporarily be kept in the combat zone. They shall however not be unnecessarily exposed to danger while awaiting evacuation.[202] In any event, the evacuation shall always be done humanely and in conditions similar to those of the detaining power in their change of stations. Food and potable drinking water must be provided by the detaining power, which is obliged to take all suitable measures to ensure their safety. They are also required to establish as soon as possible a list of all those evacuated.[203] Regarding their place and conditions of internment, it must be on land and must afford every guarantee of hygiene and healthfulness.[204] Apart from the above-mentioned guarantees, the Third Convention also makes provisions for prisoner representatives and camp command structures.[205] The law also provides guarantees for their conditions of internment (providing for minimum standards of their accommodation and feeding)[206] his relation with the outside world, complaints and measures regulating judicial and disciplinary proceedings are all stipulated in the Third Convention.[207] This Convention thus regulates almost every aspect of the captive's life *vis-à-vis* his captor from the moment he falls in the hands of the detaining power to his release after the conflict.[208]

The preceding headings considered generally the provisions of the Geneva Conventions geared at the determination of who is, and what protection is due to a prisoner of war. The proceeding paragraphs will therefore focus on the application of these provisions *vis-à-vis* captives in the "War on terror". Firstly the legal status of both the Afghan and Iraqi soldiers and the legal status of the members of *Al-Qaeda* and other decedent groups will

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[202] Art. 19.
[203] Art. 20.
[204] Art. 22 According to this provision, they shall not be interned in a penitentiary except in cases justified by the well being of the prisoners themselves. This provision also requires that they be assembled incamps or camp compounds according to their nationality, language and custom.
[205] See Arts 79-81.
[206] See Arts. 64 and 65.
[207] See Arts. 62-68.
[208] For a detailed understanding of the protection given to a prisoner of war, see Convention III of the Geneva Conventions of 1949. Also see Jean S Pictet: *Commentary Geneva Convention III; Relative to the treatment of Prisoner of War.* (1960).

be considered. It will examine, in a general manner, the difficulties surrounding the concept of prisoners of war especially the US position on the status of Guantanamo Bay prisoners.

4.4 The legal status of Taliban and Iraqi soldiers

To be able to determine the legal status of the captives from Afghanistan and Iraq, it is of utmost importance to ascertain whether the military operations in these two countries qualify as conflicts of an international nature. As discussed above,[209] before the US attacks on Afghanistan and Iraq, both countries were involved in internal struggles. For the captives of these two countries to benefit from the provisions of the Third Convention, it must be established, first of all, that the attacks by the US were sufficient to create a situation of international conflict, and, secondly, that those in captivity were captured as a result of these attacks.

To begin with, military action conducted by the regular forces of sovereign States in the territory of another sovereign State constitutes, by definition, an international armed conflict. The fact that the US government did not recognize the Taliban regime is of no consequence.[210] None of the State parties to the conflict in Afghanistan rejected the applicability of International Humanitarian Law as a whole.[211] In its memorandum of 24 October 2001 the International Committee of the Red Cross (ICRC) reminded the parties to the conflict of their obligations under the applicable rules of International Humanitarian Law. This memorandum was never challenged. Apart from minor protestations on the applicability of certain parts of the memorandum, the applicability of the main body of rules was never protested against.[212] Thus one can infer that the US accepted that the main body of International Humanitarian Law was applicable. This is, however, not surprising, as, despite the asymmetric character of the conflict and despite

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[209] See page 37.

[210] Only three States, viz Pakistan, Saudi Arabia and The United Arab Emrates, recognized the regime in Afghanistan.

[211] President Bush in a statement before the attack on Afghanistan, declared that in this war the Geneva Conventions would be adhered to. This also accounts for the reason that the memorandum of the ICRC was never challenged.

[212] Though this memorandum was issued with a two weeks delay, it was never challenged. According to press sources this delay could be attributed to a rejection of an earlier version by the US, on the basis that the prohibition by the text of the use of, or threat of the use of, nuclear weapons did not reflect the current state of the law.

the fact that the Taliban was an unrecognized government, the war was essentially between two High Contracting Parties to the Geneva Conventions, thereby automatically triggering the application of Article 2. With regard to Afghanistan, both the International humanitarian legal regime applicable to international and non-international armed conflicts operated jointly or were often intermingled, because, as seen above,[213] before the US attack there were violent internal conflicts going on in Afghanistan.[214]

If the categorization of the attack on Afghanistan by the US seemed complicated, that against Iraq is rather clear. Iraq being one of the High Contracting Parties to the Geneva Conventions, a sovereign State with its armed forces under a responsible command, and thus expected to obey the laws of war, the requirements of Article 4 of the Third Convention are definitely satisfied. That said, military operations by the armed forces of another sovereign State within Iraq would indisputably constitute a conflict of an international character. This being so, captives from such operations are entitled to protection under the Geneva regime. However, while one might safely argue that captured Taliban and Iraqi fighters are entitled to protection under the Third Convention, the position of captured *Al-Qaeda* members and members of other terrorist groups has been a subject of debate amongst international legal practitioners and human rights activists on the one hand, and the US administration on the other. The debate surrounding the legal categorization of these persons will constitute the subject matter of the next heading.

4.5 The legal status of terrorist groups, with particular reference to *Al-Qaeda*

The Geneva Conventions extends its protective status to any one who finds him or herself in the hands of the enemy in a situation of war. In effect every person in enemy hands must have some status under International Law. He is either a prisoner of war,[215] a civilian,[216] or a member of the medical personnel[217] there is no intermediate status.[218] This was also the reasoning of the Trial Chamber of the ICTY in the *Delalic* case.[219]

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[213] See page 3.3
[214] Luingi Condorelli: The War Against Terrorism and *Jus in Bello,* are The Geneva Conventions Out of Date? *Enforcing International Law Norms Against Terrorism.* In Andrea Bianchi (ed). (2004) P.33.
[215] Thus covered by the Third Convention.
[216] Covered by the Fourth Convention.
[217] This situation is covered by the First Convention
[218] Silvia Borelli P. 45.
[219] *Delalic* case IT-96-21-T. The Trial Chamber of the ICTY 16 November 1998 no 271.

Furthermore, in the *Blaškic* case, the trail judgment responded to the prosecution's argument that a group of Bosnian Moslem combatants held by the Croatian Defence Council (HVO) where prisoners of war, by finding that:

"[t]hose who did not enjoy this protection were civilians and thereby enjoy the protection accorded by Convention IV". [220]

This decision was followed by the Trial Chamber II of the ICTY in the *Simič* case[221].

While all commentators agree that the war against Afghanistan was an international conflict, thus giving rise to the application of The Geneva Conventions, and their various Protocols in the event of capture of American, Taliban or Iraqi soldiers, the protection owed to militants of *Al-Qaeda* is still plagued with controversy. As indicated by Quénivette, the actual relationship between the Taliban and *Al-Qaeda* was not documented, and thus difficult to establish. This being so, the *Tadic* decision in the so-called 'internationalized' conflict will be difficult to apply in this situation. Internationalization of this conflict would have the effect of providing protection to everyone captured in the course of the war.

