IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID KHAN, Petitioner,	:	
v.	:	Civil Action No. 06-1690 (RBW)
BARACK OBAMA, *et al.*, Respondents.	:	

MAJID KHAN'S SUPPLEMENTAL MEMORANDUM
REGARDING THE GOVERNMENT'S DETENTION AUTHORITY

Petitioner Majid Khan, by and through his undersigned counsel, respectfully submits this supplemental memorandum addressing whether the Executive may detain him at Guantánamo Bay under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), given that the conflict between the United States and "those nations, organizations, or persons" named in the AUMF is a "non-international armed conflict." Mar. 18, 2009 Order.

PRELIMINARY STATEMENT

Majid Khan is not responsible for the September 11th attacks. He is not a member of Al Qaeda, an enemy of the United States, or a combatant of any kind. The government has properly abandoned its contention that he may be detained indefinitely at Guantánamo Bay as an "enemy combatant" – a term not recognized under international law, including the laws of war, or under U.S. law until after the September 11th attacks, when the prior presidential administration reverse-engineered that designation in order to justify its detention of prisoners held for purposes

of interrogation.[1] Indeed, Khan was a victim of that unprecedented regime. He was abducted in Karachi, Pakistan in March 2003, and forcibly disappeared by the United States despite his legal status and other substantial and voluntary ties to this country. He was imprisoned and tortured in secret CIA detention for more than three years until his transfer to Guantánamo Bay in September 2006. Khan's detention was, and continues to be, unlawful by any standard of U.S. or international law.

The government has properly abandoned its contention that the President has inherent power under Article II of the Constitution to detain Khan indefinitely at Guantánamo Bay – a contention that no court recognized or accepted. Instead, the government bases its new purported detention authority on the AUMF, which it contends is "informed by principles of the laws of war." Resp'ts' Mem. at 1. Yet in seeking to articulate its new standard, the government fundamentally misapprehends the scope of the laws of war, or what the laws of war require if they apply to Khan. The government is correct that the laws of war "have evolved primarily in the context of international armed conflicts," but it wrongly asserts that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized for the current armed conflict" against the Taliban and Al Qaeda. Resp'ts' Mem. at 1. Assuming *arguendo* that the United States is engaged in an "armed conflict" of any sort with the Taliban and Al Qaeda, that conflict is a "non-international armed conflict," which is governed by discrete law of war principles.

The government cites no authority – and we are aware of none – to support the proposition that the law of war principles governing "international armed conflicts" apply in any

[1] Around the time of World War II, the term "enemy combatant" appeared in case law only as a generic term to describe members of the armed forces of an enemy government. *See Ex Parte Quirin*, 317 U.S. 1 (1942). It was not a status or category of prisoner separate and apart from the categories of "combatant" and "civilian" recognized under the laws of war. *See infra* pp.14-15.

fashion to "non-international armed conflicts" such as the conflict with the Taliban and Al Qaeda. The government effectively concedes as much by arguing that its detention authority is "informed by" – but not required by – law of war principles applicable to international armed conflicts, and by retreating to analogy to such principles rather than citing affirmative legal authority. Resp'ts' Mem. at 1. Accordingly, it is not surprising that the government goes to great lengths to avoid any actual mention of "non-international armed conflict" in its brief, and instead argues cryptically that the body of law applicable to the "novel" conflict with the Taliban and Al Qaeda is "less well-codified" than the law of war rules applicable to international armed conflict. *Id.* The government's position is meritless.

ARGUMENT

There are no recognized law of war principles that affirmatively authorize Majid Khan's indefinite detention at Guantánamo Bay. If the Executive seeks to continue to detain him, his detention must be authorized by domestic law – the Constitution and laws of the United States, including treaties and other international law obligations binding on the United States. Neither the AUMF nor the Supreme Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942), provide the required authorization.

It is axiomatic that the laws of war only apply during times of war or "armed conflict."[2] Under the laws of war, there are two principal types of armed conflict – international and non-international – from which different rights and protections flow to persons impacted by the conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006). As set forth below, Khan is not

[2] Khan also refers to the "laws of war" as "international humanitarian law" or "IHL." The purpose of this body of law is to "limit the effects of armed conflict," so as to protect persons not participating in hostilities and limit the methods of warfare. Int'l Comm. of the Red Cross, *What Is International Humanitarian Law?* (July 2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf.

being detained incident to a war between nations, and any "armed conflict" that exists between the United States and the Taliban or Al Qaeda must be a "non-international armed conflict." Brief for *Amici Curiae* Experts in the Law of War at 4, *Al-Marri v. Spagone*, S. Ct. No. 08-368 (Jan. 28, 2009) [hereinafter Law of War Experts] (attached hereto as Exhibit A). But, contrary to the government's argument concerning the "novel" and "less well-codified" nature of the conflict with the Taliban and Al Qaeda, the parameters of what constitutes a "non-international armed conflict" are neither "infinitely malleable" nor do such conflicts lack discrete governing principles. *Id.* "The law-of-war rules governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention . . . Authorization, if any, must be found in domestic law." *Id.* (emphasis in original).

There is no authority under the AUMF or Supreme Court precedent for Khan's indefinite detention. Even if the government were authorized under the AUMF to use force against him – which he obviously does not concede – that power would not provide related authority to detain him in the context of the non-international armed conflict with the Taliban or Al Qaeda. Khan is a "civilian" under the laws of war, and the government does not contend otherwise. Assuming the military were authorized to use force against Khan while he was directly participating in hostilities,[3] the government's authority to target and kill him under the AUMF would not by definition mean that it had equivalent authority to detain him under the AUMF because civilians, unlike combatants, may not be held indefinitely until the end of hostilities. Rather, whether a conflict is international or non-international in nature, the military must turn over civilians

[3] The government concedes "direct participation in hostilities" is the recognized standard under which "civilians" lose their protections such that force may be used against them under the laws of war applicable to international armed conflicts. Resp'ts' Mem. at 8 n.3.

captured during the conflict to domestic authorities or release them. The power to use force and the power to detain are simply not the same under the laws of war.

Moreover, Khan would not be subject to indefinite detention even in the context of an international armed conflict because he is a Pakistani citizen who was captured in Pakistan in 2003, and because Pakistan and the United States are allies with ongoing diplomatic relations, which place him outside the detention authority of the Geneva Conventions.

Finally, the laws of war do not authorize the government to target or detain *anyone* it wants, *whenever* it wants, and *wherever* it wants because they are suspected of being terrorists. Armed conflicts, whether international or non-international in nature, are limited in scope and require some nexus between the relevant zone of conflict and the law of war powers being exercised. Law of War Experts at 17 (citing authority). The purpose of that limitation is clear – to maintain the clear distinction between combatants and civilians, and to carry out the most fundamental purpose of the laws of war – protection of civilian populations. The Court should reject the government's invitation to rewrite the laws of war and undermine these principles.

I. IF KHAN IS DETAINED PURSUANT TO AN ARMED CONFLICT, THAT CONFLICT IS A NON-INTERNATIONAL ARMED CONFLICT WHICH LOOKS TO DOMESTIC LAW FOR DETENTION AUTHORITY

As set forth above, there are two principal types of armed conflict – international and non-international – from which different rights and protections flow to persons impacted by the conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006).

A. International Armed Conflict and the Third and Fourth Geneva Conventions

An "international armed conflict" is defined as a conflict between two nation-states which are signatories to the Geneva Conventions leading to the intervention of forces, even if one party denies the existence of a state of war. Geneva Convention (III) Relative to the

Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316 ("Third Geneva Convention"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516 ("Fourth Geneva Convention"); Int'l Comm. of the Red Cross, *Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* at 32 (Prictet ed. 1994) [hereinafter ICRC Commentary]; Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 237 (2009) [hereinafter Rona] (attached hereto as Exhibit B). An "international armed conflict" is triggered when one state uses force against another, and it is in such conflicts that the Third and Fourth Geneva Conventions apply, including the limited power to detain combatants as an incident to international armed conflict recognized by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). ICRC Commentary at 32; Rona at 236-37; Law of War Experts at 8-10.

In particular, the extensive regulations of the Third and Fourth Geneva Conventions govern the authority of a state to detain prisoners in an international armed conflict. The Third Geneva Convention applies to "combatants," including members of a state's military that are engaged in hostilities against the United States. Individuals in this category are presumed to be combatants whether or not they have individually taken up arms. *See Hamdi*, 542 U.S. at 519 (enemy combatants include individuals who "associate themselves with the military arm of the enemy government") (citing *Quirin*, 317 U.S. at 37-38); Third Geneva Convention, art. 4(A)(1)-(2) ("prisoners of war" include, among others, "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces").

All aspects of the detention of "combatants" are highly regulated by numerous articles of the Third Geneva Convention. Law of War Experts at 8-10. Detention is also governed by an

additional treaty known as the Additional Protocol I, which the United States has signed, but not ratified, and has recognized as having the status of binding customary international law. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 3, 23 ("Additional Protocol I") (defining "combatants" as "[m]embers of the armed forces of a Party to a conflict" other than medical and religious personnel); *see* Law of War Experts at 9; Rona at 236-37 n.16.

Among other things, these authorities require that combatants in an international armed conflict must be treated humanely, and are entitled to combat immunity (*i.e.*, immunity from prosecution for engagement in belligerency) as long as they do not commit war crimes such as attacking civilians. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 227 n.11 (4th Cir.) (Motz, J., concurring) (discussing combatants and combat immunity), *cert. granted*, 129 S. Ct. 680 (2008), *judgment vacated and remanded with instructions to dismiss as moot*, 2009 U.S. LEXIS 1777 (Mar. 6, 2009). In addition, combatants in a traditional international armed conflict ordinarily may be detained until the end of hostilities, but only for the limited purpose of preventing their return to the battlefield. *Cf. Hamdi*, 542 U.S. at 520-21 (where "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," the rationale for detention until the end of hostilities may "unravel").

It is also well-established under the laws of war governing international armed conflict that anyone who is not a "combatant," or whose status as a combatant is in doubt, is considered a "civilian." Additional Protocol I, art. 50. The treatment of "civilians" in international armed conflict is governed by the Fourth Geneva Convention. A civilian who directly participates in hostilities may lose his protections against direct attack for such time as he takes a direct part in

hostilities, and thus may be targeted with lethal force. However, unlike an enemy soldier or combatant, a civilian who directly engages in hostilities *may not* be held indefinitely in military detention until the end of hostilities. Such a person may be detained without charge or trial only briefly, and only so long as that person poses a serious, imminent security risk to the detaining power. And such person must be promptly afforded an opportunity to challenge his status as an enemy soldier or his direct participation in hostilities. Fourth Geneva Convention, arts. 5, 79; Additional Protocol I, arts. 45(3), 75.

Further, a civilian who directly participates in hostilities is not lawfully entitled to do so or to claim the privilege of combat immunity, and thus may be detained and tried for crimes such as engaging in unlawful belligerency pursuant to domestic laws. *See Al-Marri*, 534 F.3d at 227 n.11, 235 (Motz, J. concurring); *see also* Rona at 240, 241.[4]

B. Non-International Armed Conflict and Common Article 3 of the Geneva Conventions

Non-international armed conflicts, by contrast, include conflicts that are not waged between nation-states but reach a threshold of violence that exceeds mere "internal disturbances and tensions" such as riots or sporadic violence. ICRC Commentary at 32; Rona at 237-38; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1(2), 16. I.L.M. 1442 ("Additional Protocol II")[5]; *see also Al-Marri*, 534 F.3d at 227-28, 235 (Motz, J., concurring). Unlike international armed conflicts, non-international armed conflicts are not subject to the

[4] The treatment of "combatants" and "civilians" under the Third and Fourth Geneva Conventions is addressed in greater detail in the memoranda concerning the "enemy combatant" standard filed by the other petitioners before this Court, which Khan incorporates herein by reference.

[5] Additional Protocol II also largely reflects binding customary international law. Rona at 236-37 n.16; *see also* Law of War Experts at 11 n.6, 12.

extensive regulations of the Third and Fourth Geneva Conventions. Law of War Experts at 10. The only provision of the Geneva Conventions which applies to non-international armed conflicts is Common Article 3 of the Third and Fourth Geneva Conventions, which makes no mention of detention power. *Id.*; *Hamdan*, 548 U.S. at 628-32.[6] Common Article 3 neither authorizes nor prohibits detention; it merely sets forth a minimum baseline of human rights protections to individuals in non-international armed conflicts. 548 U.S. at 631.[7]

Indeed, the inapplicability of the extensive regulations of the Third and Fourth Geneva Conventions to non-international armed conflicts does not mean that civilians may not be detained during non-international armed conflicts. They may be detained, but the legal basis for detention is located in domestic law, not international law. *Id.* at 632 (quoting International Committee of the Red Cross); Rona at 240-41. Like a civilian who takes direct part in hostilities during an international armed conflict, fighters in non-international armed conflict remain civilians under IHL and are not entitled to "prisoner of war" status or combat immunity. Law of War Experts at 22. Because they remain civilians and unprivileged belligerents, they are "mere criminals under domestic law" who may be prosecuted for engaging in belligerency. Rona at 241. "It is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-

[6] "Common Article 3" refers to Article 3 which appears in each of the four Geneva Conventions.

