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## TERRORISM AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW: THE MUJAHIR CASE

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**Sumário:** 1. Introduction. 2. Facts to the Case. 3. IHL Appreciation. 4. Conclusions

### 1. Introduction

The U.S. government calls the fight against international terrorism a “war”. It is well known that this opinion is more than mere rhetoric. Since October 8, 2001 the U.S. government together with its alliance partners, is using military means to fight terrorism in Afghanistan. While the legitimacy of this enterprise seems to be widely accepted, the legality of some of these military actions is sometimes called into question especially with regards to the International Humanitarian Law (IHL).<sup>1</sup> A prominent example is the detention of captured Taliban and Al Qaeda fighters in “Camp X-Ray” in Guantanamo.<sup>2</sup> The U.S. government classifies detainees as “unlawful combatants”<sup>3</sup>, as individuals who took part in the hostilities without being entitled to do so by international law.<sup>4</sup> In its view, they were not “lawful combatants”, they had no right

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<sup>1</sup> See e.g. St. Kirchner, Der aktuelle Fall: Der Einsatz von Bomben des Typs BLU-82 „Daisy Cutter“ durch die USA in Afghanistan, in: Humanitäres Völkerrecht-Informationsschriften 2002, p. 26ss.; s. also the overview regarding criticized means of warfare at: R. Falk, Appraising the War Against Afghanistan, [www.ssrc.org/sept1/essays](http://www.ssrc.org/sept1/essays) (July 3, 2002), under II.

<sup>2</sup> See e.g. J. Wiczorek, Der aktuelle Fall: Der völkerrechtliche Status der Gefangenen von Guantanamo nach dem III. Genfer Abkommen über die Behandlung von Kriegsgefangenen vom 12. August 1949, in: Humanitäres Völkerrecht-Informationsschriften 2002, p. 88ss.

<sup>3</sup> U.S.-Secretary of Defense D. Rumsfeld, Secretary Rumsfeld Media Availability after Visiting Camp X-Ray, in: News Transcript, January 27, 2002, United States Department of Defense, [www.defenselink.mil/news/Jan\\_2002](http://www.defenselink.mil/news/Jan_2002) (July 15, 2002); “The characteristics of the individuals that have been captured are that they are unlawful combatants, not lawful combatants.” S. also: M.C. Dorf, What is an “unlawful combatant”, and why it matters: The status of detained Al Qaeda and Taliban Fighters, in: Findlaw’s Writ, January 23, 2002, <http://writ.news.findlaw.com> (July 20, 2002); J. Bowman, POWs and unlawful combatants, in: CBC News Online, January 2002, [www.cbc.ca/news/features/pows.html](http://www.cbc.ca/news/features/pows.html) (July 15, 2002).

<sup>4</sup> See the definition of “unlawful combatant” in: Ch. Greenwood, International law and the “war against terrorism”, in: *International Affairs* 78, 2 (2002), p. 301 (315); K. Ipsen, Combatants and Non-Combatants, in: D. Fleck et al. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford et al. 1995, p. 68 cm. 302.

to be treated as Prisoners of War (POWs) according to the III Geneva Convention (GC III) of August 12, 1949.<sup>5</sup>

However, the law does not follow the opinion of any government, but of objective criteria. This is also valid in regard to the fight against international terrorism. Most IHL scholars therefore consider that the denial of POW status to the Taliban fighters is a violation of IHL.<sup>6</sup>

Recently, a case dealing with a “combatant” allegedly linked to the international Al Qaeda network has attracted much attention both on the national and international levels. The U.S. government transferred the alleged terrorist and U.S. national Abdullah Al Mujahir as “enemy combatant” to a U.S. military prison.<sup>7</sup> Again, the question to be asked is whether this specific course of events is in accordance with IHL obligations. The following examination tries to shed some light on this case.

