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2007

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## Recommended Citation

Sean D. Murphy, *Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'* 75 *Geo. Wash. L. Rev.* 1105 (2007).

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# **Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”**

SEAN D. MURPHY\*

The purpose of this essay, written in late 2006, is to take stock of the current application of the Geneva Conventions in the global “war on terrorism,” including interpretations recently taken by the U.S. Supreme Court in the *Hamdan* case.<sup>1</sup> As will be evident in the discussion that follows, the Geneva Conventions and the laws of war more generally comprise a sophisticated regulatory regime whose rules can and should be closely analyzed by lawyers. Yet, like all law, the inevitable imprecision in the rules presents opportunities for governments to exploit gray areas so as to augment governmental authority, and to avoid sensible interpretations that will protect individuals from overreaching governmental power. Such exploitation, however, invariably severs the rules from their ethical foundation and loses sight of their underlying object and purpose.

The events of 9/11 and their aftermath revealed complicated scenarios that do not fit easily into the traditional paradigms of the laws of war, including the 1949 Geneva Conventions. Highly knowledgeable persons in the field have reached diametrically opposite conclusions about certain fundamental issues, such as whether the conflict with Al Qaeda constitutes an “armed conflict” within the meaning of the laws of war, whether it matters if the Taliban wore regular uniforms or operated within a regular command structure, and whether a person who fails to qualify as a prisoner of war under one convention must invariably then qualify as a protected civilian under another. Many of these controversies arise because the two dominant paradigms that operate within the Geneva Conventions—one concerning “international” armed conflict between two or more states, and the other concerning “non-international” (typically understood as internal) armed conflict between a state and non-state actors—do not fit the phenomenon of global terrorism, where the dominant paradigm concerns transnational armed conflict between state and non-state actors.

Yet from their earliest formation, the laws of war have recognized the problem of dealing with irregular forces and the problem of adapting the law to circumstances that change over time. For that reason, built into the 1949 Geneva Conventions and their additional protocols are the means for taking account of areas that are not addressed explicitly or in detail. Rather than trying to exploit such gray areas in the law, lawyers should seek to inject the dictates of humanity into them, in a manner that best reconciles the competing interests during armed conflict of both governments and persons who are at risk.

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<sup>1</sup> *Hamdan v. Rumsfeld*, 548 U.S. \_\_\_\_ (2006).

Part I of this essay recounts some of the history concerning the formation of contemporary laws of war, with a particular focus on the writings of Francis Lieber. This part sets forth how the problem of the “guerrilla” (or “brigand” or “outlaw”) is not unique to our post-9/11 era; it is a problem that has bedeviled the law of war for quite some time. Lieber saw it as desirable to try to draw distinctions among different type of guerrillas, and to contemplate according varying levels of protection to them. Thereafter, the laws of war began evolving to try to take account of certain kinds of guerillas—civilians rising as part of a *levee en masse*, organized partisans operating in coordination with a belligerent, peoples fighting against colonial domination or racist regimes—by according to them protections despite not being members of a state’s regular armed forces. Even so, this evolution stopped short of seeking to accord to organizations engaged in terrorist activity protections under the laws of war.

Part II briefly recounts the two central paradigms that emerged in the post-Lieber era for rules on protections of persons caught upon in armed conflict. Now reflected in the 1949 Geneva Conventions and their additional protocols, the two paradigms speak to rules that apply to “international” (state-to-state) conflicts and rules that apply to “non-international” armed conflicts, with the latter traditionally understood to mean internal conflicts. Here, too, the laws of war evolved in a manner that largely did not, at least expressly, address the phenomenon of a state-versus-non-state actor conflict that was transnational in scope.

Part III recounts how these deficiencies played out in the aftermath of the terrorist attacks of 9/11. The central paradigms of the Geneva Conventions were strictly construed by the U.S. government, resulting in a classification of alleged Taliban and Al Qaeda detainees as “combatants” who could be detained until the “cessation of hostilities,” but as “unlawful” (or unprivileged) combatants who had no ability to take advantage of the protections normally accorded prisoners of war or civilian internees under the laws of war. Indeed, the central paradigms proved inadequate for dealing with the three different types of armed conflict emerged in the post-9/11 period. Even so, a set of fundamental humanitarian principles—principles that are widely regarded as the hallmark of an advancing civilization—were recognized as relevant for regulating each of these conflicts. Article 3 common to the four Geneva Conventions came to be seen as a set of basic default rules that should be applied even in the unusual context of a conflict between a country and a global terrorist movement, Al Qaeda.

Part IV explains why a parsimonious construction of the Geneva Conventions is neither helpful nor appropriate. Within the laws of war exist the means for accommodating the changed circumstances that global terrorism presents. Indeed, the manner in which events unfolded after 9/11 suggests that states moved ultimately to a position of applying fundamental principles of international humanitarian law to the unusual circumstances that unfolded.

As an example of how one might allow the Geneva Conventions to evolve in a sensible fashion, Part VI discusses the rules that should be applied with respect to the termination of the

captivity of unprivileged combatants, such as those held at Guantánamo Bay. While the environment for handling such detainees remains fluid, and the norms expressed by the laws of war on these points are far from certain, this essay suggests answers that are legally plausible and that appear consistent with sound policy choices. Similar efforts to fill in the gray areas for other aspects of the law of war as it relates to global terrorism should also be pursued.

### *I. Of Guerillas and Brigands: The Ghost of Francis Lieber*

The problem of the unprivileged or irregular combatant in a time of armed conflict is not new to the law of war.<sup>2</sup> From the start, efforts to codify the laws of war have grappled with whether and how to accommodate the phenomenon of persons fighting outside regular military units. By recounting some of the early history of these codification efforts, this part seeks to demonstrate that this is an old problem, and that the laws of war have emerged cognizant of its existence.

Contemporary laws of war often are traced back to the writings of Francis Lieber during the course of the American Civil War. Lieber is best known as the author of one of the first codifications of the law of land warfare—the 1863 *Instructions for the Government of the Armies of the United States in the Field*<sup>3</sup>—which thereafter influenced the development of national manuals on warfare by many countries, and helped pave the way for the 1899 and 1907 Hague conventions on the laws of war. Less known is his work on the problem of “guerrillas” during wartime.<sup>4</sup> After the outbreak of the Civil War, the Union Army found itself confronted not just by the Confederate Armies operating largely as armies do (under a centralized command, with regular and open movements, etc.), but by a wide range irregular forces that were loosely referred to as guerillas. General Henry Halleck, the General-in-Chief of the Union Armies, and also an acclaimed expert in the field of international law,<sup>5</sup> asked Lieber for his views on how to treat such guerillas: were they to be treated simply as criminals or as something else?

His essay responding to Halleck, entitled *Guerrilla Parties Considered with Reference to the*

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<sup>2</sup> See EDWARD KOSSOY, *LIVING WITH GUERRILLA* 47-58 (1976).

<sup>3</sup> The instructions were part of the U.S. War Department’s General Orders No. 100, which is reprinted in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 45 (1983)

<sup>4</sup> Even less known is that Lieber had sons who fought on both sides of the American Civil War (one of whom died), *id.* at 6-7, which no doubt animated his interest in promoting humanity in warfare.

<sup>5</sup> See HENRY W. HALLECK, *INTERNATIONAL LAW, OR RULES REGARDING THE INTERCOURSE OF STATES IN PEACE OR WAR* (1861).

*Laws and Usages of War*,<sup>6</sup> helped clarify that there were differing types of guerillas who were entitled to differing levels of protection. After noting the origins of the term “guerilla” (the diminutive of the Spanish word guerra, thus meaning “petty war”),<sup>7</sup> Lieber stated: “It is universally understood in this country at the present time that a guerrilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerilla party, to carry on what the law terms a regular war.”<sup>8</sup> That understanding speaks volumes to us today as we consider the threat of a terrorist organization such as Al Qaeda, which cannot operate in the manner of a regular army, and yet can carry on acts that in their violence and intensity can approximate that of a military attack.