Further complications arise, however, when considering the position of the US administration on the current fight against terrorism. As already mentioned,[222] according to the US administration, the "War on Terror" is not only waged against terrorists, but also against those States who harbour them. This means that both the terrorists and their host are to be considered as one. Furthermore, in his to before the UN General Assembly on 10 November 2001, President Bush indicated that the two components of enemy forces were now virtually "indistinguishable," These considerations have significant implications for the application of International Humanitarian Law. Condorelli asks, for example, whether members of *Al-Qaeda* could be considered as "members of other militias and members of other volunteer corps belonging to a party to the conflict and operating in or outside their own territory" for the purpose of prisoner of war treatment contained in Article 4(A)(2). Borelli in support of this view argues that:

"[W]hile it is indisputable that the members of *al-Qaeda* did not belong to the regular army of the Taliban, and therefore do not qualify as prisoners of war on that basis, they never the less form a hierarchical

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[220] James G Steward: Rethinking Guantanamo Bay. Unlawful Confinement as applied in International Criminal Law. *Journal of International Criminal Justice.* (2006).

[221] Simic case no. IT 95-9/2-S.

[222] See James G Steward Ibid P.8

organized militia which took an active part in the hostilities, and had a connection with a State or a group that was a party to the conflict and therefore would seem, at least *prima facie* to fall within the provisions of Art. 4 (A)(2)".

This, however, will only be possible if Article 4(A)(2) is given the widest interpretation. Moreover, it is very unlikely that protection under the Conventions and Protocols will apply to belligerents who do not respect the rules on the conduct of warfare. But again, if the "War on Terror" were to be considered generally as constituting a single war against an undistinguishable enemy (terrorists and hosting States), it will have the consequence of portraying the whole operation as a conflict of an international nature and the rules governing this type of conflict will apply. It, however, would be different if attacks on terrorists, and their activities, were separated from attacks on sovereign States. In that case other rules of International Law may be applied to the terrorists.

4.6 Conclusion

While the Geneva Conventions provides for the protection of prisoners of war, Article 4(A) of the Third Convention lists the categories of persons that needs to be protected in the event of their capture by an enemy power. A general examination of the "War on Terror" proves that there are some captives that do not actually fit the criteria required for the accordance of the status of prisoner of war. For example, while the Taliban and Iraqi captives in Guantanamo Bay and other camps can justifiably claim to be protected persons under the Third Convention, and the captives of the internal conflicts in both countries remain out of the scope of protection provided by the above the Third Convention, the status of militants of *Al-Qaeda* and other terrorist groups still remains unclear. This is mainly because they fall short of the requirements for combatant status provided by the Convention. The US, on the other hand prefers to term them "enemy" or "illegal" combatants. The next Chapter will thus be exploring the concept of "enemy" combatants, and their rights (if any) in International Law. It will proceed first of all by attempting to define who the US terms an "enemy" combatant.[223] Owing to the fact that this concept is unknown in the domain International Humanitarian Law, the following chapter will endeavor to establish its legal basis in the US judicial system.[224] The law prescribes the manner in which combatants and civilians in the hands of the enemy are to

[223] See. 5.1
[224] See.5.1.1

be treated. Enemy combatants on the other hand, are treated neither as combatants nor as civilians. Thus what is the nature of the treatment they receive?[225] Finally, the laws governing the conduct of warfare will be examined in an effort to determine whether the concept of "enemy" combatant is one recognized by law.[226]

[225] See. 5.1
[226] See .5.2

CHAPTER FIVE

THE CONCEPT OF "ENEMY" COMBATANT

5.1 Introduction

As discussed in the previous Chapter,[227] captives of a conflict of an international nature who satisfy the requirements of Article 4 of the Third Convention are entitled to be treated as prisoners of war. This notwithstanding, the US prefers to consider certain captives of the "War on Terror" as "enemy" combatants, thereby denying then the privileges prescribed by law. This Chapter will thus be considering the concept of "enemy" combatant in International Humanitarian Law generally, and the "War on Terror" in particular.

5.2 Who is an "enemy" combatant?

An "enemy", "illegal" or "unlawful" combatant has historically been used to refer to member of the armed forces of a State with which another State is at war.[228] Precedent for the detention of US citizens as enemy combatants was set by the Supreme Court of the US in *ex parte Quirin*,[229] in 1942. The Court used the following characterization in determining who should be considered an "enemy" combatant. It said,

"[t]he laws of war draw a distinction between the armed forces and the peaceful population of belligerent nations and also those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention but in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

In the form of examples, the Supreme Court stated:

"[T]he spy who secretly and without uniform passes the military line of a belligerent in time of war seeking to gather military information and communicate to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property,

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[227] See Chapter Four paragraph 2.
[228] See the Detention of Enemy Combatant Act.
[229] *exparte Quirine*: 317 US 1(1942). This was a case of two Germans accused of planning acts of sabotage against the US. They, however, claimed US citizenship, and thus were to be treated as enemy combatants.

are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the laws of war subject to trial and punishment by military tribunals."[230]

This category of persons are subject to trial by Court Marshal[231] and their punishment ranges from imprisonment to thee death penalty.

According to the US Congress, detention of enemy combatants who are US citizens is appropriate to protect the safety of the public and those involved in the investigation and prosecution of terrorism. It also facilitates the use of classified information without compromising intelligence or military efforts. Finally, it helps in gathering unimpeded vital information from the detainee in other to protect national security interest.[232] This is in conformity with Article 5 of the Fourth Convention, which gives States or occupying powers the ability to limit certain rights and privileges of an individual protected person suspected of, or engaged in, activities hostile to the security of a State. Article 27 of the Third Convention also allows the parties to a conflict to take such measures of control and scrutiny as may be necessary as a result of the war. This, in any case, does not affect the procedural rights enshrined in Article 43 of the same Convention.

However, the 1966 decision in *ex parte Malligan*[233] moved away from the position adopted in *ex parte Quirin.* The Supreme Court held that military tribunals could not try civilians in an area where civil courts are available even during times of war.

Despite the availability of civil courts since the declaration of the" War on Terror", the US administration still insists that such persons must be tried by military tribunals. Thus in the fight against terrorism, the US administration seems to be reverting to the decision in *ex parte Quirin.* This is, however, not surprising, as in passing the "Detention of Enemy Combatant Act" of 2003 Congress acknowledged the fact that in the present conflict, "enemy" combatants come from different nations, wear no uniform, and use unconventional weapons. Moreover, in the "War on Terror" this class of people is not

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[230]The last time American and British citizens were tried and executed as "illegal combatants" was during the Luanda (Angola) trials in 1976. Of the 13 men who stood trial, 3 were given a 16 years imprisonment term, 3 a 24 years term, 3 a 30 years jail term and 4 were executed by firing squad. For full details of this trial, access http://enwikipedia.org/wiki/Detention/Luanda-Trials. (Accessed on 23/8/06).

[230] E*x parte Malligan* 71 US 2 (1966).

[231] This is the US military tribunal.

[232] See the "Detention of Enemy Combatant Act" section.9.

defined by simple, readily apparent criteria, such as citizenship or military uniform. Thus the power to name a citizen as an enemy combatant is therefore extraordinarily broad.[234] This thus necessitates a discussion of the legal justifications for the concept of "enemy" combatant in the "War on Terror".

5.3 The legal justification of the concept of "enemy" combatant in the "War on Terror"

According to the findings of the US Congress in 2003,[235] the *Al-Qaeda* terrorist network and its leaders had committed unlawful attacks against the US. These attacks included the 1998 bombings of the US embassies in Nairobi and Dar-es- Salaam in Kenya and Tanzania respectively. Further atrocities on the US by the same organization included the Bali attacks and the 11 September attacks on the WTC. The *Al-Qaeda* terrorist organization and its leaders had threatened renewed attacks on the US, with threats of the use of weapons of mass destruction. Congress was of the view that the UN Resolution 1368 and1373 declaring these attacks a threat to international peace, were justification enough for the US to act in self-defence.

