Doubtful prisoner-of-war status

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The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention or GC III), generally regarded as part of the customary law of armed conflict,[1] sets out, *inter alia*, two cardinal principles. The first is that a prisoner of war cannot be prosecuted and punished for the mere fact of having taken part in hostilities.[2] The second is that prisoners of war must be given humane treatment from the time they fall into the power of the enemy until their final release and repatriation.[3] Prisoner-of-war status is therefore of utmost importance for a captured person in the hands of a hostile power in terms both of legal status and of treatment. If a person is not given combatant status, he may be tried for having committed a belligerent act. Where this criminal offence may be punished by capital punishment under the domestic jurisdiction, the lack of prisoner-of-war status may be a matter of life or death.

Therefore, when the prisoner-of-war status of a captured person is in doubt, the question of how to resolve the determination of status takes on a crucial significance, a realization not lost on the delegates at the Diplomatic Conference of Geneva in 1949 when negotiating the Third Geneva Convention.[4] Accordingly, this Convention provides that where the prisoner-of-war status of a captured person who has committed a belligerent act is in doubt, their status shall be determined by a competent tribunal.[5] The Convention does not, however, lay down the composition of the tribunal, or specify the due process rights of a person facing status determination procedures. The open-ended wording of the Third Geneva Convention's Article 5(2) begs the question of what exactly a competent tribunal consists of, and what judicial guarantees must be accorded to those who come before one. It also raises the question as to how doubt over prisoner-of-war status arises.

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This article explores what is meant by doubtful prisoner-of-war status and what constitutes a "competent tribunal" for the purpose of prisoner-of-war status determination. The first part gives a legal analysis of the rule stated in Article 5(2), taking into account customary rules and principles concerning judicial guarantees in international humanitarian law. In the second part, State practice and domestic military regulations regarding status determination are examined.

International humanitarian law and the Article 5(2) rule

The Third Geneva Convention is based on the principles of general international law on the treatment of prisoners.[6] These principles, which have gradually evolved since the eighteenth century, have established that captivity in war is "neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[7] This particular principle was developed in accordance with the view that it is contrary to the law of war to kill or injure helpless people. Moreover, prisoners of war are among the most vulnerable victims of war and therefore in need of spe-

1 L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, p. 188; H. Fischer, "Protection of prisoners of war", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 325.

2 Art. 99 of GC III provides: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed."

3 Articles 12-16 set forth the general protection to be given to prisoners of war by the Detaining Power, including the requirement of humane treatment at all times (Art. 13), respect for their persons and their honour (Art. 14) and the principle that there must be no adverse distinction in treatment based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria (Art. 16). See also Art. 5(1) GC III.

4 Delegates were aware that status determination decisions might have "the gravest consequences". J. Pictet, *Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 [hereinafter *Commentary GC III*], p. 77.

5 GC III, Art. 5(2).

6 This assertion, first made in 1941 by the German Admiral Canaris in protest against the regulations concerning Russian prisoners of war issued by the German army authorities, was approved as legally correct by the International Military Tribunal at Nuremburg. HMSO Cmd 6964 (1946) p. 48, reprinted in *American Journal of International Law*, Vol. 41, 1947, pp. 228-229.

7 *Ibid*.

cial protection.[8] In addition, principles underlying prisoner-of-war status and treatment have been developed from traditional military concepts of chivalry, entailing a respect for the honour of combatants.[9] The State detaining the captured persons is responsible for the treatment given to prisoners of war.[10] This responsibility extends to a requirement that the detaining State be fully satisfied that a State to which it intends to transfer or has transferred prisoners of war is willing and able to apply GC III.[11]

To be recognized as having prisoner-of-war status, a captured person has to fit within one of the six categories in Article 4 of GC III.[12] Despite the careful wording of Article 4, in the confusion of battle the distinction

8 In ancient times, prisoners of war were killed, mutilated or enslaved, whereas in the Middle Ages they were generally imprisoned or held to ransom. In the 17th century, for the first time, prisoners of war were regarded as prisoners of the State and not the property of the individual captors. Ill-treatment of prisoners of war continued, however, throughout the 19th century. Following World War II, a great number of German and Japanese officers were tried and convicted for the murder and maltreatment of prisoners of war. Art 6(b) of the Charter of the International Military Tribunal made "murder or ill-treatment of prisoners of war" a war crime. See the *Dachau Concentration Camp Trial*, 11 W.C.R., p. 5; *Belsen Trial*, 2 W.C.R.; "The Law of War on Land", Part III of the *Manual of Military Law*, The War Office, London, 1958 [hereinafter UK 1958 Military Manual], p. 45, para. 122; Fischer, *op. cit.* (note 1), p. 322.

9 This is stipulated as a rule in Art. 3 of the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (the 1929 Prisoner of War Convention), and in Art. 16 of GC III: "Prisoners of war are entitled to respect for their persons and honour."

10 GC III, Art. 12(1).

11 GC III, Art. 12(2). If that Power fails to carry out the provisions of GC III in any important respect, the Power which transferred the prisoners of war must either take measures to correct the situation or must request their return. Such requests must be complied with. Art. 12(3) GC III.

12 The six categories in GC III, Art. 4, are: "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war; (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power; (4) Persons who accompany the armed forces without actually being members thereof (...); (5) Members of crews (...) of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law; (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular army units, provided they carry arms openly and respect the laws and customs of war."

between combatants and civilians may not always be apparent.[13] For this reason, Article 5(2) of GC III provides:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

This rule would seem to make clear that where there is doubt as to the prisoner-of-war status of a captured person, States Parties are required to have individual status determined by a formal mechanism. In the meantime, the captured person must be treated as if he or she is a prisoner of war. What is not clear is what "any doubt" really means, who should be entertaining the doubt, and what is meant by a "competent tribunal".

Prisoner-of-war status "in doubt"

As Article 5(2) states, the doubt must be with regard to whether a captured person belongs to any of the six categories listed in Article 4 of GC III. But what does it mean to have a doubt and who should be having it?[14] "Reasonable doubt" may be defined judicially as such doubt as would cause a reasonable person to hesitate before acting in a matter of importance.[15] The *Commentary to GC III* is fairly unhelpful in explaining how "any doubt arises". It mentions only two examples of those to whom Article 5(2) would apply: deserters, and persons who accompany the armed forces and have lost their identity card. It does, however, make the point that "[t]he clarification contained in Article 4 should, of course, reduce the number of doubtful cases in any future conflict. It therefore seems to us that this provision should not be interpreted too restrictively". Given the instruction in the *Commentary* to interpret Article 4 of GC III broadly, it should be easy to raise a doubt that captured persons are *not* entitled to prisoner-of-war status. Conversely, it should be difficult to raise a doubt that a captured person is a prisoner of war. This means that States should not be able to unilaterally decide that no

13 See for example the confusion over combatants and non-combatants in the 1980-1988 Iran-Iraq War, described in P. Tavernier, "Combatants and non-combatants", in I. Dekker and H. Post (eds), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, The Netherlands, 1992, pp. 129-136.