For Lieber, this broad understanding of “guerillas” was not good enough; one needed to dig deeper and to be more discriminating. He considered multiple types of ideas that could be associated with different types of guerillas. One idea of the guerrilla is simply an irregular force that is self-constituted and not a part of the normal process of conscription or volunteering for the regular army. Such a guerrilla force might be fighting for the same cause as an army, and might operate in close coordination with the army, but is not associated with the system of army “pay, provision or movements.”<sup>9</sup> Since the guerrilla force is not self-sustaining, Lieber noted that a further idea of the guerrilla concerned pillaging of the countryside, an act that imposed hardships on the civilian population, but that to a certain extent is an understandable necessity for such a force.

Yet Lieber identified far more pernicious ideas of the guerrilla that might arise. For example, a guerrilla group might be motivated by an “idea of intentional destruction for the sake of destruction, because the guerrilla chief cannot aim at any strategic advantages or regular fruits of victory.”<sup>10</sup> Similarly pernicious is the idea of guerillas engaging in “necessitated murder, because guerrilla bands cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners, thus introducing a system of barbarity which becomes intenser in its demoralization as it spreads and is prolonged.”<sup>11</sup> Indeed, since the organization of the guerillas “being but slight and the leader utterly dependent upon the band, little discipline can be enforced, and where no discipline is enforced in war a state of things results which resembles far more the wars

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<sup>6</sup> Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1861), reprinted in, HARTIGAN, *supra* note 3, at 31.

<sup>7</sup> *Id.* at 31.

<sup>8</sup> *Id.* at 33.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

recorded in Froissart, or Comines, or the thirty-years’ war, and the religious war in France, than the regular wars of modern times . . . .”<sup>12</sup> These more pernicious ideas resonate with the contemporary sense of the terrorist threat and with some of the sentiments felt by those responding to that threat.

Hence, Lieber thought it useful to classify various types of persons who fall within the general rubric of “guerrilla,” to wit: “The freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, and especially the highway robber, the rising en masse, or the ‘arming of the peasants.’”<sup>13</sup> Some of these types of persons might be allied closely with a regular army; Lieber viewed “partisans” as a corps operating separate from a main army, but that is nevertheless “part and parcel of the army.”<sup>14</sup> Such persons are not inherently lawless and may be entitled to the benefits of war.<sup>15</sup> Other types of persons may not be allied with a regular army, but are still entitled to protection, such as the rising *en masse* of peasants to resist an invasion.<sup>16</sup> Yet there are those who fall outside any protection. Lieber wrote:

It is different if we understand by guerrilla parties, self-constituted sets of armed men in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and who will therefore generally give no quarter.

They are peculiarly dangerous because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simply robbers or brigands. . . .<sup>17</sup>

While such persons might be granted certain protections if captured in the midst of a “fair fight and open warfare,” as a general matter such persons are to be treated as “brigands, who are “subject to the infliction of death if captured.”<sup>18</sup> Lieber concludes his essay with the admonition that “no army,

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<sup>12</sup> *Id.* at 33-34.

<sup>13</sup> *Id.* at 34.

<sup>14</sup> *Id.* at 35.

<sup>15</sup> *Id.* at 36.

<sup>16</sup> *Id.* at 38-39.

<sup>17</sup> *Id.* at 41.

<sup>18</sup> *Id.* at 35, 42.

no society engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation without the deepest injury to itself and disastrous consequences with might change the very issue of war.”<sup>19</sup>

Thus, while Lieber is credited with helping launch the formation of our contemporary international humanitarian law, he regarded a certain category of brigands as being fully outside the scope of that law, and viewed such persons as a unique threat to society that could not be tolerated. Though Lieber did not identify specific persons or groups during the Civil War that would fall into differing categories of guerrillas, one can imagine what he had in mind.<sup>20</sup> For example, one of the main guerrilla groups operating outside the Confederate command system, comprising in total some 800 men, was under the command of John Singleton Mosby in Western Virginia. Small squads of “Mosby’s Rangers” would attack Union outposts and wagon trains with such vigor that the area became known as “Mosby’s Confederacy.”<sup>21</sup> One imagines that these forces, preying solely upon the Union military, were viewed by Lieber as a somewhat more acceptable form of guerilla—Confederate partisans who shared the objectives and targets of an established belligerent. By contrast, a very different form of guerilla was epitomized by William Clarke Quantrill, whose raiders in Kansas and Missouri simply slaughtered unarmed soldiers and civilians, including an infamous massacre at Lawrence, Kansas in 1863.<sup>22</sup> As James McPherson has put it, “[t]he guerrilla fighting in Missouri produced a form of terrorism that exceeded anything else in the war. Jayhawking Kansans and bushwhacking Missourians took no prisoners, killed in cold blood, plundered and pillaged and burned (but almost never raped) without stint.”<sup>23</sup> Lieber no doubt viewed such raiders as the “peculiarly dangerous” brigands that society simply cannot tolerate and that the laws of war did not protect.

The contemporary terrorist threat by a group such as Al Qaeda is largely viewed in the United States as comparable to Lieber’s guerilla brigands. The terrorist may have some generalized strategic objective, but he operates in a free-wheeling manner unmoored from the constraints of being a sovereign entity, and engages in attacks that fail to discriminate between military and non-military targets. To the extent that the United States regards Al Qaeda as contemporary brigands who are qualitatively different from those the law of war was intended to protect, it appears that Lieber’s

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<sup>19</sup> *Id.* at 44.

<sup>20</sup> HARTIGAN, *supra* note 3, at 11.

<sup>21</sup> See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 737-38* (1988).

<sup>22</sup> *Id.* at 784-86.

<sup>23</sup> *Id.* at 784.

ghost is still with us.

Lieber was concerned, of course, with the “guerilla” principally as a feature of a civil war, not as a stand-alone phenomenon, and that has been the case as well since his time. The normal guerilla model is one of indigenous bands fighting against a colonial oppressor (e.g., French partisans fighting the German Army in occupied France during World War II or the Algerian Front de Libération Nationale fighting the French Army in Algeria in 1954-62), or fighting against an indigenous government (e.g., Fidel Castro’s rise to power in Cuba in 1956-59). Though operating with many of the same tactics and objectives as guerillas of the past, a terrorist group such as Al Qaeda is far more transnational in nature, and operates without any connection to a sustained contestation with a standing army.

Since Lieber’s time, the laws of war have evolved in ways that accommodate some aspects of the phenomenon of the guerrilla. The 1899 and 1907 Hague Peace Conferences accorded combatant status to “militia” and “volunteer corps” who fulfilled certain conditions, and to persons engaged in a *levée en masse*, whereby civilians spontaneously take up arms to resist an invading force in unoccupied territory.<sup>24</sup> The latter persons, though civilians, can become protected POWs so long as they carry their arms openly and obey the laws and customs of war. After World War II, combatant status was further expanded to include “organized resistance movements,”<sup>25</sup> such as the French forces who fought within France during the Nazi occupation. With the advent of global terrorist movements, such as Al Qaeda, it has become necessary to consider whether and how the laws of war apply to such movements. On the hand, persons associated with Al Qaeda may be seen as modern outlaws or brigands, entitled to no protection as “unprivileged” combatants. On the other hand, the magnitude of the threat posed by such a movement has prompted the United States to view its response as a “war on terrorism,” to invoke legal doctrines associated with wartime action, and to deploy vast military forces to combat the threat. The next section discusses how the central paradigms that exist under contemporary laws of war do not easily address the phenomenon of global terrorism.

## II. *The Central Paradigms in the 1949 Geneva Conventions*

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<sup>24</sup> See Regulations Respecting the Laws and Customs of War on Land, arts. 1-2 [hereinafter Hague Regulations], *annexed to* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227; KOSSOY, *supra* note 2, 73-105.

<sup>25</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4A(2), 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); KOSSOY, *supra* note 2, 106-112; see generally Theodore Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT’L L. 173 (1971).



