

LEGAL EAGLES CLE

Continuing Legal Education for Criminal Lawyers

“THE DETENTION AND PROSECUTION OF SUSPECTED INSURGENTS IN AFGHANISTAN, THE UNEASY INTERACTION OF NATIONAL AND INTERNATIONAL LAW”

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Part One – Introduction

This paper arises from work I did in Afghanistan 2013-2014 when I was deployed as a member of the Australian Civilian Corps to work as an Australian Justice Advisor at the Justice Centre in Parwan (JCIP) at Bagram Air Field (BAF), Afghanistan. BAF is the largest United States military base in Afghanistan and until November 2014 the JCIP sat within its secured perimeter².

The JCIP is a court of Parwan Province (the province BAF is located within) and was established by the Supreme Court of Afghanistan to facilitate the criminal trial under domestic Afghan criminal law of Afghans who had been captured by coalition forces and then ‘administratively detained’, generally in United States detention facilities at BAF. It is a national court, staffed by Afghan judges, prosecutors and defence lawyers, but has been heavily supported by United States and coalition forces logistically and defensively.

Administrative detention (or ‘internment’) is the depriving of the liberty of a person by the executive arm of government for security reasons other than pursuant to a criminal charge. It is commonly used by states in the context of armed conflict and has been extensively used in the Afghan and Iraq conflicts by the United States.

The AJA deployment arose directly from Australia’s military involvement in the Afghan conflict and our close relationship with the United States. Australian forces also captured numerous Afghans and when a domestic legal process was established Australia acceded to a request to provide resources to assist.

² In November 2014 the JCIP, the adjacent detention facility and the camp housing support staff moved outside the BAF perimeter. This occurred through the movement of the perimeter.

The resources provided to the JCIP took the form of Australian lawyers, all members of the then newly established Australian Civilian Corps (ACC).³

AJA's undertook varied work focused mainly on supporting and training the Afghan defence lawyers defending the detained alleged insurgents but also including assisting with the development of case management systems and supporting the work of the Australian Embassy in Kabul in relation to detainees captured by Australian forces.

Drawing on that practical experience this paper aims to provide an overview of the way that suspected/alleged insurgents captured by coalition forces were dealt with during the different stages of the Afghan conflict leading up to and including the establishment of the JCIP.

This overview commences with a description of the administrative detention regime established by coalition forces to detain captured insurgents (as is permitted by international law) and concludes with the creation of the JCIP and a description of how it functioned in the time I was there. This overview will require first something of an analysis of international law as it pertains to administrative detention.

This paper does not deal with a number of very topical and interesting issues pertaining to the Afghan conflict.

It does not deal with the status of a cohort of non-Afghan 'third country nationals' long detained at BAF by the United States who have existed in something of a legal black hole. The United States never proposed they be tried at the JCIP and nor were they able to access the courts of the United States, in the way detainees at Guantanamo were, to test the legality of their continued detention. Recent commentary suggests some were handed over to the Afghan government in December 2014 when the United States handed over control of their last detention facility in Afghanistan to Afghan authorities⁴ Many others have been repatriated to their home countries.⁵

Nor does the paper deal with those the United States has detained or sought to actually try, with varying success, at Guantanamo. They are in a different situation

³ The ACC was a product of the Kevin Rudd initiated 'Australia 2020 Summit' and provides a standing corps of deployment ready civilian experts specialising in conflict, post conflict and disaster relief work. AJA's deployed under a Memorandum of Cooperation agreed with the United States of America to facilitate the deployment.

⁴ <https://www.afghanistan-analysts.org/the-other-guantanamo-13-what-should-afghanistan-do-with-americas-foreign-detainees/>

⁵

in the sense that United States authorities have made a decision to detain them administratively at Guantanamo, or prosecute them, under United States military law, for various breaches of the law of war.

It will be seen that the way coalition detainees in Afghanistan are dealt with has involved a transition, for some detainees at least, from open ended administrative detention in the context of a conflict to domestic criminal prosecutions leading to either an acquittal or a sentence. This evolution has to an extent dovetailed with international and Afghan efforts to move from the conflict phase into the nation building phase of the joint efforts in Afghanistan. Whether this latter process is successful, (or indeed has even meaningfully started), remains to be seen. It has also dovetailed with the United States drawdown from Afghanistan.

The “uneasy” interaction between national and international law in this process (referred to in the title of this paper) can be seen in both the administrative detention phase and the current JCIP/domestic prosecution phase and this paper identifies two notable features of the interaction.

The first is seen in an examination of the legality of administrative detention in Afghanistan from an international and national law perspective.

There is no doubt International Humanitarian Law (IHL) (or the Law of Armed Conflict (LOAC), discussed further below, as the *lex specialis* designed to regulate armed conflict, allows the administrative detention of captured combatants in both international and non-international armed conflicts. However international law is largely silent as to any express processes and obligations that should accompany such detention in non-international armed conflicts (and indeed in international armed conflicts involving non state actors who fall short of being protected civilians). This is not to say the law is actually silent, as various minimum standards have been inferred and applied, as is discussed below, but there is not the same express prescription as is found in respect of the treatment of prisoners of war in international armed conflicts for example. The lack of specificity of international law in this regard is a consequence of the drafters of the Geneva Conventions apparently having envisaged it would be a matter dealt with by domestic legislation.⁶

Afghan law however itself makes no provision for administrative detention, despite it having been taking place there since the US invasion in 2001. The question of the legality of this form of detention in Afghanistan arose very publicly in the context of a bitter dispute that developed between the Karzai government and the United

⁶ <http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/>

States, at least ostensibly, over the custody of detained insurgents. This dispute involved the Afghan government vociferously demanding that all Afghan detainees be transferred to its custody and alleging that administrative detention was a violation of Afghan law and sovereignty⁷.