14 "Doubt" is defined by the *Oxford English Dictionary*, 2nd. ed., 1989, as being either "the (subjective) state of uncertainty with regard to the truth or reality of anything" or "the condition of being (objectively) uncertain; a state of affairs such as to give occasion for hesitation or uncertainty."

15 *Merriam-Webster's Dictionary of Law* 1996.

doubt has arisen for an entire group of captured persons who have taken part in hostilities. In fact, GC III has been interpreted by some commentators as creating a presumption that individuals apprehended in the war zone are prisoners of war.[16] This quasi-presumption of prisoner-of-war status for those participating in hostilities has been adopted in some military manuals. For example, the 1992 Interim Law of Armed Conflict Manual of New Zealand states that "[a]s a practical matter, unless combatants as defined in Article 43 [of Protocol I] are actually captured while their arms are concealed, they will be entitled to prisoner-of-war status. In any event, status will be determined by a tribunal."[17] Similarly, the Australian Defence Force Manual 1994 notes that "[i]n most cases, captured combatants are entitled to claim PW [prisoner-of-war] status."[18]

The United Kingdom (UK) Privy Council considered the operation of Article 5 in a case arising out of the confrontation between Malaysia and Indonesia in 1967.[19] It held that: "Until 'a doubt arises' article 5 does not operate and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises."[20] This indicates that the Council construed "a doubt arises" as meaning that a claim for prisoner-of-war status is made by an accused before or at the trial. This is an interesting interpretation of Article 5(2), suggesting that the criterion "a doubt arises" may be fulfilled in a procedural sense, rather than in a factual sense in relation to the Article 4 categories. Lords Guest and Barwick, in their joint dissenting judgment, differed on this point, noting that "the accused in reality did not raise the appropriate claim.(...) The 'doubt' which would have to arise under article 5 would be whether the person belonged to the categories mentioned in Article 4A [GC III]."[21]

The interpretation of "a doubt arises" as occurring when a claim of prisoner-of-war status is made has also been adopted in some military manu-

16 See for example "Statement of Eliso Massimino, Director of the Washington Office of the Lawyers Committee for Human Rights", Lawyers Committee for Human Rights Press Release, 7 February 2002, ‹http://www.lchr.org/media/admin_gc.htm›.

17 New Zealand Defence Force Interim Law of Armed Conflict Manual, Directorate of Legal Services Headquarters, Wellington, 1992, para. 907(3).

18 Australia, Defence Force Manual 1994, ADFP 37, para. 1004.

19 *Public Prosecutor* v. *Oie Hee Koi and connected appeals*, Judicial Committee of the Privy Council (U.K.), 4 December 1967 [1968] ,A.C. 829.

20 *Ibid*., p. 834.

21 *Ibid*., p. 839.

als, notably the United States (US) 1997 Army Regulation dealing with prisoners of war, which requires the convening of a competent tribunal to determine the status "of any person not appearing to be entitled to prisoner-of-war status" but who "asserts that he or she is entitled to treatment as a prisoner of war".[22] Significantly, this interpretation is also consistent with the presumption of prisoner-of-war status in Article 45(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 1977 when a captured person "claims the status of prisoner of war" or if "the Party on which he depends claims such status on his behalf".[23]

While Article 5(2) of GC III was an important development in 1949 for the protection of people taking part in hostilities, the rule remained "rather imprecise and at an embryonic stage".[24] The problems of legal recognition of combatants of guerrilla warfare highlighted the insufficiency of Article 5(2). Article 45 of Protocol I was designed to remedy this insufficiency. The objective was to establish procedures which were more likely to guarantee that prisoner-of-war status would be granted.[25] In effect, the provision lists the cases in which doubt regarding the status of a combatant must give way to a presumption of prisoner-of-war status: (1) if he claims that status; (2) if he appears to be entitled to such status; and (3) if the Party on which he depends claims such status. Where doubt remains notwithstanding the said presumption, the question then goes to the competent tribunal. The series of presumptions in Protocol I are a development of Article 5(2) of GC III, but in contrast to the latter provision the burden of proof clearly lies

22 Section 1-6 (b) Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps, Washington, DC, 1 October 1997 [hereinafter 1997 US Army Regulation].

23 The Party makes this claim by notification to the detaining Power or to the Protecting Power. Protocol I, Art. 45(1).

24 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I)*, Martinus Nijhoff Publishers, Geneva, 1987, [hereinafter *Commentary to Protocol I*] p. 544, para. 1726.

25 *Ibid*., para. 1728. The first paragraph of Article 45, entitled "Protection of persons who have taken part in hostilities" provides: "A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Geneva Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."

with the captor. By implementing a system of presumptions, Protocol I reverses the burden of proof so that it is the competent tribunal which must provide evidence to the contrary every time the presumption exists and is contested.[26]

It would thus appear that Article 45 of Protocol I reaffirms the interpretation of "any doubt arises" in Article 5(2) as including instances when a claim of prisoner-of-war status is made either by the detainee or by the Party on which he or she depends. It may be concluded, on the basis of the interpretation of the rule in military manuals, that doubtful prisoner-of-war status under Article 5(2) of GC III may arise where serious doubt exists as to whether a captured person fits within the Article 4 categories despite a general (unwritten) presumption of prisoner-of-war status for those taking part in hostilities.

A "competent tribunal"

The "competent tribunal" in Article 5(2) is undefined, leaving its composition to be determined under the domestic law of the States Parties. The word "competent" has been defined as "possessing jurisdiction or authority to act".[27] A "tribunal" can be a "court of justice" or, more generally, a "place of judgment or decision".[28] The phrase "competent tribunal" therefore suggests an authorized forum of judgment, not necessarily judicial in character. The drafting history of Article 5(2) gives some indication of the meaning of the phrase. The original draft provision, inserted at the request of the International Committee of the Red Cross (ICRC) and approved at the Stockholm Conference in 1949, stated:

> "Should any doubt arise whether any of these persons belongs to one of the categories named in the said Article, that person shall have the benefit of the present Convention until his or her status has been determined by *some responsible authority*".[29]

The objective of the ICRC was to guarantee these combatants a minimum degree of protection when they were captured by the enemy. During

26 *Commentary to Protocol I, op. cit.* (note 24), p. 553, para. 1746.