[7] This was no mere oversight by the drafters of the Geneva Conventions. Rather, they specifically rejected a proposal to extend all provisions of the Geneva Conventions to non-international armed conflicts because it could "impinge[ ] too heavily on nation-states' sovereignty." Law of War Experts at 11. Because non-international armed conflicts are typically conducted within the territory of only one nation, it was thought that the extension of the IHL of international armed conflict to situations of non-international armed conflict would be unnecessary to authorize or regulate detention (subject to certain limitations such as the requirement of humane treatment) and would also interfere with the "sovereign prerogatives" of the nation in which the conflict was occurring. *Id.* at 20.

international armed conflict should be silent, in deference to national law, on questions of detention." *Id.*

C. Even Assuming the Conflict with the Taliban and Al Qaeda Qualifies as an Armed Conflict, it Is a Non-International Armed Conflict

The government does not contend that Khan was captured pursuant to an international armed conflict. Nor could it given the circumstances of his capture, as well as what happened to him in secret CIA detention, or his legal status in the United States and his attendant entitlement to full constitutional rights.[8] Nonetheless, even assuming the conflict with the Taliban and Al Qaeda qualifies as an armed conflict, that conflict is a non-international armed conflict.

There is little doubt that an international armed conflict existed between the United States and the Taliban government of Afghanistan – both signatories to the Geneva Conventions – after the U.S. invasion in October 2001. *Hamdan*, 548 U.S. at 628-29. However, the international armed conflict ended as a matter of law on December 21, 2001, after the fall of Kabul and the collapse of the Taliban government, when the United States "formally recognized and extended full diplomatic relations to the new government of Hamid Karzai." *United States v. Prosperi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008). "That recognition signaled the cessation of a state of war with Afghanistan." *Id.*; *cf.* News Transcript, U.S. Dep't of Defense, May 1, 2003 (Secretary Rumsfeld announcing end of "major combat activity" in Afghanistan and shift to "period of stability and stabilization and reconstruction and activities"), *available at* http://www.defenselink.mil. Accordingly, because the United States is no longer at war with the government of Afghanistan, Common Article 3 applies to the continuing detention of individuals

[8] Because the Court has indicated that it will resolve arguments unique to Khan at a later date, he does not present those arguments here. Instead, he presents arguments of possible general applicability concerning the non-international armed conflict with the Taliban and Al Qaeda. Mar. 18, 2009 Order at 6. Khan reserves his additional arguments.

captured during the conflict with resurgent Taliban forces rather than the extensive regulations of the Third and Fourth Geneva Conventions. The continuing detention of those individuals must be authorized by domestic law otherwise they are entitled to release from military custody.

In addition, as the Supreme Court has recognized, the conflict with Al Qaeda is not and has never been an international armed conflict. *Hamdan*, 548 U.S. at 628-29; *Al-Marri*, 534 F.3d at 233 (Motz, J., concurring). Accordingly, as set forth above, to the extent a detainee like Khan is purportedly held in connection with that conflict, his detention must be authorized by domestic law or he is entitled to immediate release. Khan must be held, if at all, pursuant to the Constitution and laws of the United States, including treaties and other international law obligations binding on the United States. *Al-Marri*, 534 F.3d at 234-35 (Motz, J., concurring) (applicable law in conflict with Al Qaeda is the Constitution and laws of the United States). Indeed, while it may be "the understandable instincts" of some to treat suspected terrorists as "combatants" in a "global war on terror," "[a]llegations of criminal activity in association with a terrorist organization . . . do not permit the Government to transform a civilian into an enemy combatant subject to indefinite military detention, just as allegations of murder in association with others while in military service do not permit the Government to transform a civilian into a soldier subject to trial by court martial." *Id.* at 235.

II. NEITHER THE AUMF NOR SUPREME COURT PRECEDENT PROVIDES THE REQUIRED AUTHORITY TO DETAIN KHAN

The government argues that its new purported detention authority is authorized by the AUMF as informed by the laws of war. Resp'ts' Mem. at 3-8. The government also relies heavily on the Supreme Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942), as domestic authority to detain Khan indefinitely in military custody. Resp'ts' Mem. at 3, 5-6, 7. The government's arguments are meritless.

The AUMF is limited by its plain terms to the September 11th attacks, and does not authorize military detention beyond the limited authority to detain that is incident to the use of force under the law of war principles governing *international armed conflict*. The AUMF authorizes the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a). By its plain terms, the authorization is limited to persons or entities responsible for the September 11th attacks.[9] Yet the government does not contend that Khan had any prior knowledge of, or connection whatsoever to, those attacks.

The AUMF also contains no express authorization for military detention; its focus is clearly on the use of military force. *See Hamdi*, 542 U.S. at 547 (Souter, J., concurring) (concluding AUMF does not authorize detention).[10] In *Hamdi*, the Supreme Court held that the AUMF only provides legislative authority to detain individuals falling into the "limited category" of "enemy combatant" at issue in the "narrow circumstances" of that case – a detainee

[9] The legislative history confirms such limitation. *See*, *e.g.*, 147 Cong. Rec. S9417 (Sen. Feingold) (AUMF is "appropriately limited to those entities involved in the attacks that occurred on September 11.") (daily ed. Sept. 14, 2001); *id.* at S9416 (Sen. Levin) ("[The AUMF] is limited to nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks."). Indeed, contrary to the government's argument (at p.7) that the AUMF provides broad authority for President Obama to use force and detain suspected terrorists throughout the world in order to protect the country from future acts of terrorism not connected to September 11th, it is important to note that President Bush specifically proposed – and Congress rejected – an earlier version of the AUMF that would have authorized the President to use force to "deter and pre-empt any future acts of terrorism or aggression against the United States" that are unrelated to the September 11th attacks. Richard F. Grimmett, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, CRS Report for Congress (Jan. 16, 2007).

[10] Justice Souter's concurrence is controlling because it is the narrowest opinion necessary to effect the plurality's judgment in the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*).

who fought against the United States, on the battlefield in Afghanistan, as part of the Taliban – because such detention is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518, 519 (plurality). Critically, the Court based its decision on "long-standing law of war principles" related to the detention of combatants and prisoners of war, and noted that military detention of such individuals is recognized by "universal agreement and practice" as "important incidents of war." *Id.* at 518, 521 (quoting *Ex Parte Quirin*, 317 U.S. at 30).

In reaching its conclusion, the Supreme Court merely interpreted the AUMF to authorize that which was already an incident of the laws of war applicable to international armed conflict – the power under the Geneva Conventions to detain "combatants" in the international armed conflict between the United States and the Taliban government forces of Afghanistan. Indeed, in contrast to Khan and most other Guantánamo detainees, it is important to note that Yaser Hamdi was captured during an *international armed conflict* in 2001, when his "Taliban unit surrendered" to Northern Alliance forces allied with the United States against the Taliban government of Afghanistan, and after which Hamdi surrendered his "assault rifle" to them. *Id.* at 510, 513 (internal quotation marks omitted). Again, the Court explained that the absence of legislative authorization was no barrier to detention of individuals falling within this "limited category" for the duration of the "particular conflict" in which they were captured because detention was "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress [through the AUMF] has authorized the President to use." *Id.* at 518. *Hamdi* therefore cannot be said to apply to or govern detention in non-international armed conflict because the AUMF is silent on such detention and the law of war principles for detention applied by the Court in *Hamdi* are absent from the laws of war applicable

to non-international armed conflict. *Hamdi* simply had no occasion to consider detention in the context of non-international armed conflict.

The government's extensive reliance on *Ex Parte Quirin* as providing authority for detention is equally misplaced. 317 U.S. 1 (1942). Like *Hamdi*, *Quirin* only addressed the authority to detain enemy soldiers pursuant to the laws of war applicable to *international armed conflict*. The decision had nothing at all to do with detention under the laws of war applicable to non-international armed conflict.

Quirin involved German Marines – members of the military of an enemy government – who entered the United States to commit hostile acts during the international armed conflict of World War II. Although the German Marines were ordinary enemy soldiers, they cast off their uniforms – a violation of the laws of war – thus losing their combat immunity and exposing themselves to war crimes prosecutions. It was their treacherous acts – the war crime of perfidy – which rendered their belligerency unlawful and made them "unlawful combatants." Although *Quirin* references "lawful and unlawful combatants," as well as "enemy combatant[s]," it used those terms in relation to the *conduct* of the accused, not their *status*. *Id.* at 31. The Court explained that the accused were subject to military detention and trial not because of their status as "enemy combatants" or even for attempting to enter the United States for hostile purposes, but "for *acts* which render[ed] their belligerency unlawful," *i.e.*, discarding their uniforms. *Id.* (emphasis added). *Quirin* simply did not involve a category of belligerent other than the category of "combatant" recognized in the context of international armed conflict, nor did it involve "associated" forces except in terms of forces associated with the "military arm of the enemy government," *i.e.*, service in an enemy government's military. *Id.* at 37. *Quirin* is therefore largely irrelevant to Khan's case because he is not alleged to have been a member or

associate of any nation's military, and, again, the decision provides no authority for detention of anyone outside the context of international armed conflict.

In contrast to *Hamdi* and *Quirin*, the Supreme Court's decision in *Ex Parte Milligan* squarely addresses the authority of the Executive to detain civilians under law of war principles applicable to *non-international armed conflict*. 71 U.S. (4 Wall.) 2 (1866). There, the Supreme Court considered whether the government could deal militarily with Lambdin Milligan, who had allegedly aided the enemy (the Confederacy) and plotted military action against the United States during the Civil War.[11] The Court recognized that Milligan had allegedly committed an "enormous crime" during a "period of war" when he communicated with "a secret political organization, armed to oppose the laws, and [sought] by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States." *Id.* at 130. Yet the Court concluded that constitutional due process required that Milligan be tried in a civilian court as long as those courts were open and functioning. *Id.* at 121-22.[12]

The concurring Justices of the Court likewise concluded that Milligan must be tried criminally or released, not because the Constitution required it, but because Congress had not authorized military detention of civilians even though the United States was at war and Congress had suspended the writ of habeas corpus. *Id.* at 136-37 (Chase, J., concurring); *cf. Quirin*, 317 U.S. at 28 (concluding that the laws of war applicable to international armed conflict authorized military detention, but nevertheless emphasizing that Congress had "explicitly provided" for

[11] Civil wars are a commonly recognized form of non-international armed conflict. *Hamdan*, 548 U.S. at 631; Law of War Experts at 10.

[12] "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522.

petitioners' trial by military commission under the Articles of War). The Court in *Milligan* thus affirmed the longstanding principle under U.S. law that absent a clear statement from Congress, military jurisdiction over civilians is prohibited and cannot supersede the role of civilian courts. That need for clear legislative authorization of detention is particularly important where, as here, detention without trial is indefinite. *Zadvaydas v. Davis*, 533 U.S. 678, 699-701 (2001) (refusing to interpret statute to authorize indefinite detention of non-citizens).[13]

Accordingly, absent a clear statement from Congress in the AUMF authorizing Khan's detention in a non-international armed conflict, and absent any other domestic legal authority for his indefinite detention, Khan, like Milligan, must be charged in a civilian court or released.

III. EVEN IF THE AUMF AUTHORIZED THE USE OF FORCE AGAINST KHAN, THAT POWER WOULD NOT PROVIDE RELATED AUTHORITY TO DETAIN HIM IN THE CONTEXT OF A NON-INTERNATIONAL ARMED CONFLICT

Even if the government were authorized under the AUMF to use force against Khan – which he obviously does not concede – that power would not provide related authority to detain him in the context of the non-international armed conflict with the Taliban or Al Qaeda. Again, there are only two categories of persons in armed conflict – combatants and civilians – and fighters without a privilege to engage in belligerency are civilians, whether in international or non-international armed conflict. Nor is there any dispute that Khan is a civilian under the laws of war. He may therefore only be targeted or killed if he directly participates in hostilities. Yet such participation in hostilities, if proven, would not by definition mean that the government had equivalent authority to detain him indefinitely under the AUMF.

[13] *Milligan* has since been hailed by the Supreme Court as "one of the great landmarks in [its] history." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality). By contrast, *Quirin* "was not [the Supreme] Court's finest hour." *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting).

Neither *Hamdi* nor *Quirin* supports the government's sweeping and unprecedented assertion that the right to use force necessarily includes the authority to detain individuals who may be targeted with force, even if they have not actually committed or attempted to commit a hostile act or entered a zone of active military operations. Resp'ts' Mem. at 5-6. Even if the United States wants to state publicly that it is at war with the Taliban and Al Qaeda, and even if Congress has authorized the use of lethal force against Taliban and Al Qaeda forces wherever they are located throughout the world, that does not mean that the government may detain someone who is suspected of being a Taliban or Al Qaeda fighter indefinitely under the AUMF. The power to use force and the power to detain are simply not the same or even equivalent.

As *Hamdi* held clearly and unambiguously, the AUMF authorizes the use of force but *does not authorize detention* beyond what limited power to detain already exists under the laws of war applicable in international armed conflict. *Hamdi*, 542 U.S. at 521. Thus, by invoking *Hamdi* and the AUMF as the domestic law basis for its new purported detention authority, the government begs the very question of what the law of war allows or does not allow in terms of the detention of suspected Taliban and Al Qaeda forces. Further, as discussed above, because the conflict with the Taliban and Al Qaeda is at most a non-international armed conflict requiring domestic authority for detention, the government's reliance on *Hamdi* and the AUMF is ultimately entirely circular.

IV. KHAN IS NOT SUBJECT TO INDEFINITE DETENTION EVEN IN THE CONTEXT OF AN INTERNATIONAL ARMED CONFLICT

As a civilian, Khan is not subject to indefinite detention even in the context of an international armed conflict. He falls outside the detention authority provided by the Fourth Geneva Convention for one very simple, dispositive reason – because he is a Pakistani citizen who was captured in Pakistan in 2003, and because Pakistan and the United States are allied

nations with ongoing diplomatic relations. Article 4 of the Fourth Geneva Convention expressly excludes from its detention authority individuals like Khan who are "nationals of a co-belligerent State," at least "while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Thus, because Khan is a citizen of Pakistan, which is an ally of the United States in the fight against the Taliban and Al Qaeda, and because Khan is held by the United States which maintains diplomatic relations with Pakistan, he does not fall within the terms of the Fourth Geneva Convention. Rather, he once again falls within the terms of Common Article 3 which looks to domestic law for detention authority.