When political processes led to an agreement between the United States and the Afghan government for the establishment of an Afghan administrative detention regime and the handover of the detainees to the Afghan government, the issue was then heightened as the Afghan Government almost immediately disavowed the legality of administrative detention⁸.

As will be discussed below under these inter-governmental agreements detainees were transferred to Afghan custody and placed under the jurisdiction of an Afghan government 'Technical Committee' (under 2012 agreements), and then an 'Afghan Review Board' (under 2013 agreements) which could release them, detain them further or refer them for criminal prosecution at the JCIP.

As things have transpired little by way of administrative detention by the Afghan authorities has in reality taken place. There has rather been significant releases of detainees⁹ and a mass referral of detainees for prosecution at the JCIP:

"From May 2010 through September 2014, the JCIP provided due process¹⁰ to over 3,000 detainees through an Afghan criminal court operated by Afghan judges applying Afghan law. The JCIP successfully conducted over 7,000 primary and appellate trials of insurgents removed from the battlefield. ... The court maintained an overall conviction rate of over 75 percent and a conviction rate of 98 percent if there was DNA or a fingerprint match to an improvised explosive device".¹¹

This is not to say that no administrative detention has occurred but perhaps far less than may have been envisaged by United States authorities (and arguably perhaps far less than may be warranted by the security situation). While the Afghan government has consistently denied the legality of administrative detention the criminal procedure time restrictions binding investigations and prosecutions in Afghanistan have been so ignored at the JCIP as to amount to pre-trial

⁷ Remaking Bagram. The creation of an Afghan Internment Regime and the Divide over US detention Power. Regional Policy Initiative, September 6, 2012. Open Society Foundations. Pgs 12-15.

⁸ <https://www.afghanistan-analysts.org/the-other-guantanamo-2-the-afghan-state-begins-internment/>

⁹ <http://www.reuters.com/article/2014/02/13/us-afghanistan-detainees-idUSBREA1C08Q20140213>

¹⁰ The degree to which 'due process' has been provided in the JCIP is discussed below.

¹¹ Patrick J. Reinert and John F. Hussey. The Military's Role in Rule of Law Development. April 01, 2015. JFQ 77, 2nd Quarter 2015

administrative of all JCIP referrals – some for just a few months, others for years.¹² The contradictory nature of the positions taken by the Afghan government point to the complexities of the political/security situation, the dysfunctionality of the Afghan state and the nature of the Karzai leadership.

The second relates to the legality of the pre-trial and trial processes undertaken at the JCIP from a national and international law perspective. These processes are subject to the stringent requirements of international human rights law¹³ and there is little doubt the processes fell comprehensively short of internationally recognised fair trial standards. This is primarily relevant in considering Afghanistan's compliance with its own obligations, but also perhaps relevant in considering the policy choices of coalition forces who have not just transferred detainees to the court, but also to a very significant degree taken responsibility for its operation.

Part 2 – A Quick Overview of Conflict Related Detention in Afghanistan

In 2001 following the attacks of September 11 the United States Government (USG) commenced military operations in Afghanistan known as 'Operation Enduring Freedom'. The US and its allies engaged the Taliban Government and its Al Qaeda allies in armed conflict. Soon afterwards the first USG controlled facilities for the detention captured combatants began operating.¹⁴

In the early years of the Afghanistan conflict various facilities were used for the administrative detention of suspected insurgents including USG Internment facilities in Guantanamo (GTMO), Cuba, the USG controlled Bagram Collection Point (BCP) and other facilities spread throughout Afghanistan.¹⁵ By 2002 BCP had become the primary USG detention facility in Afghanistan. In 2005 the BCP was renamed the Bagram Theatre Internment Facility (BTIF), the name it carried until it was replaced in 2009 by the newly built Detention Facility in Parwan (DFIP). Following its creation detainee numbers quickly expanded. The 600 held by USG forces in 2007 reached 1,100 by September 2010 and 3110 by March 2012.¹⁶ Initially hundreds of detainees were transferred to Guantanamo Bay, Cuba but as discussed above

¹² In the author's experience release pre-trial never occurred in JCIP matters.

¹³ Afghanistan is a signatory to the International Covenant on Civil and Political Rights.

¹⁴ Bovarnick. Pg 12.

¹⁵ Bovarnick. Pg 15.

¹⁶ Remaking Bagram. The creation of an Afghan Internment Regime and the Divide over US detention Power. Regional Policy Initiative, September 6, 2012. Open Society Foundations. Pg 5

transfers apparently ceased following the Supreme Court ruling that detainees there had access to the US courts.

The status and fate of these detainees by this date had long been a source of conflict and controversy between the USG and Afghan authorities.¹⁷ It was the resolution of this controversy, through the handover to Afghan authorities of detainees captured by coalition forces that directly led to the creation of the JCIP. Prior to this resolution however United States and other coalition partners detained suspected combatants and had to establish mechanisms to provide the degree of due process deemed necessary.