27 *Oxford English Dictionary*, 2nd ed., 1989. The word "competent" is used in the International Covenant on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) of 16 December 1966 [hereinafter "the Covenant"], and in the American Convention on Human Rights 1950 to denote one of the essential characteristics of a tribunal for the determination of any criminal charge or of rights and obligations in a suit of law.

28 *Oxford English Dictionary*, 2nd ed., 1989.

29 See "XVIth International Red Cross Conference, Draft revised or new Conventions", p. 54, quoted in *Commentary GC III, op. cit.* (note 4), p. 77 (emphasis added).

the 1949 Geneva Conference, the term "military tribunal" was initially proposed to replace "responsible authority" in order to achieve a greater degree of precision, in view of the grave consequences which might result if the decision was left to a single person who might even be of a low rank.[30] As per-sons taking part in hostilities without the right to do so are liable to be prosecuted for murder or attempted murder, it was felt by many delegates that the question of prisoner-of-war status should be decided by a court.[31] However, this view was not unanimously accepted. Some delegates felt that bringing a person before a military tribunal might have more serious consequences than a decision which would deprive that person of the protection of the Convention.[32] To address these concerns, a further amendment was made which provided that the determination of doubtful prisoner-of-war status would be made by a "competent tribunal", not specifically a military tribunal.[33] The drafting history indicates therefore that a "competent tribunal" is something more formal and judicial in character than the ICRC's original proposal of "responsible authority", suggesting that the determination of status should be made by more than one person and with properly constituted procedures.

As noted above, Article 5(2) of GC III was considered important in principle, but legally insufficient given the definitional vagaries of combatants waging guerrilla warfare and the gravity of the consequences if captured persons were not given prisoner-of-war status. Article 45 of Protocol I likewise does not specify what a "competent tribunal" should consist of. However, two important points may be gleaned in this regard. First, the "competent tribunal" in Article 45(1) may be distinguished from the "judicial tribunal" in Article 45(2), which must adjudicate prisoner-of-war status where the person is charged with an offence arising out of hostilities and is

30 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. II-A, p. 388. During the Second World War, decisions regarding the right of a captive to benefit or not from the protection of the 1929 Prisoner of War Convention had sometimes simply been taken by non-commissioned officers, particularly corporals. See J. P. Maunoir, "La répression des crimes de guerre devant les tribunaux français et alliés" (thesis), Geneva, 1956, p. 191, cited in *Commentary GC III*, *op. cit*. (note 4).

31 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, No. 95, p. 63.

32 The USSR delegation pointed out that "If the defendant is sentenced by a [military] tribunal, he will not only be unable to benefit by the Convention under Article 4 [Article 5], but it is also uncertain whether he will succeed in clearing himself (...). I believe that the persons to be protected would (...) refuse the benefit of the Convention rather than appear before a military tribunal which is likely to punish them." *Ibid*., Vol. II-B, p. 270.

33 The Danish delegation suggested replacing the words "military tribunal" with "competent tribunal", which would mean that "[t]he laws of the Detaining Power may allow the settlement of this question by a civil court rather than by a military tribunal." *Loc. cit*.

not being held as a prisoner of war.[34] Second, the Rapporteur indicated in his report that "as in the case of Article 5 [GC III], such a tribunal may be administrative in nature", including military commissions.[35]

One assumption made during the debates was that such a tribunal would be set up near the front lines of the battle and therefore needed to be quickly organized, although it was stated that even in such circumstances, "guarantees should be furnished regarding its competence, its composition and its procedures" and it should be "impartial and effective".[36] As this is most difficult to achieve for a hastily set up tribunal near the front line, the Conference finally added the rule that each time a prisoner who is not held as a prisoner of war is to be tried for an offence related to the hostilities, that person's status must be decided by a *judicial* tribunal.[37] Article 45 thus sets up a two-tiered system: first, a "competent tribunal" must determine status where doubt in that regard persists despite the series of presumptions; second, if a detainee not held as a prisoner of war but claiming entitlement to that status is to be charged with an offence arising out of hostilities, a "judicial tribunal" will determine his status.

The implications of committing "a belligerent act"

The original proposed text for Article 5(2) was modified in Stockholm in order to specify that the provision applies only in cases of doubt where the persons have committed a belligerent act and have fallen into the hands of the adversary.[38] The *Commentary to GC III* states that "[t]he reference in the Convention to 'a belligerent act' relates to the principle which motivated the person who committed it, and not merely the manner in which the act was committed." Clearly, if someone has committed a belligerent act, it is essential that their legal status be ascertained.

34 Article 45(2) of Protocol I provides, *inter alia*: "If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated."

35 *Commentary to Protocol I, op. cit.* (note 24), p. 551, para. 1745. Bothe, Partsch and Solf have also commented that "[a]n administrative board is generally considered to satisfy this requirement", citing US Army, Field Manual 27-10, para. 71b. M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 260.

36 Such rules were applied by the United States during the Vietnam War. See "Contemporary practice of the United States relating to international law", *American Journal of International Law*, Vol. 62, 1968, p. 767.

37 Protocol I, Art. 45(2).

38 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, pp. 270-271.

The most significant deficiency of Article 5(2) is the absence of any provision which expressly authorizes a person found by a competent tribunal not to be a prisoner of war to have the question of this status decided by the judicial tribunal which tries him for his allegedly illegal act of hostility.[39] If the prisoner-of-war status of a captured person has not or not yet been established by a competent tribunal, the *Commentary to Protocol I* rightly points out that "he runs a double risk: a) to be accused of acts which are not necessarily offences (in the case of simply participating in the hostilities); b) to be deprived of the procedural guarantees to which prisoners of war are entitled, even when the acts of which he is accused are punishable."[40]

In this situation, it is essential for the accused to have the right to assert prisoner-of-war status and to have the question determined by a judicial tribunal with all the generally recognized guarantees and procedures. This was the basis for Article 45(2) of Protocol I. The Rapporteur of Committee III indicated that this provision constitutes:

> "a new procedural right (...) for persons who are not considered prisoners of war and who are to be tried for a criminal offence arising out of the hostilities. Such persons are given the right to assert their entitlement to prisoner-of-war status and to have that question adjudicated *de novo* by a judicial tribunal, without regard to any decision reached pursuant to paragraph 1. (...) The judicial tribunal may either be the same one that tries the offence or another one. It may be either a civilian or military tribunal, the term judicial meaning merely a criminal tribunal offering the normal guarantees of judicial procedure."[41]

Problems arise, however, because it is not always possible to determine the captured person's prisoner-of-war status before judgment is passed on the offence of which he is accused (in particular, the requirement to carry arms openly or to wear a distinctive sign).[42] Furthermore, entitlement to prisoner-

39 Bothe, Partsch and Solf, *op. cit.* (note 35), p. 260.

40 *Commentary to Protocol I*, *op. cit.* (note 24), p. 554, para. 1751.

