

**MURPHY'S LAW – THE CANADIAN TREATMENT OF DETAINEES  
IN AFGHANISTAN:  
ARE HUMAN RIGHTS LAW AND INTERNATIONAL  
HUMANITARIAN LAW OBLIGATIONS CIRCUMVENTED?**

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The manner in which persons captured are detained by NATO armed forces and in particular Canadian armed forces in Afghanistan presents a conundrum for military field commanders in determining how such persons are to be handled after capture and detention. This article will consider the nature of the conflict in Afghanistan, and attempt then to examine the various rights to which captured and detained persons are entitled. It will start from the premise that Afghanistan is either a failed<sup>1</sup> or failing state and will then move to consider the nature of the conflict. It will then review the manner in which members of the Canadian armed forces are dealing with detainees and the issues arising out of the same. It will then examine the manner in which NATO member countries should handle detainees, and as against this background will consider the overlap between International Humanitarian Law (IHL) and Human Rights Law (HRL).

I AFGHANISTAN – A FAILED STATE

This discussion is premised upon the supposition that Afghanistan is at best a failing and more likely a failed state.<sup>2</sup> Some of the hallmarks of failed states are (a) that they are subjects of deep conflict, are dangerous and are contested by

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<sup>1</sup> See online interview with General Rick Hillier March 12, 2007: 'In fact, we believe the security in Canada will ... be improved by helping one failed state – Afghanistan – recover to the point where it can prevent the use of its sovereign territory by terrorist groups like Al Qaeda who seek to attack us.' See, Brodie Fenlon, *Q&A: General Rick Hillier on the Canadian mission in Afghanistan* (2007) The Globe and Mail <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070309.whillierQA0313/BNStory/Front/home/?pageRequested=2>> at 30 June 2007. Note: as the Canadian Chief of Defense Staff, General Hillier, because he uses the word 'we' is deemed to be speaking on behalf of both the Canadian Forces as well as the Government of Canada.

<sup>2</sup> Ibid. See also comments made by Prime Minister Stephen Harper in Kandahar Afghanistan, March 13, 2006: 'As it stands now, Canada is in for the long haul ... Canada and the international community are determined to take a failed state and create a "democratic and modern country"'. Found at, *Canada committed to Afghan mission, Harper tells troops* (2006) CBC News <[http://www.cbc.ca/world/story/2006/03/13/harper\\_afghanistan060313.html](http://www.cbc.ca/world/story/2006/03/13/harper_afghanistan060313.html)> at 30 June 2007. See also, Richard Norton-Taylor, *Afghanistan close to anarchy, warns general* (2006) The Guardian <<http://www.guardian.co.uk/afghanistan/story/0,,1826479,00.html>> at 30 June 2007: 'Afghanistan is now one of the poorest countries with an economy and infrastructure in ruins'.

warring factions;<sup>3</sup> (b) that they are incapable of, or are unwilling to, safeguard minimal civil conditions, i.e. peace, order and security for all those living within their borders;<sup>4</sup> (c) that they reflect a collapse and often a demise of normal governmental functions associated with an internationally recognized state;<sup>5</sup> and (d) that they often manifest internal problems that threaten their continued coherence or manifest serious challenges to their political order.<sup>6</sup> Perhaps lowering this bar are the suggestions that a state need not totally fall into either chaos or civil war, but rather a state need only be in a downward cycle of being unable to provide legitimate governance<sup>7</sup> to qualify as either a failed or failing state. Rotberg observes that states will either succeed or fail based on their ability effectively to deliver basic and fundamental services.<sup>8</sup> Based on the foregoing criteria from the time of the commencement of the American led military operation in 2001, that culminated with the removal of the Taliban regime, until the present, Afghanistan is at best a failing, and more likely, a failed state<sup>9</sup> with the current government able to exercise control over little more than the capital city of Kabul and its environs.<sup>10</sup> This article will also argue that because Afghanistan is a failed or failing state, its government remains in place primarily because of the presence of foreign military forces in that country.<sup>11</sup>

## II THE AFGHANISTAN CONFLICT – INTERNATIONAL OR NON-INTERNATIONAL?

Pursuant to Security Council Resolution (UNSCR) 1386, the multinational military force in Afghanistan was afforded international legitimacy by establishing the International Security Assistance Force (ISAF), whose mandate was to assist

<sup>3</sup> Robert I Rothberg, 'The New Nature of Nation-State Failure' (2002) 25(3) *Washington Quarterly* 85-96.

<sup>4</sup> Robert H Jackson, 'Surrogate Sovereignty? Great Power Responsibility and Failed States' (Working Paper No 25, Institute of International Relations, 1998).

<sup>5</sup> Hans-Joachim Spanger, 'Failed State of Failed Concept? Objections and Suggestions' (Paper presented at Failed States III: Globalization on the Failed State, Florence, 7-10 April 2000).

<sup>6</sup> William J Olson, 'The New World Disorder: Governability and Development' in Max G Mainwaring (ed), *Gray Area Phenomena: Confronting New World Disorder* (1993).

<sup>7</sup> Robert H Dorff, 'State Failure and Responding to It' (Paper presented at the Annual Convention of the International Studies Association, New Orleans, 23-27 March 2002).

<sup>8</sup> Robert I Rotberg, 'Failed States, Collapsed States, Weak States: Causes and Indicators' in Robert I Rotberg (ed), *State Failure and State Weakness in a Time of Terror* (2003).

<sup>9</sup> See Comments made by General Rick Hillier describing Afghanistan as a 'failed state': *Q&A: General Rick Hillier on Canada's mission in Afghanistan* (2007) The Globe and Mail  
<<http://www.theglobeandmail.com/servlet/story/RTGAM.20070309.whillierQA0313/BNStory/Afghanistan>> at 30 June 2007.

<sup>10</sup> See Robert McMahon, *The Pitfalls of UN Nation-Building* (2006) Council on Foreign Relations <[http://www.cfr.org/publication/10829/pitfalls\\_of\\_un\\_nationbuilding.html](http://www.cfr.org/publication/10829/pitfalls_of_un_nationbuilding.html)> at 30 June 2007: 'The country has held successful presidential and parliamentary elections but its control extends to few places beyond Kabul'.