Part 3 - Australia's Involvement in Detention in Afghanistan

Australian first sent troops to Afghanistan in October 2001 under 'Operation Slipper' and they served alongside America forces.¹⁸ With the subsequent establishment of an international coalition (the International Security Assistance Force (ISAF) by Security Council resolution in December 2001¹⁹) Australia became a part of the coalition and contributed troops and other resources to the international effort. Our military involvement has fluctuated and between 2002 and 2005 we had no combat troops in Afghanistan. In August 2005 however Australia militarily re-entered the conflict with the deployment of approximately 150 military personnel undertaking duties similar to those Australia had been engaged in during the early period of the conflict. This recommitment of forces followed the launching of the Taliban insurgency in 2003. Australia's commitment then steadily increased and in 2006 it was announced that Australia would contribute a Provincial Reconstruction Team (PRT) to Uruzgan province in Afghanistan. These PRT's were common across Afghanistan and involved particular countries assuming special responsibility for security and reconstruction in particular provinces of Afghanistan. By 2008 Australia had over 1000 personnel in Afghanistan and this increased to 1500 by 2009. Australia remained deeply militarily involved until 2013 when Tarin Kowt (the Australian base in Uruzgan) was closed and Prime Minister Abbott declared Australian involvement in the conflict over.

In the early years of the conflict Australia was a capturing power in Afghanistan but we did not maintain detention facilities and Australian captures were deemed

¹⁷ <http://www.aljazeera.com/news/asia/2012/01/2012151811754835.html>

¹⁸ http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/MilitaryInvolvementAfghanistan

¹⁹ United Nations Security Council resolution 1386 followed the Bonn Conference and gave effect to the agreement reached there.

American captures through an agreement that rendered any Australian capture a US capture if at least 1 US soldier was present on the operation.²⁰ This was accompanied by a policy that saw at least 1 US soldier embedded in Australian military operations. The reason for this policy was to at least technically avoid a breach of the Geneva Conventions that would have been occasioned by handing a captured detainee over to a power that did not accept the application of the Geneva Conventions. This policy was widely criticised as breaching the Geneva Conventions to which Australia is signatory.

It was only Australia's assumption of responsibilities in Uruzgan that led to Australia formally assuming the mantle of a capturing power. Initially Australia shared responsibility for Uruzgan with the Dutch and detention facilities were managed by them. The Dutch however withdrew from Afghanistan in 2010 leaving Australia with the responsibility of both capturing and detaining insurgents.²¹ The conflict by then had become a NIAC and the detainees were not entitled to POW status on any view. That and other changes in US policy meant that Australian forces could transfer detainees to US custody and many such persons were eventually dealt with in the tribunals described above and some eventually tried at the JCIP. Others were transferred to Afghan custody or released.

Part 4 – International Humanitarian Law & Administrative Detention

Before examining briefly the content of IHL as it relates to administrative detention it is timely to consider briefly the distinction between different types of conflict under international law.

IHL distinguishes between international armed conflict (IAC) and non-international armed conflict (NIAC) and depending on the characterisation of the conflict different regimes regulate the conduct of states and others in the conflict.

It is widely accepted that the conflict in Afghanistan was an IAC from its onset in October 2001 until the formation of the Karzai Government in June 2002.²² (This acceptance was shared by the United States). As the Taliban and associated groups continued to fight against the new Government of Afghanistan the conflict has

²⁰ <http://military.piac.asn.au/story/australias-detention-custody-and-transfer-policy-afghanistan-and-iraq>

²¹ <http://www.minister.defence.gov.au/2013/05/16/minister-for-defence-paper-presented-on-afghanistan-detainee-management/>

²² Robin Geib and Michael Siegrist. Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities? *International Review of the Red Cross*. Volume 93 Number 881 March 2011. Pg 13.

continued to the present day as a NIAC (albeit an 'internationalised' one) with US and other coalition forces present in Afghanistan with the consent of the Afghan government to assist in combating the domestic insurgency.

The nature of the conflict from an international law perspective is a useful point of focus as when the conflict became a NIAC the domestic prosecution of combatants under the regular criminal law for acts not in breach of IHL became, from an international law perspective, permissible. The status of the conflict also determines the way that administrative detention is regulated from an international law perspective.

IHL consists of treaties and international customary law. The Geneva Conventions both set standards and create the concept of grave breaches which can be prosecuted as international crimes. IHL recognises and regulates administrative detention in both types of armed conflict. The main²³ treaties are the 4 Geneva Conventions and the 2 Additional Protocols. Their content can be quickly relevantly summarised as follows:

The First Geneva Convention, for the Amelioration of the Condition of the Wounded in Armies in the Field

This convention applies to IAC and regulates the treatment of wounded and sick soldiers and others. There is nothing of particular relevance to detention operations in Afghanistan contained within this convention.

The Second Geneva Convention, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

²³ Other treaties forming part of IHL include:

- The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols;
- The 1972 Biological Weapons Convention;
- The 1980 Conventional Weapons Convention and its five protocols;
- The 1993 Chemical Weapons Convention;
- The 1997 Ottawa Convention on anti-personnel mines;
- The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

This convention applies to IAC and regulates the treatment of wounded and sick soldiers and others at sea. There is nothing of particular relevance to detention operations in Afghanistan contained within this convention.

The Third Geneva Convention, Relative to the Treatment of Prisoners of War

This convention applies to IAC and contains provisions that allow the detention of combatants and which set down certain minimum standards for detention and the treatment of detainees. The convention allows detention of 'Prisoners of War' (POW) until the cessation of hostilities. There is no requirement to assess a detainee's security threat on an ongoing basis, (as soldiers/combatants in a time of conflict between states there is an inherent assumption of dangerousness). POW's are shielded from criminal prosecution for conflict related activities that do not violate the law of armed conflict.

POW status does not apply to combatants captured in NIAC's, they can be treated as simple criminals²⁴ though they do not necessarily have to be.