The reason that individuals like Khan are excluded from Fourth Geneva Convention because of their citizenship and the relationship between their country of citizenship and the detaining power is obvious – the Geneva Conventions are simply not needed to regulate detention until the end of hostilities because the two nations which are not in conflict with each other have the power to correct the illegal detention of a citizen of one of those nations through their ongoing diplomatic relationship.

V. THE GOVERNMENT'S ATTEMPT TO EXTEND LAW OF WAR PRINCIPLES GOVERNING INTERNATIONAL ARMED CONFLICT TO NON-INTERNATIONAL ARMED CONFLICT UNDERMINES THE INTENT AND PURPOSE OF THE LAWS OF WAR

"Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners . . . The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture." William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). The fundamental purpose of the laws of war has since remained the same:

> [S]ince war itself cannot be prevented, even though it may be legally prohibited, its horrors might at least be ameliorated through rules that limit the means and methods used, that require distinction between combatants and non-combatants

> (civilians), and that mandate the humane treatment and fair trials of detainees who are accused of crimes. Equally important has been the consensus that the laws of war apply only in and to armed conflicts.

Rona at 248. Yet the government's new purported detention authority contravenes these well-settled principles.

Although *Hamdi* held that the detention authority implicit in the AUMF's authorization of force extends no further than situations in which the laws of war themselves would authorize military force and detention, the government continues to assert a detention power far broader than that recognized by traditional laws of law. The government continues to claim that the President is free to detain not only actual combatants such as Yaser Hamdi, captured with weapons on the battlefield, but anyone, anywhere, who in the President's sole determination was "part of," "substantially supported" or "associated" with forces hostile to the United States or its allies. The government does not define, nor does it suggest any limitations on, these vague and overbroad terms. Its purported detention standard simply replaces law of war principles with nothing more than the unilateral discretion of the Executive to guide military detention.[14]

In claiming such authority with respect to the struggle against terrorism, the government appears to contend that "the existence of a non-international armed conflict *somewhere* in the world necessarily triggers application of the laws of war *everywhere* – or at least everywhere a suspected al Qaeda terrorist might be found." Law of War Experts at 16 (emphasis in original). "That is, to say the least, a novel proposition as far as the law of war is concerned." *Id.* For it ignores the time-honored principle that armed conflicts, whether international or non-

[14] *See also Hamdan*, 548 U.S. at 593-95 (expressly refusing to read language of AUMF to "expand[ ] the President's authority to convene military commissions," and finding President's authority limited by traditional law-of-war principles "[a]bsent a more specific congressional authorization.").

international in nature, are limited in scope and require some nexus between the relevant zone of conflict and the law of war powers being exercised. *Id.* at 17 (citing authority).

Abandoning the clear lines of distinction between different types of armed conflict – international and non-international – further obscures the fundamental distinction between combatants and civilians, and the respective treatment of these individuals. That conflation places both combatants and civilians at unwarranted risk of harm, for it deprives them of the certainties of the privileges and protections that flow from their respective statuses. It also undermines the purpose of the Geneva Conventions, whose drafters assumed a need to create a set of comprehensive rules to govern detention in the context of international armed conflict, but also assumed that detention authority in non-international armed conflict would be supplied by domestic law because fighters in non-international armed conflict possess no privilege of combatancy and their hostile conduct is often per se criminal.

In the end, the government urges this Court to abandon these distinctions between combatants and civilians, and between international and non-international armed conflict, and to analogize and import one body of IHL into another body of IHL in clear contradistinction to the terms of each. The government does so on the assumption that the laws of war are somehow incomplete or inadequate (or "less well-codified") to accommodate the detention of prisoners captured during the ongoing non-international armed conflict with the Taliban and Al Qaeda. Yet that assumption is false. The law of war applicable to non-international armed conflict looks to domestic law for detention authority. Here, that domestic authority is the Constitution and laws of the United States, which provide all the authority that is needed to detain prisoners like Khan.[15] All that is lacking is the political will to employ domestic law.

[15] If Khan were imprisoned in Pakistan rather than at Guantánamo Bay, for example, then Pakistani law would have to authorize and regulate his detention.

As the Supreme Court held in *Ex Parte Milligan*:

> The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, and under all circumstances. . . [T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

71 U.S. at 120-21. This Court need not doubt the adequacy of the Constitution and laws of the United States to govern the detention of prisoners like Majid Khan. But it should resist the government's invitation to undermine the fundamental tenets of the laws of war to facilitate what every court has so far rejected – the unilateral right of the Executive to do whatever it wants, to whomever it wants, for as long as it wants, outside the authority and limitations established by the Constitution and laws of the United States.

CONCLUSION

For the foregoing reasons, because the government bases its new purported detention authority on law of war principles which by their terms do not apply to Khan, the Court should reject the government's detention standard. The Court should further require the government to show cause within 14 days why Khan should not be released or transferred to the custody of the Government of Pakistan, which affirmatively seeks his repatriation from Guantánamo Bay.

Dated: New York, New York
March 20, 2009

Respectfully submitted,

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EXHIBIT A

No. 08-368

IN THE
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EXPERTS IN THE LAW OF WAR

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are scholars and other experts in the field of international humanitarian law, also commonly referred to as the "law of war" or the "law of armed conflict." Their interest in this case stems from deeply held concerns about the Court of Appeals' interpretation and application of the law of war. *Amici* view it as imperative that this Court have before it a comprehensive explanation of the manner in which the law of war applies—and does not apply—to Petitioner's case.

Jutta Brunnée is a member of the Faculty of Law at the University of Toronto.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

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SUMMARY OF ARGUMENT

Whatever domestic law may have to say about the military detention of Petitioner Ali Saleh Kahlah al-Marri, there is no clearly established law-of-war principle that furnishes affirmative, independent authorization for that detention.

As a threshold matter, the law of war applies only in and to situations of *armed conflict*—either of an international character or of a non-international character. Petitioner plainly is not being detained incident to a war between nations; if any "armed conflict" exists between the United States and al Qaeda in the United States, it must be a *non*-international one. But the definition of "armed conflict" in the non-international context, though fact-bound and debatable at the margins, is not infinitely malleable. The state of affairs in Peoria, Illinois (or even the United States more broadly) at the time Petitioner was first detained as an "enemy combatant" falls well outside even the outer boundaries of that definition.

But even if Petitioner's detention *were* incident to a non-international "armed conflict," there is no law-of-war rule that would furnish affirmative authorization for that detention. The law-of-war rules governing non-international armed conflicts guarantee minimal humanitarian protections during detentions related to the conflict, but they do not in any way *authorize* the detention of someone in Petitioner's situation. Authorization, if any, must instead be found in domestic law.

Finally, even if international humanitarian law furnished affirmative authorization for detention incident to the classic non-international armed conflict (*i.e.*, the civil war), that authorization could not extend to Petitioner's detention. The "global war" against al Qaeda is a novel beast—one that can be claimed to reach every corner of the globe, that is defined

not by territory or by the existence of actual hostilities but by the presence of suspected terrorists, and that has no discernable ending point. Given the unprecedented nature of the conflict, and, hence, the unprecedented circumstances of the detention at issue, the well-established law of war cannot be understood to authorize that detention—much less recognize it as a "fundamental and accepted . . . incident to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

ARGUMENT

To support its indefinite military detention of Petitioner Ali Saleh Kahlah al-Marri, the Government has relied on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF"), which it views as having activated the President's war powers. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 594, 629-31 (2006) (assuming, without deciding, "that the AUMF activated the President's war powers" at least in connection with the armed conflict between al Qaeda and the United States in Afghanistan).

The AUMF does not explicitly mention detention. Nonetheless, a plurality of this Court held in *Hamdi v. Rumsfeld* that the statute must be understood to authorize the detention of "enemy combatants" in the international armed conflict between the United States and the Taliban government forces in Afghanistan—individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." 542 U.S. at 510, 516 (quotation marks omitted). The plurality explained that the absence of explicit legislative authorization was no barrier to detention of individuals falling within this "limited category" for the duration of the "particular conflict" in which they were captured because such detention was "so fundamental and accepted an incident to war as to be an

exercise of the 'necessary and appropriate force' Congress [through the AUMF] has authorized the President to use." *Id.* at 518; *see also id.* at 519 ("In light of [established law-of-war] principles, it is of no moment that the AUMF does not use specific language of detention. . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

In reaching this conclusion, the *Hamdi* plurality was careful to distinguish the case there at hand, in which "a clearly established principle of the law of war" could properly be treated as incorporated by reference into the AUMF, from a situation in which "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," in which case the AUMF might well not be viewed as furnishing detention authority. *Id.* at 520, 521. In other words, the AUMF authorizes only what established law-of-war principles clearly and unmistakably authorize; to view it as authorizing more would be highly problematic, especially as applied to individuals (like Yaser Hamdi and Petitioner here) who unquestionably are entitled to the protections of the U.S. Constitution.

The circumstances of the military detention at issue in this case differ in crucial respects from those surrounding the detention of Yaser Hamdi. Petitioner here is not alleged ever to have taken up arms against the United States in Afghanistan—or indeed in any theater of active hostilities. He is being detained not in connection with the international armed conflict against the Taliban government forces that took place in Afghanistan, or with any other armed conflict on any recognizable battlefield, but rather in connection with the so-called "global war" against al Qaeda. As discussed below, there is no law-of-war principle—much less a well-established one—that furnishes independent authorization

for his military detention in such circumstances. Any such authorization, if it exists, must come from domestic law.

I. PETITIONER WAS NOT DETAINED IN A THEATER OF "ARMED CONFLICT" AND IS NOT ALLEGED TO HAVE PARTICIPATED IN AN "ARMED CONFLICT."

The law of war—also known as the laws of war, the law of armed conflict, and international humanitarian law ("IHL")—is the body of law that regulates the methods and means of waging armed conflict and stipulates the protections due to those caught up in armed conflict. *See* U.S. Dep't of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶¶ 2-3 (1956) ("*The Law of Land Warfare*"). It consists of treaties—principally, the Hague Conventions[2] and the four 1949 Geneva Conventions[3]—and customary international law. *See The Law of Land Warfare* ¶ 4.[4]

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[2] *See, e.g.*, Hague Convention (IV) on Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2301.

[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. There are two Articles common to all four Conventions and discussed herein: Articles 2 and 3 (referred to below as "Common Article 2" and "Common Article 3").

[4] *The Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative statement of the law of war, and although it lacks

(cont'd)

Putting aside for the moment the *content* of this law, its *scope* is circumscribed by a critical predicate requirement for its application: the existence of an "armed conflict." This is an important limitation, and one on which IHL furnishes concrete guidance. *See* Allen S. Weiner, Hamdan, *Terror, War*, 11 Lewis & Clark L. Rev. 997, 1017 (2007) ("'War' and 'armed conflict' are concepts with defined legal meanings.").

A. The Two Types of "Armed Conflict"

There are two kinds of armed conflict recognized under IHL: international armed conflict and non-international armed conflict. As discussed below, the law-of-war rules applicable to, the tests for identifying the existence of, and the scope of these two types of armed conflict differ in important respects.

1. International Armed Conflict

The first kind of armed conflict, which has long been the subject of international regulation, is an *international* armed conflict—an "armed conflict . . . between two or more of the High Contracting Parties." Common Article 2. This resort to armed force between nations is the principal subject of the Geneva Conventions' extensive regulations, which provide, for example, particularized requirements for the detention and treatment of "prisoners of war" captured during hostilities. *See, e.g.*, Third Geneva Convention, arts. 12-16 (general protections, including humane treatment); arts. 17-20 (protections afforded immediately upon capture); arts. 21-57 (particularized protections regarding conditions of internment); arts. 58-68 (provisions regarding prisoners'

(cont'd from previous page)

binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* ¶ 1.

financial resources); arts. 69-78 (rules regarding prisoners' relations with the outside world). International armed conflicts are also subject to the terms of an instrument commonly referred to as Additional Protocol I[5]—a treaty that the United States has not ratified, but much of which the United States has long recognized as having the status of customary international law. *See* Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, *Law of War Workshop Deskbook* 32 (Brian J. Bill ed., 2000) ("*Law of War Workshop Deskbook*"); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 420 (1987) (remarks of former Deputy Legal Advisor to the U.S. Department of State).

The term "armed conflict" is not expressly defined in the Geneva Conventions or in any other law-of-war treaty. The circumstances in which an *international* armed conflict can be said to exist are, however, explained as follows in the authoritative commentary to the Conventions:

> *Any difference arising between two States and leading to the intervention of members of the armed forces* is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces . . . .

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[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 23 (1960) ("*Commentary on Third Geneva Convention*") (emphasis added) (footnote omitted). This is a straightforward, somewhat formal test that sets a relatively low threshold meant to maximize international regulation in the arena of *inter-state* conflict.

2. Non-International Armed Conflict

The other kind of "armed conflict" recognized by IHL is a conflict "not of an international character." Common Article 3. As evidenced by the phrase in Common Article 3 describing such a conflict as "occurring in the territory of one of" the parties to the Geneva Conventions, the drafters of the Conventions likely understood this class of conflict to consist largely of civil wars. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (acknowledging that "the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' *i.e.*, a civil war"). This Court has concluded, however, that the category described is much broader—that it encompasses all "armed conflicts" that cannot be classified as "conflict[s] between nations." *Id.*

Unlike international armed conflicts, non-international armed conflicts are not subject to extensive regulation under the Geneva Conventions. Only Common Article 3 applies by its terms to these armed conflicts. That Article specifies certain "minimum" standards governing the treatment and trial of "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *See Hamdan*, 548 U.S. at 629 (discussing Common Article 3).