41 O.R. XV p. 433, CDDH/III/338 quoted in *Commentary to Protocol I*, *op. cit.* (note 24), para. 1752. Administrative authorities, military or other commissions were excluded at this stage. The tribunal called upon in the first instance to determine prisoner-of-war status may be civilian or military. The moment that prisoner-of-war status is recognized, however, Articles 84 and 102 of GC III apply, unless the offence was merely one of taking part in hostilities, in which case the indictment will lapse. Art. 84 requires the Detaining Power to have the person tried by a military court, while Art. 105 specifies all the rights and means of defence of an accused. It is a grave breach to deprive a prisoner of war of his rights to fair and regular trial, both under GC III (Art. 130) and under Protocol I (Art. 85(4)(e)).

42 Art. 45(2) of Protocol I provides that: "[w]henever possible under the applicable procedure, this adjudication [of prisoner-of-war status] shall occur before the trial for the offence."

of-war status may depend not only on facts, but on the interpretation of the rules of the Convention or the Protocol.[43]

The *Commentary to Protocol I* states that "[t]here is no doubt that in principle it is preferable to determine the status of the accused with regard to the protection of the Third Convention, i.e. to make a decision regarding his status as a combatant and prisoner of war, before deciding on the merits of the case."[44] This rather weak solution was due to the fact that, in view of the great differences in national judicial procedures, it was not thought possible to establish a concrete rule that this question must be decided before the trial for the offence. The Rapporteur did argue that "it should be so decided if at all possible, because on it depend the whole array of procedural protections accorded to prisoners of war by the Third Convention, and the issue may go to the jurisdiction of the tribunal."[45]

In any case, the procedure followed by the competent tribunal under Article 45 in the first instance should, as a minimum, be in accordance with the corresponding rules of the Fourth Convention[46] or should comply with the rules of Article 75 of Protocol I ("Fundamental guarantees").[47]

43 For example, the UK 1958 Manual of Military Law, *op. cit*. (note 8), with regard to the difficulty of application of Art. 5 of GC III for combatants coming under Art. 4A(6), states that: "It would seem that if a civilian is alleged to have violated the law of war [for example] by firing at the wounded and stretcher bearers, he would nevertheless be entitled to be treated as a prisoner of war until a competent tribunal had established that he had not complied with any one of the requirements of Art. 4A(6) (...). Accordingly, if it were proved before such competent tribunal that he had fired on the wounded or protected medical personnel of the enemy, that fact would automatically disentitle him to prisoner-of-war status with the result that he could be tried as a civilian who had committed illegal acts of hostility." This interpretation is contrary to the common understanding that a violation of the laws of war does not deprive a person of combatant or prisoner-of-war status, but entails his prosecution under Art. 85 of GC III. The requirement of respect for the laws and customs of war is constitutive of combatant status only as a group criterion, not as an individual criterion. See also Art. 44 of Protocol I.

44 *Commentary to Protocol I, op. cit*. (note 24), para. 1755.

45 O.R. XV, p. 433, CDDH/III/338. The *Commentary to Protocol I* notes that although "undoubtably [it would have] been easier, in theory, to provide for such guarantees right at the first stage, when the status of prisoners is determined by the 'competent tribunal' (...) it did not seem feasible to burden a tribunal called upon to intervene on the battlefield with such a difficult task." *Commentary to Protocol I*, *op. cit*. (note 24), p. 554, para. 1751.

46 If a person does not qualify as a prisoner of war, or until such status is granted, he is protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV).

47 Art. 45(3) of Protocol I provides: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol."

Fundamental due process rights and status determination procedures

International humanitarian law is silent as to what due process rights are applicable to prisoner-of-war status determination procedures. As human rights law operates at all times, including situations of armed conflict, it may be argued that basic human rights standards guaranteeing the due process rights of persons in any form of detention should apply to the status determination procedure.[48] Although international humanitarian law may operate as *lex specialis* in times of armed conflict,[49] fundamental due process rights are also contained in Article 75 of Protocol I[50] and in the fair trial guarantees of Article 3 common to the Geneva Conventions,[51] both of which are recognized as representing customary law.[52]

The question remaining is whether these rights are applicable to status determination procedures or exclusively to criminal prosecutions arising out of participation in hostilities. The Inter-American Commission of the Organization of American States (OAS) has recently given its opinion on the matter in answer to a Request for Precautionary Measures in regard to the Detainees in Guantanamo Bay, Cuba.[53] The Commission firstly noted that in situations of armed conflict, the protections under international

48 See for example Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988; International Covenant on Civil and Political Rights, *op. cit*. (note 27), Articles 9 and 14; Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948, Articles 6-11; American Declaration of the Rights and Duties of Man 1948, Articles II, XVIII, XXV and XXVI; and Standard Minimum Rules for the Treatment of Prisoners, GA Res. 43/173 of 9 December 1988.

49 *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, International Court of Justice Advisory Opinion of 8 July 1996, ICJ Reports 1996, paras. 23-34.

50 Note, in particular, Art. 75(3) providing that "[a]ny 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*." (Emphasis added). See also Art. 75(4) listing fundamental due process rights.

51 Art. 3(1)(d) common to the Geneva Conventions prohibits at any time and in any place whatsover "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

52 The International Court of Justice has described common Art. 3 as a reflection of "elementary considerations of humanity." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, ICJ Reports 1986, pp. 14 and 114. See also T. Meron, "Humanization of humanitarian law", *American Journal of International Law*, Vol. 94, 2000, p. 246.

53 Organization of American States, Washington, D.C., 20006, Ref. Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures, 13 March 2002, available at: ‹http://www.humanrightsnow.org/oasconventionnonguantanamodetainees.htm›.

human rights and humanitarian law may complement and reinforce one another, "sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity". The Commission found that where persons find themselves within the authority and control of a State and where circumstances of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law.

Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain entitled at least to the non-derogable protections under international human rights law. Therefore, according to the Commission, "a competent court or tribunal, as opposed to a political authority, must be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a state." The Commission, noting that "doubt exists as to the legal status of the detainees", requested the United States to take the "urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent authority".[54]

It may safely be concluded that at least the fundamental due process rights under customary international law are applicable to status determination procedures.[55] The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, asserted in its General Comment on Reservations that a State may not reserve the right to arbitrarily arrest and detain persons or to presume a person guilty unless he proves his innocence.[56] The United States Third Restatement of Foreign Relations Law has also identified prolonged arbitrary detention and a consistent pattern of gross violations of internationally recognized human rights as among its list of human rights violations which have achieved customary law status.[57]

54 *Ibid*., p. 3. Without the clarification of legal status, "the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State."

55 The core of the due process guarantees stated in Art. 14 of the Covenant, *op. cit*. (note 27), may be regarded as having reached customary law status, in view of the large number of parties to the Covenant (148 States Parties at 10 July 2002) and the degree to which some of the fair trial rights in the Covenant have been repeated in other international instruments, and through the incorporation of the rights in national laws. See generally D. Weissbordt and R. Wolftrum (eds), *The Right to Fair Trial*, Springer, Berlin, 1997.

56 United Nations Human Rights Committee General Comment on Reservations No. 24, para. 8. UN Doc. CCPR/C/21/Rev1/Add.6, 2 November 1994.

57 Restatement (Third) of the Foreign Relations Law of the United States, § 702 (1987).

While Articles 9 (*habeas corpus*) and 14 (fair trial) of the Covenant are not among the non-derogable rights listed in Article 4, derogations of these rights can only be "to the extent strictly required by the exigencies of the situation"[58] and the State Party may not take discriminatory measures on the ground of race, colour, sex, language, religion or social origin.[59] Furthermore, General Comments by the Human Rights Committee indicate that a State is not able to derogate from basic judicial guarantees necessary to vindicate non-derogable rights, such as the right to life and the right not to be subjected to torture.[60]

State practice with regard to the GC III Article 5(2) rule

United States of America

The relevant United States legislation is the 1997 Army Regulation entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees".[61] "Other detainees", defined in the glossary as "persons in the custody of United States Armed Forces who have not been classified" as enemy prisoners of war (GC III, Article 4), retained personnel (GC III, Article 33) or civilian internees (GC IV, Article 78) "shall be treated as enemy prisoners of war until a legal status is ascertained by a competent authority". Section 1-6(a) of the Regulation sets out the Article 5(2) rule. In addition, paragraph (b) provides that "[a] competent tribunal shall determine the status of any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."[62] The Regulation in fact goes further than Article 5(2) of

58 Human Rights Committee, General Comment 13, Article 14, UN Doc. HRI/GEN/1/Rev.1 (1994), at 14.

59 Human Rights Committee, General Comment 5, Article 4, UN Doc. HRI/GEN/1/Rev. 1 (1995), at 5.

60 De Zayas, A., "The United Nations and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", in Weissbordt and Wolftrum, *op. cit.* (note 55), p. 674. The Inter-American Court of Human Rights has similarly held that the "essential" guarantees which are not subject to derogation under the American Convention on Human Rights include *habeas corpus*, *amparo*, and any other effective remedy which is designed to guarantee respect for the non-derogable rights and freedoms in the Convention. *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987, Inter-Am. Ct. H.R. (Ser. A) NO. 9 (1987), at 41. The United Nations Commission on Human Rights adopted a resolution in 1994 encouraging States "to establish a procedure such as *habeas corpus* or a similar procedure as a personal right not subject to derogation, including in states of emergency", Res. 1994/32 of 4 March 1994.

61 1997 US Army Regulation, *op. cit.* (note 22).

62 *Ibid.*, Section 1-6 (b).

GC III in that it requires a competent tribunal to determine status not only where doubt about Article 4 criteria has arisen, but also where the person does not appear to be entitled to prisoner-of-war status but asserts that he or she is entitled to prisoner-of-war treatment. Therefore, even if a captured person in the custody of the US Armed Forces did not appear to fit within the Article 4 categories but claimed to be entitled to prisoner-of-war treatment, the US would be bound to have the matter determined by a competent tribunal. This is consistent with the analysis of the meaning of "any doubt arises" as including instances in which a claim of prisoner-of-war status has been made.

As regards the status determination procedures, the competent tribunal must be composed of three commissioned officers, one of whom must be of field grade. The Regulation stipulates all the fundamental procedures and guarantees of a fair trial.[63] Most importantly, persons who have been determined by a competent tribunal not to be entitled to prisoner-of-war status "may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[64] Furthermore, the record of every tribunal proceeding resulting in a determination denying prisoner-of-war status "shall be reviewed for legal sufficiency" at the office of the Staff Judge Advocate for the convening authority.[65]

The 2000 US military Judge Advocate General Operational Handbook also requires the establishment of a "competent tribunal" in case of doubt about prisoner-of-war status. The Handbook also comments on past US practice with regard to establishing competent tribunals. It is noted that during the Vietnam conflict, a Directive established procedures for the con-

63 The following guarantees are stipulated: (1) a written record of proceedings; (2) open proceedings except for deliberation or if security would be compromised; (3) persons shall be advised of their rights at the beginning of their hearing; (4) persons shall be allowed to attend all open sessions and be provided with an interpreter if necessary; (5) persons shall be allowed to call witnesses if reasonably available and to question those witnesses called by the tribunal; (6) persons have a right to testify; (7) persons may not be compelled to testify. The standard of proof used by the tribunal is "preponderance of evidence". In addition, a written record of the tribunal decision is required to be completed in each case. The tribunal may make the following board determinations: (a) prisoner of war; (b) recommended retained personnel, entitled to prisoner of war protections, who should be considered for certification as a medical, religious, or volunteer aid society retained personnel; (c) innocent civilian who should immediately be returned to his home or released; and (d) civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained. *Ibid*., Section 1-6 (10).

64 *Ibid*., Section 1-6(g).