The 1949 Geneva Conventions<sup>26</sup> are principally concerned with *international* armed conflicts, by which is meant armed conflicts that arise between two or more states. While it does not matter whether either of the states formally recognize the existence of a "war," nor whether they recognize the legitimacy of each other, the Conventions' several hundred articles are built around the paradigm of two opposing states, operating normally through the use of their regular armies, though perhaps assisted by militias or volunteer corps. Thus, Geneva Convention III on the treatment of prisoners of war (POW) anticipates that the well-functioning government of each belligerent will be in a position to detain prisoners at organized camps, where a variety of rights can be accorded to the prisoners and where a protecting power may monitor the prisoner's well-being. A modern application of Geneva Convention III may be seen in Ethiopia's treatment of Eritrean prisoners during the 1998-2000 Ethiopian-Eritrean war. Though Ethiopia viewed Eritrea as having initiated the war by its May 1998 invasion, nevertheless Ethiopia, as a party to the 1949 Geneva Conventions, operated its prison camps largely in accordance with Geneva Convention III, and allowed access by the International Committee of the Red Cross (ICRC) throughout the conflict.<sup>27</sup>

This paradigm of two opposing states engaged in an inter-state armed conflict is also apparent with respect to the protections accorded to civilians. Geneva Convention IV largely contemplates two particular categories of civilians who need protection in the course of a conventional armed conflict between two states: (1) civilians of one belligerent who happen to be in the other belligerent's territory, such as might occur at the outbreak of the armed conflict; and (2) civilians who are in their own country but fall under the occupation of the enemy belligerent. Thus, the Convention is closely tied into the notion of geography; it assumes that both of the belligerents will be exercising sovereign control over territory and thus will have obligations with respect to enemy aliens located within that territory. Here, too, the recent Ethiopia-Eritrea war demonstrates the paradigm. The Eritrea Ethiopia Claims Commission<sup>28</sup> has determined that, under Geneva Convention IV, Eritrea

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<sup>26</sup> Geneva Convention Relative to 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 I); Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention III, *supra* note 25; Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3526, 75 U.N.T.S. 287 (Geneva Convention IV). As of 2006, 194 states have adhered to the 1949 Geneva Conventions.

<sup>27</sup> Partial Award on Prisoners of War, Ethiopia's Claim No. 4, para. 45 (July 1, 2003), *reprinted in* 42 I.L.M. 1056, 1064 (2003).

<sup>28</sup> The Claims Commission was established under the Peace Agreement, Eri.-Eth., Dec. 12, 2000, 40 I.L.M. 260, with a mandate of determining whether violations of international law occurred during the course of the conflict. The Commission consists of five arbitrators: Hans van

was bound to various obligations as an occupying power in Ethiopia over the course of two years, and further had obligations with respect to Ethiopians that found themselves in Eritrea at the outbreak of the war. Ethiopia had the same obligations with respect to its brief occupation of Eritrean territory in 2000 and with respect to Eritreans who were in Ethiopia at the outbreak of the war.<sup>29</sup>

The 1949 Geneva Conventions do contemplate an alternative paradigm, in the form of armed conflict that is *not* international in nature. Article 3 common to all four conventions (common Article 3) briefly sets forth certain minimum standards that are to be applied “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . .”<sup>30</sup> Those standards provide that persons no longer taking active part in such hostilities “shall in all circumstances be treated humanely” and, to that end, certain acts against them are prohibited:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

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Houtte (president); George Aldrich; John Crook; James Paul; and Lucy Reed.

In the context of a discussion about “asymmetric warfare,” it is interesting to note that Eritrea only acceded to the 1949 Geneva Conventions in August 2000 and thus was not—as a matter of treaty law—bound to them for most of the armed conflict. Nevertheless, Ethiopia determined that it would act in accordance with the Conventions in its treatment of victims of the conflict, and called upon Eritrea to do the same. After the conflict was over, the Claims Commission found that contemporary customary international humanitarian law was “exemplified by the relevant parts of the four Geneva Conventions of 1949.” The Commission noted: (1) the widespread acceptance by states of the conventions over the course of their fifty-year existence; (2) that law of war treaties “build upon the foundation laid by earlier treaties and by customary international law”; and (3) that “rules that commend themselves to the international community in general . . . can more quickly become part of customary international law than other types of rules found in treaties.” Partial Award on Prisoners of War, *supra* note 27, at paras. 30-31. Consequently, the Commission found that Ethiopia and Eritrea were bound throughout their conflict to rules of customary international law as reflected in the 1949 Geneva Conventions.

<sup>29</sup> See Eritrea Ethiopia Claims Commission, Partial Awards on Civilian Claims (Dec. 17, 2004), 44 I.L.M. 601 (Eritrea’s Claims) & 630 (Ethiopia’s Claims) (2005).

<sup>30</sup> Geneva Convention IV, *supra* note 26, art. 3

- (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>31</sup>

Further, the parties to such a conflict should "endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."<sup>32</sup>

A fair reading of the negotiating history suggests that this "common Article 3" paradigm was principally designed to address the situation of an armed conflict *internal* to a single state.<sup>33</sup> One of the parties to that armed conflict would normally be the government of the state; the other party would be a major insurgent group seeking to obtain control of the country. Thus, common Article 3 contemplates an armed conflict between a state and non-state actor, but does so largely in the context of the classic civil war. For such a conflict, the Geneva Conventions do not accord any "prisoner of war" or "protected civilian" status to detainees. Moreover, detainees may be prosecuted under the criminal laws of the state for having engaged in violent acts; there is no privileging of their conduct under the laws of war. Yet certain minimum standards of Article 3 do apply: persons who are no longer taking an active part in the hostilities must be treated humanely, and cannot be exposed

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., GEOFFREY BEST, *WAR AND LAW SINCE 1945* 169 (1994) ("The Red Cross movement . . . , as after the war it focused on the question of revising and improving the Geneva Conventions, had their extension to civil wars in the centre of its sights."); Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 518, 519 (John Norton Moore ed., 1974) ("The Conference ultimately came around to the view that the most that states could be expected to accept would be a short statement of the basic humanitarian principles that should be given effect in civil conflicts. The result was Article 3. . . ."); Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT'L L.* 1, 39 (2003); see also U.S. Dep't of the Army Field Manual, *The Law of Land Warfare*, FM 27-10 at 9 (1956) (quoting common Article 3 in discussing the law applicable to "civil war"); U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* 384-86 (2004) (discussing common Article 3 as applying to "internal armed conflict"). The same thinking carried over to the initial negotiations of the additional protocols. See MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* at 39 (1982) [hereinafter *NEW RULES*]. ("The pre-conference work . . . was based on the following concept: The distinction between international and national conflicts, which is made on the factual and objective basis of whether a conflict takes place in the territory of different states or inside one particular state . . . should be maintained").

to violence or outrages upon personal dignity, nor the passing of sentence or execution without a judgment pronounced by a regularly-constituted court.

The paradigms of the 1949 Geneva Conventions were largely followed and extended with two 1977 protocols, generally referred to as “Protocol I”<sup>34</sup> and “Protocol II.”<sup>35</sup> Protocol I focuses on codifying and developing the law relating to the first paradigm—international armed conflict—by clarifying and advancing the law both on protection of victims and on means/methods of war. With respect to the protection of victims, Protocol I revisits, clarifies, and expands upon the various protections addressed in the earlier 1907 Hague Regulations<sup>36</sup> and 1949 Geneva Conventions. In particular, as discussed further below, Article 75 lays down a series of fundamental protections to which all persons “in the power of a Party to the conflict” are entitled without discrimination. As of 2006, 166 states have adhered to Protocol I, not including the United States.<sup>37</sup>

Protocol II focuses on the law relating to the second paradigm, stating that it “develops and supplements Article 3 common to the Geneva Conventions . . . .”<sup>38</sup> In so doing, Protocol II expressly states that it covers conflicts “which take place 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.”<sup>39</sup> Such language confirms the general understanding that common Article 3 is focused on internal armed conflicts or civil wars. Protocol II then lays down a series of fundamental protections to which all persons involved in internal conflicts are entitled without

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<sup>34</sup> 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. 609 (Protocol I).

<sup>35</sup> 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 (Protocol II). In December 2005, a third additional protocol was adopted to create an additional emblem alongside the red cross and red crescent, known as the red crystal. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, \_\_\_\_ I.L.M. \_\_\_\_ (Protocol III).

<sup>36</sup> *Supra* note 24.

<sup>37</sup> *See* <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument>.

<sup>38</sup> Protocol II, *supra* note 35, art. I.