<sup>11</sup> See statements made in Graeme Smith in an online interview: *Discussion* (2007) The Globe and Mail  
<<http://www.theglobeandmail.com/servlet/story/RTGAM.20070423.wliveafghan0424/BNStory/Afghanistan/home/?pageRequested=2>> at 30 June 2007.

the Transitional Afghanistan Authority.<sup>12</sup> NATO assumed control of ISAF in August 2003.<sup>13</sup>

The United Nations had earlier approved the invasion of Afghanistan by treating the then Taliban régime as the ruling government of Afghanistan.<sup>14</sup> It approved the use of force by considering the American led invasion as a conflict between two nations and noted that it was to be considered as armed conflict of an international nature, and therefore the provisions of the Geneva Conventions would apply.<sup>15</sup>

There remains the issue of whether the conflict in Afghanistan was, and still is, an armed conflict that is either international or, in the alternative, non-international in character. The definition of 'armed conflict' varies depending on whether the hostilities are determined to be international or non-international in character.

The basic rules applying to conflicts of an 'international' nature are contained in the Four Geneva Conventions of 1949<sup>16</sup> as well as in the First Additional Protocol of 1977.<sup>17</sup> Briefly put, a conflict of an international nature is:

... any difference between two states and leading to the intervention of armed forces... is an armed conflict within the meaning of Article 2, even if

<sup>12</sup> SC Res 1386, UN Doc S/RES/1386 (2001). Available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement>> at 30 June 2007.

<sup>13</sup> See Richard Weitz, 'Analysis: Renewing Central Asian partnerships' (Autumn 2006) *NATO Review*. Available at <<http://www.nato.int/docu/review/2006/issue3/english/analysis2.html>> at 30 June 2007.

<sup>14</sup> See SC Res 1378, UN Doc S/RES/1378 (2001). Available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N01/638/57/PDF/N0163857.pdf?OpenElement>> at 30 June 2007.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950). Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>> at 30 June 2007; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950). Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>> at 30 June 2007; *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950). Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>> at 30 June 2007; *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>> at 30 June 2007.

<sup>17</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977. Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>> at 30 June 2007.

one of the parties denies the existence of the state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.<sup>18</sup>

Further, the temporal and geographical scope of both non-international and international armed conflict extends beyond the exact time and place of hostilities. The International Criminal Tribunal for the Former Yugoslavia ('ICTY') in *Tadic* noted:

On the basis of the foregoing, we find that an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general condition of peace is reached, or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.<sup>19</sup>

One conclusion, applying the rationale of *Tadic*, is that the conflict in Afghanistan has been, since its inception in 2001, an armed conflict, and in all likelihood a conflict of an international nature. It therefore follows that the principles and rules of international humanitarian law and in particular the Geneva Conventions as well as the Additional Protocols apply.<sup>20</sup> However, while Canada is a signatory nevertheless both the United States (although a member of NATO) and Afghanistan, are not signatories to either of the Additional Protocols of 1977.

### III AFGHANISTAN – AN OCCUPIED STATE

This article is not intended to undertake a detailed examination of what is often referred to as the law of occupation. However, in order to appreciate the responsibilities attaching to an occupying military force some review is requisite. The fundamentals of what is commonly considered the law of occupation are to be found in the Hague Regulations of 1907.<sup>21</sup> It is to be noted that whether or not a

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<sup>18</sup> See Jean C Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Sick and Wounded in the Field* (1952) 32.

<sup>19</sup> International Criminal Tribunal for the Former Yugoslavia Decision in *Prosecutor v Dusko Tadic* (1996) 35 ILM 32 (decision of 1 October 1995, from the Appeals Chamber). Available at <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> 30 June 2007.

<sup>20</sup> *Geneva Convention's (I), (II), (III) and (IV)* (as listed in footnote 16), and *Protocol I* (as listed in footnote 17), as well as *Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts)*, opened for signature 8 June 1977). All documents available at <<http://www.icrc.ch/Web/Eng/siteeng0.nsf/html/genevaconventions?OpenDocument>> at 30 June 2007.

<sup>21</sup> *Convention Respecting the Laws and Customs of War on Land (Hague IV)*, opened for signature 18 October 1907, 36 Stat 2277, 2306, 205Con TS 277, 295, art 42 (entered into

military force is in occupation is to be considered a question of fact. In particular, the Hague Regulations note:

The authority of a legitimate power having in fact passed into the hands of the occupant, the latter shall take measures in his power to restore, and ensure, as far as possible, public order, and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.<sup>22</sup>

However, after examining the situation in Afghanistan it will become apparent that what may have been anticipated by the drafters of the Hague Regulations does not reflect the current reality. The new reality in Afghanistan is that the occupying military forces have undertaken a new set of policies, in conjunction with military objectives that are responding to certain (Western) expectations. The current international military occupation of Afghanistan may be described as a reflection of changing international priorities in areas such as sovereignty and human rights. Put differently, what is now being seen in Afghanistan may be described as an international attempt to undertake 'nation building.'<sup>23</sup>

If one considers the presence of foreign military forces in Afghanistan, it is easy to appreciate that occupation may be defined as the 'effective control of a power (be it by one or more states or an international organization such as the United Nations) over the territory to which the power has no sovereign title without the volition of the sovereignty of that territory.'<sup>24</sup>

In this regard the rationale of the relevance of the *Hostages* decision<sup>25</sup> of the Nuremberg Tribunal is noteworthy, and in particular the portion of the judgment that noted:

While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary and not such as would deprive the German armed forces of its status of an occupant.<sup>26</sup>

In support of the foregoing one need only consider the comment of the ICTY in the *Tadic* decision,<sup>27</sup> which notes:

Whether or not the victims were 'protected persons' depends on when it was they fell into the hands of the occupying forces. The exact moment when a person falls into the hands of a party to a conflict depends on whether that party has effective control over an area.<sup>28</sup>

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force 26 January 1910).

<sup>22</sup> Ibid art 43.

<sup>23</sup> Asli U Bali, 'Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq' (2005) 30 *Yale Journal of International Law* 431, 435-6. See also above n 2.

<sup>24</sup> Eyal Benvenisti, *The International Law of Occupation* (1939) 4.

<sup>25</sup> See *United States v Wilhelm List in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Order No 10* (1948) 1230, 1243.

<sup>26</sup> Ibid 1243.