## 2. Facts to the Case

On June 10, 2002, the U.S. government announced that the day before a 31-year-old U.S. national named Abdullah Al Mujahir had been transferred on instructions of U.S. President George W. Bush to the Department of Defense. It was stated that he is an alleged member of the Al Qaeda terrorist network and that he had planned a murderous attempt<sup>8</sup> in the USA with a so-called “dirty (nuclear) bomb”.<sup>9</sup> Hence, he should be classified as “enemy combatant”.<sup>10</sup>

At the moment<sup>11</sup> Mujahir, who was called José Padilla up to his conversion to Islam in 1990, is detained in the high security military prison Charleston Naval Weapons Station of the U.S. Army in South Carolina.<sup>12</sup> He had been previously convicted in the

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<sup>5</sup> See D. RUMSFELD, *op. cit.* (fn. 3).

<sup>6</sup> See e.g. the expert discussion at the Crimes of War Project with statements of C. Doebbler, H.W. Elliott, R.G. Goldman, M. Noone et al., [www.crimesofwar.org](http://www.crimesofwar.org) (July 4, 2002). For an opposite view, see K. ANDERSON, *The Military Tribunal Order: What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States on Detainees at Guantanamo Bay Naval Base*, in: 24 *Harv. J.L. & Publ. Policy*, p. 591 (613ss.).

<sup>7</sup> See the „Text of Attorney General John Ashcroft’s announcement“, [www.nando.net/special\\_reports/terrorism](http://www.nando.net/special_reports/terrorism) (July 19, 2002): „The safety of all Americans and the national security interests of the United States require that Abdullah Al Mujahir be detained by the Defense Department as an enemy combatant.”

See also L. THOMPSON, U.S.-Vice-Attorney General, at a press conference with the Deputy Secretary of Defense P. Wolfowitz, in: *News Transcript*, June 10, 2002 (Deputy Secretary Wolfowitz at Justice Department Press Conference), [www.defenselink.mil/news/Jun2002](http://www.defenselink.mil/news/Jun2002) (July 15, 2002): “His status, as the attorney general said, is an enemy combatant. He is being detained under the laws of war as an enemy combatant.”

At the moment, three cases relating to the detention of U.S. nationals by the U.S. government as enemy combatants are known. Beside Mujahir there are also the “U.S. Taliban” John Walker Lindh and Yaser Esam Hamdi, see T. JACKMAN/D. EGGEN, “Combatants” Lack Rights, U.S. Argues, in *Washington Post*, June 20, 2002, p. A01.

<sup>8</sup> P. WOLFOWITZ, *op. cit.* (n° 7).

<sup>9</sup> A “dirty bomb” is a combination of conventional explosive with radioactive material. When exploding there is no nuclear reaction. However, radioactive particles are set free and can contaminate the surrounding environment.

<sup>10</sup> P. WOLFOWITZ, *op. cit.* (n° 7): “Under the laws of war, Padilla’s activities and his association with al Qaeda make him an enemy combatant.” Compare also: *The New York Times* on the Web, June 12, 2002, U.S. Wants to Question Bomb Suspect, on: [www.nytimes.com](http://www.nytimes.com) (June 12, 2002).

<sup>11</sup> October 1, 2002.

<sup>12</sup> P. WOLFOWITZ, *op. cit.* (n° 7).

U.S. for street robbery, attacks and other criminal acts. Mujahir was arrested on May 8, 2002 when entering the USA at the Chicago airport. After his arrest he was brought into a high security unit of a New York prison in which he was held as “material witness”, i.e. according to U.S. law, a person deemed to hold information critical to a criminal proceeding.<sup>13</sup> Apparently, statements of the Al Qaeda member Abu Zubaydah who was arrested in Pakistan on March 28, 2002 gave grounds to the U.S. authorities for arresting Mujahir.<sup>14</sup> However, the U.S. had already placed him under suspicion before. After immigrating to Egypt in 1998, Mujahir applied for a new passport at the U.S. consulate in Karachi (Pakistan) that was issued in March 2002.<sup>15</sup> For unknown reasons, his documents alerted the employee responsible who later informed the FBI.<sup>16</sup> In the beginning of May 2002 when Mujahir tried to enter the USA via Zurich, FBI agents were awaiting incognito at the Swiss airport and searched his luggage.<sup>17</sup> After his arrival at Chicago airport they arrested him.