<sup>39</sup> *Id.*

discrimination.<sup>40</sup> As of 2006, 160 states had adhered to the protocol, not including the United States.<sup>41</sup>

The problem of the “guerilla” was partially addressed as a part of Protocol I to the 1949 Geneva Conventions. Article 1(4) of Protocol I extended “international armed conflict” to cover armed conflicts involving peoples “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . .”<sup>42</sup> Thus, just as Lieber grappled with making distinctions among different kinds of guerrillas, a particular type of modern-day guerrilla—the non-state actor fighting against a colonial or racist regime—is allowed to enter into the full realm of the 1949 Geneva Conventions (not just the realm of common Article 3). Such guerrillas are expected to conduct themselves in a manner that approximates the conduct expected of a regular army; thus they can receive POW status if captured so long as they take certain limited steps to distinguish themselves from the civilian population at the time of their attacks.<sup>43</sup> (They may dress in civilian clothing and carry their arms secretly, but must carry the arms openly just before and during their attack.) If they fail to so conduct themselves, they are still granted protections “equivalent in all respects to those accorded” to POWs under Geneva Convention III and Protocol I,<sup>44</sup> including judicial safeguards, but the conduct constitutes a violation of international law for which the guerilla may be prosecuted.<sup>45</sup> There is no requirement that the non-state actor control a portion of territory, and therefore may operate entirely from bases located in adjacent countries.<sup>46</sup>

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<sup>40</sup> *Id.*, art. 4.

<sup>41</sup> See <http://www.icrc.org>.

<sup>42</sup> Protocol I, *supra* note 34, art. 1(4).

<sup>43</sup> *Id.*, art. 44(3)

<sup>44</sup> *Id.*, art. 44(4).

<sup>45</sup> See NEW RULES, *supra* note 33, at 255.

<sup>46</sup> See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 321 (2d ed. 2000). By contrast, Protocol II requires that the non-state actor control part of the national territory, making its application to guerrillas problematic. According to Green:

If the dissident forces are constantly on the move and lack any fixed location from which to exercise control the Protocol [II] will not operate. Guerrilla or partisan activities against the administration, however effective, would therefore not be protected by the Protocol, though they would be covered by common Article 3.

*Id.*

The United States opposed this expansive approach of Protocol I, claiming that it accords far too much protection and legitimacy to non-state groups, potentially including terrorist organizations.<sup>47</sup> Moreover, characterizing the Taliban or Al Qaeda as engaged in conflict with the United States as a fight “against colonial domination and alien occupation” or against a “racist” regime, is a stretch; for all its missteps, the United States never colonized Afghanistan, nor engaged in racist oppression of the kind seen in South Africa or Rhodesia. Further, Al Qaeda has never made the necessary unilateral declaration seeking status, and assuming rights and obligations, under Protocol I.<sup>48</sup> In short, while Protocol I may be seen as extending the full panoply of law of war protections to certain contemporary guerillas, it does not do so with respect to the entire range of non-state actors. In any event, this expansion of the traditional laws of war in Protocol I has been rejected by the United States, and is one of the principal reasons the United States has not ratified the protocol.

Hence, as originally designed, the 1949 Geneva Conventions left something of a gray area. Conflicts between two states were regulated, and conflicts between a state and an insurgency were regulated, but (with one exception in Protocol I discussed above) nothing specifically addressed a transnational conflict between a state and a non-state actor. In the aftermath of 9/11, the Bush Administration sought to exploit that gray area as one means for denying to Al Qaeda detainees any of the protections accorded under the 1949 Geneva Conventions, including common Article 3. On the one hand, the Bush Administration argued that there was no inter-state conflict between the United States and Al Qaeda, since Al Qaeda was not a state; on the other hand, members of Al Qaeda fell outside common Article 3, since it was not an insurgency against the U.S. government within U.S. territory.

Views have differed over whether the Administration’s position with respect to Al Qaeda was correct, but few would disagree that the intervention in Afghanistan introduced an array of problems in applying the Geneva Convention paradigms, and exposed the paradigms’ weaknesses and limits. The circumstances that unfolded in Afghanistan ultimately may prove to be *sui generis*, but the ability of terrorist groups to thrive in countries where there is a poorly functioning government (at present, countries such as Somalia and Sudan come to mind) suggests that history in this context may well repeat itself. The next section briefly recounts that history.

### III. *The Paradigms Applied Post-9/11*

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<sup>47</sup> For a discussion, see Agora, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT’L L. 910 (1987) & 82 AM. J. INT’L L. 784 (1988); see also Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678 (1994).

<sup>48</sup> Protocol I, *supra* note 34, art. 96(3).

The post-9/11 events, especially but not exclusively as they relate to Al Qaeda, did not fit neatly into 1949 Geneva Conventions' paradigms. Most observers would likely accept that there were three types of conflicts that came into play: (1) an internal armed conflict between the Northern Alliance and the Taliban, a conflict that predated 9/11; (2) an international armed conflict between a U.S.-led coalition of states and Afghanistan; and (3) a particularly-hard-to-analyze conflict between the United States and a non-state organization, Al Qaeda. By considering each of these conflicts in turn, it becomes apparent why many roads in contemporary armed conflict can lead to application of the minimum standards of common Article 3, rather than the full range of protections contained in the 1949 Geneva Conventions as a whole.

*De Jure Afghan Government/Northern Alliance v. De Facto Afghan Government (Taliban).* The post-9/11 period saw an armed conflict between members of the Northern Alliance and the Taliban, but that conflict predated 9/11. Two principal actors were engaged in that armed conflict: a de jure government of Afghanistan that politically headed military forces in the form of the Northern Alliance; and a de facto government of Afghanistan in the form of the Taliban.

Burhanuddin Rabbani headed the government of Afghanistan at the time of the rise of the Taliban. Rabbani had previously served as a leader of the mujahideen in their fight against Soviet rule in Afghanistan. Rabbani's forces were the first mujahideen group to enter Kabul in 1992 when the puppet communist government was overthrown. Rabbani then served as President of Afghanistan from 1992 to 1996 until he was forced to leave Kabul because of the Taliban takeover of the city. As discussed in somewhat more detail below, the Taliban originally was a religious movement that in 1994 began military operations to seize control of Afghanistan.<sup>49</sup> From 1994 to 2001, the Taliban was in relatively constant armed conflict with the existing Afghan warlords and their militias, who ultimately banded together in 1996-97 to form the Afghan Northern Alliance, formally known as the "United Islamic Front for the Salvation of Afghanistan." By 2001, the Taliban had gained control of ninety percent of the territory of Afghanistan. Thus, as of 9/11, the de facto government of Afghanistan was the Taliban.

Though ousted from control of Afghanistan, Rabbani maintained that he was the head of the Afghan government and continued to control most of Afghanistan's embassies abroad. Further, his representatives retained Afghanistan's seat at the United Nations. Meanwhile, the U.N. General Assembly repeatedly deferred consideration of the Taliban representative's credentials. Rabbani was regarded as the political head of the Northern Alliance and his military commander, Ahmed Shah Massoud (and later Mohammed Fahim after Massoud's assassination), maintained control of the ten percent of Afghanistan (in the northeast) not under Taliban control. It was Rabbani who formally handed over power to an interim government headed by Hamid Karzai on December 22, 2001.

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<sup>49</sup> See generally PETER MARSDEN THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN (1998).

One might regard this Northern Alliance-Taliban conflict as fitting the paradigm of a non-international armed conflict, since it has the characteristics of an internal armed conflict (or civil war). If so, then common Article 3 would set forth the governing norms from the 1949 Geneva Conventions, since Afghanistan ratified the conventions in 1956. Since Afghanistan has not yet ratified Protocol II, both sides in this conflict would be obligated to adhere to the minimum standards set forth in common Article 3, but not the more detailed standards of the remainder of the Geneva Conventions nor of Protocol II.