<sup>27</sup> International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v Tadic*, Case No IT-94-1-T. Available at <<http://www.un.org/icty/tadic/trialc2/judgement/>> at 30 June 2007.

<sup>28</sup> Ibid, citing Jean Pictet (ed), *Commentary, Geneva Convention Relative to the Protection*

It is further worth noting the comments of the International Court of Justice ('ICJ') in the *Congo v Belgium*<sup>29</sup> advisory opinion, suggesting that in order to consider an area occupied, the Court would consider whether the occupying force, in a particular area, had in fact substituted its authority for that of the country that was being occupied. For a state of occupation to exist it is sufficient that the occupying military force has the ability to exercise 'control',<sup>30</sup> and that being the case, then this would certainly apply in Afghanistan.

Another way of understanding the current reality in Afghanistan is to appreciate, as a matter of fact, that left to its own devices and absent the presence of the various military contingents in Afghanistan, the current (Karzai) central government would collapse and the country would slide into anarchy.

The issue of control will be canvassed in more detail when the interrelationship of international humanitarian law and human rights law is explored.

#### IV INTERNATIONAL HUMANITARIAN LAW

Accepting the basic premise that the initial American led conflict in Afghanistan, and subsequently the ISAF forces, were fighting a 'declared enemy' and, by the nature of military operations were conducting offensive combat operations, and thereby incurring obligations under international humanitarian law, the issue of the classification and subsequent handling of individuals captured and detained during this operation attracts attention. It is not at all uncommon to hear in the media terms such as 'fighters' or 'militants' used to describe those individuals who engage in armed conflict against either the Afghanistan forces or members of the multinational military force in Afghanistan. However, of note is the fact that neither the Third nor the Fourth Geneva Conventions use either of these terms. The issue then is the necessity to classify individuals captured.

The ICTY in the *Celebici* decision observed that:

There is no gap between the Fourth and Third Convention. If an individual is not entitled to protection of the Third Convention, ... he or she necessarily falls within the ambit of the Fourth Convention provided that Article 4 requirements [defining a protected person] are satisfied ...<sup>31</sup>

Notwithstanding the fact that neither the Geneva Conventions nor the Additional Protocols use terms such as 'unlawful combatants' or 'fighters', nevertheless, one must be mindful of the comment attributed to the Chief of the Defense Staff of the Canadian Armed Forces describing members of the Taliban

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*of Civilian Persons in Time of War, Convention IV* (1958) 47 ('Commentary, Geneva Convention IV').

<sup>29</sup> *Armed Activities on the Territories of the Congo (Democratic Republic of Congo v Uganda)* (2006) 45 ILM 271. Available at <[http://www.un-paris2.fr/cij/icjwww/ipresscom/ipress2005/ipresscom2005-26\\_co\\_20051219.htm](http://www.un-paris2.fr/cij/icjwww/ipresscom/ipress2005/ipresscom2005-26_co_20051219.htm)> at 30 June 2007.

<sup>30</sup> Leslie C Green, *The Contemporary Law of Armed Conflict* (1993) 248.

<sup>31</sup> International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v Delalic et al (Celebici case)* (1998) ICTY IT-96-21-T, [271]. Available at <<http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf>> at 30 June 2007.

as ‘detestable murderers and scumbags.’<sup>32</sup> Specifically, the Third Geneva Convention uses the term ‘prisoners of war’ it does not use the term attributed to the most senior officer in the Canadian Armed Forces.

The Third Geneva Convention, in Article 5 further provides:

The present convention shall apply to persons referred to in Article 4 from the time they fall into the power of the enemy until their final release and repatriation.

Should any doubt arise as to whether persons, having committed the belligerent act, and having fallen into the hands of the enemy, belonging to any of the categories enumerated in Article 4, such persons shall enjoy the protection until such time as their status has been determined by a competent tribunal.<sup>33</sup>

It is suggested that, *inter alia*, the First Additional Protocol is a codified version of customary international law and as such the same cannot be considered irrelevant or not applicable to the current conflict in Afghanistan. The First Additional Protocol applies the provisions of the Geneva Conventions to situations of ‘armed conflict in which people are fighting against alien occupation’<sup>34</sup> and in that regard a very strong argument can be made that the current multinational force in Afghanistan constitutes a form of foreign occupation.

Further, in Article 44 the First Additional Protocol holds:

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

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<sup>32</sup> See comments made by General Rick Hillier describing the opposition forces in Afghanistan at a press conference on 15 July 2005, as reported by Daniel Leblanc, *The Globe and Mail* (Canada), 17 July 2005.

<sup>33</sup> See *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 5 (entered into force 21 October 1950).

<sup>34</sup> See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, art 1(4).

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention. While all combatants are obliged to comply with rules of international law applicable in armed conflict, violations of these rules do not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.<sup>35</sup>

Additionally, Article 45 of the same instrument provides:

1. Any 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 Convention, if he claims the status of prisoner of war, or where he appears to be entitled to such status ... should any doubt arise as to whether such person is entitled to the status of prisoner of war, he should continue to have such status, and therefore, to be protected by the Third Convention and this Protocol until such time as the status has been determined by a competent tribunal.<sup>36</sup>

Put another way, while many descriptions are used to depict those individuals who engage in combat in Afghanistan, nevertheless, it is the provisions of the Geneva Conventions and, in particular, the First Additional Protocol that must apply.

Given the number of different countries that have armed forces in Afghanistan, and given, in many cases, the limited size of these contingents, it is the case that they do not have, in theatre, the physical capacity to detain individuals captured, be they combatants or civilians. As a matter of declared

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<sup>35</sup> Ibid art 44.