Which criminal acts Mujahir may be precisely accused of is only vaguely known. He is supposed to have met Al Qaeda fighters, as well as Pakistani nuclear scientists in Pakistan.<sup>18</sup> In addition, it is assumed that Mujahir was trained in the use of explosives and weapons in Afghanistan in 2001 and that he had planned a murderous attempt in Washington D.C. with a “dirty bomb”.<sup>19</sup> It is alleged that he learned how to make such bombs in Pakistan.<sup>20</sup>

So far the U.S. government has admitted that Mujahir was not a member of Al Qaeda and that there was no plan for an attack.<sup>21</sup> The U.S. Deputy Secretary of Defense Paul Wolfowitz declared: “There was not an actual plan. We stopped this man in the initial planning stages [...]”.<sup>22</sup> Until today<sup>23</sup> Mujahir’s attorney Donna R. Newmann has not been informed whether she can visit her client in the military prison.<sup>24</sup> In the Hamdi Case, a U.S. national also detained as “enemy combatant”, the U.S. government asserted before the 4th U.S. Circuit Court of Appeals in Richmond: “There is no right under the laws and customs of war to meet with counsel concerning detention, much less to meet with counsel in private, without military

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<sup>13</sup> S. FAINARU, Lawyer Challenges Al Mujahir’s Detention, in *Washington Post*, June 12, 2002, p. A13.

<sup>14</sup> S. SCHMIDT/W. PINCUS, Al Mujahir Alleged to Be Scouting Terror Sites, in *Washington Post*, June 12, 2002, p. A01. Chr. Newton, Memo links dirty bomb suspect to Al Qaeda, Associated Press, August 28, 2002, on: [www.nandotimes.com/special\\_reports/terrorism](http://www.nandotimes.com/special_reports/terrorism) (August 29, 2002).

<sup>15</sup> S. SCHMIDT/W. PINCUS, *op. cit.* (n° 14).

<sup>16</sup> Ibid. NZZ Online, June 12, 2002: Verhafteter Terrorist soll weitere Attentate geplant haben, [www.nzz.ch](http://www.nzz.ch) (June 12, 2002).

<sup>17</sup> M. GEBAUER, Dirty Bomb oder PR-Bombe?, in: Spiegel Online, June 11, 2002, [www.spiegel.de](http://www.spiegel.de) (June 12, 2002).

<sup>18</sup> P. WOLFOWITZ, *op. cit.* (n° 7). NZZ Online, June 12, 2002, Wirbel um „schmutzige Bombe“ in den USA, *op. cit.* (n° 16), (June 12, 2002).

<sup>19</sup> P. WOLFOWITZ, *op. cit.* (n° 7). M. GEBAUER, *op. cit.* (n° 17); Justizministerium: Al-Qaeda-Terrorist plante Anschlag mit „schmutziger Atombombe“, in *Sueddeutsche Zeitung*, June 11, 2002, [www.sueddeutsche.de](http://www.sueddeutsche.de) (June 27, 2002).

<sup>20</sup> P. Wolfowitz, *op. cit.* (n° 7).

<sup>21</sup> Chr. Newton, *op. cit.* (n° 14). See also Chr. Newton, “Dirty bomb” suspect less significant than once thought, officials say, Associated Press, August 13, 2002, *op. cit.* (n° 14).

<sup>22</sup> L. D. KOZARYN, Alleged Al Qaeda ‘Dirty Bomb’ Operative in U.S. Military Custody, in: American Forces Press Review, January 10, 2002, [www.defenselink.mil/news/Jun2002](http://www.defenselink.mil/news/Jun2002) (July 15, 2002). There was no decision in this case until, October 1, 2002.

<sup>23</sup> October 1, 2002.