Afghan politics, however, are anything but simple. Even in 1996 the Security Council was calling upon foreign countries to stop sending arms, ammunition, and personnel in support of the Afghan parties, and declaring that continuation of the conflict provided “fertile ground for terrorism and drug trafficking which destabilize the region and beyond . . . .”<sup>50</sup> The perception that the conflict had international dimensions was reinforced in 1998 when the Security Council directly addressed the application of the laws of war to Afghanistan. Expressing concern that the conflict was “causing a serious and growing threat to regional and international peace and security”<sup>51</sup> and that there had been “foreign interference in Afghanistan, including the involvement of foreign military personnel and the supply of arms and ammunition to all parties in the conflict,”<sup>52</sup> the Security Council expressly and unanimously reaffirmed

that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.<sup>53</sup>

The reference to “grave breaches” of the Convention appears to signal a belief by the members of the Security Council that the entirety of the 1949 Geneva Conventions (not just common Article 3) applied to the Afghan civil war, since the grave breaches provisions relate to various obligations under the conventions other than common Article 3, such as unlawful deportation or transfer.<sup>54</sup> This has prompted some scholars, such as Adam Roberts, to refer to the Afghan conflict—even prior to the events of 2001—as an “internationalized civil war” or “internationalized

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<sup>50</sup> S.C. Res. 1076, pmb. & paras. 3-5 (Oct. 22, 1996).

<sup>51</sup> S.C. Res. 1193, pmb. (Aug. 28, 1998).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, para. 12.

<sup>54</sup> See Geneva Convention IV, *supra* note 26, arts. 146-147.



non-international armed conflict.”<sup>55</sup> Similar phenomena of largely civil wars that attract foreign involvement may be seen in prior conflicts in Vietnam, Cambodia and Lebanon,<sup>56</sup> and also in situations where a unitary state in the midst of civil war fragments into several new states, as occurred in the former Yugoslavia.<sup>57</sup> In such cases, one might take the position that “the whole of the law of armed conflict would apply,”<sup>58</sup> or might more cautiously maintain that “the rules pertaining to both international and civil wars may be applicable in different aspects and phases of the conflict.”<sup>59</sup>

After the intervention in the Afghan conflict by the U.S.-led coalition in October 2001, whereby coalition forces joined the Northern Alliance in largely ousting the Taliban from their control of Afghanistan, it seems plausible to maintain that, whatever might have been the situation before, the Afghan conflict either:

- had been transformed into an international armed conflict, thus binding all parties (foreign and Afghan) to the full panoply of obligations of the Geneva Conventions; or
- now consisted of two armed conflicts, one that was internal between the Northern Alliance and the Taliban (governed by common Article 3), and another that was international between the Coalition and the Taliban (governed by the full Geneva Conventions).

The first scenario is not very compelling, in that no matter what facts may develop on the ground, the 1949 Geneva Conventions were not designed to impose obligations on non-state actors (other than those contained in common Article 3). Further confusion arises, however, in determining

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<sup>55</sup> Adam Roberts, *The Laws of War in the War on Terror*, in INTERNATIONAL LAW AND THE WAR ON TERROR 175, 193 (Fred L. Borch & Paul S. Wilson eds., 2003) (U.S. Naval War College Int’l Law Studies Vol. 79).

<sup>56</sup> See Baxter, *supra* note 33, at 523-24; Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AM. U. L. REV. 145 (1983); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL ORGANIZATIONS AND CIVIL WARS 63-65 (1995); see also THE INTERNATIONAL LAW OF CIVIL WAR (Richard A. Falk ed., 1971).

<sup>57</sup> See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 220 (2d ed. 2004).

<sup>58</sup> *Id.* at 219.

<sup>59</sup> Roberts, *supra* note 55, at 193.

whether either scenario continued after the Taliban had been severely decimated and driven to the southern part of the country, and particularly after the Afghan Interim Authority assumed power in December 2001, followed in June 2002 by creation of the Afghan Transitional Government. According to the ICRC, after June 2002 there was no longer any international armed conflict in Afghanistan, only an internal armed conflict.<sup>60</sup> That conclusion may seem odd given that, as of late 2006, there remain about 20,000 U.S. troops in Afghanistan engaged in active fighting against the Taliban.<sup>61</sup> Yet the theory is that, by June 2002, there were two states—the United States (and its allies of course) and Afghanistan—that were no longer engaged in an armed conflict with each other. The conflict was between the new, internationally-recognized and -supported Afghan government and a largely indigenous insurgent group, the Taliban. As such, the conflict was non-international in nature and was principally governed by common Article 3 of the Geneva Conventions.

*U.S.-Led Coalition of States v. Afghanistan.* In light of the above, it seems clear that there was an international armed conflict between the states of the U.S.-led coalition and Afghanistan which commenced on October 7 with the coalition bombing campaign against targets in Afghanistan. All four of the 1949 Geneva Conventions came into play at that time with respect to actions between the belligerents. That campaign was directed against both the *de facto* government of the Taliban and against the terrorist organization Al Qaeda, but this particular conflict is best analyzed as only encompassing those members of Al Qaeda who were integrated into Taliban fighting units, and who fought alongside the Taliban in Afghanistan.

The United States took the view that members of the armed forces of the *de facto* government of Afghanistan, the Taliban, would not be accorded POW status under Geneva Convention III. At the time of the outbreak of the conflict, the Taliban was not recognized by the United States (or by the vast majority of countries) as the lawful government of Afghanistan. Nevertheless, this alone was not a basis for denying the Taliban POW status, since Article 4(A)(3) of Geneva Convention III requires the detaining power to regard as POWs persons who are “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>62</sup>

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<sup>60</sup> *Id.* at 196.

<sup>61</sup> See Ann Scott Tyson, *Taliban's Gains Forestall U.S. Troop Reductions in Afghanistan*, WASH. POST, Sept. 22, 2006, at A13.

<sup>62</sup> Geneva Convention III, art. 4(A)(3). Commentary on this issue tends to focus on Geneva Convention III Article 4(A)(1), which says that members of the “armed forces” of a party, as well as members of militias or volunteer corps forming a part of such armed forces, are to be treated as POWs, without any reference to these four criteria. This provision is then contrasted with Article 4(A)(2), which says that members of other militias or volunteers corps (*i.e.*, those not forming part of the regular armed forces) must meet the criteria in order to qualify as POWs. The relevant provision for the Taliban armed forces, however, is Article 4(A)(3), since

According to the United States, Article 4(A)(3) implicitly requires that members of "regular armed forces" of a party meet four criteria found in Article 4(A)(2): they must operate within a command structure, dress in a manner whereby they are recognizable at a distance as being military forces, carry arms openly, and conduct their operations in accordance with the laws of war. Although the Taliban could have qualified for POW status under Article 4(A)(3), the U.S. Government decided that they failed to do so because they did not operate in a command structure whereby military commanders took responsibility for subordinates, did not wear distinctive uniforms or other insignias, and did not act in accordance with the laws of war.<sup>63</sup> U.S. courts, to the extent they have reached this issue, have concurred.<sup>64</sup>

Knowledgeable law-of-war experts have divided over whether the Taliban were required meet these criteria.<sup>65</sup> There are at least three issues operating here. The first issue is whether there

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the United States did not recognize the Taliban government at the outbreak of the conflict.

<sup>63</sup> See Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto Gonzales (Feb. 7, 2002); White House Fact Sheet on Status of Detainees at Guantanamo (Feb. 7, 2002); see also Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A15; John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

Secretary of Defense Rumsfeld stated:

[T]he Taliban . . . did not wear uniforms, they did not have insignia, they did not carry weapons openly, and they were tied tightly to the waist to al Qaeda. They behaved like them, they worked like them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition, and there isn't any question in my mind . . . but that they are not—they would not rise to the standard of—a prisoner of war.

U.S. Dep't of Defense News Transcript, Secretary Rumsfeld Media Availability en route to Camp X-Ray (Jan. 27, 2002); see also Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Aqida Detainees, Remarks at Chatham House, London, United Kingdom (Feb. 20, 2002).

<sup>64</sup> See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 558 (E.D. Va. 2002); *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. \_\_\_\_ (2006).