<sup>36</sup> Ibid art 45.



practicality some of the non-Afghan military forces operating in theatre have reached certain accommodations on the handling of detainees. As one of the earliest participants in coalition operations in Afghanistan, the Canadian Forces, as a matter of practice, transferred detainees to American military units for detention. However, it is this practice of the military forces of one country handing over captured prisoners to the military forces of another that raises concern. Prisoners captured by Canadian troops were transferred to American custody. In early 2002 a senior Canadian military officer, in testimony before a Parliamentary committee, admitted that prisoners captured by Canadian military personnel on active operations in Afghanistan were being turned over to their American counterparts for detention purposes.<sup>37</sup> Further, as recently as the summer of 2006 a senior Canadian officer was quoted as saying:

They are not entitled to prisoner of war status but they are entitled to prisoner of war treatment ...<sup>38</sup>

The regulations apply in armed conflict between states, and what's happening in Afghanistan is not an armed conflict between states and therefore there is no basis for making a determination of individuals being prisoners of war.<sup>39</sup>

Our default setting is to transfer. We have not held anybody for more than a few hours and we would prefer not to.<sup>40</sup>

Briefings given by the military in the Afghanistan conflict often refer to those with whom conflict is engaged as either 'Taliban fighters' or 'militants'. The description given in these briefings appears to be careful in not referring to those individuals as either 'soldiers' or 'combatants'. This article takes the position that there is no magic in the wording used. So long as these individuals are members of the military of the former Taliban régime, or profess allegiance to the former Taliban regime, and are captured during combat operations in Afghanistan, they belong to the category of persons outlined in Article 4(3) of the Third Geneva Convention, and they are 'members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.'<sup>41</sup> Further, a very strong argument can be made that wordings such as this ('Taliban fighters' or 'militants') may contravene, at the very least, the spirit of the Third Geneva Convention as well as the First Additional Protocol. There exists a real possibility of misinterpretation of the words used, and therefore what might be permissible as far as detention of these individuals is concerned, as the effects of the words used 'trickles down' through the ranks.<sup>42</sup>

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<sup>37</sup> 'Eggleton was fully briefed of capture of POWs, says military commander', *Canadian Press* (Canada), 26 February 2002, describing evidence given by Vice Admiral Greg Madison.

<sup>38</sup> Paul Koring, 'Canada: Troops told Geneva rules don't apply to Taliban', *The Globe and Mail* (Canada), 1 June 2006.

<sup>39</sup> Ibid. (Further, in an interview on CBC radio, General Hillier, the Canadian Chief of Defense Staff, also said that the Geneva Conventions only apply to cases of declared war.)

<sup>40</sup> Ibid.

<sup>41</sup> *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 4(3) (entered into force 21 October 1950).

<sup>42</sup> See the transcript of Colonel (formerly Brigadier) Karpinski's testimony, made on 26

Of some concern, further, is Article 12 of the Third Geneva Convention that holds:

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.<sup>43</sup>

In the case of a failed state such as Afghanistan, notwithstanding the fact that Afghanistan is a signatory to the Geneva Conventions, although not to the First Additional Protocol, I would argue that it is unacceptable that the transferring military can absolve itself from any of its responsibilities when those affecting the transfer either knew, or ought to have known, that the accepting power either would not or could not fulfill its Convention obligations. This is particularly important given the fact that Article 13 of the Third Convention provides:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention ...

Likewise, prisoners of war must at all times be protected, particularly against violence or intimidation ...<sup>44</sup>

A very strong argument can be made that if those effecting the transfer either knew or ought to have known that a breach of this provision of the Convention was likely, the transferring Power would incur liability.

It is not the intention of this article to pursue in depth the status of captured detainees. Rather, it is taken as fundamental that the conflict in Afghanistan is a

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October 2005, available at: The Center for Constitutional Rights <<http://www.ccr-ny.org/v2/GermanCase2006/Docs/abu%20KarpinskiTestimony2006.pdf>> at 30 June 2007. See also *The Independent Panel to Review Department of Defense Detention Operations ('The Schlesinger Report')* (2004) US Department of Defense <<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>> at 30 June 2007, referring (at 1-12) to the effect of the suggestions given by MG Miller.

<sup>43</sup> *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 12 (entered into force 21 October 1950).

<sup>44</sup> *Ibid* art 13.

conflict of an international nature, and consequently, the provisions of the Geneva Conventions as well as the First Additional Protocol apply to individuals captured. Persons captured are either entitled to the protections of the Third or the Fourth Geneva Convention. Further, it would be a fundamental error in drafting, or otherwise, should any agreement on handling of detainees not refer to both the Third as well as the Fourth Geneva Conventions,<sup>45</sup> the obligation to 'respect relevant provisions of international law, to provide full access to any detainee transferred, and that the transferring power be notified before any detainee is transferred from Afghan custody to the custody of the third party or state.'<sup>46</sup>

## V CANADIAN HANDLING OF DETAINEES

Without attempting to be trite, it might be worthwhile to reflect upon the well known (although not legally accepted and certainly without legal foundation) Murphy's law that holds: 'If there are two or more ways to do something, and one of those ways can result in a catastrophe, then someone will do it.'<sup>47</sup> While the circumstances surrounding the execution of the agreement, in December 2005, between the governments of Canada and Afghanistan regarding the handling of detainees<sup>48</sup> are unclear, nevertheless it is clear that the document was signed by the Canadian Chief of Defense Staff, on behalf of the Minister of National Defense. One may interpret that this document was intended to be executed on behalf of the Government of Canada.

<sup>45</sup> See *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, December 2005* (2005) National Defence and the Canadian Forces <[http://www.dnd.ca/site/operations/archer/agreement\\_e.asp](http://www.dnd.ca/site/operations/archer/agreement_e.asp)> at 30 June 2007. This agreement only refers to the Third Geneva Convention, and makes no reference to any other international treaties such as the ICCPR, the UNCHR, or the Convention against Torture (CAT).

<sup>46</sup> See *Memorandum of Understanding Between the Ministry Of Defense of the Islamic Republic of Afghanistan and the Ministry Of Defense of the Kingdom of the Netherlands Concerning the Transfer Persons by Netherlands Military Forces in Afghanistan to Afghan Authorities*, referred to in Michael Byers, *Legal Opinion on the December 18, 2005 'Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan'* (2006) Liu Institute for Global Issues <<http://www.cesefire.ca/atf/cf/%7B0A14BA6C-BE4F-445B-8C13-51BED95A5CF3%7D/Michael%20Byers%20Opinion%20Canada-Afghanistan%20Arrangement%207%20April%202006.pdf>> at 30 June 2007. See also *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan* (2005) UK Parliament <<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaif/44/4412.htm>> at 30 June 2007, and *Memorandum Of Understanding between Ministry Of Defense of the Islamic Republic of Afghanistan and the Kingdom of Norway Concerning the Transfer of Persons Between the Norwegian Contingent of the International Security Assistance Force to Afghan Authorities* (2006) Ministry of Defence of the Kingdom of Norway <[http://www.regjeringen.no/upload/kilde/fd/anb/2006/0011/ddd/andre/301475-mou\\_afghanistan\\_norge.rtf](http://www.regjeringen.no/upload/kilde/fd/anb/2006/0011/ddd/andre/301475-mou_afghanistan_norge.rtf)> at 30 June 2007.