Congress stated that during wartime, a State must take extraordinary steps to protect itself. This would include measures that will never be accepted during peacetime. Thus the executive must be given broad latitude to establish by executive order the process, standards and conditions in which a US citizen or lawful resident may be detained as an enemy combatant. In doing so courts must give broad deference to military judgement concerning the determination of enemy combatant status, POW status and related questions.[236] As a result of these findings, the US Congress passed a resolution known as The Authorization for the Use of Military Force (AUMF).

The AUMF authorized the War Power Resolutions. This resolution prevents the the US president from waging war without the approval of Congress.[237] The AUMF in this case, permitted the US President to use:

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[234] See the "detention of Enemy Combatant Act" of February 27 2003 Sec 8. Can be accessed at http://www.theorator.com/bills108/hr1029.html.

[235] See the preamble to the "Detention of Enemy Combatant Act" ibid.

[236] For a detailed study on the these justifications, read the "Detention of Enemy Combatant Act" Sections 1to13.

[237] The War Power Resolution (Public Law 93-148), is also often referred to as The War Powers Act of 1973. The purpose of this Act is to ensure that Congress and president share in making decisions that may get the US in hostilities.

"[a]ll necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks or harbored such organizations or persons."[238]

Using this authorization, the US President issued a Presidential Military order known as the 'Detention, Treatment and Trial of Certain Non-Citizens in the "War against Terror"'.[239] In this Presidential order, he authorized the setting up of Combatant Status Review Tribunals (CSRT).[240] The administration chose to call those whom it detained under the Presidential Military Order "enemy" combatants. Since then the usage of the term has been formalized. The term "enemy" combatant is used specifically for detained alleged members and supporters of *Al-Qaeda* or the Taliban.

The CSRT defines an "enemy" combatant as:

"[a]n individual who was part of, or supporting the Taliban or *Al-Qaeda* or associated forces that are engaged in hostilities against the US or its coalition partners. This includes any person who committed a belligerent act or has directly supported activities in aid of enemy forces."

Other governmental departments and some sections of the American news media have adopted this new usage of the term. This therefore means that the term "enemy" combatant has to be read in the context of the article in which it appears in order to ascertain whether an accused person is a member of the Taliban or *Al-Qaeda*.[241]

5.1.4 The treatment of "enemy" combatants by the US administration

As mentioned above,[242] an "illegal", "unlawful" or "enemy" combatant in the "War on Terror" is accorded neither the rights a soldier will normally have under the laws of war, nor the civil rights of a common criminal in a criminal trial. As demonstrated by the decision in *Hamdy v Rumsfeld,*[243] they are even denied the right to habeas corpus[244] (though this ruling was overturned by the supreme court). Denying them these rights,

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[238] Publication L. 107-40 numbers 1-2,115 stats 224 *Rasul el v George Bush* (*Human Rights Law Journal* 29 October 2004 Volume 25 No 1-4 P. 112.

[239] Details of this document can be accessed at http://www.wikipedia.org/Enemy-Combatant. (Accesed 23/8/06).

[240] The setting up of these tribunals is contrary to the provision of Art. 5 of the Third Convention, which requires that in case of doubt the legal status of a captive, should be determined by a competent tribunal.

[241] http://enwikipedia.org/Enemy-Combatant. (Accessed on 23/8/06).

[242] See the concept of "Enemy" combatant in the "War on Terror" *p49*

[243] 542 US 507 (2004).

[244] The denial of the right to habeas corpus in this particular case was reversed by the Supreme Court. The Court while recognizing the power of the government to detain illegal combatants ruled that detainees who are US citizens must have the ability to challenge their detention.

amounts to denying them both the privileges accorded by the Third Convention, relative to the protection of prisoner of war, and also the Fourth Convention, relative to the protection of civilians.[245]

The beginning of 2003 saw numerous accounts of the torture of prisoners in Abu Graib prison in Iraq (also known as the Baghdad correctional service).[246] From 2001 there were persistent reports of prisoner abuse in Afghanistan. As in Iraq, some of the abuse in Afghanistan proved fatal. Eventually the US military reported investigations into the deaths of some thirty prisoners while in US custody both in Afghanistan and Iraq. Released prisoners articulated the usual complaints of the same conditions of confinements, and other techniques used during interrogation, in Gitmo prison.[247]

The result of this has been the call from human rights and humanitarian activists for better treatment of captives held as a result of the confrontations in Afghanistan and Iraq.[248] The reaction of the US, on the other hand, has been to implement legislation quite contrary to the provisions of International Law with a view to combating terrorism. Early on President Bush gave assurance that prisoners would be treated humanely and in keeping with the principles of the Geneva Conventions, but only in so far as military necessity permitted.[249] This statement suggests that humane treatment could be overridden on the basis of what the US deems to be military necessity.

Evidence of the US disrespect for the provisions of International Law as far as the treatment of suspects is concerned is seen in the recent enactments by Congress. After the appointment of a military tribunal to determine the legal status of the captives, President Bush went ahead to convince the US Congress to pass the Torture/Detention Bill of 2006.[250] The passage of this Bill epitomizes the US disregard for International Law. It

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[245] International Humanitarian Law, however, knows no middle ground. A captive is either a prisoner of war or a civilian.

[246] These acts were carried out by personnel of the 372nd military police company, CIA officials and contractors involved in the re-construction of Iraq. For an in-depth look at the nature of the abuse and the reaction of the US government, access; http://en,wikipedia.org/wiki/Abu-Graib-prison-abuse. (visited on 27/08/06).

[247] David P Forsythe: 'United States Policy Towards Enemy Detainees in the "War on Terror"' (2006). 28 *Human Rights quarterly* P.465-491 can be accessed at http://muse.jhu.edu/journals/human-rights-quarterly. (Visited 08/09/06).

[248] More recently there has been the call for the total closure of the Guantanamo detention camp.

[249] This accounts for the reason why the US is so resistant to implement the provision of Art 7 the Third Convention, as this will prevent them from acquiring the information they seek.

[250] Torture/Detention bill HR 6166.

lends legislative support to the broad rules for the detention, interrogation, prosecution and trial of terrorism suspects implemented by the US administration. For example,

(a) It bars terrorist suspects from challenging their detention or treatment through the traditional habeas corpus petition.[251] This decision contradicts the Supreme Court decision in *Johnson v Eisentrager*[252] In this case, the Court held that persons detained as "enemy" combatants cannot be denied the right to habeas corpus.

(b) It also allows prosecutors under certain circumstances to use evidence collected through hearsay or coercion in order to seek conviction.[253] Prohibition against the use of torture to obtain evidence is deeply rooted in customary law hence its International Law status.. In *R (Siafi) v Governor of Brixton*,[254] for example, it was held that the common law and domestic statute law[255] only gives effect to the intent of Article 15 of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the use of torture or coercion to obtain evidence. Though in common law today the inadmissibility of such involuntary confession is found in section 76 of the Police and Criminal Evidence Act of 1974, it had been implemented long before the coming into force of this Act in cases such as *Lam-Chin-Ming v The Queen*,[256] *R v Harz and Power*,[257] and also *Ibrahim v The King*.[258]

© The Act also rejects the right to 'speedy trial', and limits the traditional right of self-representation. In its place, it requires that defendants accept the services of military defence attorneys.[259]

(d) This legislation for the first time puts in writing who should be considered an "unlawful enemy combatant" in the "War on Terror". This will include those who

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[251] This contradicts the 2003 "Detention of Enemy Combatants Act" passed by Congress. According to Article 15 of this Act, the validity of the detention of citizens as enemy combatants could be challenged through the writ of habeas corpus. According to this Act the application may however be effectively nullified by denial of assistance of counsel.