The recognition that the conflict in Afghanistan was initially an IAC has not meant that the Taliban and Al Qaeda have had the benefit of the full protections of the Geneva Conventions. The refusal of the United States to regard Taliban (or Al Qaeda) detainees as prisoners of war was formally announced by the United States in February 2002.²⁵ While the USG recognised that the Geneva Conventions did apply to Taliban detainees (but not to Al Qaeda detainees) they withheld prisoner of war status from them on the basis they had not complied with aspects of the laws of war and declared them as 'unlawful combatants'. The espoused reasoning was widely criticised as legally flawed at least in respect of the Taliban detainees.²⁶

While the United States never conceded that Taliban fighters were entitled to prisoner of war status many other states disagreed including Australia. The change in the status of the conflict, discussed above, allowed countries like Australia (albeit many years after the end of the IAC) to transfer captures to the United States and assist in the creation of the JCIP and the trial of Taliban captures under regular Afghan criminal law for acts that were entirely conflict related and not necessarily in breach of the laws of war (though many were). Had the conflict remained an international one it seems Australia may have had to act consistently with the fact

²⁴ In this sense international law recognises a right to fight for a state against another state, not a general right to fight against a state

²⁵ <http://www.state.gov/s/1/38727.htm>

²⁶ George H. Aldrich. The Taliban, al Qaeda, and the Determination of Illegal Combatants. *Humanitäres Völkerrecht*. No 4/2002.

that Taliban captures were entitled to prisoner of war status and a shield from domestic prosecution.

The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

This convention applies in IAC's and governs the treatment of civilian persons in the time of conflict and expressly allows the administrative internment of civilians.

In the absence of detailed prescription as to the applicable standards for the detention of combatants in NIAC's its standards are perhaps the most appropriately analogous to those that might reasonably be used to determine whether combatants in an IAC should be detained. This convention has been influential in the formation of the processes used by the United States in applying administrative detention in Afghanistan and elsewhere.

Some important articles include:

- Article 78 - If the detaining authority "considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most subject them to assigned residence or to internment."
- Article 79 - Internment shall be in accordance with the provisions of articles 41, 42, 43, 68, and 78.
- Article 42 - Initial internment "may be ordered only if the security of the Detaining Power makes it absolutely necessary.
- Article 43 - Once an internment decision is made, a court or administrative board must review the initial decision at least twice yearly.

Common Article Three

Each of the 4 Conventions, despite being primarily concerned with IAC, contain 'Common Article 3' which sets down minimum standards for the treatment of persons in NIAC.

There is nothing express in this Common Article 3 dealing with administrative detention (though relevantly its judicial guarantees were applied by the US Supreme Court to strike down the initial military commissions utilized at Guantanamo)

Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

Article 1(4) of the protocol provides that armed conflicts in which peoples are fighting against "colonial domination, alien occupation or racist regimes" are to be considered international conflicts and the rest of the protocol sets out various standards and protections.

Article 75 speaks directly to internment in IAC stating, “any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”. This article is considered to reflect international customary law.²⁷

Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts

This protocol contains certain humanitarian guarantees for those whose liberty has been deprived as a consequence of NIAC’s and as such expressly envisages administrative detention in such conflicts, particularly in articles 5 and 6. It is however silent as to the procedures and standards for the determination of who should be detained and when they should be released.

As is evident from the above despite the Geneva Conventions not prescribing detailed standards for administrative detention there is no doubt international law permits it in NIAC’s. It is also widely agreed, including by the International Committee of the Red Cross, that international IAC customary law allows it.²⁸

International Customary Law

International customary law has been held to encompass many of protections and guarantees codified within the Geneva Conventions and to include a prohibition against arbitrary deprivation of liberty.²⁹ This is an important foundation in the context of the silence in the Conventions on the specific permissible process for administrative detention in NIAC. It directs parties to adopt and modify procedures that meet a minimum standard of justice. This begs the question, in the context of international customary law prohibiting such detention from being arbitrary, of what standards apply and what falls on the side of not being arbitrary when it comes to the detention of combatants in NIAC.

²⁷ Jelena Popic. Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and other Situations of Violence. International Review of the Red Cross. Vo 87 No. 858. June 2005. Pg 377.

²⁸ Jelena Pejic. The protective scope of common Article 3: more than meets the eye SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW Volume 93 Number 881 March 2011. Pg 207

²⁹ Jelena Pejic. The protective scope of Common Article 3: more than meets the eye SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW Volume 93 Number 881 March 2011. Pg 205-6.

As is discussed below the United States forged policies and procedures in Afghanistan relying on aspects of the fourth Geneva Convention that they claimed met this minimum standard. While opinions will differ about the compliance of the regime with international law the combination of the protection provided by international customary law and the guidance provided by analogous regimes such as those contained within Geneva Convention IV has been an important source of protection for those subject to administrative detention in Afghanistan.

Minimum Standards for Administrative Detention in Armed Conflict

Drawing on existing IHL and international human rights treaty law, and the body of international customary law the ICRC³⁰ has suggested a set of 'minimum standards' for administrative detention. The standards include:

- Internment is an exceptional measure
- Internment is not an alternative to criminal proceedings
- Internment can only be ordered on a case by case basis and without discrimination of any kind
- Internment must cease as soon as the reasons for it cease to exist
- Internment must conform to the principle of legality
- An internee has the right to information about the reasons for the detention
- An internee has a right to be registered and held in a recognised place of detention
- Foreign nationals have the right for their state to be notified and able to access them
- An internee has the right to challenge the legality of their detention
- Review of the lawfulness of detention must be carried out by an independent and impartial body
- An internee should be able to have legal assistance
- An internee should have the right to periodic review of the lawfulness of detention
- An internee and their legal representative should be able to attend proceedings in person
- An internee should be able to have contact with family and the ability to correspond
- An internee should have the right to medical care and attention