<sup>47</sup> Murphy's Law found at <<http://www.science.uva.nl/~mes/jargon/m/murphyslaw.html>> at 30 June 2007.

<sup>48</sup> See *Geneva Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 13 (entered into force 21 October 1950).

This agreement purported to establish a mechanism to deal with the transfer of detainees from Canadian to Afghan custody. The agreement committed both parties to the agreement to treat detainees in accordance with the Third Geneva Convention.<sup>49</sup> The agreement did provide a right for the International Committee of the Red Cross to have access to (presumably Canadian captured) detainees, however the agreement did not provide any mechanism or right for Canadian authorities to have access to these individuals subsequent to transfer to Afghan custody.<sup>50</sup> Further the agreement contains no limitation or prohibition upon the transfer of (Canadian captured) detainees from Afghan custody to the custody of a third country.<sup>51</sup>

Subsequent to the agreement being put in place, in March 2006, the UN High Commissioner for Human Rights, Louise Arbour, issued a report on certain activities of the Afghan Security Service. In particular this report noted:

The NSD, responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture and systematic due process violations. Multiple security institutions managed by the NSD, the Ministry of Defense, function in an uncoordinated manner, and lack central control. Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common. Thorough, transparent and public investigations are absent and trials occur without adhering to the due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards.<sup>52</sup>

It is difficult to accept that this information was not in the hands of Canadian authorities shortly after this document became part of the public domain.

In June 2006, the Canadian Press reported that the Afghanistan Independent Human Rights Commission had estimated that approximately one in three detainees that were handed over by members of the Canadian Forces to Afghan authorities (pursuant to the agreement of December 2005) were beaten or tortured in local jails.<sup>53</sup> In early February, 2007 it was reported in the Canadian media that

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<sup>49</sup> Ibid. The agreement makes no mention of the Fourth Geneva Convention, nor does it refer to the Additional Protocols (to which Afghanistan is not a signatory).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid. Note, when the agreement was executed the then Minister of National Defense said that this agreement was put in place because 'it wouldn't be appropriate to hand them (the detainees) over to the Americans.' See Paul Koring, 'Handover deal lacks key detainee protections', *The Globe and Mail* (Canada), 30 March 2006.

<sup>52</sup> *Report Of the High Commission for Human Rights on the situation of Human Rights in Afghanistan and on the achievements of technical assistance in the field of human rights*, UN ESCOR, 62<sup>nd</sup> sess, [68], UN Doc E/CN.4/2006/108 (2006). Available at <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/116/91/PDF/G0611691.pdf?OpenElement>> 30 June 2007. (Louise Arbour is a former prosecutor at the ICTY, a former Justice of the Supreme Court of Canada, and a former member of the Ontario Court of Appeal.) Note, Professor M Cherif Bassiouni reiterated these comments and went further to say that in many cases detention centres and intelligence services operate without any form of oversight or control and may report directly to President Karzai. Substance of interview with M. Cherif Bassiouni on CBC Radio One, *As it Happens*, 27 April 2007.

<sup>53</sup> See Sue Bailey and Bob Weber, 'Canada's top general defends handling of Afghan

detainees transferred from Canadian custody to Afghan custody had been the subject of abuse and as a result of the same a number of investigations were commenced by the Canadian military.<sup>54</sup>

In February, 2007 a further agreement was executed between the Government of Canada and the Afghanistan Independent Human Rights Commission whereby the Afghan body would monitor the treatment of detainees transferred from Canadian to Afghan custody. However, in an interview subsequent to the execution of this agreement, the director of the Afghanistan Independent Human Rights Commission, when interviewed, indicated that abuse and torture still occurred in Afghan detention facilities, and, further, that his organization did not have either the funds or the logistical ability to monitor all of the detention facilities where detainees were being held.<sup>55</sup>

In March 2007, the annual U.S. State Department Report on Human Rights Practice in Afghanistan noted:

Complaints of serious human rights violations committed by representatives of national security institutions including arbitrary arrest, unconfirmed reports of torture and illegal detention were numerous.<sup>56</sup>

Further, in April 2007, *The Globe and Mail* reported that the Canadian Department of Foreign Affairs had prepared a report that contained, *inter alia*, the observation that ‘Extrajudicial executions, disappearances, torture and detention without trial are all too common.’<sup>57</sup>

In late March 2007, as a result of issues that were raised concerning the handling of detainees in Afghanistan, the Canadian Minister of National Defense stated that the International Committee of the Red Cross would monitor the condition of detainees and in the event that any abuse was observed the same would be reported to the Government of Canada. However, shortly thereafter the Minister recanted that statement and indicated that the International Committee of the Red Cross was under no obligation whatsoever to report incidents of abuse of detainees transferred from Canadian custody to the custody of Afghanistan officials, but, rather, were only obliged to report the same to Afghan authorities.<sup>58</sup>

The issue of how detainees who had been captured by Canadians and then were subsequently transferred to Afghan custody came to light as a result of published media reports of detainee abuse subsequent to Afghan authorities assuming control of these prisoners.<sup>59</sup>

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Prisoners as torture reported’, *Canadian Press* (Canada), 4 June 2006.

<sup>54</sup> See Paul Koring, ‘Canadian military expands probe into prisoner-abuse allegations’, *The Globe and Mail* (Canada), 21 February 2007.

<sup>55</sup> See interview with Abdul Noorzai, *Monitoring fate of Taliban suspects will be difficult: human-rights group* (2007) CBC News <<http://www.cbc.ca/cp/world/070313/w031340A.html>> at 30 June 2007.

<sup>56</sup> See *Country Reports on Human Rights Practices, 2006 – Afghanistan* (2007) US Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>> at 30 June 2007.

<sup>57</sup> See Paul Koring, *What Ottawa doesn’t want you to know – Government was told detainees faced ‘extrajudicial executions, disappearances, torture and detention without trial’* (2007) *The Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070424.wdetainereport0425/BNStory/specialComment/>> at 30 June 2007.