[252] *Johnson v Eisentriger*, 339 US 763 (1950).

[253] According to sec. 13 of the "Detention of Enemy Combatant Act", during wartime a nation must use extraordinary means to protect itself. According to the US this will include acting in breach of International Law norms. Using evidence acquired in such a manner is in breach of Article 17 of the Third Convention.

[254] [2001] 1 WLR 114.

[255] The court here was referring to Section 78 of the Police and Criminal Evidence Act.

[256] [1911] 2 AC 760,817.

[257] [1967] 760,817.

[258] [1914] AC 599 609-610.

[259] According to British terrorism legislation, a suspect cannot be held for more than twenty one days without trail.

"purposefully and mentally" supported anti-US hostilities, and the executive branch has the power to detain them indefinitely.

(e) US army officials are also immunized from prosecution for cruel, inhumane and degrading treatment of prisoners who were captured before the end of 2005. This is in contravention of Article 15 of the International Convention against Torture and other Cruel, Inhuman and Other Degrading Treatment and also, Article 13 of the Third Convention, which prohibits any act of violence, intimidation, insults, public curiosity and acts of reprisal against a prisoner of war.

(f) According to the Act, the president has a dominant though not exclusive role in setting the rules for future interrogation of terrorist suspects.[260]

Apart from this piece of legislation, the US administration has since the beginning of the "War on Terror" held detainees in secrete places without acknowledging their detention, thus preventing in a practical sense any law applying to them.[261] Moreover some prisoners were transferred without following due legal process to foreign jurisdictions, such as Egypt, known for harsh interrogatory practices.[262]

Following the imminent threat posed by terrorists to world order, the US administration seems to be advocating for stringent measures in defiance of International Law to combat acts of terrorism. It is sometimes debatable whether extreme terrorist threats could justify extreme counter-measures, in particular whether it could be admissible to use torture during interrogation of a terrorist who knows were a bomb that could kill hundreds is planted. The legal answer to this question is clear. There is no justification whatsoever for the use of torture.[263] Prohibition of torture is part of *jus cogens* thus it is "emergency resistant" under all existing human rights and humanitarian law instruments. In this sense, even in an emergency, the prohibition of torture cannot be derogated from.[264]

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[260] Details of this Act can be found in the article by R Jeffrey Smith:' Many Rights in the US legal System Absent in New Bill'. Can be accesses at http://www.washingtonpost.com/wp-dyn/content/article. For further comments access http://www.informationliberation.com/index (both sites accessed on 10/09/06).

[261] Some of these were held in eight locations abroad two of these are said to be in Eastern Europe.

[262] This is often done in the understanding that assurances have been obtained regarding the prohibition of improper interrogation. Apparently, the US government accelerates rather than initiate this policy, which prevents US Courts from exercising any jurisdiction under US law. For more on this see David Forsythe: Ibid.

[263] See Stein. How much Humanity do Terrorists Deserve; *Humanitarian Law of Armed Conflicts. Challenges Ahead.* In JM Dellissen (ed) (1991) P.35.

[264] Torsten Stein; Ibid P.180.

So far, in this Chapter, the concept of "enemy" combatant has been examined, viz who the US administration considers an "enemy" combatant; the legal justification therefore; and the form of the treatment that the US administration prescribes for such detainees. It has been established that the US approach in all respect is contrary to the principles of International Law in general, and International Humanitarian Law in particular. Since the Geneva Conventions are the main embodiment of International Humanitarian Law norms, it will be worthwhile to examine the concept of "enemy" combatant in the framework of the laws governing the conduct of warfare.

5.5 The concept of "enemy" combatant in International Humanitarian Law

The protection and treatment of captured combatants in a situation of international armed conflict is detailed in the Third Geneva Convention. Considering the "War on Terror" generally, it appears that the conflicts with Afghanistan and Iraq were conflicts of an international character. Both countries are sovereign States, even though the Taliban regime in Afghanistan was not recognized by the US regime. Moreover, both Afghanistan and Iraq are High Contracting Parties to the Geneva Conventions. They possess a regular armed force, which wears distinctive uniforms, and is under a responsible command.[265] This being so, Taliban and Iraqi soldiers captured during the course of these conflicts, and held at Guantanamo Bay and other camps around the world, have a valid claim to protection under the Third Convention, despite initial refusals by the US administration to grant such protection to Taliban fighters.[266] However, the position of *Al-Qaeda* militants still remains unclear, as the US administration contends that they are a terrorist group and, as such, fall outside the ambit the Geneva Conventions. These persons are categorized by the US administration as "enemy" combatants. The term has, however, since the declaration of the "War on Terror" been constantly modified to suit different situations. In legal literature and military manuals, for example, it was used to signify "[a]ll persons taking a direct part in hostilities

[265] These are the requirements of Article 4 of the Third Convention for the according the status of prisoner of war in the event of an international conflict.

[266] The initial position of the US was that the Taliban were out of the category of protected persons outlined in Article 4 of the Third Convention owing to the fact that though a party to the Geneva Conventions, they do not wear uniforms and were not subject to a chain of command. The US also contended that the Taliban fighters fell short of the requirement of Article 43 (1) of the Protocol, which is to the effect that "Armed forces shall be subject to an internal disciplinary system which among other things shall enforce compliance with the rules of International Law applicable in armed conflicts".

withoutbeing entitled to do so and who therefore cannot be classified as prisoners of war if captured by the enemy."[267] This however, is contrary to the goals of the Geneva Conventions, which are aimed at ensuring that no one in enemy hands is left without protection. Thus every individual captured in the course of an armed conflict is entitled to some protection under the Geneva system. According to the commentary to the Fourth Convention:

"Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, or a civilian covered by the Fourth Convention. [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status."[268]

The ICTY in the *Celebici* case[269] affirmed that there exists no gap between the two Conventions, by stating unequivocally

"There is no gap between the Third and the Fourth Conventions. If an individual is not entitled to protection under the Third Convention, as prisoner of war [h]e or she necessarily falls within the ambit of the Fourth Convention relative to the protection of civilians." Thus members of *Al-Qaeda* are either combatants, to be treated according to the provisions of the Third Convention, or civilians and should be treated according to Fourth Convention.

Turning to non-Afghan or non-Iraqi citizens apprehended during the conflicts, they are protected by the provision of Article 4 of the Third Convention. In defining the scope of application of the Convention, this Article stipulates that:

"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 to which they are not nationals."

Thus non- Afghan and non-Iraqi citizens apprehended in these wars have a right to protection. In order to make sure that no person in the hands of the enemy is without protection, Article 5(2) of the Third Convention is to the effect, that in case of doubt the status of such a person should be determined by a competent tribunal. This provision was

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[267] Silvia Borelli: The Treatment of Terrorist Suspects Captured Abroad. *Enforcing International Law Norms Against Terrorism* Andrea Bianchi ed.P45.The definition of an enemy combatant given in *ex parte Quirine* is however different from that contained in the "Detention of Enemy Combatant Act" of 2003 that again varies from that contained in the Torture/Detention Act of 2006.

[268] That there exist no gaps between the conventions was affirmed by the ICTY in the *Celebici* case.