65 *Ibid*.

duct of Article 5 tribunals. On the other hand, no Article 5 tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation "Desert Storm" led to the capture of a large number of persons thought to be prisoners of war, who were in fact displaced civilians. Interrogations subsequent to their capture determined that they had taken no hostile action against Coalition forces.[66] In any case, tribunals were established to verify the status of the detainees.[67]

In the Vietnam War the United States issued Directive Number 20-5 which prescribed policies and procedures for determining whether persons in the custody of the US who had committed belligerent acts were prisoners of war.[68] The Directive authorized and established "GPW [GC III] Article 5 tribunals".[69] Detainees who had committed belligerent acts were referred to an Article 5 tribunal either (a) if there was doubt as to whether the detainee was entitled to prisoner-of-war status, or (b) if a determination had been made that the status of the detainee was that of a non-prisoner of war and the detainee or someone on his behalf claimed that he was entitled to prisoner-of-war status.[70] Under the Directive, the Article 5 tribunal should consist of no less than three officers, at least one of whom must be a judge advocate or other military lawyer.[71] Detainees were advised and accorded "fundamental rights considered to be essential to a fair hearing".[72] The procedure was weighted in favour of finding prisoner-of-war status.[73] From 1965 in the Vietnam War, the United States granted not only the treatment, but also the status, of prisoner of war to combatants for whom there was any evidence to show that they belonged to a military unit, even a secret one, and

66 The Handbook notes that in some cases they had surrendered to Coalition forces to receive food and water.

67 The Handbook states that "[w]hether the tribunals were necessary as a matter of law is open to debate — the 'civilians' had not 'committed a belligerent act', nor was their status 'in doubt'." If it was determined that they were civilians who had taken no part in hostilities, they were transferred to refugee camps.

68 Directive Number 20-5 of 15 March 1968, reproduced in *American Journal of International Law*, Vol. 62, 1968, p. 768.

69 *Ibid*., Art. 2.

70 *Ibid*., Art. 5(f).

71 *Ibid*., Annex A(3).

72 *Ibid*., Annex A(7).

73 Decisions were by majority vote, but if the vote was evenly divided the decision would be in favour of prisoner-of-war status. *Ibid*., Annex A(6). Where the determination was that a detainee was not entitled to prisoner-of-war status, the decision had to be accompanied by all relevant documents and copies given to all parties and the convening authority. *Ibid*., Art. 15(b).

who had taken part in an act of war of any nature, including propaganda or protection missions, whether these were full-time or part-time activities.[74] The ICRC delegate speaking in Saigon had the following to say about the US policy concerning treatment of captured combatants:

> "The MACV instruction (...) is a brilliant expression of a liberal and realistic attitude (...) this text could very well be a most important one in the history of the humanitarian law, for it is the first time (...) that a government goes far beyond the requirements of the Geneva Conventions in an official instruction to the armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones become embodied in an international treaty (...) will be a great one for man concerned about the protection of men who cannot protect themselves."[75]

United Kingdom

The United Kingdom 1981 Manual "The Law of Armed Conflict" provides that if there is doubt about the status of a captured person, he should be treated as a prisoner of war until his status has been determined by a "higher authority".[76] The more comprehensive UK 1958 Manual of Military Law restates the Article 5 rule. It also emphasises that "[s]uch determination cannot be finally made by the officer into whose hands he has fallen."[77] Furthermore, "[i]t is not (...) for officers or soldiers in determining towards a disarmed enemy to occupy themselves with his qualifications as a belligerent.(...) [T]hey are responsible for his person and must leave the decision of his fate to the competent authority".[78] The Manual goes on to say that if his character as a member of the armed forces is contested, he should be sent before "a court competent to enquire into the matter."[79] The terms of the findings of the competent tribunal should determine whether or not further

74 *Commentary to Protocol I, op. cit.* (note 24), p. 548. The reason for such treatment was largely based on the reciprocal benefits for American captives in the power of the Viet Cong and North Vietnamese Army. "Prisoners of War and War Crimes", ‹http://www.army.mil/cmh-pg/books/Vietnam/Law-War/law-04.htm›.

75 Quoted in "Prisoners of War and War Crimes", *op. cit.* (note 74), p. 5.

76 "The Law of Armed Conflict", Army Code 71130, D/DAT/13/35/66, United Kingdom Ministry of Defence, revised 1981, p. 28.

77 UK 1958 Military Manual, *op. cit.* (note 8), p. 50, para. 132.

78 *Ibid.*, p. 35, para. 104.

79 The Manual calls for the creation of Regulations to provide for tribunals to function as competent tribunals for the purposes of Art. 5. *Ibid.*, para. 104. This was done in the Prisoner of War Determination of Status Regulations 1958, First Schedule of the Royal Warrant Governing the Maintenance of Discipline among Prisoners of War 1958.

proceedings will be instituted for a war crime, for example, a hostile act committed by a person found by a competent tribunal not to be entitled to prisoner-of-war status.[80]

Article 5 tribunals are governed by the Prisoner of War Determination of Status Regulations 1958, which become applicable if it appears to an officer that a doubt exists as to whether a captured person in the custody of the UK belongs to any of the categories of Article 4 of GC III. For the purposes of the Regulations, a "competent tribunal" consists of a board of inquiry which makes a report that constitutes the effective determination of the status of the person concerned. Detainees may be represented by a lawyer at public expense. The practice of the UK indicates a willingness to utilize a board of inquiry to determine status even where Article 5 does not apply. For example, during the 1990-1991 Gulf War, some 35 Iraqi detainees protested that they were not members of the Iraqi armed forces and asked to be released from their internment in the Rollestone camp. Despite the fact that none of the detainees was alleged to have committed a belligerent act, it was decided, "in order to follow the spirit of the Convention",[81] that where the Commandant of Rollestone entertained doubts about the status of a particular individual, the correct course would be for him to report those doubts to his superiors, with a recommendation that a board of inquiry be convened under the Board of Inquiry (Army) Rules 1956.[82]

Canada

In Canada, the 1991 Prisoner-of-War Status Determination Regulations provide that a tribunal, consisting of one officer of the Legal Branch of the Canadian Forces, "shall hold a hearing to determine whether a detainee brought before it is entitled to prisoner-of-war status."[83] Each detainee (defined as a person in the custody of the Canadian Forces who has committed a belligerent act) is initially screened as soon as is practicable after being taken into custody by the commanding officer to determine whether or not the detainee is entitled to prisoner-of-war status or whether

80 *Ibid*., footnote 3(a).

81 G. Risius, "Prisoners of war and the United Kingdom", in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, Routledge, London, 1993, p. 296.

82 These Rules derive their authority from s.135 Army Act 1955 (UK). The detainees were allowed legal representation, were present during the proceedings, and could give evidence and question witnesses.