<sup>58</sup> See, *O’Connor sorry for misinforming House on Afghan detainees* (2007) CBC News <<http://www.cbc.ca/canada/story/2007/03/19/afghanaplogy.html>> at 30 June 2007.

<sup>59</sup> See Graeme Smith, *From Canadian custody into accrual hands – Savage beatings,*

The situation involving the Canadian transfer of detainees may be an anomaly. Conversely, however, it may only be the tip of the proverbial iceberg. In an interview on April 24, 2007 the Ambassador of Afghanistan to Canada, when specifically asked whether or not torture of detainees takes place in Afghan prisons specifically did not deny the same but rather indicated that the treatment of prisoners in Afghan custody, now, is better than it was during the time frame when Afghanistan was controlled by the former Soviet Union.<sup>60</sup> One inference of these words is that torture or other abuse of detainees still was taking place. This would serve to corroborate the reports of both the UN High Commissioner of Human Rights<sup>61</sup> and the report of the U.S. State Department regarding the state of human rights in Afghanistan<sup>62</sup>

It is against this background that the significance of the actions of members of the Canadian Forces, who are to be considered State agents, will be considered.

#### VI INTERNATIONAL HUMANITARIAN LAW & INTERNATIONAL HUMAN RIGHTS LAW – THE INTERPLAY

The obligations of the various military forces operating in Afghanistan are not limited to the application of the Geneva Conventions and the Additional Protocols. Rather, in addition to international humanitarian law, there are coexisting principles of international human rights law. A starting point for any consideration of human rights principles is the Universal Declaration of Human Rights.<sup>63</sup> The Universal Declaration is clear in holding that no one shall be subject to torture or to cruel or degrading treatment or punishment.<sup>64</sup> The right of the detainee, once captured by any of the military forces operating in Afghanistan, not to be tortured can be understood as implying what amounts to a continuing obligation on the capturing force, particularly where there is knowledge of the likelihood of torture or of other treatment as referred to not only in Article 5<sup>65</sup> of the Universal Declaration, but in other instruments as well.

Further, one must consider the ‘Martens Clause’, which remains one of the bedrocks of customary international law. The Martens Clause recites:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare, that in cases not included in the Regulations adopted by them, the populations and belligerents remain under the protection and empire of the principles of the law of

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*electrocution, whipping and extreme cold: Detainees detail a litany of abuses by Afghan authorities* (2007) The Globe and Mail <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070423.wdetainee23/BNStory/National/>> at 30 June 2007.

<sup>60</sup> See *Afghan detainees* (2007) The Globe and Mail <<http://www.theglobeandmail.com/servlet/Page/document/video/vs?id=RTGAM.20070427.vvafghanabuse0427&ids=RTGAM.20070427.vvafghanabuse0427&hub=search>> at 30 June 2007.

<sup>61</sup> See above n 52.

<sup>62</sup> See above n 56.

<sup>63</sup> *Universal Declaration of Human Rights*, GA Res 217 A (III) (1948). Available at <<http://www.un.org/Overview/rights.html>> at 30 June 2007.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* art 5.

nations, as they result from the usages established among civilized people, from the laws of humanity and the dictates of public conscience.<sup>66</sup>

There is an interrelationship between international humanitarian law and international human rights law. As will be seen, one does not operate to the exclusion of the other. In that regard decisions of the International Court of Justice (ICJ), as well as, for example, decisions from the European Court of Human Rights are instructive. International humanitarian law as a *lex specialis* does not replace or otherwise supplant international humanitarian rights law and the obligations that flow therefrom, but, rather, international humanitarian law only replaces certain derogable provisions of human rights law that may be inconsistent with international humanitarian law.

This latter point was specifically canvassed by the International Court of Justice, in considering the applicability of the ICCPR in the *Nuclear Weapons* advisory opinion. The Court noted the following, specifically in considering the interrelationship between international humanitarian law and human rights law:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war ...<sup>67</sup>

Further, in its subsequent *Legal Consequences*<sup>68</sup> advisory opinion, the ICJ held:

More generally, the Court considers that the protection offered by human rights conventions does not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both of these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>69</sup>

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<sup>66</sup> The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the *1899 Hague Convention (II) with respect to the laws and customs of war on land*, opened for signature on 29 July 1899, 187 Consol TS 429 (entered into force 4 September 1900). See Rupert Ticehurst, *The Martens Clause and the Law of Armed Conflict* (1997) International Review of the Red Cross <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jnhny?opendocument>> at 30 June 2007.

<sup>67</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, [26]. Available at <<http://www.icj-cij.org/docket/files/95/7495.pdf>> at 30 June 2007.

<sup>68</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136. Available at <<http://www.icj-cij.org/docket/files/131/1671.pdf>> at 30 June 2007.

<sup>69</sup> *Ibid* [106].

In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.<sup>70</sup>

The commonsense interpretation of the above is that the International Covenant on Civil and Political Rights<sup>71</sup> is applicable in times of armed conflict. Most, if not all of the NATO states now constituting the ISAF in Afghanistan are signatories to this Covenant. It is also noted that most of the members of the NATO forces currently in Afghanistan are States that are signatories to the European Convention on Human Rights.<sup>72</sup> In that regard, the obligations to respect human rights abroad by signatories to the European Convention are clear. This issue was dealt with, as has been noted, not only by the International Court of Justice, but as well by the European Court of Human Rights in its benchmark *Loizidou*<sup>73</sup> decision, where it was noted that:

Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it is exercised directly, through its armed forces, or through a subordinate local administration.<sup>74</sup>

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<sup>70</sup> Ibid [111].

<sup>71</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 999 UNTS 171 (entered into force 23 March 1976). Available at <<http://www.ohchr.org/english/law/ccpr.htm>> at 30 June 2007. The court further noted that it considered the covenant to be applicable in respect of acts done by a State in the exercise of its jurisdiction outside of its own territory.

<sup>72</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocols Nos 3, 5, 8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. The Convention and Additional Protocols are available at <<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/>> at 30 June 2007. It is to be noted that neither the United States nor Canada are signatories to the European Convention.

<sup>73</sup> *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (ser A), no 40/1993/435/514, [62-4]. Available at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695797&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> at 30 June 2007.