<sup>24</sup> St. Fainaru, *op. cit.* (n° 14).

authorities present”.<sup>25</sup>

Mujahir has been jailed without formal criminal charges. The U.S. government has excluded the possibility to try him before a military tribunal.<sup>26</sup> It was claimed “the United States can hold Padilla until Bush decides the war against terrorism is over”.<sup>27</sup> His detention has preventive reasons.<sup>28</sup> Whether a court takes up the case of Mujahir is still an open question.<sup>29</sup>

### 3. IHL Appreciation

It is right to assert that, under IHL, there is no right to meet with counsel. However, the question to be raised first is whether IHL is applicable at all. On account of the information available, it can be supposed that Mujahir is at least a sympathizer of the Al Qaeda terrorist organization. Furthermore, it seems adequate to assume that he planned a murderous attempt and therefore had to be considered as an individual dangerous to society. On the other hand, it may appear doubtful to even those who are not familiar with IHL whether Mujahir can be qualified as a (“lawful” or “unlawful”) combatant. In the ordinary meaning of the word, “combatant” means a person who fights. Contrary to Al Qaeda members who fought or are still fighting in Afghanistan, Mujahir obviously never actively used weapons against any person and therefore, as it seems, cannot be qualified as a fighter. Can he still be qualified as a combatant under IHL?

#### 3.1 Mujahir’s Qualification as a Combatant

##### a) Combatant status under IHL

Generally, under IHL only individuals who participate directly in armed conflicts qualify as combatants.<sup>30</sup> Combatant status is subject to certain criteria stipulated in GC III and the

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<sup>25</sup> T. JACKMAN/D. EGGEN, *op. cit.* (n° 9). See also the statement of M. Posner, Executive Director of Lawyers Committee for Human Rights, U.S. Government Asserts That „Enemy Combatants“ – Including U.S. Citizens – Have No Due Process Rights, www.lchr.org (July 14, 2002): “The U.S. government yesterday asserted that the President of the United States and the Executive branch of the government have limitless powers to detain and imprison U.S. citizens.

In a brief filed in a Virginia appeals court, the U.S. Department of Justice has said, in effect, that the world – from Chicago to Kabul – is their battlefield and anyone that it deems an enemy on these global frontlines can be apprehended and thrown in jail – without being charged, without access to a lawyer, and without any legal oversight.”

<sup>26</sup> Chr. Newton, *op. cit.* (n° 21); Chr. Newton, Padilla won’t get before military tribunal, fed says, *op. cit.* (n° 21).

<sup>27</sup> Quoted after Chr. Newton, *op. cit.* (n° 21).

<sup>28</sup> Ibid. As legal justifications for the classification and treatment of Mujahir as an “enemy combatant” the U.S. government refers to the Nazi-saboteur-case of the U.S. Supreme Court *Ex Parte Quirin*, 317 U.S. 1 87 L.Ed.(1942), see L. THOMPSON, *op. cit.* (n° 7). The applicability of this case to Mujahir seems to be doubtful, see e.g. G. Solis, Even A ‘Bad Man’ Has Rights, in *Washington Post*, June 25, 2002, p. A19.

<sup>29</sup> Mujahir’s attorney had asked the U.S. District Court for the Southern District of New York to order the government to give Padilla a trial. Until October 1, 2002, no decision had been taken, Chr. Newton, Memo links dirty bomb suspect to al-Qaeda, *op. cit.* (n. 21).

<sup>30</sup> K. IPSEN, *Kombattanten und Nichtkombattanten*, in: D. Fleck et al. (ed.); *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, München 1994, para. 301. Compare Article 43, paragraph 2, of AP I:

“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Art. 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”

Additional Protocol I (AP I) of 1977.<sup>31</sup> The basic provisions are Article 4 A of GC III and Article 43 of AP I. If the respective conditions are fulfilled, then individuals can legally fight under international law. As long as a combatant fights within the limits of IHL,<sup>32</sup> he cannot be held accountable for any of his lethal and/or injuring actions.