[269] Case no. IT 96-21-T

applied by the US in conflicts from Vietnam to the first Gulf War. In 1977 a regulation issued by military authorities set out detailed procedures for tribunals that could be established to determine the status of prisoners apprehended during military operations.[270] These regulations seem to have been discarded in the fight against terrorism by the Bush administration today. This same administration constantly derogates from the provisions of the Third Convention as far as the "War on Terror" is concerned, by holding many captives in a legal limbo in relation to their status in International Law.

5.6 Conclusion

The definition of an "enemy" combatant has varied since the commencement of the "War on Terror", from those contained in military manuals to that laid down by the US Supreme Court in *ex parte Quirin* and modified in *ex parte Malligan*. Recently the definition of an "enemy" combatant provided in the Torture/Detention Bill passed by the US Congress in 2006, makes it clear that the definition is constantly modified to achieve particular outcomes sought by the US administration. It is also increasingly evident that in the "War on Terror" the legislature is being continuously sidelined. President Bush, however, argues that the government requires extraordinary powers to respond to the unusual threat of terrorism. This notwithstanding, the treatment given to the so-called "enemy" combatants is completely parallel to the provisions of the laws of war. In some cases the US even refutes the application of certain parts of these laws to the fight against terrorism. The Geneva Conventions contain no provisions on the concept of "enemy" combatant. The treatment thus prescribed by the US is mostly seen as an attempt by the Bush administration to singlehandedly rewrite the Conventions. This has been a major cause for concern to international lawyers. How to insure respect for the Geneva

[270] The military regulations seem to extend the guarantees set forth in Article 5 of the Third Convention to a wider group of subjects, as it establishes that a person having committed a belligerent act or engaged in hostile activities in aid of enemy armed forces is entitled to have his or her status determined by a competent tribunal not only where "any doubt arises as to whether he belongs to one of the categories enumerated in Article 4 the Third Convention", but also in cases where such persons, " although not appearing to be entitled prisoners or war status, asserts that he or she is entitle to be treated as prisoner of war."

onventions'[271] and the recently much debated question of the relevance of the Geneva Conventions in the fight against terrorism[272] will be discussed in the next Chapter.

[271] See 6.1
[272] See.6.2

CHAPTER SIX

THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS AND THE "WAR ON TERROR"

6.1 Introduction

The concept of "enemy" combatant is not recognized in International Humanitarian Law. The US insistence on the applicability of this concept in the fight against terrorism can thus be considered disdainful of International Law. The Geneva Conventions and their Additional Protocols contain provisions obliging signatories to respect them. Such provisions constitute the subject matter of this Chapter.

6.1.2 Ensuring respect for the Geneva Conventions

The trend of events since 11 September 2001 shows a complete deviation of the US and its NATO allies from the provisions of the Geneva Conventions. They regard the "War on Terror" as a 'must win' and, if ignoring the rules of war which they themselves helped to formulate is what it takes, they are prepared to do so. However, in drawing up the rules the drafters of the Geneva Conventions took cognizance of the imperfections of International Law. International legislation as a whole is difficult to enforce. This is mainly due to the uneven nature of the international playground and the sometimes recalcitrant attitude of States. To guard against any contraventions, common Article 1 provides as follows:

"[T]he high contracting parties undertake to *respect* and to *ensure respect* for the present Convention in all circumstances."

An analysis of the issue of respect for the Conventions provided for by the above Article can be divided into two parts. First, by signing and ratifying these Conventions, the High Contracting Parties undertook to respect all of their provisions. According to the Commentaries on the Third Convention the engagement is not merely an obligation taken on the basis of reciprocity, binding each party to the contract only insofar as the other parties observe their obligations.[273] It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other contracting parties. Each State conducts obligations *vis-à-vis* itself and at the same time *vis-à-vis* the others.

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[273] This renders moot the argument that the provisions of the Conventions cannot be applied to Taliban soldiers because they do not respect the rules of warfare.

The Conventions are so essential for the maintenance of civilization, that the need is felt for their assertion, not only out of respect for it on the part of the signatory State itself, as in the expectation of such respect from all parties.

Respect for the provisions of the Geneva Conventions is not only expected from those executing orders, but also from those actually issuing them. This accounts for the reason why humane treatment of prisoners of war is not the responsibility of the soldier or regiment that captured them but that of the detaining power.[274]

Secondly, common Article 1 does not only require the High Contracting Parties to respect the provisions of the Geneva Conventions, but also makes it their responsibility to ensure respect for it. As a result, it is the duty of the High Contracting Parties to bring a defaulting State to compliance in the event of a breach. This can be done by mounting international pressure on the defaulting State to comply with the rules.[275] Pressure usually takes the form of embargoes, but sometimes outright military force can be used against such a State subject to the approval of the United Nations.[276]

Finally, the phrase "in all circumstances" contained in Art. 1 is of extreme importance. It requires the application of the Geneva Conventions in all circumstances that its provisions have to apply. According to the commentaries on the Third Convention the words indicate that in applying the Convention the cause of the conflict should not be taken into consideration.[277] The US and its NATO allies are parties to the Conventions and thus must abide thereby and apply them in all circumstances, as required by Art. 1.

In the current fight against terrorism, where the US administration disputes the application of the Third Convention, it is the responsibility of the other High Contracting Parties to bring the US into compliance. Due to the constant disregard exhibited by the US and its allies (especially Britain) for International Law, acting in compliance with common Article 1, individual nations or the world in its unified form (UN) can bring

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[274] See Article 12 of the Third Convention.

[275] The US itself has on many occasions mounted pressure on another State to make it comply with International Law norms. A good example was the pressure mounted on the South African government before 1994 that eventually led to the collapse of the Apartheid government. Another example was the military action taken against Iraq in the first Gulf War to force that country to pull out of Kuwait.

[276] The military action brought against Iraq in the first Gulf War had the backing of the United Nations.

[277] In applying the rules of International Humanitarian Law as a whole, the causes of the conflict are of no consequence. This is because this branch of law is more concerned with the manner in which wars should be conducted than with the actual causes of the conflict.

pressure to bear on the allies. However, due to the uneven playing ground of the international arena, the pressure on these defaulting States is not strong enough to bring them to submission. Occasional visits are, however, paid to detention camps by the International Committee of the Red Cross, but of course their findings always remain confidential.

The approach of the US administration towards the issue of terrorism since 11September 2001 has cast a shadow on the whole institution of International Law. Most controversial among the numerous debates raised is the question of the adequatecy of the Geneva Conventions to cater for today's conflicts. The US administration has even gone as far as to reject the application of the Third Convention in the fight against terrorism. Thus the next section examines the importance of the Geneva Conventions and their various Protocols in the current struggle against terrorism. This will be done under the next heading.

6.3 **Relevance and applicability of the Geneva Conventions and Additional Protocols to the "War on Terror"**

In order to assess the importance and application of the Geneva Conventions to the "War on Terror", it will be necessary to briefly ascertain the circumstances in which the law provides for the activation of the rules contained in the Conventions. In this regard, Common Article 2 provides that the provisions of the Convention be applicable to

"[a] ll cases of declared war or any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them [a]nd all cases of partial or total occupation of the territory of a High Contracting party even if the said occupation meets with no resistance."