<sup>65</sup> Compare George Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891(2002) (finding that the four criteria do not apply to members of the armed forces of a party), with Yoram Dinstein, *Unlawful Combatancy*, in INTERNATIONAL LAW AND THE WAR ON TERROR, *supra* note 55, at 151 (finding that the criteria express a general standard for lawful combatancy and, while there may be a presumption that regular armed forces

are criteria that the detaining country may apply in determining whether certain persons should be regarded as “[m]embers of the regular armed forces” of a non-recognized belligerent. While it is clear that Geneva Convention III Article 4(A)(3) does not expressly apply the four criteria to “regular armed forces,” the real question is what is meant by that phrase. Presumably it is not enough that a government merely declare that certain persons are a part of its regular armed forces. If that were the case, then any government could designate any persons—whether militias, mercenaries, volunteers, guerillas, brigands or pirates—that are willing to attack its enemy as part of its “regular armed forces,” thereby extending to them a status that the laws of war clearly do not contemplate. The better view is that it is implicit in the idea of establishing “regular armed forces” that the government must be responsible for organizing, training, and using its recruits so that they can operate in the manner anticipated under the 1949 Geneva Conventions and other laws of war.<sup>66</sup> Seen in that light, the four criteria are simply a surrogate for determining whether a particular group of persons fall within the meaning of “[m]embers of the regular armed forces of a Party.” Thus, a government that does not exercise command and control over the group of persons cannot expect other states parties to view those persons as part of the government’s “regular armed forces.” Similarly, a government that organizes the group of persons in a manner that prevents operation of a cardinal principle of the laws of war—the obligation to distinguish combatants from non-combatants—and that fails to inculcate in them awareness of and fidelity to the laws of war, cannot expect other states parties to view those persons as part of the government’s “regular armed forces.” The official ICRC commentary supports that position, asserting that the “regular armed forces” referred to in Article 4(A)(3)

have all the material characteristics and all the attributes of armed forces in the sense of subparagraph (1): they wear uniform, they have an organized hierarchy and they know and

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meet the criteria, the presumption may be rebutted).

<sup>66</sup> As Bothe, Partsch, & Solf observed:

It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered to be unnecessary and redundant to spell them out in the Conventions. It seems to be clear that regular armed forces are inherently organized, that they are commanded by a person responsible for his subordinates and that they are obliged under international law to conduct their operations in accordance with the laws and customs of war.

NEW RULES, *supra* note 33, at 234. Since the Geneva Conventions obligate a party to train its military authorities regarding their obligations under the Conventions, it is reasonable to expect the armed forces to conduct their operations in accordance with the laws and customs of war. *See, e.g.,* Geneva Convention III, art. 127.

respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph 2(a), (b), (c) and (d).<sup>67</sup>

The second issue is whether, factually, Taliban personnel were operating as the “regular armed forces” of Afghanistan. Here, neither the U.S. government nor most legal commentators parsing the Geneva Conventions have not done much to advance our understanding the nature of the Taliban as a military force. One of the more detailed U.S. government analyses that is publicly available is a February 2002 memorandum by the Department of Justice Office of the Legal Counsel, which was based on information about the Taliban provided by the Department of Defense.<sup>68</sup> Much of the memorandum, however is conclusory in nature, and could have been strengthened by a more robust and nuanced analysis.

When the Soviet Union withdrew its military forces from Afghanistan in 1989, the Afghan militias that were previously allied against the Soviets turned on one another, causing significant disorder and civil strife. In 1994, the Taliban—which was a Pashtun-dominated, ultra-conservative Islamic group—began seizing Afghan territory, starting at its home base of Kandahar province and reaching the capital of Kabul in 1996. The Taliban succeeded in quelling the strife unleashed by the warring militias, seizing ninety percent of Afghanistan’s territory, and imposing a strict form of Islam throughout most of the country.<sup>69</sup> Thus, the Taliban was not an organization initially formed to constitute the regular army of a government; the Taliban was a religious and a military movement that ultimately swept across Afghanistan. As one commentator has noted: “Ironically, the Taliban were a direct throwback to the military religious orders that arose in Christendom during the Crusades to fight Islam—disciplined, motivated and ruthless in attaining their aims.”<sup>70</sup>

After seizing power, did the Taliban have a command-and-control system characteristic of “regular armed forces”? Much of its organization remained secretive, in part because the Taliban issued no press releases or policy statements and held no press conferences, and in part because its

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<sup>67</sup> See 3 INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 63 (Jean S. Pictet ed., 1952) (hereinafter PICTET COMMENTARY).

<sup>68</sup> Memorandum from Assistant Attorney General Jay S. Bybee to White House Counsel Alberto R. Gonzales (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 136 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>69</sup> See generally AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA (2001); MARSDEN, *supra* note 49.

<sup>70</sup> RASHID, *supra* note 69, at 33.

ban on photography and television made identification of its leaders difficult. Yet the Taliban did have a military structure of sorts. At the top it was headed by Mullah Muhammed Omar, to whom reported the Chief of the General Staff, which in turn directed the Chief of the Army and the Chief of the Air Force. Omar would either in person or by wireless radio communicate orders to military commanders such as allowing them to make an attack.<sup>71</sup> Further, the Taliban had at least four army divisions and an armored division. A military "shura" helped plan strategy, but apparently had no strategic decision-making power.<sup>72</sup> At the lower level, however, the idea of the Taliban as a regular armed force begins to break down. The Taliban fighters (numbering some 25,000 to 30,000 men) were structured less like a normal army and more like a traditional tribal militia (or *lashkar*), in which personnel were constantly being shifted between the front lines back and their villages.<sup>73</sup> As such, "there [was] no clear military structure with a hierarchy of officers and commanders while unit commanders [were] constantly being shifted around."<sup>74</sup> Globalsecurity.org maintains:

The Taliban-led "Islamic Emirate of Afghanistan" lacked the administrative efficiency of a state. The military did not exist on a national basis. Some elements of the former Army, Air and Air Defense Forces, National Guard, Border Guard Forces, National Police Force (Sarandoi), and tribal militias existed, but were factionalized among various groups. The Taliban's "army" was a coalition of militia formations composed of assorted armed groups with varying degrees of loyalty, commitment, skill, and organizational coherence. Many had a history of switching sides and shifting loyalties prior to coming under the nominal command of the Taliban.<sup>75</sup>

As for whether Taliban fighters were identifiable as part of an armed force and could be distinguished from civilians, here too the factual analyses by the U.S. government and legal commentators have been rather thin. Some assert that the Taliban "did not wear uniforms nor did they display any other fixed distinctive emblem,"<sup>76</sup> while others opine that "various Taliban units . . . may have been wearing a distinctive insignia as they wore a black head-covering of a similar

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<sup>71</sup> *Id.* at 24.

<sup>72</sup> *Id.* at 99.

<sup>73</sup> *Id.* at 100.

<sup>74</sup> *Id.* at 99.

<sup>75</sup> *Taliban Militia* (n.d.), at <http://www.globalsecurity.org/military/world/afghanistan/militia-taliban.htm> (visited Sept. 21, 2006).

<sup>76</sup> Dinstein, *supra* note 65, at 171.

type.”<sup>77</sup> It again seems to be the case that the vast majority of Taliban fighters were not wearing any particular uniform, nor had any of the normal insignia that one normally associates with regular armed forces (patches, berets, etc.), even in the developing world. The lack of such identification tends to reinforce the idea that most Taliban fighters were not part of a regular armed force. Yet it also seems that Northern Alliance fighters were not wearing any normal uniform or insignia, but were regarded by the United States as wearing “non-standard” uniforms by donning a certain style of cap and scarf, so much so that U.S. special operations forces who dressed similarly were viewed as not dressing like a civilian.<sup>78</sup> Why the Taliban were considered out-of-uniform while the Northern Alliance were not was never made clear by the U.S. government. Further, even if the Taliban were largely out-of-uniform, it still leaves room for the possibility that some units were distinctive, such as personnel associated with an armored division. Perhaps the United States engaged in a systematic assessment of whether any such units existed and concluded that they did not, but public information to date has not revealed such an effort.