³⁰ International Review of the Red Cross, Vol. 87 No. 858 June 2005, pp. 375–391

- A internee should have the right to make submissions regarding their treatment and conditions of detention
- The ICRC should have access to persons detained

Part 5 – Other Relevant Legal Issues

The Legal Basis for United States Detention Operations

The international law perspective has been an important one in terms of measuring coalition and United States compliance with international law standards but it is important to understand that the United States has never relied upon international law itself as the basis for its detention operations. The legal basis for the detention of suspected combatants was in issue from the outset of the conflict. USG authorities have relied on provisions of US domestic law for their power to detain, though the exercise of that power is conditioned by the incorporation of international law standards in US military law. In 2004 the United States Supreme Court held such detention to be lawful under legislation passed by Congress in the immediate aftermath of the attacks of September 11.³¹

Detainee's Access to United States Courts

The assertion by the United States that detainee operations in Afghanistan comply with US and international law is substantially untested legally as the United States courts have thus far declined to extend the writ of habeas corpus to detainees held in Bagram.³² Therefore the legality of USG executive detention operations in Afghanistan remains wholly outside the province of US domestic courts.³³

In contrast in 2004 the US Supreme Court ruled that the legality of detention at GTMO could be tested, holding, "*the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrong doing*".³⁴ The consequence of this jurisdiction was a ruling that the justice being applied at Guantanamo was inconsistent with United States legislation which as stated above incorporates IHL standards.³⁵ In an apparent

³¹ Hamdi v Rumsfeld 542 U.S. at 51 Boumediene v. Bush 128 S. Ct. 2229 (2008).

³² <http://www.lawfareblog.com/tag/al-maqaleh/>

³³ Fadi Al Maqaleh and, Ahmad Al Maqaleh v. Chuck Hagel, Secretary, United States Department of Defense, et al. No. 12-5404 Appeal from the United States District Court for the District of Columbia. (accessible online at <http://www.gpo.gov/fdsys/pkg/USCOURTS-caDC-12-05404>)

³⁴ Rasul v Bush 542 U.S 466 (2004) at 485

³⁵ In particular common article 3 of the Geneva Conventions.

response to this decision transfers to Guantanamo from Afghanistan ceased shortly afterwards.³⁶

Part 6- The United States Administrative Detention Regime

Prior to the transfer of detainees to Afghan control (discussed below) USG detainees, were detained or released by the decisions of a series of administrative bodies established by the US military.³⁷ The bodies that undertook this function were known by various titles including, the Detainee Review Board, the Enemy Combatant Review Boards and the Unlawful Enemy Combatant Review Board.³⁸ These bodies attracted criticism in both Afghanistan and internationally and different perspectives have been expressed regarding their legitimacy and operation as is discussed further below.³⁹

Common to all the tribunals in their various incarnations was the capacity to order the further detention of those adjudged to be combatants or their release (subject to a veto by a superior military authority). Initially this also involved a decision as to whether a detainee met a more stringent set of criteria (based on dangerousness) and would be transferred to Guantanamo.

The staffing and composition of the tribunals varied, initially they were as large as 10 military personnel but later reduced to only 3. Generally detainees were not notified of the tribunal's hearing their case and had no right to appear or be represented. From 2008 detainees however were notified and had the right to attend and make a statement.

Following the election of President Obama there was a further development of US detention policy and revamped procedures were adopted. These included the capacity of detainees to be represented by a military 'personal representative', who was not, however, a lawyer. There was also a reduction in the time within which a review was mandated and a reduction in the time within which an initial review had to take place.

³⁶ Bovarnick. Pg 16.

³⁷ Bovarnick. Pg 15-17.

³⁸ Bovarnick. Pg 47.

³⁹ Bovarnick. Pg 10 and particularly footnote 5 for a detailed list of articles and publications assessing and critiquing the US procedural regime for administrative detention. See *Undue Process, An Examination of Detention and Trials of Bagram Detainees in April 2009*. Human Rights First, November 2009 for a particularly critical perspective.

Common to all manifestations of administrative detention in Afghanistan however was an incapacity to test allegations, a lack of disclosure and the lack of a right to a legal representative.

Human Rights Watch described the revamped procedures in the following way:

“Despite the high-level focus and evident dedication of the personnel involved, the DRBs remain flawed. As with the CSRTs, detainees don't have access to legal counsel. Instead, they have a military officer called a Personal Representative appointed to assist them. But they don't truly represent them - there is no lawyer-client confidentiality and no reason for the detainees to trust the US military officers. As it is, conscientious Personal Representatives are overworked -- there are 800 detainees and only 8 Personal Representatives. Although detainees can meet with family members in person or by video conference, they are unable to meet with a lawyer. And secret evidence -- unavailable to the detainee -- continues to be used in almost every case.

In the DRBs I observed, several detainees were asked why an unnamed source might have turned them in. The source's identity was classified, causing the detainee to speculate as to who in his village might dislike him enough to provide information -- false or otherwise -- to US forces. It is simply impossible for a detainee to fairly rebut the accusations against him without being able to see the evidence”⁴⁰

A United States military lawyer who worked in Bagram and who has written on these issues described the legal situation of the detainees as follows:

“Since the application of GC III (for prisoners of war) is not applicable to the current detainees in Afghanistan as a matter of law. Even so, practitioners always default to the principles of the Geneva Conventions when searching for an analogous legal framework. In this regard, rather than the “prisoner of war” terminology from GC III, the general legal framework currently applied in Afghanistan uses civilian security internee concept from the Fourth Geneva Convention. See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Under article 78 of GC IV, if the detaining authority “considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most subject them to assigned residence or to internment.” Id. art. 78. Article 79 of GC IV then states that protected persons shall not be interned except in accordance with the provisions of articles 41, 42, 43, 68, and 78. Id. art. 79. Initial internment “may be ordered only if the security of the Detaining Power makes it absolutely necessary. Id. art. 42. Once an initial internment decision is made article 43 of GC IV requires, among other provisions, a court or administrative board to review the initial decision at least twice