This Article further stipulates that where one or more of the parties to a conflict are not parties to the Conventions, those, that are parties to the Conventions remain mutually bound to observe them, and will be so bound even in relation to a non-party which in practice accepts and applies their provisions. On the other hand, where a State is not a party to the Conventions, has denounced them, or is not in practice willing to observe their requirements, other parties to the conflict are not bound *vis-à-vis* that State to implement the full Geneva regime. This provision is of vital importance when considering the fate of captives in the war against Afghanistan and also the war against

Iraq. These were cases of declared war between and in the territory of the High Contracting Parties. As a result the Geneva laws should rigorously be applied. In this respect the treatment of captives held in the Island of Guantanamo Bay in Cuba is in breach of Article 75 of Protocol I.[278] Article 75(2) of this Protocol, for example, provides, as a fundamental guarantee the prohibition of torture of all kind, and mutilation. This provision also enhances the argument that the war against Afghanistan was governed by the provisions of the Convention despite the fact that the Taliban regime was not recognized by the US administration.

The case of militants the of *Al-Qaeda,* however, is somewhat different, considering the fact that they are non-state actors. This notwithstanding, it must be mentioned that most of the provisions of the Geneva Conventions are part of customary law. The customary law status of International Humanitarian Law is expressly preserved in the provision that States will:

"[r] emain bound to fulfill obligations arising from the principles of the law of nations, as they result from the usages established amongst civilized people, from the laws of humanity and the dictates of public conscience".

One could derive from the wording of this provision that, though militants of *Al-Qaeda* might not meet the requirements necessary for the application of the full Geneva regime, they are, however, required to be treated humanely and according to the dictates of public conscience.

It is, however, understandable that the so- called "War on Terror" has ushered in many challenges that were not contemplated by the drafters of the Conventions in 1949. The question then is: whether these challenges are of a nature that renders obsolete the provisions of the Geneva Conventions?

After 11 September 2001 and the war against Afghanistan there emerged two schools of thoughts regarding the trial and treatment of captives held by the US at Guantnamo Bay prison and other camps around the world. First, the US administration can use the federal

[278] Article 75 provides that captives be treated humanely in all circumstances and shall enjoy the this protection without any adverse distinction based upon race, color, sex, language, religion or believe, political or other opinion, national or racial origin, wealth, birth, or other status, or on any other similar criteria.

courts and laws, including terrorism statutes, to prosecute alleged terrorists.[279] On the other hand, those detained, especially from the war with Afghanistan, can individually be tried according to the provision of Article 5[280] of the Third Convention to determine whether they have been properly detained. If so, they should be brought before a regularly constituted court-martial operating under procedures that are essentially the same as those applied to US service personnel.[281]

The administration, on the other hand, believes that the "War on Terror" has ushered in a new paradigm and requires new thinking on the laws of war.[282] It made a single across-the- board decision that the Geneva Conventions do not apply to members of *Al-Qaeda* as they do not constitute part of a regular arm force of a State, and therefore cannot be considered a party to the Conventions. As regard the Taliban, the US administration contends that they failed to conduct their military operations as required by the law, and were therefore not entitled to protection under the Conventions. Instead they would be treated as "illegal" combatants. Unofficially, though, the US believes that to effectively fight, and succeed, in the "War on Terror", certain aspects of the Geneva Conventions should be discarded. A full application of the provisions of the Third Convention, for example, will result in the early release of captives thus; losing the opportunity to obtain vital information that can help the fight against terrorism. Even more problematic to the US are the provisions of Article 17 of the Third Convention which require that captive are only obliged to give their names, surnames, ranks, and Army regiments, and failing which, equivalent information.

The "War on Terror" can be likened to a worldwide civil war. As explained by the US administration, this war is not waged against a readily identified enemy. Moreover, enemies in the "war" cannot be identified by any laid down criteria.[283] This being so, the

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[279] This has been done previously, as in the case of the 1993 World Trade Center bombings, and also in the prosecutions that arose from the bombings of the US embassy bombings in Kenya and Tanzania in 1998.

[280] Article 5 requires that, in case of doubt, the status of a captive be determined by a regularly constituted tribunal.

[281] This argument stem from the premiss that using court-martial will be swift and effective and will make it clear that the US is providing detainees full and fair trial, the same that is afforded US service members under International Law.

[282] Eugene R Fidell: 'Uphold The Geneva Conventions and the Convention Against Torture'. Can be accessed at *http://www.securitypeace.org/pdf/chapter3.RAL.GenevaConventions.pdf* accessed on the 20/10/06.

[283] See the Detention of Enemy Combatant Act of 2003.

problems of a full application of the Geneva Conventions become apparent, especially when one considers the element of "protracted" postulated by the ICTY for the activation of Common Article 3. Some of the attacks fall short of an armed conflict in the sense of the Geneva Conventions and thus render the same inapplicable. Examples of such situations are: the continuous presence of US military personnel in Afghanistan, and the bombardments by the US after the war of what are considered terrorist training grounds.[284] Military actions by the US in other countries, like Yemen for example, also produced situations short of the requirements for the activation of Common Article 3, and thus cannot be considered an armed conflict in the sense of the Conventions.[285] Even more problematic is the *modus operandi* of the terrorist groups. These are non-state actors with a transnational network.[286] It is unclear if the requirement of Common Article 3 that the "conflict be taking place in the territory of a High Contracting Party" is an essential criterion for the application of International Humanitarian Law. As correctly suggested by Luigi "One could argue that in the light of globalization and the increased phenomenon of trans-border conflicts, geographical location is no longer essential for the application of Common Article 3."[287] The ICJ characterization of Article 3 as reflective of 'elementary standards of humanity' would seem to reinforce this view. This not-withstanding, the above requirement that the conflict be taking place in the territory of a High Contracting Party, will necessitate a line of distinction to be drawn between attacks directed against a State within the territory of that State, and attacks directed against terrorists within the same territory. This will ease the confusion as to the applicable legal regime for captives arising from such operation. Making no distinction between terrorists and countries that harbour them, as the US is doing, raises more questions than answers.

While the provisions of Common Article 1 are geared at ensuring respect for the Conventions, Common Article 2 provides for instances where the Conventions become

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[284] The application of the rules of International Humanitarian Law ended with the end of the war with Afghanistan. However, the continued presence of US troops in that country, and the incessant guerilla attacks from other militias, do not alter the fact that, from the date of cessation of hostilities between the US and Afghanistan, the situation reverted to an internal conflict.

[285] Common Article 3 requires that for the Conventions to be activated the conflict should be of a protracted nature. Some of the military operations carried out by the US are not protracted in nature, thus rendering the Conventions inapplicable.

[286] According to the US Congress Report in 2003, *Al-Qaeda* had about sixty branches around the world.

[287] Luigi Condorelli: Ibid.

operational. The "War on Terror" produces situations falling within the ambit of Common Article 2, which in turns signifies that the respect for the Conventions required by Common Article 1 must be adhered to. On the other hand, difficulties arise when attempting to classify non-state agents who do not fit very well within the boundaries of protected persons set forth in Article 4(2). Moreover, certain military actions carried out by the US do not fulfill the requirement of an armed conflict. The legal characterization of such military actions, and captives created by them, has been a subject of controversy and ambiguities, among legal scholars, on the one hand, and the US administration, on the other. This has led to the out right rejection of some parts of the Geneva Conventions, and the assertion by some that the Conventions are a hindrance to the fight against terrorism.[288] How true can this be?