83 Articles 4 and 5 of the Prisoner-of-War Status Determination Regulations, SOR/91-134, Department of Justice Canada, 1 February 1991.

there is doubt with respect to the detainee's entitlement to prisoner-of-war status. Where the commanding officer "believes that there may be doubt" about status entitlement, he requests an authority[84] to direct that a tribunal hold a hearing to determine status. If the authority is in doubt with respect to the entitlement of the detainee to prisoner-of-war status, it may direct a tribunal to hold a hearing for determination of status.[85] Therefore there is in a sense a preliminary finding by the authority, at least of whether there is doubt with regard to status.[86]

In the tribunal hearing, a detainee has the right to be represented, the right not to testify against himself or herself, the right to an interpreter, the right to present evidence, and the right to request a review of the determination within 24 hours after the tribunal announces its determination.[87] The standard of proof is "a balance of probabilities that the detainee is not entitled to prisoner-of-war status", or "in any other case, determine that the detainee is entitled to prisoner-of-war status".[88] The fact that a standard of proof is specified only for a determination that the detainee is not entitled to prisoner-of-war status suggests that a lesser standard of proof may suffice to entitle a detainee to that status. It is stipulated that in the interim period of doubtful status, a detainee shall be treated as a prisoner of war.[89]

Australia

Under the 1994 Australian Defence Force Manual, if any doubt arises about a captured person's status, prisoner-of-war status is to be granted until such time as a "proper tribunal" established under the Third Geneva Convention can determine their status.[90] This is reiterated in the Law of Armed Forces Commanders' Guide, which provides that in cases of doubt, prisoner-of-war status shall be granted until "a proper tribunal can authorita-

84 The authorities which may establish a tribunal are: the Ministry of National Defence; the Chief of the Defence Staff; an officer commanding a command; an officer commanding a formation; and any other authority that the Chief of the Defence staff may prescribe or appoint. *Ibid*., Art. 3.

85 *Ibid*., Art. 8.

86 If the authority is not in doubt as to entitlement of prisoner-of-war status, it may direct the commanding officer either to recognize prisoner-of-war status or not to, depending on its opinion. See *ibid*., Art. 8(1)(a) and (b).

87 *Ibid*., Articles 10, 6(2), 11, 13(d), and 17 respectively.

88 *Ibid*., Art. 13(g).

89 *Ibid*., Art. 12. See also Canada LOAC [The Law of Armed Conflict at the Operational and Tactical Level] Manual 1999, Office of the Judge Advocate General, 8 January 1999, Section 2 (10).

90 Australia, Defence Force Manual 1994, ADFP 37, para. 1004.

tively rule on their status".[91] The use of the words "authoritatively rule" seems to suggest that a high burden of proof is required to make a determination on status. It may also imply that all the due process rights and procedures are necessary for the proceedings to be valid.

New Zealand

The Interim Law of Armed Conflict Manual provides that when there is doubt as to whether a particular captive is entitled to "treatment he claims as a prisoner of war", he shall be treated as such until his status has been "determined and denied by a properly constituted tribunal (...)".[92] These provisions indicate that doubt may arise if a detainee claims to be entitled to prisoner-of-war treatment. The words "properly constituted tribunal" could either be meant to refer simply to a tribunal under Article 5 of GC III or could denote a more formal, judicial character of the tribunal.

Israel

Prisoner-of-war status determination procedure is contained in the Imprisonment of Combatants not Entitled to Prisoner-of-War Status Law 2000 in Israel, the objective of which is to "incorporate in Israeli law the imprisonment of combatants who are not entitled to prisoner-of-war status, in a manner consistent with the provisions of international humanitarian law, particularly the Geneva Conventions of 12 August 1949".[93] Under this Law, if the Chief of Staff "has a basis to assume" that a person in the custody of the State is a combatant who is not a prisoner of war, he may issue an order directing imprisonment of that person.[94] The order is made known to the prisoner "at the earliest possible time" and he is given the opportunity to state his arguments regarding the order before an officer holding the rank of Lt. Colonel, and to have his written arguments conveyed to the Chief of Staff. Within three weeks from the issuing of the order, the prisoner must be brought before the President of the District Court, who must determine

91 Law of Armed Conflict Commanders' Guide, ADFP 37 Supp. 1, Australian Defence Force Publication, Operations Services, Canberra, 7 March 1994, para. 703.

92 Interim Law of Armed Conflicts Manual, *op. cit.* (note 17), para. 912. New Zealand does not have any prisoner-of-war status determination regulations in force, although under section 9 of the Geneva Conventions Act 1958, the Governor-General by Order in Council may make such regulations as are necessary to give full effect to the Act.

93 Imprisonment of Combatants not Entitled to Prisoner-of-War Status Law, 5769-2000, Art. 1.

94 *Ibid*., Art. 3(A). The order is valid until "the end of hostile activities between the State of Israel and the force combating Israel to whom the prisoner belongs or took part in its activities" or until an earlier time that the Chief of Staff shall direct. See *ibid*., Art. 3(B).

whether the prisoner is a combatant who is not a prisoner of war.[95] This decision may be appealed to the Supreme Court. In terms of proceedings, the detainee has the right to representation (although this may be limited to persons approved to serve as defence counsel in military courts), the hearing is conducted *in camera*, and deviation from the law of evidence is allowed (although the reasons for this must be recorded).[96] Even before the enactment of this law, one commentator noted that "[t]he utilization of special tribunals and detention facilities, and the special treatment accorded to captured Palestinian 'terrorists' by Israel (...) is further evidence of an underlying humanitarian law."[97]

Article 45 of Protocol I as representing customary law

A proper analysis of the customary nature of Article 45 goes beyond the scope of this paper; however, a few indications of its status may be pointed out. The overview of the incorporation by some States of Article 5(2) into military regulations reveals that States have generally treated the Article 5 rule as a minimum protection. States such as the United States have voluntarily extended the obligation to have status determined before a competent tribunal to instances in which a captured person does not appear to be entitled to such status but has made a claim to that effect. States have also tended to accord most of the fundamental due process rights to those facing status determination procedures. With the notable exception of the detainees at present being held at Guantánamo Bay, Cuba, by the United States,[98] State practice as regards GC III Article 5(2) has generally shown a willingness to accord both the treatment and status of prisoners of war to captured persons who have taken part in hostilities, even where, strictly speaking, the persons may not fit easily into the Article 4 categories.

Bothe, Partsch and Solf point out in their commentary to Protocol I that "Article 45 reaffirms, supplements, clarifies and expands upon Article 5 of the Third Convention".[99] As discussed above, the series of presumptions of prisoner-of-war status and the reversal of the burden of proof in Article 45

95 *Ibid*., Art. 4.

96 *Ibid*., Art. 4(E), (D) and (C).

97 A. Rubin, "Terrorism and the laws of war", *Denver Journal of International Law and Policy*, Vol. 12, No. 2-3, 1983, p. 227.