⁴⁰ <http://www.hrw.org/news/2010/06/02/bagram-detainee-review-boards-better-still-falling-short>

yearly. Id. art. 43. Finally, article 68 distinguishes between internment and imprisonment with the former only authorized to deprive the detainee of liberty”⁴¹

The complicated and controversial process that has been the administrative detention (and in some cases the trial) of combatants captured in Afghanistan (and elsewhere in the ‘war on terror’) lends further weight to calls for the amendments of the Geneva Conventions⁴² to cater for the increasing incidence of NIAC, IAC involving non state actors and NIAC with a distinct international dimension (such as in Afghanistan where foreign troops have been active participants in the conflict on the side of the Afghan government).

Part 7 - Transfer of Detainees to Afghan Control and Jurisdiction and the Creation of the JCIP

An array of political, legal, humanitarian and security issues arising from the detention by the large number of suspected Afghan insurgents created pressure for a solution to resolve the status of the Afghan detainees. As early as 2005 President Karzai was quoted as saying his government wanted custody of all Afghan prisoners held by foreign forces.⁴³

Between 2005 and 2010 various agreements were reached between the Afghan Government and the USG for the transfer of detainees to Afghan control. These agreements however did not lead immediately to such a transfer. In 2011 USG officials were quoted saying, “*the Afghans don’t have the legal framework or the capacity to deal with violence being inflicted on the country by the insurgency*”. In early 2012 USG forces still remained in control of the DFIP.⁴⁴

Important developments from 2007 however did see USG forces transfer a limited number of Afghan detainees to the GIROA for prosecution under Afghan domestic law. This occurred by agreement and involved the United States review boards discussed above being given an additional option, referral for domestic prosecution.

⁴¹ Bovarnick. Pg 11, footnote 12.

⁴² John B. Bellinger III and Vijay M. Padmanabhan. Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law. The American Journal of International Law, Vol. 105, No. 2 (April 2011)

⁴³ Karzai Demands Custody of all Afghan Prisoners. May 22, 2005. New York Times (<http://www.nytimes.com/2005/05/22/international/asia/22karzai>).

⁴⁴ Kevin Sieff, “Afghan Prison Transfer Delayed,” Washington Post, August 12, 2011.

These detainees were held and tried in Pul-i-Charkhi prison in Kabul. In April 2008 it was reported that 65 persons had been convicted in such trials⁴⁵.

These trials fell far short of international standards and are somewhat similar to those the author later observed at the JCIP:

*“During the trials, there are no prosecution witnesses presented, no out-of-court sworn prosecution witness statements to support the charges, and little or no physical evidence is presented. Defense counsel is not present when his client is interrogated by the prosecution, nor when the local NDS office attempts to collect evidence about a suspect as required by Afghan law. Defendants are thus unable to effectively challenge the evidence against them or cross-examine witnesses to the allegation, either in the pretrial investigatory phase or during trial as allowed by Afghan law. Lawyers, in fact, are appointed to the case only after the investigation is concluded and generally have five days to review the government’s evidence prior to trial, thereby impeding counsel from adequately preparing for trial. Such trials violate both Afghan criminal procedure law and international fair trial standards”.*⁴⁶

In May 2010 the Supreme Court of Afghanistan authorised the establishment of a special division of the Parwan Provincial Court to sit in Bagram. The court was empowered to conduct Primary and Appellate Court trials. The jurisdiction of the JCIP was agreed to include Afghan detainees captured by coalition forces in Afghanistan. The first trials began in June 2010. The number of trials initially heard at the JCIP in the first eighteen months of its existence were however small and the great bulk of approximately 3000 detainees remained in USG custody at the DFIP.

In March 2012 US and Afghan officials finally agreed on the full transfer of the DFIP to the GIROA and signed the “*Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on the Transfer of US detention Facilities in Afghan Territory to Afghanistan*”. In September 2012 a ceremony was held marking the official hand over of the facility⁴⁷ but the hand over did not occur until March 2013 when another agreement was struck between the governments.

⁴⁵ Arbitrary Justice. Trials of Bagram and Guantanamo Detainees in Afghanistan. Human Rights First. Executive Summary ii (accessible at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf>)

⁴⁶ Arbitrary Justice. Trials of Bagram and Guantanamo Detainees in Afghanistan. Human Rights First. Executive Summary ii (accessible at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf>)

This MOU noted:

“The participants intend to continue to transfer detainees, captured during military operations, to Afghanistan to be held in administrative detention consistent with Additional Protocol II, or for prosecution at the Justice Center in Parwan (JCIP) consistent with the criminal laws of Afghanistan. The participants intend to address this matter further in a separate document”.

It was the signing of this agreement that led to the referral in great numbers of detainees to the JCIP. As discussed above while a large part of the MOU was concerned with the establishment of an Afghan internment regime the GIROA subsequently still maintained that such detention was not allowed by Afghan law. The main effect of this decision was the referral in very great numbers of detainees to the JCIP, it apparently not being palatable or possible for these Afghan bodies to order administrative detention in circumstances where the official position of their government was that it was illegal.