Finally, in terms of whether the Taliban adhered to the laws of war, the position taken by the United States on this issue was somewhat risky. Allegations by one side that another side has engaged in war crimes has been a recurrent feature of armed conflict; linking POW status to such allegations creates significant opportunities for summary denial of protections to U.S. and allied forces for spurious reasons.<sup>79</sup> At the same time, no one has suggested that the Taliban ever trained their forces in the laws of war, nor viewed themselves as bound by such rules. In the course of the Taliban’s conflict with the Northern Alliance, both sides committed horrific atrocities, with the Taliban carrying out summary executions of noncombatants, including women and children, arbitrarily detaining persons, forcibly relocating the civilian population, burning homes and crops, and using forced labor.<sup>80</sup> Perhaps the more notorious atrocity was the torture and execution of former Afghanistan President Najibullah after the Taliban entered Kabul.<sup>81</sup> While members of regular armed forces do commit atrocities on occasion, and while that alone does not result in the violator losing his status as a POW—let alone stripping an entire army of its entitlement to POW status—the systematic violation of basic human rights by the Taliban suggests the existence of something other

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<sup>77</sup> Leslie Green, *Commentary-Jus in Bello, in* INTERNATIONAL LAW AND THE WAR ON TERROR, *supra* note 55, 235 at 240.

<sup>78</sup> See W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493, 498 (2003).

<sup>79</sup> See NEW RULES, *supra* note 33, at 250.

<sup>80</sup> See, e.g., U.S. DEP’T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES at \_\_\_\_ (2000).

<sup>81</sup> RASHID, *supra* note 69, at 49-50

than a regular armed force.

All things considered, and while opinions clearly differ, there seems to be a reasonable basis for the U.S. government to have concluded that the vast majority of Taliban fighters were not "[m]embers of regular armed forces." At the same time, it seems less reasonable to regard the higher levels of Taliban military authorities, as well as discrete units, such as its armored division, as *ipso facto* failing to constitute a regular armed force. For the United States to credibly maintain that position, it should have explained with greater detail and nuance why the Taliban *en toto* fell outside the scope of Article 4(A)(3). The failure to do so invites a similar lack of discrimination by other countries in future conflicts in situations where some U.S. forces (*e.g.*, special operations forces) are found not have fulfilled the four criteria, leading to a denial of POW status to U.S. forces as a whole.

The third issue is whether there was "doubt" about the status of the Taliban sufficient to trigger the requirements of Geneva III Article 5, which states that detainees "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Here much turns on what it means to have "doubts" and who is supposed to have them. Though there appears to have been some internal dissent, the leadership of the U.S. Executive Branch appears to have had no doubt, from early in the conflict, that all Taliban fighters as a group failed to fall within the scope of Article 4.<sup>82</sup> To the extent that the issue is whether the detaining power is uncertain, then Article 5 does not seem to be engaged. To the extent, however, that Article 5 is speaking to a broader viewpoint, doubts were certainly expressed by others, be it the ICRC<sup>83</sup> or legal commentators.<sup>84</sup>

In my view, Article 5 is written essentially as a guide to governments as to how they should act in a time of war. When Article 5 notes "should any doubt arise" it appears to be directed at doubts by the government who has taken custody of the detainee, and appears to be telling the government to resolve those doubts in a particular manner. There is no sense of any other entity, including a protecting power or the ICRC, being involved in determining whether the doubt exists

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<sup>82</sup> The State Department in early 2002 argued forcefully that the 1949 Geneva Conventions should be regarded as applying to the conflict in Afghanistan, but accepted that members of Al Qaeda and the Taliban may not be entitled to POW status under Geneva Convention III. See Memorandum from William H. Taft IV to White House Counsel Alberto R. Gonzales (Feb. 2, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 129 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>83</sup> See ICRC Press Release, Geneva Convention on Prisoners of War (Feb. 9, 2002) ("There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.")

<sup>84</sup> Aldrich, *supra* note 65, at 897.



or whether it has been resolved. At the same time, it is implicit in Article 5 that the detaining power is responsible for undertaking a serious and careful analysis as to whether persons who are detained are entitled to status as POWs. Further, in my view, the spirit of the Convention suggests that such an analysis should be communicated to any state or body that would otherwise serve as the protecting power for such persons were they to be accorded POW status, so that the status of the persons and the reasons for that status are clearly understood.

Less clear is whether the decision that "no doubt exists" can occur on a group basis or must be resolved on a person-by-person basis. The text of Article 5 certainly suggests that group determinations are permissible, in that it uses the word "persons" rather than "a person." Further, past state practice reveals that classification by groups of persons has been undertaken when considering POW status, such as the distinctions made between regular North Vietnamese army troops, the Viet Cong main force, and the Viet Cong local force during the Vietnam War. The issue is not so much what status was actually accorded to those groups, as it is that determinations can be made with respect to groups rather than on an individualized, case-by-case basis.

In short, the U.S. government probably did have the leeway to determine that all the persons in its custody who were Taliban fighters captured on the battlefield in Afghanistan fell outside the scope of Geneva Convention III, though in doing so there may well have been some overbreath. The error by the United States was not so much in making that determination as it was in making sure that the persons in its custody *were in fact part of the Taliban (or Al Qaeda)*, rather than a wayward tourist or relief worker. We now know that there were persons detained by the United States who had nothing to do with either the Taliban or Al Qaeda; they were just in the wrong place at the wrong time.<sup>85</sup> Article 5 does not appear to encompass the process by which a state determines whether an individual has committed a belligerent act against the detaining power; it assumes that such an act has occurred and then addresses what is to be done if there is doubt about the person's status as a POW. Yet, again, it seems within the spirit of Article 5 to see the detaining power as having a responsibility to review carefully and expeditiously whether persons detained are in fact combatants at all. Such a review seems especially merited in situations where persons are captured on a chaotic battlefield, where combatants and non-combatants by their dress are easily confused, or have been handed over by indigenous groups who are paid a bounty for doing so, as was the case in Afghanistan. As discussed in more detail below, the United States in 2004 created "combatant status review tribunals" to determine whether each detainee at Guantánamo Bay was properly classified as a combatant, and to release those who were not. The United States can and should be criticized for not doing more, and sooner, to ensure that such mistakes were not made.

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<sup>85</sup> See, e.g., Josh White, *Suspect is Freed from Guantanamo*, WASH. POST, Sept. 9, 2004, at A3 (recounting the release of a Pakistani national picked up on the battlefield in Afghanistan who the United States determined, after three years at Guantánamo, not to be an enemy combatant).

If the Taliban detainees are not entitled to POW status, that does not mean they lack any status under the laws of war. One possibility is that they should be accorded protections as civilians in accordance with Geneva Convention IV, on a theory that the conventions were designed to ensure that all persons would fall into some category of protection. Support for that position may be found in Article 4 of Geneva Convention IV, which states in rather broad terms that the Convention protects persons who, "in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict . . . of which they are not nationals."<sup>86</sup>

On the other hand, the whole structure of Geneva Convention IV is oriented toward protection of civilians detained either in occupied territory or in the detaining power's own territory; there is little to suggest regulation of the civilian bearing arms on the battlefield.<sup>87</sup> Moreover, Article 4 itself makes clear that certain persons in the hands of a belligerent are *not* protected by Geneva Convention IV. Nationals of the detaining power itself are not protected. Nationals of a neutral state "who find themselves in the territory of a belligerent state" and nationals of a co-belligerent state are not protected, so long as those states have diplomatic relations with the detaining state.<sup>88</sup> As such, detainees at Guantánamo Bay who are nationals of a co-belligerent in the conflict against either the Taliban or Al Qaeda (*e.g.*, Australia or the United Kingdom) clearly are not covered by the Geneva Convention IV. For this purpose, "co-belligerent" might be defined as the wide range of states that provided support for "Operation Enduring Freedom," in the form of military assistance, financial assistance, intelligence, overflight and landing rights, or political support.<sup>89</sup> Nationals of "neutral states," which might be defined as states other than Afghanistan who did not provide support for Operation Enduring Freedom, are not protected by Geneva Convention IV if they "find themselves"

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<sup>86</sup> Geneva Convention IV, *supra* note 26, art. 4.

<sup>87</sup> The Pictet commentary is also a bit conflicted on the issue, asserting on the one hand that "[e]very person in enemy hands must have some status" under the four conventions, 4 PICTET COMMENTARY (1960), *supra* note 67, at 51, but on the other hand stating that Geneva Convention IV basically concerns civilians living in the enemy belligerent's territory or in territory occupied by the enemy belligerent (which seems to exclude a civilian combatant who is taken into custody on the battlefield). *Id.* at 45.