## **b) Delimitation**

### **aa) Fighters (without combatant status)**

IHL makes a fundamental distinction between combatants and civilians.<sup>33</sup> The latter group is defined by Article 50 paragraph 1 of AP I which reads:

*“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered a civilian.”*

In the framework of IHL, civilians enjoy special protection.<sup>34</sup> As a precondition of this protection, however, they are obliged to abstain from taking part in the hostilities.<sup>35</sup> A civilian, who is nonetheless participating therein, loses its protected status though he is not becoming a combatant.<sup>36</sup> Moreover mercenaries “shall not have the right to be combatant”.<sup>37</sup> In contrast to a spy who, according to Article 46 of AP I, is a member of the armed forces but is not directly participating in the fighting, these groups of persons are fighters without combatant status.<sup>38</sup> They are not entitled to take directly part in the hostilities and hence are accountable for their actions.

### **bb) “Unlawful Combatant”**

Against this background the term “unlawful combatant” appears to be misleading.

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<sup>31</sup> Compare with the criteria and categories of persons entitled to POW status: I. Detter, *The Law of War*, 2nd ed., Cambridge 2000, p. 136; Y. Dinstein, *Prisoners of War*, in *Encyclopedia of Public International Law*, Vol. 3, Amsterdam et al. 1997, p. 1109 (1109ss.).

<sup>32</sup> Art. 44 para. 2 AP I: “*While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive his right to be a combatant or [...] a prisoner of war, except as provided in paragraphs 3 and 4.*”

<sup>33</sup> K. IPSEN, *Kombattanten und Kriegsgefangene*, *op. cit.* (n° 32), p. 136 (136).

<sup>34</sup> Compare Part IV AP I and II as well as GC IV “Relative to the Protection of Civilian Persons in Time of War”.

<sup>35</sup> M. BOTHE/K.J. PARTSCH/W.A. SOLF, *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague et al. 1982, Art. 50, 2.2.1. (d).

<sup>36</sup> H. P. GASSER, *Einführung in das humanitäre Völkerrecht*, Bern et al. 1995, p. 48.

<sup>37</sup> Article 47, paragraph 1, of AP I.

<sup>38</sup> They must not be called non-combatants. This term refers to members of armed forces who do not have combatant status, since they will never be instructed to fight, but nonetheless enjoy POW status - e.g. medical personnel and chaplains, K. IPSEN, *Kombattanten und Kriegsgefangene*, in H. Schöttler/B. Hoffmann (Hrsg.), *op. cit.* (n° 32), p. 136 (136).

Obviously, the GCs call every person who fulfils the criteria spelled out in Article 50 paragraph 1 a combatant. This person may be called a “lawful” combatant in order to distinguish him from an “unlawful” combatant, a person who is not fulfilling these criteria. However, codified IHL does not refer to a specific category called “unlawful combatant”. Some international law scholars, e.g. Dinstein, nonetheless state: „The laws of war make a cardinal distinction between lawful (or privileged) and unlawful combatants”.<sup>39</sup> Dinstein may consider “combatant” to be the upper term for “lawful” and “unlawful” combatants. From a terminological point of view this seems to be inadequate because it suggests that the GCs and their APs consider “unlawful combatants” as a distinctive category. This is hardly consistent with the wording of Article 50, paragraph 1, of AP I. Furthermore, during the negotiations of AP I, negotiators rejected draft proposals that attempted to exclude from the definition of civilians those persons who are not entitled to take directly part in the hostilities because the government experts “feared that it would create a new category of persons, who were neither combatants nor civilians”.<sup>40</sup>

### cc) Scope of Application of the Term Combatant

As a matter of fact, only the law of international armed conflict contains provisions on combatant status, however not the law of non-international armed conflicts. Therefore, it seems appropriate to apply the term only to fighters who, on one hand, fulfill the combatant criteria, and, on the other hand, participate in inter-state armed conflicts according to common Article 2 of the GCs, or in international conflicts which are defined by API. Yet, international law scholars frequently apply the term combatant also to those fighters covered by common Article 3 of the GCs or AP II.<sup>41</sup> As a matter of terminological clarity, however, it seems to be more appropriate to omit the applicability of the term combatant. Instead, it seems preferable to call them “fighters”.