98 For a discussion of the legal issues involved, see E. Chlopak, "Dealing with the detainees at Guantanamo Bay: Humanitarian and human rights obligations under the Geneva Conventions", *Human Rights Brief*, Vol. 9, Issue 3, p. 1, available at: ‹http://www.wcl.american.edu/hrbrief/09/3guantanamo.cfm›.

99 Bothe, Partsch and Solf, *op. cit*. (note 35), p. 260.

are expansions or a development of Article 5 of GC III. On the other hand, Article 5 has already been interpreted in many military manuals as establishing a high threshold for asserting that doubt as to status had arisen.[100] Therefore, while the exact provisions of Article 45(1) may be said not to reflect customary law in their entirety, it is submitted that the underlying principle establishing a general presumption of prisoner-of-war status for those participating in hostilities is developing into a customary rule. In addition, the right of a captured person who does not appear to be a prisoner of war to assert such entitlement and thereby to trigger Article 5(2) is reflected in many military manuals and is consistent with State practice.[101] The Article 45(2) rule stipulating that a person not being held as a prisoner of war who is to be tried for an offence arising out of hostilities has the right to have his status decided by a judicial tribunal has also been adopted by some States in military manuals or in practice. It is also supported by a great body of internationally agreed principles and declarations concerning the rights of persons in any form of detention.

As a non-party to Protocol I, the US position on the customary status of some aspects of Article 45 may be ascertained from a speech by Michael J. Matheson, Deputy Legal Adviser of the State Department during the Reagan Administration in 1987. Speaking at a workshop on "Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", Matheson stated at the outset that he appreciated the opportunity to offer "a presentation on the United States position" on the customary nature of Protocol I, and went on to say that:

> "[on the other hand] we do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in Article 45."[102]

The right of a captured person who does not appear to be a prisoner of war to assert entitlement to treatment as a prisoner of war and to have the

100 See notes 14-25 and accompanying text.

101 See Section Two on State practice with regard to Art. 5(2), especially practice of the US and the UK.

102 Quoted in M. Depuis, J. Heywood and M. Sarko, "The Sixth Annual American Red Cross — Washington College of Law Conference on International Humanitarian Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University International Law Review*, Vol. 2, No. 2, 1987.

matter adjudicated before a competent tribunal is contained in the 1997 US Army Regulation. Given the United States' non-ratification of Protocol I, this suggests that the right to assert entitlement to prisoner-of-war status and to subsequently have a determination made by a competent tribunal is considered a rule of customary law for the US.[103]

Conclusion

The Third Geneva Convention was designed to ensure the protection of one of the most vulnerable groups of victims of armed conflicts: combatants who are in the power of the enemy State. In keeping with the objectives and spirit of the Convention, prisoner-of-war status for a person who has committed a belligerent act may be cast in doubt only where there are substantial misgivings as to whether that person fits into the Article 4 categories of combatants or where the captured person, not accorded prisoner-of-war status, has claimed to be entitled thereto. Therefore, if a person or a group of persons has taken part in hostilities but does not appear to fit into the normal categories of combatants under the Convention, States should consider that a doubt has arisen and the Article 5(2) rule should apply.

If the combatant status of a captured person who has committed a belligerent act is in doubt, it is a violation of GC III and Protocol I (if applicable) not to submit such a determination to a competent tribunal and to have the matter decided by another authority. Moreover, as the *Commentary to Protocol I* emphatically states, "one thing is certain, and on this point the provision is quite clear: all persons who are captured and who are not considered either as prisoners of war or as civilians who have not participated in the hostilities, are treated there and then as prisoners of war until such time as their status has been determined by a competent tribunal."[104]

A competent tribunal is established by domestic law and the procedure must allow individual status determination. The tribunal should not be composed of a single individual, but it may be military, civilian, or administrative in character, including military commissions. Rules clarifying the tribunal's competence, composition and procedure must be provided by the detaining State. These rules should embody fundamental due process rights. Although there does not appear to be any time limit within which status determination should be made, it is reasonable, given the gravity of consequences of such a

103 Section 1-6(b) 1997 US Army Regulation, *op. cit.* (note 22).

104 *Commentary to Protocol I, op. cit.* (note 24), p. 550, para. 1743.

determination and the application of fundamental rights of due process, to assume that status determination should take place as soon as practicable.

Persons who are not held as prisoners of war, or whose status has not yet been determined, and who are to be tried by the detaining power for offences arising out of the hostilities, have the right to assert their right to prisoner-of-war status and to have that question adjudicated before a judicial tribunal or at least a tribunal guaranteeing all the fundamental fair trial rights. The status determination must take place before the criminal trial whenever possible. As status determination procedures may be seen as tantamount to a trial, given that a person can be found to have taken an illegal part in hostilities, having their status determined in an expeditious, fair and properly constituted way is not just an obligation on States under international humanitarian law[105] but is also strong evidence of a State's commitment to human rights and the rule of law.

105 Denial of the right to fair trial is a grave breach of both GC III (Art. 130) and GC IV (Art. 147). It is also a grave breach to deny the right to fair trial to a person protected by Art. 45 of Protocol I. This would include the judicial guarantees for status determination procedures under Art. 45(2).

Résumé

Statut de prisonnier de guerre «sujet à contestation»

Yasmin Naqvi

Le statut de prisonnier de guerre est capital tant sur le plan du statut juridique accordé à une personne capturée «tombée au pouvoir» d'une puissance hostile que du traitement dont cette personne bénéficie. Cet article examine comment le statut de prisonnier de guerre peut être «sujet à contestation» et comment la détermination de ce statut devrait être réglée conformément à l'alinéa 2 de l'article 5 de la III^e^ Convention de Genève. L'analyse de la règle de droit qui figure dans cet article et l'examen de la pratique de l'État concerné permettent d'affirmer qu'une contestation peut apparaître s'il y a de fortes raisons de croire qu'un détenu n'entre pas dans la catégorie des définitions classiques d'un combattant ou si les personnes qui ne semblent pas entrer dans lesdites catégories demandent à être traitées en prisonniers de guerre. Un «tribunal compétent» ne doit pas nécessairement être un tribunal judiciaire et être tenu de garantir l'ensemble des droits accordés à une personne déférée devant un tribunal pénal, puisque les droits fondamentaux à une procédure régulière, dont le caractère coutumier est reconnu par le droit international humanitaire, sont indérogeables. Toute tentative des États à contourner ces garanties judiciaires minimales est contraire à l'esprit et à la lettre du droit international humanitaire et contrevient également à la législation des droits de l'homme régissant le droit des personnes soumises à une forme quelconque de détention ou d'emprisonnement.