Common Article 3 represented the first concerted—albeit very limited—effort to formulate international standards for the conduct of armed conflict other than between nation states. Until 1949, the conduct of armed conflict between a nation state and a non-state group, or between non-state groups, within the territory of a sovereign state, was generally viewed as a matter of exclusively domestic concern—at least insofar as the law of war was concerned. *See* Lindsay Moir, *The Law of Internal Armed Conflict* 19-21 (2002) ("*Internal Armed Conflict*"). A residue of this understanding is reflected in the drafting history of Common Article 3: Although it was originally proposed that *all* provisions of the Geneva Conventions be made applicable to non-international conflicts, that proposal was rejected on the basis that it impinged too heavily on nation-states' sovereignty. *See Commentary on Third Geneva Convention* 33.[6]

The trigger for the existence of "armed conflict" under Common Article 3—"armed conflict not of an international character"—is somewhat less formal and more closely tied

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[6] Additional international regulation of a limited subset of non-international armed conflicts was introduced in 1977 in the form of the instrument commonly known as Additional Protocol II. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; *see also Law of War Workshop Deskbook*, 32 (noting that Additional Protocol II, like Additional Protocol I, largely has the status of customary international law in the United States). Additional Protocol II applies only to those non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, art. 1(1).

to particular geography than that for international armed conflict. *See, e.g.*, *HH & Others v. Sec'y of State for the Home Dep't*, Somalia CG [2008] UKAIT 00022, ¶ 321 (United Kingdom: Asylum & Immigration Tribunal) (noting that an international armed conflict is "usually easier to establish" than a non-international one). After all, if mere "intervention of the armed forces" sufficed to trigger application of the law of war to a conflict not between nations, *see Commentary on Third Geneva Convention* 23, a vast array of domestic deployments would become subject to the law of war, making them at once fair game for international regulation and potential excuses for displacement of normal domestic law. That result is not contemplated by IHL, which excludes "internal disturbances and tensions" and "isolated and sporadic acts of violence" from the definition of "armed conflict." Additional Protocol II, art. 1(2). *See also* Int'l Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (1960) (listing non-exclusive criteria for identification of non-international armed conflict and observing that such "criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection"); Comm. on the Use of Force, Int'l Law Ass'n, *Initial Report on the Meaning of Armed Conflict in Int'l Law* 11-12 (2008) ("*ILA Report*"), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 (follow "Conference Report Rio 2008 (206kb)" hyperlink).

The definition of "armed conflict" in the non-international context is based upon two minimum criteria: that the groups using armed force be relatively well-organized, and that the hostilities be sufficiently intense. These two criteria are clearly reflected in the influential jurisprudence of the United Nations International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In the seminal *Tadić* case, the ICTY Appeals Chamber stated that "armed conflict exists

whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995) ¶ 70; *see also, e.g.*, *Prosecutor v. Haradinaj*, Case No. IT-4-84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008) (explaining that the test for whether there is an "armed conflict" triggering the law of war in a non-international context rests on "whether (i) the armed violence is protracted and (ii) the parties to the conflict are organized," and distinguishing "armed conflict" from "banditry, riots, isolated acts of terrorism, or similar situations").[7] The use of the word "protracted" in this definition has since been clarified, with the Appeals Chamber explaining that it is intended to exclude, for example, cases of civil unrest and single acts of terrorism, and is properly regarded as a measure of *intensity*; even a days-long campaign can qualify as sufficiently "protracted" if it involves intense exchanges of firepower. *See Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶¶ 333-41 (ICTY Appeals Chamber Dec. 17, 2004); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 17 (ICTY Appeals Chamber June 16, 2004); *see also Haradinaj*, *supra*, ¶¶ 40-49 (surveying ICTY jurisprudence

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[7] The ICTY's definition of "armed conflict" in the non-international context has gained broad acceptance. *See, e.g.*, Moir, *Internal Armed Conflict* 42-45; Natasha Balendra, *Defining Armed Conflict*, 29 Cardozo L. Rev. 2461, 2475 (2008) (describing *Tadić* as "perhaps the most frequently cited decision on what constitutes an armed conflict"); *ILA Report* 13 ("The ICTY *Tadić* decision is nowadays widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts … [and] focused on two aspects of a conflict: the intensity of the conflict and the organization of the parties to conflict.").

on existence of "armed conflict"). Among the factors relevant to gauging intensity are the "[l]ength or protracted nature of the conflict and seriousness and increase in armed clashes"; the "[s]pread of clashes over the territory" in which the armed conflict is alleged to have occurred; the number of forces deployed to the territory; and the size and force of the weapons used. *See Milošević*, ¶¶ 28-31.

B. Petitioner Is Not Alleged to Have Been Involved in, nor Was He Detained During, Any "Armed Conflict" in the United States.

Applying the above-described criteria for the existence of the two kinds of "armed conflict," it is clear as an initial matter that Petitioner has not been detained incident to an *international* armed conflict. *Cf. Hamdan*, 548 U.S. at 628-29 (noting Government's argument that the armed conflict with al Qaeda—as opposed to the Taliban government forces—in Afghanistan was not an international armed conflict because it was not between nations). Petitioner, a citizen of Qatar, is not alleged to belong to or to have fought alongside the armed forces of any enemy nation. *See Al Marri v. Pucciarelli*, 534 F.3d 213, 231 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment) ("[U]nlike Hamdi and Padilla, al-Marri is not alleged to have been part of a Taliban unit [and] not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation . . . ."); *cf.* Common Article 2 (stating that the full panoply of Geneva Conventions' provisions apply to "armed conflict . . . between two or more of the High Contracting Parties"); *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (holding that "combatants" fighting on behalf of an enemy nation in an international armed conflict could be subject to trial by military commission if they violated the laws of war). The only other form of armed conflict to which Petitioner's detention might be incident is a *non*-international armed conflict.

Application of the *Tadić* test for existence of a non-international armed conflict may be debated at the outer edges—for example, where the hostilities are not at all "protracted" in the usual sense of the term. Some have argued, for instance, that the events of September 11, 2001 qualified not just as an "armed attack" triggering the right to engage in self-defense under Article 51 of the Charter of the United Nations[8] but as a full-fledged "armed conflict." *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 33-38 (2003). *But see, e.g.*, Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 Colum. J. of Transnat'l L. 435, 452-56 (2005); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 326-28 (2003); Reservation by the United Kingdom to Article 1.4 and Article 96.3 of Additional Protocol II, *reprinted in Documents on the Laws of War* 510 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) ("[T]he term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.").

But Petitioner here is not detained in connection with the September 11 attacks (in which he is not alleged to have participated), nor is he alleged to have taken part in any armed conflict in, for example, Afghanistan. He is instead alleged to have taken part in acts in preparation for an unrealized terrorist attack at some undetermined point. To suggest that there was a non-international "armed conflict" in Peoria, Illinois, or even in the United States generally,

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[8] *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 Stan. L. Rev. 415, 430 (2006). *But see* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 144 n.30 (2004).

years after the September 11 attacks, when Petitioner was first detained as an "enemy combatant" (on June 23, 2003), stretches the concept of "armed conflict" beyond its breaking point. There were no acts of hostilities, much less intense or sustained hostilities, occurring in this country at the time.[9] *Cf. Prosecutor v. Kunarac*, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 58 (ICTY Appeals Chamber June 12, 2002) ("What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed.").

The only escape from the legal import of these undeniable facts is in a claim that the existence of a non-international armed conflict *somewhere* in the world necessarily triggers application of the laws of war *everywhere*—or at least everywhere a suspected al Qaeda terrorist might be found. That is, to say the least, a novel proposition as far as the law of war is concerned.[10] As discussed above, the existence of a

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[9] There is some uncertainty in IHL concerning the territorial application of the law of war once an armed conflict has been found to exist. The ICTY has at times suggested that the law of war would apply only within the "zone of hostilities" within a state, but at others suggested that the law of war would apply to the entire territory of the state in which an armed conflict is found. *Compare, e.g., Kordić and Čerkez, supra*, ¶ 341 (finding existence of armed conflict in "Central Bosnia"); *Milošević, supra*, ¶ 29 (finding existence of armed conflict in Kosovo region), *with Tadić, supra*, ¶ 70 (suggesting armed conflict is deemed to exist in "whole territory" of the state). This uncertainty is of no moment here, where there cannot be said to have existed an armed conflict in *any* part of the United States at the relevant time.

[10] It is also inconsistent with the approach that other countries around the world have taken in response to al Qaeda's terrorist acts—for example, in London and Madrid. *See* Mary Ellen O'Connell, *When is a War not a War? The Myth of the Global War on Terror*, 12 ILSA J. of Int'l & Comp. L. 535, 538 (2006).

non-international "armed conflict" is determined by facts on the ground in the territory in which the purported fighter (or, as is often the case in the ICTY jurisprudence, the purported war criminal) is alleged to have operated. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866) (observing that, in state where petitioner resided (Indiana), the facts on the ground were not such as to justify resort to military procedures);[11] *see also* Mary Ellen O'Connell, *Combatants and the Combat Zone,* 43 U. Rich. L. Rev. 101, 118-119 (2009), *available at* http://ssrn.com/abstract=1332096.

This Court has recognized the need for some nexus between the relevant "armed conflict" and the law-of-war powers being exercised, particularly in the detention context. In *Hamdi*, the plurality concluded that the purpose of detaining "combatants" (a term of art discussed further below) in international armed conflicts is to prevent return to the *battlefield*, *i.e.*, the zone of hostilities. *Hamdi*, 542 U.S. at 518 (plurality opinion) ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."); *see also Rasul v. Bush*, 542 U.S. 466, 488 (2004) (opinion of Kennedy, J.) (referencing detention in connection with the "zone of hostilities"); International Military Tribunal at Nuremberg, Judgment and Sentences, HMSO cmd 6964 (Oct. 1, 1946) p. 48, *reprinted in* 41 Am. J. of Int'l L. 229 (1947) (approving

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[11] As noted in *Milligan*, the existence of armed conflict at a particular time in a particular territory is what necessitates and constitutionally justifies the resort to the law of war. *See Milligan*, 71 U.S. at 127 ("If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.").

the "principle[] of general international law on the treatment of prisoners of war" that "war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war").[12] Detention as "combatants" of individuals who are not members of the armed forces of a nation state or who have never even been in a zone of hostilities cannot of course be justified on these grounds.

For all of these reasons, to the extent the Government here claims to draw its authority from well-settled IHL principles, the fact that by its own terms IHL does not apply to situations like that of Petitioner is fatal to that claim.[13]

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[12] This is not to say that the detention itself must be at or near the battlefield. In *Hamdi*, the petitioner was being detained in the United States to prevent his return to the battlefield in Afghanistan. By contrast, here, Petitioner is being detained in the United States yet is not alleged ever to have been on any identifiable battlefield.

[13] The Government's own actions, moreover, belie the existence of any supposed "war" within the United States at or around the time of Petitioner's detention. Of those individuals resident in the United States at the time of their arrest, *no one* other than Petitioner has been subject to military detention based solely on allegations of suspected terrorism plans, absent any allegation of prior engagement in active hostilities outside the United States. As discussed above, Yaser Hamdi was alleged to have taken up arms against the United States as part of a Taliban unit in Afghanistan. Another individual, José Padilla, was subjected to military detention based in part on allegations of having taken up arms against the United States alongside the Taliban in Afghanistan, and was later transferred to civilian custody before this Court could review the legality of his military detention. *See Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005), *rev'd in part*, 546 U.S. 1084 (2006), *and cert. denied*, 547 U.S. 1062 (2006) (Kennedy, J., concurring). Numerous others—including some not even captured in the United States—have been prosecuted criminally in the United States. *See, e.g.*, Neil A. Lewis, *(cont'd)*

II. EVEN IF THE LAW OF WAR APPLIES HERE, IT DOES NOT FURNISH INDEPENDENT AUTHORIZATION FOR PETITIONER'S DETENTION.

There is another reason why any resort to IHL by the Government in this case must fail: Even if the Government may properly invoke the law of war in relation to aspects of the "global war" against al Qaeda that do not fall within the parameters of what traditionally has been considered non-international "armed conflict," that law cannot be said to include affirmative authorization for Petitioner's detention.

A. The Law of War Does Not Furnish Affirmative Authorization for Detention Incident to a Non-International Armed Conflict.

As discussed above, if Petitioner is being detained incident to any "armed conflict," it must be a non-international armed conflict—a conflict governed not by the full panoply of provisions set forth in the bulk of the Geneva Conventions, but by the "Convention in miniature" that is Common Article 3. This is a critical point. As reflected in the plurality decision in *Hamdi*, IHL supplies definite authority for the detention as "combatants" of individuals fighting on behalf of an enemy nation. *See* 542 U.S. at 518;

(cont'd from previous page)

Moussaoui Given Life Term by Jury Over Link to 9/11, N.Y. Times, May 4, 2006, at A1; Pam Belluck, *Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, at A13; Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. Times, Oct. 5, 2002, at A1; *see generally* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts* (2008) (white paper for Human Rights First), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

see also Third Geneva Convention, art. 21 ("The Detaining Power may subject prisoners of war to internment."); Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants,"* 10 Y.B. of Int'l Humanitarian L. 232, 240-41 (2009) ("In international armed conflicts, the Geneva Conventions have long supplied a clearly defined and established legal framework for detention."), *available at* http://papers.ssrn.com/so13/papers.sfm?abstract_id=1326551. Such authorization makes sense in the context of inter-state conflict, which often is conducted outside the territory of the power seeking to prevent the return of fighters to the battlefield, far from the arena of domestic laws and institutions. *See, e.g., id.* at 240-41; John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict*, 40 Isr. L. Rev. 396, 402 (2007).