### b) Subsuming

Although the U.S. has not ratified AP I, most of its provisions are applicable as customary international law.<sup>42</sup> Hence it is, in principle, possible to apply the above legal explanations to the case of Mujahir who is classified by the U.S. government as a (enemy and unlawful) combatant.

It is obvious that Mujahir was not someone who took directly part in the fighting. According to the information available he has never used any kind of weapon in any conflict,

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<sup>39</sup> Y. DINSTEIN, *op. cit.* (n° 31), p. 1109 (1109). Regarding the terminology “privileged/unprivileged” combatants compare: W.T. MALLISON/S.V. MALLISON, *The Juridical Status of Privileged Combatants Under the Geneva Protocols of 1977 Concerning International Conflicts*, in: 42 *Law & Contemporary Problems* (1978), p. 4 ss., particularly p. 6: “[I]t is accurate to characterize both unprivileged and privileged as having lawful status in spite of the drastically different treatment to which each group may be lawfully subjected upon capture.[...]”

<sup>40</sup> M. BOTHE/K.J. PARTSCH/W.A. SOLF, *op. cit.* (n° 36), Art. 50, 2.2.2.

<sup>41</sup> Compare e.g. M.C. Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, in 43 *Harv. Int'l L.J.* (2002), p. 83 (99).

<sup>42</sup> Compare Ch. Greenwood, *International law and the “war against terrorism”*, *op. cit.* (n° 4), p. 301 (315).

neither carried a weapon nor been engaged in any kind of function in the fighting in Afghanistan. In any case, during the military battle in Afghanistan between the anti-terror alliance and the Taliban and Al Qaeda fighters, IHL pertaining to international armed conflicts was applicable.<sup>43</sup> However, Mujahir did obviously not belong to the fighting groups in Afghanistan who actively resisted the military operations.

To what extent his presumed training in the use of weapons and explosives in Afghanistan may alter this determination cannot be answered on the basis of the information available. It is not known at what precise date the training took place, but it seems to be more likely that it occurred before October 8, 2001. Hence, in principle, IHL is not applicable to the Mujahir case.<sup>44</sup> Furthermore, there are no grounds to suppose that a more extensive interpretation of the facts related to the case is adequate. The same is true with regard to a more extensive geographical application of IHL. Considering that IHL was not designed to apply to fighting members of terrorist networks, there is no reason to deviate from the existing legal situation.

Since IHL lacks applicability, Mujahir cannot be qualified as a combatant, neither as a “lawful” or an “unlawful” nor as an “enemy” combatant under IHL.<sup>45</sup>

### c) Hypothetical applicability of IHL

Hence, in the case at hand, the question to be examined is whether Mujahir’s treatment by the U.S. government can be brought into compliance with human rights standards. Particular attention has to be paid to the “right of detainees to legal assistance”, a right that is withheld from him.<sup>46</sup>

If, in dubio pro U.S., IHL pertaining to international armed conflicts were to be applicable because a connection to the armed conflict in Afghanistan could be proven, Art. 50, paragraph 1, of AP I would be applicable to Mujahir and he would qualify as a doubtful case and, therefore, as a civilian, unless the opposite could be demonstrated. In this case, GC IV

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<sup>43</sup> Ibid.; R.K. GOLDMAN, *Is this a New Kind of War?*, September 11 and its Aftermath, [www.crimesofwar.org](http://www.crimesofwar.org) (July 3, 2002).

<sup>44</sup> Compare also the Human Rights News, June 12, 2002 (Human Rights Watch), U.S. Circumvents Courts With Enemy Combatant Tag, under: [www.hrw.org/press/2002/06/us0612.htm](http://www.hrw.org/press/2002/06/us0612.htm) (July 15, 2002):

“International humanitarian law applies to the international armed forces in Afghanistan, but it does not apply to any and all members of Al Qaeda terrorists regardless of their individual involvement with that conflict. To maintain its designation of al-Mujahir as an enemy combatant, the U.S. government would need to demonstrate to a civilian court a clear nexus between his activities and the armed conflict with the United States in Afghanistan.”