<sup>74</sup> *Loizidou v Turkey (Merits and Just Satisfaction)* (1996) VI Eur Court HR 2216, no 40/1993/435/514, [52]. Available at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695884&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> at 30 June 2007.



In *Al-Skeini*<sup>75</sup> the English High Court went further and noted that even though UK forces were operating in Iraq, and were there with the consent of the Iraqi government, nevertheless there was a presumption that a domestic (UK) statute connecting international human rights treaty obligations would be applicable to UK forces' operations in Iraq. If one accepts the rationale of the *Al-Skeini* decision, and applies the same to Afghanistan, then one may conclude that at the very least the forces of the various NATO states that are signatories to the European Convention are bound to honor the provisions of not only the European Convention but also other international treaties that have been incorporated into domestic law. Further, the *Al-Skeini* decision is not to be interpreted as limiting military combat activities, nor is it to compromise or limit the fundamental principle of military necessity. However, this decision does imply that the members of the military are responsible for the protection of the human rights of individuals under their control even outside of the domestic territory of these armed forces. Further, this duty or obligation cannot be abrogated by the execution of any agreement as between the operating military forces and the State in which they are operating.

To address this particular point attention is given to the General Comment no 31 to the ICCPR, which details some of the legal obligations that are imposed upon States Parties. In particular, Article 4 of the General Comment notes:

The obligations in general and Article 2 in particular are binding upon every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.<sup>76</sup>

Article 6 of the same Comment notes that obligations imposed upon States Parties are both positive and negative in nature.<sup>77</sup> Therefore, the ICCPR obliges States Parties to refrain from any activity that would constitute a violation of the Covenant, and where any restriction of rights recognized by the Covenant are undertaken, that these restrictions must be necessary and only proportionate to the pursuance of legitimate States Parties' aims. As well, Article 6 of the General Comment is also very clear in noting that no restriction may be applied or invoked in such a manner so as to impair the essence of any Covenant protected right.<sup>78</sup>

Applicable to military operations in Afghanistan is Article 9 of the ICCPR which is specific and notes that the 'beneficiaries of the rights recognized by the Covenant are individuals.'<sup>79</sup> Further, and of particular note, is Article 10 of the Commentary that notes:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within the territory, *and all persons set into their jurisdiction. This means that a State party must*

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<sup>75</sup> *R (Al-Skeini and others) v Secretary of State for Defense* [2004] EWHC 2911 (Admin), [2004] All ER (D) 197 (Dec).

<sup>76</sup> *General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Pursuant to the Covenant*, UN HRC, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1Add.13 (2004). Available at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocum ent](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocum ent)> at 30 June 2007.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid* art 9.

*respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... (t)he enjoyment of Covenant rights is not limited to citizens of States Parties, but must be available to all individuals ... who may find themselves in a territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside of its territory, regardless of the circumstances in which such power or effective control was obtained ...*<sup>80</sup>

My conclusion, therefore, is that subject only to limited issues such as military necessity, members of the foreign military forces operating in Afghanistan are obliged to protect anyone within either their power or effective control. Article 9 of the ICCPR does not exclude any individual, and, that being the case the ICCPR dovetails with the Geneva Conventions and the First Additional Protocol and certainly includes detainees captured during either military or related operations in Afghanistan. Further, in light of the fact that the obligations are both positive as well as negative in nature, members of the various military contingents operating in Afghanistan have a positive and continuing obligation to ensure the rights afforded to detainees continue not just at capture and detention, but to subsequent transference as well. This is particularly the case where the entity that may be receiving detainees has a less than a sterling human rights record.

In addition, there is now some judicial opinion that holds that the liability of a State is not just limited 'to the acts of the soldiers or officials in an area, but also extends to the acts of the local administration which survives there by virtue of [its] military support.'<sup>81</sup> This suggests that should there be violations of human rights obligations, and perhaps, by extension, violations of international humanitarian law, the liability for the same would attach not only to the individuals who committed such violations, but as well to the outside military forces who initially took custody of the individual and then either transferred or permitted the transference of that individual.

There is, as already suggested, a very strong argument to be made to the effect that the current government in Afghanistan remains in office only so long as the ISAF forces or other foreign military contingents remain in theatre. Supporting the proposition that the current Afghanistan government relies on the foreign military contingents are comments such as:

However, according to the Afghan Independent Human Rights Commission and several government officials, it would be lethal for the international forces to leave Afghanistan in its current state.

'The present structure will not stand,' explains AIHRC Director Abdul Qadi Noorzai in Kandahar. 'The current Afghan central authority is unable to maintain stability and human rights without the international presence.'

<sup>80</sup> Ibid art 10 (emphasis added).

<sup>81</sup> *Ilascu and others v Moldova and Russia* [GC] (2004) VII Eur Court HR, no 48787/99, [316]. Available at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699762&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> at 30 June 2007.

'[The presence of] international military forces means is not possible to fall back into civil war,' argues Ramadan Bashar Dost, former minister of planning. 'If international forces leave Afghanistan they will be war within 10 minutes.'<sup>82</sup>

If these comments are credible, then they suggest that should the foreign forces operating in Afghanistan leave, then, the current Afghan government would collapse. From that, we might well conclude that the foreign military forces supporting the government in Afghanistan may also be responsible for any human rights violations that take place because of the maintenance of the current Afghan government. Further, this line of reasoning would also call into serious question the validity of any Status of Forces Agreements executed between the foreign military forces in Afghanistan and the government of Afghanistan.