By contrast, because non-international armed conflicts (paradigmatically, civil wars) historically have been conducted wholly within the territory of the only party to the conflict that could—from the sovereign state's perspective, at least—be *authorized* to detain enemy fighters, there has been no need on the state's part to resort to international law to justify detention and no desire to permit its invocation by rebels or insurgents. In the absence of any felt need, and in deference to the sovereign prerogatives of nation-states, therefore, IHL has left detention authorization to domestic law in non-international armed conflicts. *See, e.g.*, John Cerone, *Misplaced Reliance on the "Law of War,"* 14 New Eng. J. Int'l & Comp. L. 57, 66 (2007) ("As the central case of non-international armed conflict is an internal conflict, [detention] authorization is unnecessary. Of course the state is free to detain insurgents operating within its territory."); Marco Sassòli, *Query: Is There a Status of "Unlawful Combatant?"*, 80 Int'l L. Stud. 57, 64 (2006) ("In [non-international armed conflicts], IHL cannot possibly be seen as providing a sufficient legal basis for detaining anyone.");

Jenny S. Martinez, *Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant*, 98 Am. J. Int'l L. 782, 787 (2004) (observing that IHL does not provide the "independent authority for detention of individuals" in non-international armed conflicts that it does in international armed conflicts).

IHL's silence on this front is closely linked to its traditional silence concerning the status of fighters in non-international armed conflict. The Government here seeks to detain Petitioner as an "enemy combatant." The term "combatant," however, is generally regarded as a term of art in the law governing *international* armed conflict—a term used to describe a member of the armed forces (or group under a command responsible to the armed forces) of a warring nation, one who is privileged to use lethal force against others but also a legitimate target of opposing lethal force. *See, e.g.*, Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 45-47 (2003); *Quirin*, 317 U.S. at 45 (distinguishing status of "combatants" in international armed conflict, and their amenability to trial for violations of the law of war, from the petitioner in *Ex Parte Milligan*, 4 Wall. 2, on the basis that Milligan was not "a part of or associated with the armed forces" of an enemy government).[14] It

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[14] *Quirin* was decided in 1942, seven years before the Geneva Conventions. Nonetheless, the Court's use of the term "combatant" in that case is generally consistent with the term's current use: A "combatant" is a soldier in the armed forces of an enemy nation with combat privileges (a "lawful combatant," or an "enemy combatant"). *See Quirin*, 317 U.S. at 31. A combatant, according to *Quirin*, may become an "unlawful combatant" if he or she engages in war crimes—"acts which render [his or her] belligerency unlawful." *Id.* In *Quirin* itself, the petitioners were alleged to have committed the war crime of perfidy by shedding their uniforms before crossing military lines, to give the impression of being civilians. *See id.*

denotes privileges and immunities as well as vulnerabilities. Because states whose armed forces are engaged in armed conflict against non-state groups typically are loath to enhance the status of rebels or insurgents or to afford them the combatant's immunity from punishment for killing, IHL has not imported the term "combatant," or the privileges it entails, into the non-international armed conflict context. *See* Dörmann, *supra*, at 47 ("The law applicable in non-international armed conflicts does not foresee a combatant's privilege (i.e. the right to participate in hostilities and impunity for lawful acts of hostility)."). Fighters in non-international armed conflict are not automatically entitled to prisoner-of-war immunities under the laws of war but would potentially be subject to criminal prosecution pursuant to domestic law. And "[i]t is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention." Rona, *supra*, at 241; *see also* Sassòli, *supra*, at 64 ("The international humanitarian law applicable to non-international armed conflicts does not provide for combatant or prisoner of war status, contains no other rules on the status of persons detained in connection with the conflict, nor details the circumstances under which civilians may be detained.").

Where a person has directly participated in hostilities, it could not be said that that the law of war would *prohibit* his detention incident to a non-international armed conflict, or even that it is entirely silent about detention in such a conflict. To the contrary, Common Article 3 affords certain humanitarian protections to those detained, as does article 5 of Additional Protocol II (insofar as it applies), which lists a number of provisions governing treatment of "[p]ersons whose liberty has been restricted." But neither treaty

furnishes independent *authorization* for the detention of any defined class of people.

Finally, it should be emphasized that this particular case does not present occasion to consider whether the authorization for detention found under the rules governing international armed conflict should, by virtue of similar military exigency, apply to detentions in aspects of the "war on terror" that involve "armed conflicts" in foreign territory, whether or not of an international character. The features of this case—the domestic detention of a U.S. resident suspected of planning to engage in domestic terrorist acts—bear much closer relation in important respects to the circumstances of a classic internal conflict than they do to a classic war between nation-states in which the detaining power is operating outside its own territory.

B. IHL Plainly Does Not Furnish Authority for the Military Detention of Petitioner.

Even if the case could be made that IHL furnished some independent authority to detain "fighters" in non-international armed conflict, that authority could not extend to Petitioner here. The circumstances of Petitioner's military detention are, as far as *amici* are aware, utterly unprecedented in the law of war.

As discussed above, it is clear there were no active hostilities in Peoria, Illinois or in the territory of the United States generally at the time of Petitioner's designation and detention as an "enemy combatant." It is likewise clear that Petitioner is not alleged to have directed any of his purported actions or plans toward any theater of war, to have directly participated in any armed hostilities, or to have participated in any aspect of the "global war on terror" that IHL would view as rising to the level of "armed conflict." He manifestly is not a battlefield detainee.

As noted above, the law governing non-international armed conflict originally was developed principally to address the problems posed by civil wars and other armed conflicts confined to the territory of a single state, not transnational conflicts. Even assuming that the "global war" against al Qaeda in its entirety qualifies as an "armed conflict," and assuming further that the existence of that conflict triggers application of *some* of the laws of war, it cannot trigger the battlefield detention authority recognized in *Hamdi*. Such authority, even when applicable, is inextricably intertwined with involvement in actual hostilities. The *Hamdi* plurality recognized as much; in finding authority for the detention in that case, the plurality stated that its holding stemmed from an "understanding . . . based on longstanding law-of-war principles"—an understanding that might "unravel" "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Hamdi*, 542 U.S. at 521.

CONCLUSION

For all of the foregoing reasons, *amici curiae* support Petitioner's request that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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Dated: January 28, 2009

EXHIBIT B

AN APPRAISAL OF US PRACTICE RELATING TO 'ENEMY COMBATANTS'[1]

Gabor Rona[2]

1. INTRODUCTION

Following the terrorist attacks of 9/11, the United States sought to establish a framework for detaining, interrogating and possibly prosecuting persons suspected of various degrees of connection to international terrorism. There were several factors militating against reliance on a tried and true law enforcement paradigm of arrest and prosecution in federal courts. Perhaps the most significant one, as described by then Attorney General Ashcroft and other senior officials in the Department of Justice, was the felt need for a fundamental shift in approach when dealing with terrorist suspects, from prosecution to prevention of future attacks.[3]

It was presumed that these two interests were at odds: on the one hand, preparing and trying criminal cases, and on the other hand, obtaining actionable intelligence about terrorist groups and their plans; in other words, that the application of criminal justice procedures would hamper the intelligence gathering effort. After all, 'you have a right to remain silent and a right to an attorney' (the so-called *Miranda* warnings) was not the message that the administration wanted to convey.[4] Requiring that each detention be supported by a criminal charge and that

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2. G. Rona is International Legal Director of Human Rights First. The views expressed herein are those of the author and do not necessarily reflect those of Human Rights First or of the following individuals whom I thank for their time and expertise in reviewing prior drafts: Diane Marie Amann, Nicholas Colten, Jean-Marie Henckaerts and Matthew Waxman.

3. US Department of Justice Strategic Plan 2001–2006 (2001), at <http://www.usdoj.gov/archive/mps/strategic2001-2006/goal1.htm>; Carl Cameron, 'FBI Reorganization Gets Under Way', *Fox News*, 29 May 2002, <http://www.foxnews.com/story/0,2933,53949,00.html>; Press Release, US Dept. of Justice, Attorney General Ashcroft Directs Law Enforcement Officials to Implement New Anti-Terrorism Act (26 October 2001), at <http://www.usdoj.gov/opa/pr/2001/October/01_ag_558.htm>.

4. The suggestion that the *Miranda* requirement forced the government to choose between interrogation for prosecution (*Miranda* warnings are given) and interrogation for intelligence gathering (no *Miranda* warnings) is a considerable overstatement. There are numerous exceptions to the requirement to give *Miranda* warnings in criminal cases, including where public safety considerations are in play, where the interrogation is not at the hands of US authorities, where the subject is not in custody, and where the subject of the interrogation is not the accused. Also, failure to administer the warnings where they are required does not impede prosecution *per se*. It merely impedes the introduction into evidence of statements made by an accused who is subjected to custodial interrogation but is not

Yearbook of International Humanitarian Law
Volume 10 - 2007 - pp. 232-
DOI 10.1017/S1389135906002327

each detainee be put on trial was seen as an unduly restrictive distraction from the task at hand. Moreover, despite the protections of the Classified Information Procedures Act,[5] there was concern about public trials in which the government is obligated to disclose potentially sensitive national security information to the defense. And what if individuals thought to be truly dangerous could not be proven guilty 'beyond a reasonable doubt' using the rules of procedure and evidence that apply in federal criminal courts? Perhaps the most compelling concern was the criminal justice system's rejection of evidence gained through the use of interrogation methods of questionable compatibility with the requirement that confessions be voluntary. However misguided it was, the decision was made, as reflected in the now notorious and repudiated Bybee/Yoo memos, that such methods were either useful or necessary to thwart the next terrorist attack, and therefore, lawful.[6] That secret detention and what the administration called 'enhanced interrogation techniques' would impede bringing terrorists to justice in anything but the 'wild west' sense of the term was not seen as enough of a negative.[7] From now on, conflicts

informed of his or her *Miranda* rights. Finally, and perhaps most importantly given the priorities expressed by then Attorney General Ashcroft, U.S. courts have ruled that the *Miranda* rule is not violated, if at all, until 'Miranda-less' statements are sought to be introduced into evidence at trial. Therefore, there is no obligation to administer *Miranda* warnings, and thus, no legal consequence for failure to do so, where the purpose of interrogation is intelligence gathering, as opposed to building a criminal case.

5. The Classified Information Procedures Act (CIPA), 18 USC App. III, § 6(a) (2000). CIPA serves three purposes: 1) to provide the government with advance notice when a defendant intends to disclose classified information during litigation of pretrial issues or at a criminal trial, 2) to permit the government to avoid unnecessary harm to the national security where the disclosure of such information is not legally required, and 3) to permit the government to gauge the harm to national security, and thereby determine how and whether to proceed, where the disclosure of such information *is* necessary to the fair resolution of the case. Jim McAdams, Senior Legal Instructor, Federal Law Enforcement Training Center, Department of Homeland Security, 'An Introduction and Practical Guide for Criminal Investigators (2007)', at <http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/the-classified-information-procedures-act.html>.

6. Judge Jay Bybee is credited with having suggested that an act isn't torture unless the pain inflicted is 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.' 'Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 USC 2340-2340A, 1 August 2002', at <http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf>. Prof. John Yoo contemporaneously opined that neither U.S. law nor U.S. obligations under the Convention against Torture impede the use of certain interrogation methods against 'captured Al Qaida operatives'. John Yoo letter to Alberto Gonzales, 1 August 2002, at <http://news.findlaw.com/wp/docs/doj/bybee80102ltr.html>. Bybee and Yoo were both members of the US Department of Justice, Office of Legal Counsel when these opinions were rendered.

7. President Bush has often used the phrase 'bring them to justice' in relation to terrorists and in the case of Osama Bin Laden, either 'dead or alive'. For example, the president's then spokesman, Ari Fleischer, in a 17 September 2001 press briefing stated as follows in response to a question about Mr. Bush's intention to get Bin Laden 'dead or alive': 'Well, and the President said that again today, he said that remark in the context of justice. He added that, as you heard, in his comments. I think that justice comes in many different shapes and forms. And the President has stressed his opinion about a couple of those different shapes and forms that it could come in', at <http://www.whitehouse.gov/news/releases/2001/09/20010917-8.html>.

between the two interests – prosecution and prevention – would be resolved in favor of the latter.

Lacking either a general, comprehensive statutory scheme of administrative detention,[8] or one that could be applied to terrorism suspects, the US faced what may have seemed at the time to be a stark choice between the strictures of criminal justice and a more attractive 'plan B' that sought justification in the application, however flawed, of an armed conflict detention paradigm.[9] Such a paradigm, according the US administration, permits the detention of persons it deems to fall within its definition of 'enemy combatant', regardless of whether or not the individual has actively participated in hostilities. This note explores the use and abuse by the US of the law of armed conflict, and related consequences in the realm of international human rights obligations, that result from designation of persons as 'enemy combatants' or 'unlawful enemy combatants' in the fight against terrorism.[10]

Section II briefly describes factors that do and do not trigger application of the law of armed conflict and the consequences of whether or not it applies. Section III describes the two subcategories of armed conflict – international and non-international – and how IHL does and does not apply to various aspects of the so-called 'war against terror', as they fall within the scope of international armed conflict, non-international armed conflict and non-armed conflict. It then describes the IHL concept of 'combatant' (privileged belligerent) and its alternative, 'civilian', the appropriate designation for persons who do not qualify for combatant status even though they may participate in hostilities. Having distinguished between the two categories of armed conflict and of individuals who fall there under, Section III then discusses the scope of application of human rights law to such individuals, even where IHL is the primary source of applicable law. With the scope of application of legal frameworks to distinct categories of individuals having been estab-

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8. The US does, however, have a number of laws that permit detention other than pursuant to sentencing for a criminal convection. Persons awaiting criminal trial may in some circumstances be detained in order to prevent their flight and protect the public. Persons who pose a danger to themselves or others by virtue of mental disease or defect are subject to involuntary civil commitment (not punishment). Persons who flout certain court orders are subject to incarceration without a right to trial, so long as they continue to be in contempt of the court order. Some states permit the continued detention of convicted sex offenders beyond the length of their criminal sentence, on the basis of danger to the public.