To begin with, International Humanitarian Law is to a large extent aimed at easing the superfluous suffering that results from conflicts.[289] This being so, the application of its rules cannot depend on the legality of the methods used by a party to the conflict, nor can it depend on the causes of the conflict.[290] Moreover, in an effort to safeguard against unnecessary suffering, the Conventions are designed in such a manner that they leave no one in enemy hands without protection. Thus, if a captive is not protected as a prisoner of war by the Third Convention, he is protected as a civilian under the Fourth Convention.[291] To strengthen this guarantee further, Article 5 of the Third Convention makes provision for the determination by a competent tribunal of which category a captive belongs to in the event of uncertainty. In the light of the above it can be inferred that International Humanitarian Law, as a matter of fact, assists in safeguarding what is already considered the hardcore of Human Rights Law. Nothing in the Conventions prevents the prosecution of a prisoner of war for war crimes or actions committed

[288] Proponents of this view rely heavily on the provisions of Article 17 of the Third Convention, which requires that on interrogation; the captive is only allowed to give his name, surname, first name, and rank, date of birth, Army regiment, and serial number or equivalent information. The provision forbids physical or mental torture of any kind, or any other form of coercion, to secure information of any kind.

[289] For this reason this branch of International Law provides protection to those that are most vulnerable in a situation of armed conflict. The Geneva Conventions further provide protection not only to those *hors de combat* but also to those taking an active part in the war. Though they may be military targets, they might not be killed in an unorthodox manner or be inflicted with prolonged suffering.

[290] International Humanitarian Law is not concerned with the causes of a conflict but with the manner in which the conflict is conducted. Thus the rules contained in the Conventions are without regard to the causes of the conflict that is, which party is right or wrong.

[291] See the ICTY ruling in the *Celebicci* case P 62.

contrary to *jus in bello.* Thus, while Human Rights Law provides judicial guarantees in peace times, International Humanitarian Law safeguards such guarantees in periods of conflict. This is done by preventing the detaining power from arresting, and putting into custody, apprehended individuals in an arbitrary manner, especially at the end of hostilities. Their continuous detention, however, can either be because of committing crimes while in detention, or because of the commission of war crimes.

6.4 Conclusion

Undoubtedly, the "War on Terror" has brought challenges that were not contemplated by the drafters of the Geneva Conventions. If there were proof that the Conventions were inapplicable to the fight against terrorism, or that a strict application thereof would be to the advantage of the terrorists, there would be justification to discard their provisions. Though the Conventions do not lay down specific guidelines for the fight against terrorism, their content is broad enough to achieve their goals which, *inter-allia,* is to leave no one in enemy hands without protection. While Common Article 1 compels all signatories to respect its provisions, Common Article 2 provides circumstances in which such rules are deemed operational. Events since 11 September 2001 have produced certain circumstances falling within the ambit of Common Article 2, and, as a result, non-compliance with the provisions of the Conventions in these circumstances should be considered a breach of International Law. In situations of doubt Article 5 of the Third Convention should be applied rather than single handedly declaring the non-applicability of the Conventions to certain groups of individuals on account of their not meeting the laid down criteria for benefiting from favourable treatment under the Third Convention. Lastly, it must be mentioned that in the fight against terrorism International Humanitarian Law is only performing its traditional role of filling in the gaps of Human Rights Law in times of armed conflict. Thus rejecting its application is tantamount to rejecting the fundamental principles of Human Rights Law.

CHAPTER SEVEN

CONCLUSION AND APPROPRIATE RECOMMENDATIONS

7.1 Conclusion

Terrorism is not a new phenomenon.[292] Its eradication is, however, complicated by the absence of an acceptable definition of the term.[293] Acts of a terrorist nature have evolved over the years from a stage where terrorists targeted individual subjects or people in power, to a stage where innocent civilians are made the objects of their actions. The focus on civilians, rather than political figures or military targets, has made the fight against terrorism a major problem in International Humanitarian Law. This is because of the fact that the protection of civilians in the event of an armed conflict is one of the main goals of this branch of International law. The necessity, thus, to formulate laws directed towards combating acts of this nature was realized by the founders of the League of Nations. Unfortunately, legal sanctions were never enforced owing partly to the events leading up to the Second World War, and partly due to the over ambitious nature of the proposed laws.[294] These efforts were, however, continued after the Second World War by the UN, but were hindered by the growing nationalistic ideals of developing countries and other nations under repressive regimes.

The contradiction inherent in an attempt to define the term 'terrorism' is also felt in the definition of the term 'war'. The absence of universally accepted definitions of these terms makes the current fight against terrorism otherwise known as the "War on Terror", a contradiction in terms.[295] This lack of unanimity is, however not felt significantly in the domain of International Humanitarian Law, as this branch of International law deals less with the causes of an armed conflict than with the manner in which it is conducted.[296] This notwithstanding, the absence of acceptable definitions creates an apparent confusion between a terrorist and a freedom fighter.[297] The difference between the two is that while a true freedom fighter will respect the laws of war, a terrorist will carry on his activities in contravention of such rules. However, until an accepted definition of the term 'terrorism' is reached, the problem of terrorist versus freedom fighter will not be resolved.

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[292] For the development in terrorism in a historical perspective, see chapter one 1.2 and 1.3.
[293] See Terrorism: Difficulties in Definition. Chapter Two P. 19.
[294] Earlier attempts by the international community to combat terrorism is dicussed at 2.2.
[295] See Difficulties in the Definition of war at 1.5
[296] This branch of International Law is more concerned with *jus in bello* (the manner in which hostilities are conducted) asopposed to *jus ad bello* (the reasons for the hostilities).
[297] See the Problem of Terrorist versus Freedom fighter at 2.4.

As discussed above,[298] the focus of terrorists has changed from individual assassinations to the killing of innocent civilians. Many reasons account for this, but the main reasons are; the publicity these terrorists enjoy from the media; State support they receive; and the creation of terrorist network.[299] These three factors contribute significantly to the difficulties inherent in the current endeavours to eradicate terrorism.

The change in the nature of terrorist acts between the first half of the 20th century and the second half of the 20th century prompted States to adopt tougher majors to eradicate acts of this nature. Before 11 September 2001, for example, the international community believed in peaceful and diplomatic solutions to combat terrorism. Their efforts, however, did not achieve much owing, as mentioned above,[300] to complications resulting from the struggle of developing nations for independence from their colonizers. As a matter of fact, before this date the more powerful nations, such as the US and Israel, had occasionally bombarded buildings and areas believed to be terrorist training grounds, and situated beyond their borders. However, after the attacks on the Pentagon and the declaration of these acts by the UN as a threat to international peace, the US and its allies embarked on a strategy of pre-emptive strikes for the purpose of self-defence. [301] This is widely considered the beginning of a new era in the fight against terrorism, generally known as the "War on Terror". This new approach saw the US and its allies initiate a full-scale military attack against Afghanistan and Iraq. These conflicts, especially that against Afghanistan are questionably wars of self-defence or even a pre-emptive war. This is so as it falls short of the test laid down by the ICTY for the so-called "internationalized" conflicts.[302]

However, a general consideration of the totality of US operations since 11 September 2001 under the heading of "War on Terror," raises certain problematic questions. For example, the war against Afghanistan and Iraq can rightly be termed conflicts of an international nature, and thus subject to the operation of the Geneva Conventions in their entirety. On the other hand, not all captives from the "War on Terror" held by the US in

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[298] See 72. Also see Terrorism in the second half of the 20th Century at 1.3.
[299] These reasons are chronicled at 1.4
[300] See the fight against Terrorism before 11 September 2001 at 1.6.
[301] See the fight against terrorism after 11 September 2001 on at 1.7.
[302] For an in-dept analysis of the legal nature of the "war on Terror" in International Humanitarian Law, turn to Chapter 2