<sup>45</sup> This opinion is shared by G. Solis, *op. cit.* (n° 28); Human Rights Watch, *op. cit.* (n° 45) and the American Civil Liberties Union (ACLU), in: ACLU Questions Military Detention of U.S. Citizen, Saying President Reneged on Promise, Press Release, June 10, 2002, [www.aclu.org/news/2002/n061002a.html](http://www.aclu.org/news/2002/n061002a.html) (July 14, 2002).

<sup>46</sup> Compare Principle 17, Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, UN doc. GA Res. 43/173, 9 Dec. 1988, as well as N.S. Rodley, *The Treatment of Prisoners Under International Law*, 2. ed., Oxford/New York 1999, p. 325ss. S. also Art. XI (Detention) of the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism of July 15, 2002: “*The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to: (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client.*”



would not grant special protection. According to its Article 4 “persons protected by the Convention are those who [...] find themselves [...] in the hand of a Party to the conflict [...] of which they are not nationals”.

This supposition being carried on, in dubio pro U.S. again, if an active participation of Mujahir in the line of Al Qaeda resistance fighters in the aftermath of October 8, 2001 could be proven, he would qualify as a fighter without combatant status.

On the basis of this double hypothesis, his treatment by the U.S. government needs to be examined under the light of the applicability of the IHL related to international armed conflicts and Mujahir’s qualification as a fighter without combatant status.

### **3.2 Mujahir’s treatment as an “enemy combatant”**

Whereas under criminal law combatant status excludes accountability for the participation in hostilities, the determination whether somebody qualifies as a POW decides upon the standard of treatment a former fighter is entitled to in captivity.

#### **a) Persons enjoying POW status**

Persons who enjoy POW status are entitled to the detailed legal guaranties of GC III.<sup>47</sup> In principle these provisions give privileges to POWs as compared to other captured fighters. A person enjoying combatant status always enjoys POW status, as soon as he finds himself in the hands of the enemy. However, Article 4 A of GC III does not mention the term combatant. It just determines that “prisoners of war [...] are persons belonging to one of the following categories [...]”.

#### **b) Persons with doubtful POW status**

As it is presently the case with most of the Taliban fighters, it is possible to argue that it is difficult to assert their status as combatants or POWs. In this case, Article 5, paragraph 2, of GC III provides that:

*“should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories of Art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”<sup>48</sup>*

Details about the tribunal are not provided by GC III and consequently, the intention

<sup>47</sup> See the overview of H.-P. GASSER, in H. Haug, *Humanity for all*, Bern et al. 1993, p. 525ss.

<sup>48</sup> A similar wording is contained in Article 45, paragraph 1, of AP I.

of the U.S. to establish a military tribunal for Taliban and Al Qaeda fighters seems to be covered by this provision.

### **c) Persons who do not enjoy POW status**

AP I explicitly refers to persons who do not enjoy POW status. On one hand, according to Article 46 and 47, these persons are spies and mercenaries. On the other hand, Article 45, paragraph 3, of AP I provides that:

*“Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from a more in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”*

In other words: Art. 45, paragraph 3, of AP I addresses persons who, in principle, qualify as civilians, but have lost their status as protected person due to their irregular participation in the hostilities. Article 75 of AP I ensures that they are not completely at the mercy of the power in whose hands they have fallen. Instead, they are to be treated according to its “Fundamental Guarantees”. It is the opinion of most IHL scholars, among whom Greenwood is a prominent example, that the basic principles of Article 75 have to be considered as declaratory customary international law.<sup>49</sup> Therefore, there is a strong presumption that Article 75 is applicable to the U.S. even though they have not ratified it.