Both the 2012 and 2013 agreements created bodies to consider detainees cases and to make decisions on release, detention or prosecution. These bodies' names have included the Technical Committee (a product of the 2012 agreement) and the Afghan Review Board (a product of the 2013 agreement). There is no legislation that creates these bodies and they seem to be the product of the agreements and government policy. It is those bodies that took over the work of the earlier US military tribunals and referred thousands of detainees to the JCIP. As discussed above the Afghan government never accepted the bodies had the power to order further detention, only release or referral for trial. In reality referral to the JCIP involved ongoing detention.

The vast majority of the detainees brought before the JCIP in the author's experience were charged with insurgency and terrorism related offences under Afghan domestic criminal law. Many related to the construction and placing of Improvised Explosive Devices (IED's) and taking part in other hostile acts against Afghan and coalition forces. The Act creating many of the commonly charged offences is the *Law on Combat Against Terrorist Offences* (2008).⁴⁸ Penalties under the act include imprisonment for up to 20 years and for some offences death.⁴⁹

⁴⁸ Art 14 – Offences related to the use of explosives and other lethal devices. Art 17 – Attempt to commit the offence of participation. Art 19 – Supporting or service to the offence (i.e. membership of a terrorist organisation). See **Annexure A** for full text of commonly charged offence provisions.

⁴⁹ Only one death sentence has been imposed at the JCIP to the author's knowledge. It was imposed on a young man who was the sole survivor among the militants who mounted an attack in September

The Supreme Court of Afghanistan ordered a body of judges to preside at the JCIP. There are Primary and Appellate jurisdictions, separated by juvenile and adult divisions. Each level normally sits as a three judge panel with a chief judge.⁵⁰

Prosecution was undertaken by prosecutors appointed from the Attorney-General's Office (AGO).

In the period 2013-2014⁵¹ there were five organisations providing defence lawyers who defended detainees:

- Ministry of Justice (MOJ)
- Legal Aid Organisation of Afghanistan (LAOA)
- Centre for Conflict and Peace Studies (CAPS)
- International Legal Foundation - Afghanistan (ILF-A)
- Da Qanoon Ghushonky (DQG)

Dari is the official language of the court is Dari and a team of linguists service the court.

The staffing and operation of the JCIP has been supported by the US military, the US Department of State (Bureau of International Narcotics and Law Enforcement) and the Australian Government. The military assistance to the JCIP has included security, provision of prosecution advisors and assistance with logistics and operations. This included forensic support, consisting of fingerprint and DNA analysis resources. The INL component included DOS officials leading the JCIP mission and contracted staff providing further prosecution support and maintenance support.⁵²

Part 8 - The Quality of the Justice at the JCIP

2012 on Camp Bastion. (http://www.nytimes.com/2012/09/17/world/asia/green-on-blue-attacks-in-afghanistan-continue.html?pagewanted=all&_moc.semityn.www&r=0).

⁵⁰ Though in the author's experience 1 or 2 judge panels were not unusual at the Primary Court level.

⁵¹ As of May 2015 only MOJ and ILF-A continue to provide representation at the JCIP.

⁵² By May 2015 most support to the JCIP from the United States Government had ceased.

In the experience of the author and others who have had the opportunity to observe trial proceedings⁵³ the JCIP has largely failed to meet international fair trial standards or indeed compliance with Afghan criminal law.

This must be considered in the context of the conflict situation facing Afghanistan and the huge challenge inherent in processing thousands of detainees into a domestic criminal justice system.

It is relevant to note that Afghan law incorporates much of international law with article 7 of the Constitution of Afghanistan 2004 stating:

The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.

Failure to Meet International Fair Trial Standards

The main body of international law mandating fair trial standards is the International Covenant on Civil and Political Rights. As noted above Afghanistan has ratified the ICCPR.

Article 14 states:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

⁵³ Human Rights First. Detained and Denied in Afghanistan How to Make U.S. Detention Comply with the Law May 2011. Pgs 23-26

3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*

5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

Perhaps the most egregious breach of fair trial standards at the JCIP is the systemic denial of the right to examine witnesses who have provided adverse information

about an accused, as guaranteed by article 14(3)(e). This is examined in detail in the Human Rights First publication cited at footnote 44.

A critique of the Pul-i-Charkhi trials referred to above is again equally apposite to the JCIP:

*“Defense counsel are not only denied the opportunity to challenge evidence in the investigation phase, but because no prosecution witnesses testify in court, defendants are completely deprived of their rights to confront evidence. This situation is aggravated by the fact that the evidence in the dossier consists of second and third-hand statements and summary allegations, with no names of witnesses who can be interviewed or brought to court and cross-examined. Moreover, defense counsel is not adequately able to prepare a defense when the evidence in the dossier consists of second and third-hand statements and summary allegations with no names of witnesses who can be brought to court and cross-examined”.*⁵⁴

Other systemic breaches of fair trial standards at the JCIP include:

- Most witness statements given by Afghan or Coalition soldiers and used in the JCIP are unsigned and/or redacted.
- The ICCPR provides that suspects and defence counsel have the right to be present at all times during the interrogation of a suspect and that suspects and defence counsel have a right to be present during searches, confrontations, line up procedures and expert examinations. Defence lawyers are not present for these types of processes in JCIP matters for a variety of reasons including the inability to access military controlled detention facilities and the time at which lawyers are assigned to detainee’s cases.⁵⁵
- The ICCPR provides that police, prosecutors and courts must inform an accused before interrogation about their rights to remain silent, retain defence counsel and to be present during searches, line ups, confrontations, expert examinations and trial. There has been no evidence of any such warnings being given in cases which AJA’s have been involved in.
- The ICCP provides that at least 5 days before a trial the court shall issue a ‘deed of notification’ setting the day and hour for the commencement of the trial and containing an indication of the alleged crime and its factual

⁵⁴ Arbitrary Justice. Trials of Bagram and Guantanamo Detainees in Afghanistan. Human Rights First. Pg 2. (accessible at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf>)

circumstances in reference to the related law provisions. There are many instances where detainees at the JCIP are brought to court on the day of their trial and meet their defence lawyer on the same day. Whilst there was a period of time where a 5 day docket existed in the Primary Court, and defence counsel had notice of the trial 5 days in advance, it was most common for a 1 day docket to be used. At no time in the appellate court was the docket issued more than one day in advance of the appeal listing.