9. One of the few documents written for public consumption that lays out the US administration's position with respect to applicability of the law of armed conflict to detentions in the fight against al Qaida and its affiliates is 'Annex 1 to the Second Periodic Report of the United States of America to the Committee Against Torture', submitted by the United States of America to the Committee Against Torture, 6 May 2005, at <http://www.state.gov/g/drl/rls/45738.htm#annex1>.

10. A separate topic, whether the US was correct to see incompatibility between national security interests and criminal prosecution in existing federal courts, is not addressed in this note. The experience of the criminal justice system in the prosecution of terrorism cases is, however, the subject of a detailed and recently published report by Human Rights First, entitled 'In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts', at <http://www.humanrightsfirst.org/us_law/prosecute/index.asp>.

lished in Sections II and III, Section IV then describes the non-conforming concept and consequences of being designated an 'enemy combatant' by the US administration, and how that concept and those consequences have been debated and affected by domestic legislation and litigation. Finally, Section V concludes with recommendations to bring US practice back in to line with US international legal obligations

2. SCOPE OF APPLICATION OF THE LAWS OF ARMED CONFLICT

Supporters of the US administration's framework for dealing with terrorist suspects have noted: 'Never in the history of armed conflict have enemy combatants been accorded as many rights as the US grants them today.'[11] One would assume, then, that the 'enemy combatant' tag applies only to persons detained in conjunction with armed conflict (war). But the US does not limit its definition of enemy combatant, or for that matter, its claimed application of the laws of war, to persons detained in war, such as the hostilities in Afghanistan and Iraq. Rather, it claims that the laws of war, and thus, the right to detain so-called 'combatants', apply to all of the 'global war on terror' (or 'long war', or war against al Qaeda and its supporters), whether or not manifested in armed conflict. The US claims that it may avail itself of the prerogatives of the laws of war anywhere and everywhere until this 'war' is won, despite that hostilities may not rise to the level of armed conflict and that neither the enemy nor the components of victory can be defined.[12]

Some have cited events such as Congress' post-9/11 Authorization for the Use of Military Force (AUMF),[13] NATO's invocation of its mutual assistance provisions,[14] and Osama Bin Laden's various declarations of enmity toward the US as proof of an armed conflict. But neither the right to use force (determined by *jus ad*

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11. See e.g., A.C. McCarthy, 'The New Detainee Law Does Not Deny Habeas Corpus: Fear not, New York Times, al Qaeda's lawfare rights are still intact', *National Review Online*, 3 October 2006, at <http://article.nationalreview.com/?q=YWNlMjg3YWRlNmNjMTk0NDc1NzE0ZWI2YzBlOGRlNzU=>; See also J.L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, (New York NY, Norton 2007). Goldsmith asserts that law and lawyers have had unprecedented influence over the establishment of war policy since 9/11.

12. President Bush and others speaking on behalf of the US administration have clearly suggested that some aspects of the 'war on terror' will not involve armed conflict, permitting us to conclude that in their view those aspects, at least, will not be covered by IHL. On 20 September 2001, President Bush said in an Address to a Joint Session of Congress and the American People, 'The war will be fought not just by soldiers, but by police and intelligence forces, as well as in financial institutions,' at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. Then National Security Advisor Condoleezza Rice stated on a *Fox News* broadcast on 10 November 2002: 'We're in a new kind of war, and we've made it very clear that this new kind of war be fought on different battlefields', at <http://www.foxnews.com/story/0,2933,69783,00.html>.

13. Authorization for Use of Military Force, September 18, 2001, Public Law 107-40 [S. J. RES. 23].

14. 'Invocation of Article 5 confirmed', at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

bellum), nor even a declaration of war by a non-state armed group, in the absence of hostilities, establishes the existence of war and the commensurate application of the laws of war (*jus in bello*). Facts on the ground do. And IHL does not apply, and there are no combatants, let alone 'enemy combatants', outside of an armed conflict. In any case, since the law of armed conflict permits (within limits) killing and detention without all the customary protections of due process applicable in peacetime, the assertion of armed conflict must be based on objective criteria, rather than upon a mere declaration that a state of war exists.[15] Conversely, the lack of a declaration of war does not affect the applicability of IHL where one state uses armed force against another or where hostilities between armed groups or between a state and an armed group are sufficiently organized and severe or frequent to constitute armed conflict.

The distinction between the presence and absence of armed conflict is significant. In armed conflict, the necessity to curtail human rights law rules is assumed and many rules of otherwise applicable human rights law are displaced by conflicting rules of the laws of armed conflict. For example, human rights law prohibits arbitrary detention and presumes the right of habeas corpus to implement the prohibition. See e.g., International Covenant on Civil and Political Rights, Article 9.4. But in international armed conflict (see definition below), detainees subject to Geneva Convention protections have no right to habeas corpus.

A distinct but related question and source of confusion is whether the United States is (or can be) at war with a transnational, non-state armed group of amorphous composition, such as al Qaeda, even if it cannot be at war with 'terror,' 'terrorists,' or 'terrorism.' That question is addressed in the next section of this note.

3. INTERNATIONAL ARMED CONFLICT, NON-INTERNATIONAL ARMED CONFLICT AND INTERNATIONAL LAW DEFINITION AND CONSEQUENCES OF BEING AN 'ENEMY COMBATANT' V. CIVILIAN IN ARMED CONFLICT

3.1 International and non-international armed conflict

IHL is primarily comprised of the four Geneva Conventions of 1949, the two Additional Protocols of 1977 and of customary international humanitarian law.[16] It

15. See G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the War on Terror', 17 *Terrorism and Political Violence* (2005) p. 157.

16. The United States is a party to the four Geneva Conventions of 1949. See Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949, 6 *UST* 3114, 75 *UNTS* 31; Geneva Convention [II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 6 *UST* 3217, 7 *UNTS* 85; Convention [III] Relative to the Treatment of Prisoners of War, 12 August 1949, 6 *UST* 3116, 75 *UNTS* 135 [hereinafter Third Geneva Convention]; Geneva Convention [IV]

applies to all armed conflicts, be they international, non-international or a combination thereof. IHL defines *international* armed conflict as 'any difference arising between two States and leading to the intervention of armed forces … even if one of the Parties denies the existence of a state of war'.[17]

Non-international armed conflict is understood in IHL to exist when armed groups engage in hostilities against a state, or against one another within a state.[18] If hostilities spill over beyond the boundaries of a single state, the conflict remains non-international so long as there is no use of force between two or more states. Thus a trans-national – even a global – armed conflict can be non-international so long as no two states are using armed force against each other.[19] But there's a complicating factor to the determination of non-international armed conflict, a factor not present in the determination of international armed conflict. The IHL of *international* armed conflict is triggered whenever state A uses armed force against state B.[20] The frequency or severity of attacks, the number of casualties or amount of damage is irrelevant.[21] On the other hand, the IHL of *non-international* armed conflict is only triggered when some threshold of violence is reached, and the identification of parties is possible. Questions include the temporal and geographic scope of hostilities and the frequency and intensity of attacks.[22] Internal distur-

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Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 *UST* 3516, 75 *UNTS* 287 [hereinafter Fourth Geneva Convention]. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 *ILM* 1391 (1977) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 16 *ILM* 1442 (1977). The US is not a party to the two Additional Protocols, but important segments of the Additional Protocols are widely regarded as customary international law. See generally, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, Cambridge University Press 2005); see also W.H. Taft, 'IV, Symposium: Current Pressure on Int'l Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features', 28 *Yale JIL* (2003) pp. 319, 321-323 (arguing that Art. 75 of Additional Protocol I is customary international law). Mr. Taft was the Legal Advisor of the US State Department from 2001 to 2005; see also J.M. Matheson, 'The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', 2 *Amer. Univ. JIL. & Pol.* (1987) pp. 419 at 420-427 (with particular reference to the customary nature of Art. 75 of Additional Protocol I).

17. See J. Pictet, ed., *Commentary. I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, ICRC 1994) p. 32 (Hereinafter ICRC Commentary).

18. See *Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, 'Decision on Defence Motion for Interlocutory Appeal on Jurisdiction', Para. 70 (2 October 1995).

19. The US Supreme Court aligned with this view in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006). It determined that the US administration was wrong to construe Common Article 3 of the Geneva Conventions as applying only to armed conflicts occurring within the borders of one state. The Court, instead, understood the intent of IHL to provide protection in all situations of armed conflict, and so, construed Common Article 3 to apply at least to all armed conflicts that are not between two or more states parties to the Geneva Conventions.

20. ICRC Commentary, *supra* n. 14.

21. Ibid., 'It makes no difference how long the conflict lasts, or how much slaughter takes place.'

22. See *Prosecutor* v. *Tadić*, *supra* n. 18; *Abella* v. *Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. 271 (1997); Case No. IT-94-1-AR72, Decision on

bances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature do not trigger the application of the IHL of non-international armed conflict since such occurrences do not amount to armed conflict.[23] The ability to identify parties is equally important, since the rights and responsibilities of IHL are administered through the parties to an armed conflict.[24] Thus, a 'war on terror' is not *ipso facto* an armed conflict because, regardless of the frequency or intensity of hostilities, 'terror', 'terrorism' and even the universe of 'terrorists' (as a generic class) cannot be parties to an armed conflict.[25] Therefore, before concluding that there is an armed conflict between the US and al Qaeda, one must be able to identity within what is called 'al Qaeda' indicia that it is a sufficiently cohesive entity, capable of being bound by the law of armed conflict.[26]

Defence Motion for Interlocutory Appeal on Jurisdiction, Para. 70 (2 October 1995): '[T]he concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other … Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State … Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.'

23. See Art. 1(2) of Additional Protocol II (*supra* n. 16) to the 1949 Geneva Conventions: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' While the scope of application of AP II and CA 3 are not identical, this caveat is understood to apply to the scope of application of CA 3 as well as of AP II; See also Art. 8(2)(d), Rome Statute of the International Criminal Court, 2187 *UNTS* 90, entered into force 1 July 2002 ('Para. 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.'); See also *Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War*, Jean Pictet, ed., (Geneva, ICRC 1994) pp. 35-37.

24. *Abella* v. *Argentina*, *supra* n. 22, paras. 152-156. See also D. Jinks, 'September 11 and the Laws of War', 28 *Yale JIL* (2003) pp. 1, at 25-33; and G.I.A.D. Draper, 'The Geneva Conventions of 1949', 114 *Recueil des Cours* (1965) pp. 63, 90.

25. One observer suggested that wars against proper nouns (e.g., Germany and Japan) have advantages over those against common nouns (e.g., crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again. Grenville Byford, 'The Wrong War', Foreign Affairs, July/August 2002, at <http://www.foreignaffairs.org/20020701faessay8518/grenville-byford/the-wrong-war.html>.

26. 'Indeed, together with the intensity of the armed violence, it is the existence of these collective entities – organised armed groups – which is central in distinguishing genuine armed conflicts from mere internal disturbances, sporadic acts of violence and the like, which are beyond the reach of the laws of armed conflict.' J.K. Kleffner, 'From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred YearsAafter the Second Hague Peace Conference', 54 *NILR* (2007) pp. 315, at 324.

3.2 Application of IHL to aspects of the 'Global War On Terror'

There can be little doubt that the IHL of international armed conflict applied to the war in Afghanistan beginning in October of 2001 and to the war in Iraq, beginning in March of 2003.[27] As of those dates, one State Party to the Geneva Conventions, the United States, launched the use of armed force against another State Party, Afghanistan and Iraq, respectively. (Some have asserted that the Geneva Conventions did not apply to the conflict in Afghanistan because it was a failed state, but this is distinctly a minority view. The Taliban were in effective control of much of the machinery of the state and despite the existence of the Northern Alliance in opposition to the Taliban, there was no entity capable of exercising powers of sovereignty that invited the United States to use force in the country.) Detention of persons within the context of those conflicts is governed primarily by the rules of detention applicable in international armed conflict and contained in the 3rd and 4th Geneva Conventions.[28] As to other aspects of the 'global war on terror' (hereinafter GWOT), however, the law of *non*-international armed conflict cannot apply unless, as previously discussed, the intensity and frequency of attacks meets or exceeds the threshold for armed conflict and the parties to the conflict are sufficiently organized to be identified as such.

The law of armed conflict simply does not apply to detention of persons suspected of terrorist activity and held by the US outside the context of international and/or non-international armed conflict, notwithstanding classification of such persons by the US as 'enemy combatants.' Thus, for example, IHL most likely does not apply to persons suspected of terrorist-related activity and detained within the US or brought to Guantánamo from such disparate places as The Gambia and Bosnia, absent some connection to al Qaida, and assuming, of course, that the US is 'at war' with al Qaida. And even if IHL does generally apply, it is domestic law and international human rights law that are the frame of reference for rules pertaining to the power to detain and the right to challenge detention, not IHL, as discussed below.

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27. Dispute over whether or not the international armed conflict in Iraq is part of the GWOT needs not be resolved. What matters for present purposes is simply the determination that the rules of international armed conflict law did apply.