### **d) The issue of Mujahir’s unlimited detention without trial**

If Article 45 of API were to be applicable to Mujahir, he would then be entitled to the protection of Article 75. The main function of the Article 75 is to close legal gaps with regard to persons not already protected by codified IHL.<sup>50</sup> This protection covers, albeit according to a not uncontested opinion, even nationals of a Party to a Conflict.<sup>51</sup>

U.S. Secretary of Defense Donald Rumsfeld has stated in connection with Mujahir’s detention that “we’re not interested in trying him at the moment. We’re interested in finding out what in the world he knows”.<sup>52</sup> Until today<sup>53</sup> no legal procedure has been opened against Mujahir. This raises the question whether his treatment is consistent with IHL and in particular Article 75 of AP I.

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<sup>49</sup> Ch. GREENWOOD, *op. cit.* (n° 4), p. 301 (315).

<sup>50</sup> M. BOTHE/J. PARTSCH/W.A. SOLF, Art. 75, *op. cit.* (n° 36), 2.3.

<sup>51</sup> *Ibid.* They also draw attention to the fact that: “With respect to a Party’s own nationals who in its powers it is an open question whether one can speak of a loophole in the Geneva law, because in principle they are not protected by the Conventions and the Protocol.”

<sup>52</sup> *The New York Times on the Web*, *op. cit.* (n° 8).

<sup>53</sup> Article completed on October 1, 2002.

Article 75, paragraph 3, of AP reads:

*“Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”*

Mujahir was first detained in a regular prison as “material witness”. He was then transferred as an “enemy combatant” to a military prison. Despite the fact that it is unclear which kind of criminal act he could possibly be accused of, it seems to be logic to presume that he has been transferred to the military prison because he has committed terrorist acts which fall within the scope of domestic criminal law. Hence the “as-soon-as-possible”-rule spelled out in Article 75 of API is not applicable to Mujahir, so that the length of his detention can presently be judged as being in conformity with IHL. Otherwise it might be assumed that the U.S. is violating IHL.

It has additionally to be appreciated under IHL that Mujahir is obviously kept detained without any real prospect of being tried. Against the background of the object and purpose of Article 75, paragraph 4, of AP I, this circumstance seems to be alarming. Paragraph 4 states:

*“No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: [...]”*

It follows from Article 75, paragraph 4, of AP I that a detained person is entitled to court proceedings. It is yet not said how long a person may be detained without instituting court proceedings, although a teleological interpretation of the provision leads to the conclusion that it is not allowed to detain a person for a longer period of time without indicating any intention to institute court proceedings. Otherwise the legal guarantees of Article 75, paragraph 4, would have to be considered as void. For this reason the U.S. is obliged by IHL to institute court proceedings against Mujahir in conformity with the standards of Article 75, paragraph 4.

#### **4. Conclusions**

Considering the background information at hand, the following conclusions concerning the Mujahir case can be drawn.

First, the claim of the U.S. government that IHL is applicable in the instant case seems doubtful. Rather, from the point of view of international law, the laws of peace seem to be applicable, and that is mainly the human rights standards. He therefore seems to be a case for the national U.S. justice.<sup>54</sup>

Furthermore, it is worth criticizing that Mujahir has been labeled “enemy combatant” by the U.S. government. This not only suggests the existence of a combatant status to which he is obviously not entitled to, not to mention that the term “unlawful combatant” is leading to many misunderstandings.

Finally, there are strong doubts as to whether Mujahir’s unlimited detention without any prospect of a court proceedings can be considered to be in conformity with Article 75 of AP I.

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<sup>54</sup> S. the Statement of K. Roth, Executive Director of Human Rights Watch, op. cit. (n. 45):

*“There should be a strong presumption that anyone arrested in the United States, far from any battlefield, be granted the full legal protections of the criminal justice system – including the right to counsel and not to be held without charges. Simply accusing someone of working with al-Qaeda does not justify throwing him into a navy brig.”*

S. also the ACLU Statement, op. cit. (n. 46): „The ACLU said that if the government has sufficient evidence of criminal conduct of a United States citizen then it should charge him in U.S. courts [...]”