It is further to be noted that the issue of the expansion of extraterritorial human rights obligations was also considered by the European Court in the *Issa* case. In *Issa* the Court found that as a result of the military incursion by Turkish military forces into Iraq, the Turkish military had established, albeit briefly, control over a portion of Iraq, and as result incurred obligations for human rights abuses that may have taken place during that timeframe.<sup>83</sup>

It is entirely foreseeable that individual contingents are not in a position of overall control of portions of Afghanistan and, therefore the argument would be made that human rights obligations would not attach. However, while territorial control is of significance, it is not necessarily the deciding factor. Account was also taken of the actions of so-called 'state agents' during what may be best described as *ad hoc* operations or interventions. Human rights obligations properly attach to any situation in which a person is captured or detained by a state agent in a foreign country, irregardless of the nature or extent of the operation of that state in the foreign jurisdiction. Applying this reasoning it seems to me that a state's obligation is triggered once control over an individual is established and consequently liability for human rights violations may attach even when the breach of protected rights takes place after the individual has been turned over to the custody of the third State. This is particularly the case where the transferring State either has reason to apprehend, or should have apprehended, that the receiving state has less than an acceptable human rights record or where, such as with Afghanistan, the receiving state is less than stable in its own right. Supporting this position are the comments of the United Nations Human Rights Committee in that matter of *Kindler*.<sup>84</sup> In particular the Committee noted:

The Committee considered the contention of the State party that the claim is inadmissible *ratione loci*. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not

<sup>82</sup> Aisha Ahmed, *Canadian troops in Kandahar: A new commitment to war* (2005) CBC News <[http://www.cbc.ca/news/viewpoint/vp\\_ahmad/20050803.html](http://www.cbc.ca/news/viewpoint/vp_ahmad/20050803.html)> at 30 June 2007.

<sup>83</sup> *Case of Issa v Turkey* (2004) Eur Court HR, no 31821/96. Available at <<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=707749&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>> at 30 June 2007.

<sup>84</sup> *Kindler v Canada*, UN HRC, 48<sup>th</sup> sess, Comm no 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993). Available at <<http://www1.umn.edu/humanrts/undocs/html/dec470.htm>> at 30 June 2007.

generally have responsibility under the Covenant for any violations of that person's rights that may later occur in another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under Article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain, or is a very purpose of handing over. For example, a State party would itself be in violation of the Covenant if it handed over persons to another State in circumstances in which it is foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.<sup>85</sup>

The example cited by the United Nations Human Rights Committee is particularly appropriate to the consideration of the obligation to foreign military forces operating in Afghanistan. Of note is the fact that the Commentary does not limit liability to cases where an individual is removed from one State, but rather, liability would attach if a State, or agents of the State (which would include members of the armed forces) turned over a person to another State, or a State agent in circumstances in which it was foreseeable that torture would take place. Further, the torture need not take place within an immediate future time frame, but rather, the test seems to be that it only be foreseeable that torture would take place in the future.

It is worthwhile, further, to remember General Comment 31 that noted, specifically:

the Covenant also applies in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of covenant and that rights, both spheres of law are complementary, not mutually exclusive.<sup>86</sup>

It is also necessary to consider the applicability of the Convention against Torture (CAT).<sup>87</sup> Specifically the CAT notes:

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.
2. For the purpose of determining whether there are such grounds the competent authorities shall take into account all relevant considerations

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<sup>85</sup> Ibid [6.2].

<sup>86</sup> Above n 76, [11].

<sup>87</sup> *Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984 (annexed onto GA Res 39/46, UN GAOR Supp (no 51) at 197, UN Doc A/39/51 (1984)) (entered into force 26 June 1987). Available at <[http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm)> 30 June 2007.

including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>88</sup>

While the two instruments are separate, nevertheless it is suggested that Article 3.1 of the CAT must be read in conjunction with the Commentary regarding the Covenant (ICCPR). That suggests that Article 3.2 of the CAT places the positive obligation on the part of the transferring body to conduct inquiries into the conduct of affairs on the part of the receiving party. This positive obligation is all the more significant when consideration is given to a report from the United Nations High Commissioner for Human Rights which noted, in March 2006, with reference to Afghanistan:

The [Afghanistan National Security Directorate] responsible for both civil and military intelligence operates in relevant secrecy with inadequate judicial oversight and there have been reports of prolonged detention ... with extortion, torture, and systematic due process violations ... Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture are common. Thorough transparent and public investigations are absent and trials regularly occur without adhering to due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitments of the security institutions to comply with international standards.<sup>89</sup>

Is also worthwhile to consider comments contained in a US State Department report:

Afghanistan's human rights record remained poor ... There continued to be instances in which security and fractional forces committed extrajudicial killings and torture ...

Credible observers reported that local authorities ... routinely tortured and abused detainees. Torture and abuse consisted of pulling at fingernails and toenails, burning without oil, sexual humiliation and sodomy ...<sup>90</sup>

If the test is that the transferring power either 'knew or ought to have known' it becomes difficult to accept that any of the foreign military forces operating in Afghanistan would allow detainees to be transferred to the care custody and control of any Afghan authority.

While not directly related to the provisions of the ICCPR, the Universal Declaration Human Rights, or the Convention against Torture, nevertheless, there is a possibility that by affecting the transference of detainees to Afghan authorities that those who either transfer, or aid and abet in such transfer may be exposed to war crimes prosecution.

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<sup>88</sup> Ibid arts 3.1, 3.2.

<sup>89</sup> *Report Of the High Commission for Human Rights on the situation of Human Rights in Afghanistan and on the achievements of technical assistance in the field of human rights*, UN ESCOR, 62<sup>nd</sup> sess, [68], UN Doc E/CN.4/2006/108 (2006). Available at <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/116/91/PDF/G0611691.pdf?OpenElement>> 30 June 2007.

<sup>90</sup> *Country Reports on Human Rights Practices, 2005 – Afghanistan* (2006) US Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2005/61704.htm>> at 30 June 2007.

## VII CONCLUSION

This article was intended to demonstrate that the military action of detainee transfer does not operate in a vacuum. While, from a military operational perspective it may be both practical and convenient for smaller military contingents not to maintain detainee holding facilities, nevertheless, responsibility and therefore liability for such transfer cannot be abrogated by simply executing an intergovernmental agreement as between the State maintaining military forces in Afghanistan and the government of Afghanistan.

The old bright line between international humanitarian law and human rights law is now sufficiently blurred that the two arguably operate in conjunction with each other. No longer can the military operator simply concern itself with the Geneva Conventions. The Geneva Conventions have been expanded by the Additional Protocols. Humanitarian military intervention now carries with it human rights responsibilities that were not envisaged when the Charter of the United Nations was written.

The challenge, not just for the current military operation in Afghanistan, but indeed, for any future international military operation that involves the use of armed forces in an armed conflict situation will be to find the appropriate balance between military necessity/objective achievement and the respect for fundamental human rights that was, in all likelihood, one of the prime driving forces for the military intervention in the first place.