Guantanamo Bay and other camps around the world comply with the essential criteria laid down by law for the purpose of acquiring prisoner of war status. This is so because certain military operations by the US and NATO cannot be termed international conflicts.[303] As a consequence the US administration prefers to term them "enemy" combatants. The concept of "enemy" combatants, though known in the literature and military manuals is unknown to International Humanitarian Law. The definition of the term "enemy" combatant has thus varied since the commencement of the US led fight against terrorism.[304] This being so, the treatment prescribed for the captives held by the US administration is quite contrary to the provisions of the Geneva Conventions. The passing by the US Congress of the Torture/Detention Bill epitomized the Bush's administration's disregard for the provisions of the Geneva Conventions. While activists and certain sectors of the American population argue that Article 5 of the Third Convention should be applied to determine the status of captives held in Guantanamo Bay, the US administration insists on trials, for the purpose of determining the legal status of detainees, to be carried out by military tribunals appointed by the President. The link between the administration and the military tribunals raises doubts about the impartiality of the process, as prescribed by both International Human Right and International Humanitarian Law.[305]

The disagreement between the allies, on the one hand, and human rights activist,on the other, have raised questions as to the adequacy of the provisions of the Geneva Conventions in governing the current fight against terrorism. The US administration considers the Geneva Conventions to be a stumbling block in this fight against terrorism. One thing, however, is clear. According to the Third Convention, no one in the power of the enemy should be without protection. In this respect, if those in captivity are not prisoners of war, they should be considered as civilians and treated accordingly.[306] The question is thus raised; whether terrorists deserve some humanity owing to the fact that in carrying out their atrocities they show a lack of consideration for innocent lives. There is no ready-made answer to this question at this stage. But it is also a legitimate question to

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[303] See 4.2-4.4 for the requirements necessary for a captive to be treated as a prisoner of war.
[304] For a definition of the term "enemy" combatants in the "War on Terror", turn to chapter five at 5.2
[305] The concept of "enemy" combatants and the treatment prescribed to the by the US administration is discussed in 5.2 and 5.3.
[306] See the relevance and application of the Geneva Conventions in the "War on Terror" at 6.3

ask how much of the rules of International Law can a State ignore if it feels threatened by acts of terrorism. A somewhat partial answer to these question is provided by Fidell when he asserts that "[t]he international system of military law is predicated on reciprocity, so United States adherence to the norms is highly relevant to expectations of appropriate treatment when United States personnel are captured."[307]

7.2 Recommendations

Since the terrorist attacks on the WTC, terrorism has taken centre stage in international affairs. It is, however, evident that there is no simple solution to this problem. With the escalating nature of modern acts of terrorism, it is evident that unless stringent majors are taken its effect on civilian lives will become more devastating. This is enhanced by advance in modern technology wherewith, the machinations of terrorists are becoming more and more unimaginable. Generally speaking, one of the greatest worries of the international community is the fact that terrorist acts are increasingly being directed against civilians. It is the opinion of the author that there can be no justification for taking civilian lives. No matter how justified the cause may be, directing acts of terrorism against a non-military objective is criminal and swift measures must be taken to bring the perpetrators to justice.

The most difficult problem faced in the fight against terrorism is that of the absence of a definition of the term itself. It could, therefore, justifiably be termed "a fight against the unknown". Thus, until an acceptable definition of the term is agreed upon, its eradication will remain complicated. It is, however, true to say that some progress has been made towards this end;[308] but a unanimous view would nonetheless facilitate the fight against terrorism. This will go a long way to solving the problem of State sponsorship of terrorism, and the distinction between terrorist and freedom fighter. Agreeing on a definition will definitely facilitate the extradition of those accused of terrorist acts.

Certain factors have enhanced the growth of terrorism in recent years. The media is one such factor. Understandably the media is constantly searching for new angles and new story lines to increase their ratings. It is also true to say that a good journalistic report

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[307] http://www.securitypeace.org/pdf/chapter3.RAL.GenevaConventions,pdf (accessed on 29 January).

[308] Of the 109 definitions that exist most share a common understanding of what will constitute an act of terrorism no matter the ends sought by the perpetrators

requires objectivity and impartiality. This sometimes acts in favour of terrorists, as they usually carry out their acts with the aim of getting media attention, and thus the widest publicity possible. It is therefore the opinion of this author that reporting on such acts should be done with caution. The idea is to avoid raising public sympathy for terrorists. In reporting acts of this nature, therefore, the same restrictions that apply to pornography should be implemented.

While acknowledging the challenges posed in the fight against terrorism, the author holds the view that it is inappropriate to let the course of the fight be dictated by one nation. In this respect the UN should play a pivotal role in this fight. The fact of a single nation championing the cause of the fight only helps to cause tensions between nations.[309] It can, however, be agreed that States who feel threatened by acts of terrorism can work with the UN to eradicate existing threats but any action should be taken under the banner of the UN. This will require that this institution be strengthened both with adequate personnel and resources.

In the current effort to eradicate terrorism, the US has declared that in pursuing terrorists, it will make no distinction between the terrorists and those who harbour them. This raises some problematic questions as to the applicable legal regimes in respect of those apprehended. If International Law norms have to be respected, there should be a clear line of distinction between the regular military of a State and members of a terrorist organization. The former must be treated according to the provisions of the law in the event of capture, while the latter must be subjected to criminal process. This will eradicate the current dilemma inherent in the application of the provisions of the Third Convention *viz-a-viz* captives in the "War on Terror".

Turning to the "War on Terror" specifically, the adopted strategy of pre-emptive strike for the purpose of self-defence might be a source of problems, rather than a solution. The situations in Afghanistan and Iraq are a testimony to the ineffectiveness of this strategy. Moreover, the recent tensions between the US and Iran, and the US and North Korea, are further examples of how disastrous this strategy can be. In this respect, then, it would be better for States to consider the UN's call for self-defence in Resolution 1373 to be

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[309] This recently has raised tensions between the US and countries like Iran and North Korea as the US considers these States to be terrorist States thus the establishment and development of nuclear plants is considered a threat to the world.

collective rather than individual self-defence. Here the UN should play a pivotal role in the organization of such collective self-defence: any major decision should be debated both in the General Assembly and the Security Council; and the view of one State should not be allowed to dominate that of the collective.

The recent trend of events has seen States departing from the provisions of International Law. There is no disputing the fact that, by acting in contravention of the provisions of the law, the international community will help to create an atmosphere in which terrorism will thrive. In an attempt to eradicate terrorism, it is important that States act in accordance with the provisions of the law. International conventions entered into must be respected to the fullest extent. In this context, those captives held by the US and its allies in Guantanamo Bay and other camps around the world must be treated as prisoners of war. However, in cases that are not certain, the author is of the view that they be tried by a competent court to determine whether they meet the requirements of Article 4 of the Third Convention. This will be in keeping with Article 5 of the same Convention. Those that fall short of the requirements of Article 4 should be treated as criminals, and thus be transferred to the branch of International Law with competency in such matters. Though as already mentioned[310] the term 'terrorism' does not express a legal concept, it constitutes a criminal offence. Thus the International Criminal Court should have jurisdiction over such matters. Despite the absence of a general consensus on the constitutive elements of terrorism, it is generally accepted that the acts of 11 September 2001 were terrorist in nature thus the court should determine the appropriate punishment for its perpetrators. This will lead to the abandonment of the CSRT and the concept of "enemy" combatant.

[310] See 2.3 at page 25 para 1.

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