28. In the case of Afghanistan, President Bush made several determinations of questionable legality in connection with the status and treatment of detainees, including that the Geneva Conventions, including Common Article 3, do not apply to the conflict with al Qaeda and that Taliban members are categorically not entitled to POW status determinations under Article 5 of the 3rd Geneva Convention. He also intimated that detainees are not legally entitled to humane treatment. There was no mention of the applicability of the 4th Geneva Convention to persons denied POW status under the 3rd Geneva Convention, although Mr. Bush conceded the application of the Geneva Conventions to the conflict with the Taliban. See 'Memorandum for the Vice President, et al, on the Humane Treatment of Al Qaeda and Taliban Detainees', 7 February 2002; <http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf>.

3.3 Enemy combatants under IHL and the application of domestic and international human rights law

Only once the fact of armed conflict is established can and should one ask: 'Who is an enemy combatant?'. IHL provides the answer: a combatant is someone who, by virtue of membership in the armed forces or associated militia, possesses a 'combatant's privilege', or, something akin to a license to kill in war. A combatant is immune from criminal responsibility for lawful acts of belligerency but may be prosecuted for war crimes such as targeting civilians or using prohibited means of combat, including biological weapons or rape. In turn, a combatant may be targeted and detained without charge or trial for the duration of the armed conflict, but is entitled to prisoner of war status and treatment in accordance with the Third Geneva Convention.

Civilians who take direct part in hostilities in an armed conflict are not combatants. These 'unprivileged belligerents', unlike combatants, are subject to prosecution under domestic law for their belligerent acts and they do not qualify for prisoner of war status upon capture. They may be targeted, and in wars between states (international armed conflict) civilians may be detained without charge or trial so long as they pose a serious security risk to the detaining authority.[29] But they do not lose their status as civilians.[30] Because a combatant, by definition, enjoys a 'privilege of belligerency', the term 'lawful combatant', is redundant, and thus, the term 'unlawful combatant' is an oxymoron.

In non-international armed conflict, civilians may also be detained, but the legal basis for detention is found in domestic, not international law.[31] This is no omission. The IHL of international armed conflict, as contained in the 3rd and 4th Geneva Conventions, governs the power to detain and the right to challenge detention in such conflicts because the involvement of two or more sovereigns at war renders the application of domestic law impractical. On the other hand, where the IHL of non-international armed conflict applies, there is no such impracticability.

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29. See 4th Geneva Convention, Art. 79.

30. Pictet, ed., *supra* n. 23,: '[It is] a general principle which is embodied in all four Geneva Conventions of 1949 [that] [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.' (Emphasis in original). Note, however, that nationals of the detaining authority and of neutral and co-belligerent states are not 'protected persons. See GC IV, Art.4. Nevertheless, even they must have some legal status. See ICCPR, Arts. 16 and 4.2.

31. Cf., *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), in which the US Supreme Court applies IHL, namely Common Article 3 of the Geneva Conventions, to all Guantánamo detainees, without regard to distinguishing between those who are and those who are not detained in the context of armed conflict. The *Hamdan* Court also appears to accept, without analysis, the premise that the laws of armed conflict provide the basis for the right to detain in all armed conflicts, not just international ones. However, it may also be argued that the premise for the right to detain is not IHL, but in the Congressional Authorization for the Use of Military Force (AUMF) of September 18, 2001, Public Law 107-40 [S J Res. 23], at <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>.

Civilians who engage in hostilities against the state, or against each other, do not attain a combatant's privilege of belligerency. Rather, they remain civilians under IHL, and thus, mere criminals under domestic law.[32] It is logical that, since civilian, non-international armed conflict fighters gain no status in international law, and since there is no conflict between two or more sovereigns, the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention. And indeed, it is. Common Article 3 of the Geneva Conventions, unlike the other Geneva Conventions' rules applicable to POWs and civilians in international armed conflict, makes no mention of the power to detain and the right to challenge detention. The *lex specialis*, IHL, simply does not displace domestic law on questions of detention. And the possibility that a non-international armed conflict is trans-national does not alter this calculus. While it is certain that the international community did not anticipate the existence of groups such as al Qaeda when these rules were drafted, there is also little reason to doubt the continued efficacy of the rules.

Once the continued applicability of domestic law to questions of detention is established, the continued applicability of international human rights rules looms large. While some commentators have argued that human rights law is entirely displaced by IHL in situations of armed conflict, the US State Department Legal Advisor has taken a more nuanced position that human rights law, at least as manifested in the International Covenant on Civil and Political Rights (ICCPR), does not apply where it is 'impractical' in situations of armed conflict.[33] The US has also asserted a not-so-nuanced claim that its conduct is not constrained by conventional human rights rules when it acts extraterritorially – that the ICCPR has no application to aliens abroad, even though they are under the control and jurisdic-

32. There exists some dispute about whether all who directly participate in hostilities absent a combatant's privilege should remain classified as civilians. Some suggest that in non-international armed conflict, certain persons designated as 'fighters', would be considered to be directly participating in hostilities at all times, and as such, would be targetable at all times during the armed conflict. See Kleffner, *supra* n. 26. Absent consensus on what criteria would serve to permit this designation (membership? specific acts? level of authority within an armed group?) it cannot be said that the concept of 'fighter' as a distinct status has ripened into a provision of customary international humanitarian law. In addition, it is unclear what purpose would be served by removing such individuals from the realm of civilian status, since the ability to target them would already follow from any broadening of the concept of direct participation in hostilities.

33. J.B. Bellinger, 'Prisoners in War: Contemporary Challenges to the Geneva Conventions' University of Oxford, 10 December 2007. 'But even where States do have human rights obligations, it is fair to ask proponents of this approach what particular human rights provisions they would apply to activities arising in the conduct of armed conflict, and how they would apply them in practice. For example, Article 9 of the ICCPR requires States to provide anyone detained the right to bring their case before a judge without delay to determine the legality of the detention. Would it be practical to expect States detaining tens of thousands of unprivileged combatants in a non-international armed conflict to bring them before a judge without delay?' at <http://useu.usmission.gov/Dossiers/Detainee_Issues/Dec1007_Bellinger_PrisonersOfWar.asp>.

tion of, and the conduct in question is that of, US officials.[34] These extreme, minority positions have been widely criticized as misapplications of the concept of *lex specialis* in relation to IHL and of the territorial scope of application of the ICCPR.

As concerns application of *lex specialis* doctrine, the better, majority view is that human rights law applies at all times, but that certain of its rules must be interpreted in light of conflicting IHL rules.[35] This is especially the case in international armed conflict. For example, the ICCPR prohibits arbitrary detention (Art. 9.1) and obliges states to provide judicial review of the decision to detain. (Art. 9.4). However, this provision is derogable (Art. 4.2) and indeed, the Geneva Conventions do contemplate detention of POWs and civilians in international armed conflict, and without recourse to judicial review. On the other hand, non-derogable provisions of the ICCPR that are not in conflict with applicable IHL, such as the prohibition against arbitrary deprivation of life (Art. 6.1) and against torture and cruel, inhuman or degrading treatment (Art. 7) continue to apply. And even derogable provisions that are not pre-empted by IHL rules continue to apply in armed conflict, unless conditions and procedures for derogation outlined in ICCPR Art. 4 are met and observed. Therefore, absent compliance with ICCPR Art. 4, the right to challenge detention before a court remains intact in situations of non-international armed conflict. As concerns extraterritorial application of the ICCPR, the United States asserts that Article 2(1) of the ICCPR, which obliges each state to respect and to ensure to all individuals 'within its territory and subject to its jurisdiction' the rights recognized in the Covenant, was intended, according to the *travaux preparatoires* of the Covenant, to have no application to the conduct of a state beyond its territory. In its submission to the Human Rights Committee, the United States cites the ICCPR *travaux* in support of its position that the treaty was intended to have no extraterritorial application. The *travaux* indicate that in describing the scope of application of the ICCPR, the United States was motivated to add the words 'within its territory' to the words 'subject to its jurisdiction' for a limited purpose: to prevent a state from shouldering responsibility for violations committed against persons over whom the state has nominal jurisdiction, such as its own citizens or persons in territory under its occupation, but where the violations are actually committed by another state.[36] There was no indication of intent to shield a state from responsibility for the conduct of its own agents. This interpretation of the treaty language is the only one that is consistent with the 'object and purpose' of the treaty.

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34. See 'Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights', 21 October 2005, Annex I, at <http://www1.umn.edu/humanrts/us-report-HRC.html>.

35. See e.g., 'ICJ, Legality of the Threat of Use of Nuclear Weapons', Advisory Opinion, 1996 ICJ 226, § 25 (8 July).

36. See C. Tomuschat, *Human Rights between Idealism and Realism* (Oxford, Oxford University Press (2003) pp. 109-110; see also O.Ben-Naftali and S. Yuval, 'Living in Denial: The Application of Human Rights in the Occupied Territories', 37 *Israel LR* (2003-2004) p. 34.

The US view has been rejected by the vast majority of authorities and authors.[37] The ICJ notes, in particular, the ambiguity of the subject language, namely the possibility of reading the word 'and' as either conjunctive or disjunctive.[38] Ambiguity raises the need for interpretation, which, in accordance with customary provisions of the Vienna Convention on the Law of Treaties, is to be done in light of a treaty's 'object and purpose.'[39] The Preamble to the ICCPR speaks of the inherent dignity and equal and inalienable rights of '*all* members of the human family' and conditions under which '*everyone* may enjoy' their rights. It can hardly be claimed that it is within the object and purpose of the ICCPR for a State Party to be permitted to discriminate in its responsibility for its own conduct, between consequences to persons at home versus those abroad. This interpretation of the treaty language is the only one that is consistent with the 'object and purpose' of the treaty.

In any case, the US Supreme Court, in *Rasul* v. *Bush*, 542 US. 466, 480 (2004), described Guantánamo as 'a territory over which the United States exercises plenary and exclusive jurisdiction.' The majority opinion went onto state: 'Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States.'[40]

4. THE US DEFINITION OF 'ENEMY COMBATANT'

The term 'enemy combatant' appears nowhere in IHL or in US criminal law prior to 9/11. Administration supporters cite the World War II-era *Quirin* case[41] to buttress the claim that an unprivileged belligerent is a form of enemy combatant – an unlawful combatant – but they are mistaken. That case involved combatants/privileged belligerents (members of the German armed forces) who entered the United States in civilian garb to commit acts of war. This is the war crime of perfidy. Their conduct rendered their belligerency unlawful, but they were not unprivileged belli-

37. See e.g., International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List, No.131 §§ 108-111; Human Rights Committee General Comment 31 on Article 2 of the ICCPR, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13; *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No.R 12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) § 12.1; see also *Guillermo Waksman* v. *Uruguay*, 28 March 1980, Comm. 31/1978, UN Doc. CCPR/C/OP/1 (1984) 9; *Samuel Lichtensztein* v. *Uruguay*, 31 March 1983, Comm. 77/1980, UN Doc. Supp 40 (A/38/40) (1983).

38. International Court of Justice, *Legal Consequences of the Construction of a Wall, supra* § 108.

39. Vienna Convention on the Law of Treaties Art. 31, 1155 *UNTS* 331, 8 *ILM* 679 (entered into force 27 January 1980).

40. See also Human Rights First, *Memorandum to Members of the UN Human Rights Committee, Re: Human rights consequences of US counter-terrorism measures since September 11, 2010*, 7 June 2006; at <http://www.humanrightsfirst.info/pdf/06705-hrf-hrc-final2.pdf>.

41. *Ex parte Quirin*, 317 US 1 (1942).

gerents. The case simply does not address, let alone decide, that an unprivileged belligerent is an unlawful combatant.

The 'enemy combatant' designation was the subject of a recent decision by the Israeli Supreme Court, Public Committee against Torture in Israel v. Israel,[42] in which the Court rejected the government's position that international law must recognize the status of 'unlawful combatant' as a separate category. The Court, in an opinion authored by President Barak, held:

> '[i]t is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a category has been recognized in customary international law.'[43]

President Barak also made clear that in the absence of a legal category of 'unlawful combatant', there remain only two categories of individual in armed conflict: combatant and civilian – the categories recognized by the 3rd and 4th Geneva Conventions, respectively. He states that 'an unlawful combatant is not a combatant, rather a civilian'.[44] Likewise, Antonio Cassese explains in his Expert Opinion for the Court that

> ' "unlawful combatant" is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively *descriptive* character. It may not be used as proving or corroborating the existence of a third category of persons …'[45] (Emphasis in original).

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42. *The Public Committee Against Torture in Israel* v. *The Government of Israel* (2006) HCJ 769/02 ('*PCATI*'), 13 December 2006, at <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf>.

43. Ibid., at para. 28. More recently, the Israeli Supreme Court, sitting as the Court of Criminal Appeals, upheld the validity of Israel's 'Internment of Unlawful Combatants Law,' which permits the indefinite detention of a person who does not qualify for POW status and 'who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel.' *A and B* v. *State of Israel*, 11 June 2008, at <http://elyon1.court.gov.il/files/06/590/066/n04/06066590.n04.htm> (in Hebrew). There is no conflict between this decision and the *Public Committee Against Torture* decision, as concerns IHL. The *Public Committee* decision rejects the concept of 'enemy combatant' as a status in IHL. The *A and B* decision accepts the concept under domestic law. While there is no such status as 'enemy combatant' under IHL, neither IHL nor international human rights law categorically prohibit detention absent criminal charge pursuant to domestic law. What is prohibited is absence of elements of due process designed to guard against detention that is arbitrary. In this respect, the Israeli and U.S. constructs diverge. The Israeli definition of who may be detained as an 'enemy combatant' is significantly narrower than the US definition and the Israeli law permits a broader scope of judicial review, and periodic review, than is contemplated by the US administration under the Detainee Treatment Act (DTA). See text *infra* at n. 49.