Non-Compliance with Afghan Law

The unique origins and jurisdiction of the JCIP means much of Afghan procedural criminal law is also unable to be complied with. Examples include the right of defence counsel to be present during forensic testing and time limits applicable on various authorities to complete investigations and other matters.

Article 7 of the Afghan Interim Criminal Procedure Code 2004 states that, “*evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the court cannot base its judgment on it*”. This provision is routinely invoked by counsel in JCIP trials but never to the knowledge of the author used by the judges to exclude evidence.

More importantly perhaps, as discussed above, the JCIP has functioned almost exclusively as a document based court. Except oral testimony given by detainees there is no opportunity for evidence to be tested through cross examination. This breaches various aspects of Afghan criminal law.

Article 53 of the Interim Criminal Procedure Code outlines how an Afghan criminal trial should proceed.

Conduct of the Hearing

1. *The Primary Saranwal is duty bound to take part in the hearing.*
2. *The accused and his defense counsel have the right to be present.*
3. *The Court proceedings are conducted according to the following order:*
 - a. *At the opening of the hearing the Court reads out the act of indictment;*
 - b. *When the accused is under detention the Court shall immediately assess the legality of the arrest and order the liberation of the accused when realizes that the arrest was unlawful or not necessary;*

- c. The Primary Saranwal makes an oral presentation of the case and of the findings of the investigations;*
 - d. The judicial police officers who have conducted the investigations make oral reports of the activities accomplished;*
 - e. The first witness to be heard is the victim;*
 - f. Then the other witnesses and the experts are heard;*
 - g. The accused can testify if he does not avail himself of the right to remain silent and the accused or his defense counsel can ask questions to the witnesses and the experts;*
 - h. In case the witness cannot be present for health reasons the Court can hear him in his domicile;*
 - i. The primary Saranwal and the defense lawyer can ask question to the accused.*
- 4. The Court can, at any time, address questions to the accused, to any witness in the hearing and order confrontations.*
- 5. The accused can refuse to answer the questions of the Court consistent with his right to remain silent*

No trials at the JCIP can follow this order of proceedings due to the complete absence of witnesses.

In the observation of the author detainees were never advised of a right to remain silent and were always questioned by the judges.

Other problems occur with a lack of disclosure of evidence held by coalition forces, the listing of trials in a way that prevents adequate preparation and the inability of defence lawyers to access clients in the detention facility in an adequate way.

Acquittal Rates

All of these failings do not however mean that the JCIP is purely a rubber stamp for the prosecution. In the author's experience up to a third of the prosecutions at the JCIP lead to an acquittal. This is often due to a complete lack of any evidence of guilty or indeed any real allegation of criminality. This most directly seems to be a

consequence of inadequate consideration of the suitability of a case for domestic prosecution at the administrative detention review stage.

Another particularly positive feature of the JCIP is that every detainee has access to legal counsel.

The JCIP in the Context of the Afghan Criminal Justice System

The quality of the justice at the JCIP seemed a worthy focus of this paper not least because much of the commentary and analysis of the question of detainees in Afghanistan has focused on the shortfalls and problems with the system of review of administrative detention open to detainees at the point in time where they are detained subject to international law as combatants, i.e. prior to referral to the JCIP and when they were in the hands of the United States or other coalition forces.

Little attention however has been focused on the human rights issues for those detainees who are ultimately referred for trial under Afghan law but in circumstances where the resources and support for their detention and trial is largely provided by the same coalition forces who previously detained them. This is not to suggest that the JCIP trials were in some sense a cynical method of placing an Afghan judicial stamp on the further detention of those who had previously been administratively detained. This analysis would fly in the face of the fact, as discussed above, that a very significant percentage of those tried at the JCIP have been acquitted and nearly half of those convicted received time-served sentences, entitling them to release. There does however seem to be an assumption in much of the commentary that administrative detention is the poor cousin of the full criminal trial. Yet the operation of the JCIP suggests that the Afghan system may be little better, from a substantive due process point of view, than administrative review and indeed may in some respects be worse, especially given that the JCIP can, and does, impose lengthy prison sentences and the death penalty. The fact that the JCIP is sometimes heralded as offering a superior standard of justice in Afghanistan⁵⁶ and is indisputably better resourced than the regular Afghan justice system, also rather begs the question of how detainees not eligible for a JCIP trial (because they were not captured and detained by coalition forces) are being dealt with in the Afghan justice system.⁵⁷

⁵⁶ <http://www.centcom.mil/en/news/articles/rule-of-law-makes-impressive-gains-at-justice-center>

⁵⁷ This is not something the author can offer much insight into as he was effectively detained in Bagram for the duration. The commentary that exists however is generally not positive.

<http://www.crisisgroup.org/en/publication-type/speeches/2011/rule-of-law-and-the-justice-system-in-afghanistan.aspx> “the Afghanistan’s justice system is in a catastrophic state of disrepair. The majority of Afghans still have little or no access to judicial institutions. Judicial institutions have withered to near non-existence and the lack of justice has destabilized the country. Many courts are inoperable and those that do function are understaffed”