44. Ibid., at para. 26.

45. *PCATI* (2006) HCJ 769/02 (Expert Opinion of Antonio Cassese, 'On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law'), at <http://www.stoptorture.org.il>.

By contrast, President Bush's Military Order of 13 November 2001 authorized detention of any non-citizen who the President determines:

> ' (1) ... .(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in (other parts of) this order;'[46]

This precursor to the US definition of 'enemy combatant' is tethered not to any concept of armed conflict, nor to the meaning of 'combatant' under the laws of war, nor to any semblance of due process required by the laws of war and applicable international human rights law. Subsequent efforts to pin down the administration on a reasonable and workable definition of 'enemy combatant' have resembled a game of whack-a-mole and three-card-Monty combined. Thus, Justice O'Connor noted in the *Hamdi* case that 'the Government has never provided any court with the full criteria that it uses in classifying individuals as such'.[47] Coincident to the Supreme Court's consideration of detention challenges in *Hamdi* and the *Rasul*[48] cases in 2004, the administration arranged for Combatant Status Review Tribunals (CSRTs) at Guantánamo to determine whether a detainee is an 'enemy combatant,' which the CSRT rules defined as:

> 'an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'[49]

This formulation is more narrow and precise than that of the President's 2001 Military Order 'definition', but how has it been applied?

'Could a "little old lady in Switzerland" who sent a check to an orphanage in Afghanistan be taken into custody if unbeknownst to her some of her donation was passed to al-Qaida terrorists?' asked US District Judge Joyce Hens Green in the *In*

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46. At <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.
47. *Hamdi* v. *Rumsfeld*, 542 US 507 (2004).
48. *Rasul* v. *Bush*, 542 US 466 (2004).
49. At <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf>. The Military Commissions Act also contains a definition of unlawful enemy combatant: '(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or '(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.' The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (17 October 2006) § 948a.

Re: Guantánamo cases in 2005.[50] 'She could', replied Deputy Associate Attorney General Brian Boyle. 'Someone's intention is clearly not a factor that would disable detention.'[51] Judge Green objected to such an expansive definition of enemy combatant, which includes 'individuals who never committed a belligerent act or who never directly supported hostilities against the US or its allies'.[52] If innocence is not a factor, then clearly it is the intention of the government to use the 'enemy combatant' label to justify detention of persons for interrogation. That this is an improper basis for detention has been addressed in the US Supreme Court opinions in *Hamdi*.[53]

Judge Green highlighted another problem with the CSRTs. Detainees are given no meaningful opportunity to contest their designation, which is potentially based on coerced evidence and often based on secret evidence unavailable to the detainee, such as that the detainee 'associated with' an alleged, but unnamed, member of al Qaeda.[54] On at least one occasion, the evidence of whom the detainee was alleged to have associated with was even unknown to the CSRT.[55] Administration supporters respond that under the Detainee Treatment Act (hereinafter DTA),[56] judicial review of the 'enemy combatant' designation is available. They neglect to mention that the DTA limits review of CSRT decisions to whether or not they conform to the rules for CSRTs and to US laws and the Constitution.[57] No mention is made of US treaty obligations such as the Geneva Conventions or the prohibitions against arbitrary detention contained in the ICCPR.

In the *Bismullah* case, an appeal under the DTA of the CSRT determination that the petitioners were enemy combatants, the government even objected to the reviewing court's access to information available to the CSRT in making its determination. The court ruled against the government, ordering that the Pentagon and other government agencies would have to produce a wide range of relevant information about the detainee, not merely the material the CSRT used in making its determination.[58] Next, in the *Boumediene* case, the government argued to the Supreme Court that the CSRTs do comply with all applicable law and rules. The

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50. MSNBC, Government argues for holding detainees: Says rule should apply even if they didn't fight against US, 1 December 2004, at <http://www.msnbc.msn.com/id/6631668/>.

51. Ibid.

52. *In re: Guantánamo* cases, 355 F. Supp. 2d 443, 475_ (DDC 2005), vacated on other grounds by *Boumediene* v. *Bush*, 476 F.3d 981 (DC Cir. 2007), cert. granted, _ US _ (2007).

53. *Hamdi* v. *Rumsfeld*, *supra* n. 38.

54. *In re: Guantánamo* Cases, *supra* n. 43, at p. 472.

55. Ibid., at pp. 468-469. 'In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr (footnote omitted), a petitioner in *Boumediene* v. *Bush*, 04–CV–1166 (RJL), the Recorder of the CSRT asserted, 'While living in Bosnia, the Detainee associated with a known Al Qaida operative.' In response, the following exchange occurred: Detainee: Give me his name. Tribunal President: I do not know.'

56. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006 (2005) at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&>.

57. Ibid.

58. *Bismullah* v. *Gates*, 501 F. 3d 178 (DC Cir. 2007).

Supreme Court disagreed, and more importantly, ruled that Guantánamo detainees have a constitutional right to *habeas corpus* review of their detention and that the alternative provisions for appeal of CSRT decisions established by the DTA are not an adequate substitute for *habeas corpus*.[59] In the *Parhat* case, another judicial review of a CSRT determination pursuant to the DTA (like *Bismullah*, but decided after *Boumediene*), the court found that the evidence presented to the CSRT was insufficient to support the conclusion that the detainee was an enemy combatant 'even under the Defense Department's own definition of that term'.[60]

Another flaw of the 'enemy combatant' designation and CSRT process is their failure to grant to persons who are, indeed, combatants (privileged belligerents) as that term is understood in the laws of war, the POW status to which they are entitled. This failure results in US violation of its obligations to accord POW status to those who meet the criteria for it under Article 4 of the 3rd Geneva Convention and long-standing US Army regulations implementing Article 4.[61] Likewise, the CSRTs provide no opportunity to establish civilian status under the 4th Geneva Convention.

Bismullah, Boumediene and *Parhat* all concern Guantánamo detainees. The status and rights of persons detained under US military authority elsewhere, such as in Iraq and Afghanistan, was not addressed and remains unsettled. Questions concerning persons detained in the US as enemy combatants also remain, but may soon be addressed by the Supreme Court. In *al Marri* v. *Pucciarelli*, the US Court of Appeals for the Fourth Circuit determined that the president may order the detention of a lawful US resident who meets the government's definition of an 'enemy combatant', but that al Marri was not afforded sufficient process to challenge his designation.[62] Al Marri will, no doubt, and the government may, seek Supreme Court review of the decision. If the Court accepts the case, it will have to decide whether a lawful resident who was detained from within the US – not on a battlefield – can be detained as an enemy combatant,[63] and it may have occasion to

59. *Boumediene* v. *Bush*, No. 06-1195, slip op. (US 12 June 2008).

60. *Parhat* v. *Gates*, No. 06-1397, slip op. (DC Cir. 20 June 2008).

61. Some observers, speaking in support of the CSRTs claim that they provide even more process to detainees than do the so-called Article 5 tribunals called for in the 3rd Geneva Convention to determine detainee status. The Article 5 requirement is implemented into US procedure through Army Regulation 190-8, *Enemy Prisoners of War, retained Personnel, Civilian Internees and Other Detainees, headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps* (Washington, DC, 1 October 1997), Sec. 1-6, at <http://www.usapa.army.mil/pdffiles/r190_8.pdf>. Senator Lindsay Graham has referred to CSRTs as 'Article 5 tribunals on steroids'. *Yale Law Journal* 'Pocket Part', at <http://yalelawjournal.org/2007/07/04/blocher.htm>. The assertion is false. First, there no basis to assert that detainees receive procedural advantages in CSRTs that are not available in AR 190-8 proceedings. Second, and more importantly, CSRTs are restricted to determining whether or not a detainee is an 'enemy combatant' and have no authority to determine what Article 5 tribunals and AR 190-8 proceedings are designed to determine: whether or not the detainee is entitled to prisoner of war status.

62. *al Marri* v. *Pucciarelli*, No. 06-7427, slip op. (4th Cir. 15 July 2008).

63. In the *Hamdi* case, the Court ruled that even an American citizen can be detained as an enemy combatant, but that the government did not provide him with a sufficient opportunity to challenge his

decide the ultimate question it has been able to avoid in all previous cases: what is the geographic and conceptual scope of this 'war' and thus, of the term 'enemy combatant?'

5. WHY WISE MEN FEAR TO TREAD ON TIME-HONORED LEGAL DISTINCTIONS

Shoehorning non-fighters, let alone innocents and criminals who have no connection to armed conflict, into the definition of 'enemy combatant' wreaks havoc with important, time-honored distinctions in international law. For 150 years, parties to armed conflict have been bound by an international code of conduct in warfare: the Geneva Conventions. The Conventions have been periodically amended and augmented to reflect the changing nature of warfare. It may surprise some in the administration, but not many professionals in the Pentagon and military academies, that this is not the first time ill-advised departures from humanitarian law sought justification in the claim that the old rules were 'quaint' and could not be applied to the new face of war. But the growing numbers of humanitarian law rules have always remained true to the fundamental principles of that body of law: since war itself cannot be prevented, even though it may be legally prohibited, its horrors might at least be ameliorated through rules that limit the means and methods used, that require distinction between combatants and non-combatants (civilians), and that mandate humane treatment and fair trials of detainees who are accused of crimes. Equally important has been the consensus that the laws of war apply only in and to armed conflicts.

The US uses the 'unlawful enemy combatant' label both in and outside of armed conflict to obscure and deny the rights of detainees to challenge detention,[64] and to receive humane treatment and fair trials under the Geneva Conventions, where applicable, and under international human rights law. The US-manufactured definition of 'unlawful enemy combatant' obscures important distinctions between war and its absence, between *jus ad bellum* and *jus in bello* considerations, between international and non-international armed conflict and between combatants and civilians. It also seeks to deprive those to whom the label is attached of their rights

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detention. *Hamdi* v. *Rumsfeld*, 542 US 507 (2004). But *Hamdi* is also distinguishable from *al Marri* in that *Hamdi* was allegedly captured on a battlefield in Afghanistan. It was in reaction to the *Hamdi* and *Rasul* decisions (*Rasul* v. *Bush*, 542 US 466 (2004), was decided on the same day as *Hamdi*) that the Pentagon initiated the CSRT process. See *supra* text at nn. 40-42.

64. As previously noted, not all detainees have the same rights to challenge detention. In international armed conflict, detaining authorities are obliged to convene a 'competent tribunal' to distinguish between combatants and civilians, in the event of any doubt. See 3rd Geneva Convention, Art. 5. Detention of civilians must be reviewed bi-annually and all detainees must be released at the end of hostilities, unless pending charges or serving a sentence. In non-international armed conflict, as in non-armed conflict, the power to detain and the right to challenge detention are subjects of domestic law as tempered by international human rights law, which obligates detaining authorities to permit the detainee to challenge his or her detention in a court. See discussion at Section III. C, *supra*.

under any framework of applicable international and domestic law. In the first of a one-two punch, administrative determinations, such as the President's Military Order of November 13, 2001[65] and legislation such as the DTA and the Military Commissions Act (MCA),[66] bring within the laws of war persons whose conduct has no nexus to armed conflict, while denying them their rights under the law of armed conflict. The second punch is the equally ill-advised US position that human rights law does not apply in armed conflict, and in any case, does not apply to US conduct abroad, including Guantánamo. The end result, absent correction by Congress or the courts, is to allow the US a barely-limited definition of who it may detain without charge or trial in a virtually rights-free zone.

Fortunately, the courts have taken halting steps to fill the vacuum, for example, by asserting the application of Common Article 3 of the Geneva Conventions to Guantánamo detainees[67] and by opining that the US Constitution may have some currency in Guantánamo.[68]

The Army's new Counterinsurgency Manual, drafted under the authority of General David H. Petraeus, is accompanied by a Rule of Law Handbook, which states:

> 'In light of the need to establish legitimacy of the rule of law among the host nation's populace, conduct by US forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations.'[69]

To combat terrorism, to re-establish America's status as a standard-bearer for human rights and the rule of law, and to uphold the bedrock principles served by international humanitarian and human rights law, the US must return to a mainstream concept of 'combatant'. Here are three things that the US can do to that end:

—For persons detained outside of armed conflict: stop using the term 'combatant' and stop asserting application of IHL. Reform legal procedures so that the power

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65. *Supra* n. 39.

66. *Supra* nn. 49 and 51.

67. *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006).

68. *Rasul* v. *Bush*, 542 US 466 (2004). The now famous footnote 15 of the Court's Opinion states: 'Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States". 28 USC §2241(c)(3). Cf., *United States* v. *Verdugo-Urquidez*, 494 US 277-278 (1990) (*Kennedy, J.*, concurring), and cases cited therein.' See also *Boumediene* v. *Bush*, *supra* n. 52, recognizing a constitutional right to *habeas corpus* for Guantánamo detainees.

69. *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*, Center for Law and Military Operations The Judge Advocate General's Legal Center and School, Joint Force Judge Advocate United States Joint Forces Command, July 2007, p. 67, at <http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_07-2007.pdf>.

to detain, the right to challenge detention and trial procedures comport with the requirements of international human rights law.

—For persons detained in international armed conflict: reform legal procedures so that entitlement to POW status and civilian status might be determined in appropriate cases and so that trial procedures are consistent with applicable requirements of IHL. Restrict the use of the term 'combatant' to persons entitled to POW status.

—For persons detained in non-international armed conflict: reform legal procedures so that the power to detain, the right to challenge detention and trial procedures comport with the requirements of applicable IHL and international human rights law. Stop using the term 'combatant' to describe persons in these categories.