<sup>88</sup> *Id.* Nationals of a state that has not ratified the conventions are also not protected, but since all states admitted to the United Nations have ratified or acceded to the 1949 Geneva Conventions, this carve-out would not apply.

<sup>89</sup> See U.S. Dep't of State Press Release on Operation Enduring Freedom Overview (Oct. 1, 2001), at <http://www.state.gov/s/ct/rls/fs/2001/5194.htm>.

in U.S. territory.<sup>90</sup>

Further evidence that persons caught up in armed conflict regulated by the Geneva Conventions are not necessarily protected, at the minimum, by the full range of Geneva Convention IV may be seen in Geneva Convention IV Article 5, which sets forth circumstances where a civilian loses most of the protections under the Convention. Those circumstances include when the person is a spy or saboteur, or is suspected of engaging in activities hostile to the security of the detaining state. Likewise, common Article 3 protects a certain category of persons but without providing them the full status enjoyed by either POWs or protected civilians under the Geneva Convention. Perhaps most importantly, Protocol I—which is viewed as clarifying and supplementing the 1949 Geneva Conventions—explicitly envisages a situation where a person who takes part in hostilities and is then detained may be found not entitled to either POW status or protected civilian status.<sup>91</sup> In other words, Protocol I expressly states that the failure to qualify under Geneva Convention III does not *ipso facto* result in protection under Geneva Convention IV.

Thus, the 1949 Geneva Conventions do not, by their terms, create a seamless system of full protection of all individuals, whereby if you do not qualify under the comprehensive protections of one convention, you automatically fall under the full protections of another. The further question, however, is whether Taliban personnel who fail to qualify as POWs should be considered protected civilians under Geneva Convention IV. Certainly they are not persons who simply happened to be present in the United States (or one of its allies) at the outbreak of the conflict, nor persons who just happened to be living in an area of Afghanistan placed under occupation by the U.S.-led coalition. Thus, they do not squarely fit within the dominant paradigm of Geneva Convention IV. Moreover, they are not persons who were normally civilians, but happened to take part in the hostilities in the course of unusual or extraordinary circumstances, which would seem the most likely scenario by

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<sup>90</sup> Ironically, this is apparently one area where detaining persons outside U.S. territory may give them greater rights than detaining them within.

<sup>91</sup> See Protocol I, *supra* note 34, art. 45(3) (“Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”); see also *id.*, art. 75(7)(b) (referring to persons who do not benefit from the general protections of the 1949 Geneva Conventions or Protocol I). The official ICRC commentary on the protocol states that Article 45 “covers persons who not only cannot claim prisoner-of-war status, but are also not protected persons under the Fourth Convention.” INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 870 (Yves Sandoz et al. eds., 1987) [hereinafter SANDOZ COMMENTARY]. The ICRC originally proposed Article 75 so as to protect “any person who was, for one reason or another, unable to claim a particular status, such as that of” POW or civilian internee. *Id.* at 864.

which a combatant who fails to qualify for POW status might be placed in protected civilian status. Rather, the Taliban personnel were trained to engage in, and did engage in, armed hostilities on a rather sustained basis, albeit in a capacity different from that of a regular army. While as a policy matter it might have been desirable for the United States to treat Taliban fighters in accordance with Geneva Convention III or IV, as a legal matter neither status was compelled. Rather, a key reason not to accord the Taliban fighters status as protected civilians is to avoid blurring the distinction between combatants and non-combatants, which, of course, is a central organizing tenet of the 1949 Geneva Conventions.<sup>92</sup> Regarding persons engaged in active hostilities as protected civilians may provide greater protections to such combatants, but it concomitantly invites the treatment of non-combatant civilians as hostile threats to a belligerent, thereby diminishing the protections for such civilians.

Assuming that the Taliban detainees are not entitled to either POW or protected civilian status under the Conventions, what is left for them appears to be the core standards advanced in common Article 3. For while common Article 3 was designed to deal with "armed conflict not of an international character," over time it has come to be regarded as setting minimum standards of humanity applicable in *all* armed conflicts, including international armed conflicts. A key source often cited for confirming this proposition is the statement by the International Court of Justice in the 1986 *Nicaragua v. United States* case regarding the status of common Article 3. In commenting on common Article 3's rules, the Court stated:

There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" . . . .<sup>93</sup>

In other words, common Article 3 establishes rules "with legs," capable of operating outside the confines of the paradigm of conflicts "not of an international character." As such, like the case of the Northern Alliance-versus-Taliban conflict discussed above, the regulatory road with respect to the U.S.-led coalition-versus-Taliban international armed conflict leads ultimately to common Article 3.

*U.S.-Led Coalition v. Al Qaeda as a Non-Afghan Movement.* Problems with applying the Geneva Conventions to the two prior conflicts pale in comparison to their application to the conflict between the U.S.-led coalition and Al Qaeda as a non-Afghan movement.

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<sup>92</sup> See Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226, para. 78 (July 8).

<sup>93</sup> Military and Paramilitary Activities in and against Nicaragua, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 104, para. 218 (June 27) (citing the *Corfu Channel* case).

One might first try to view this conflict as a "state-versus-state" conflict. Yet the attacks of 9/11 orchestrated and funded by Al Qaeda were the product of a global terrorist movement; they were not directed by the *de facto* government of Afghanistan, although that government did tolerate and benefit from the presence of Al Qaeda in Afghanistan. At its essence, Al Qaeda is an armed Sunni Islamist organization that is seeking to eliminate foreign influence in Muslim countries. Though its exact organization is shrouded in secrecy, most analysts describe it as comprising numerous independent and collaborative cells operating across multiple countries. As such, Al Qaeda is not an entity temporally or geographically tied to the prior *de facto* government of Afghanistan<sup>94</sup> but, rather, an independent force engaged in a private war.

Alternatively, one might try to view this conflict as a "state versus non-state actor" internal conflict. Yet that, too, is a poor fit for the Geneva Conventions paradigm, since the conflict is transnational in scale. Al Qaeda as an organization has a presence in numerous countries; it is not limited in its operations to Afghanistan or even countries adjacent to Afghanistan.

Thus, it is of no surprise that the ICRC and various scholars<sup>95</sup> and leading non-governmental organizations<sup>96</sup> see no basis for viewing the U.S. "global war" on Al Qaeda as an "armed conflict" within the meaning of the 1949 Geneva Conventions.<sup>97</sup> For these observers, while the phrase "war

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<sup>94</sup> See generally *The Global Reach of Al-Qaeda: Hearing Before the Subcomm. on International Operations and Terrorism of the S. Comm. on Foreign Relations*, S. HRG. 107-390 (2002); JANE CORBIN, *AL-QAEDA: IN SEARCH OF THE TERROR NETWORK THAT THREATENS THE WORLD* (2003); AL QAEDA NOW: UNDERSTANDING TODAY'S TERRORISTS (Karen J. Greenberg ed., 2005); LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006).

<sup>95</sup> See, e.g., Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1342 (2004) ("[A]ny conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war."); Mary Ellen O'Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 1, 3-4 (2005) ("Outside the real wars of Afghanistan and Iraq, al Qaeda's actions and our responses have been too sporadic and low-intensity to qualify as armed conflict.").

<sup>96</sup> See, e.g., Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFF., Jan.-Feb. 2004, at 2, 7 (argument by the director of Human Rights Watch that the laws of war are not applicable to the non-battlefield campaign against Al Qaeda).

<sup>97</sup> See ICRC Statement on Conflict in Afghanistan, at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList405/8C4F3170C0C25CDDC1257045002CD4>

on terrorism” is a catchy rhetorical device expressing a general policy of taking seriously a particular problem (not unlike the “war on poverty” under the Johnson Administration or “war on drugs” in recent years), this conflict is not really a “war” in the traditional sense, nor is there a discrete enemy called “terrorism.” Consequently, they argue that—leaving aside those collected on the battlefield in Afghanistan—the pursuit of Al Qaeda suspects should be undertaken in accordance with the norms that operate with respect to any pursuit of persons believe to have violated criminal laws, and not on the basis of the laws of war.

If, as some scholars have done,<sup>98</sup> one were to make the case for why this “state versus non-state actor transnational conflict” should fall within the scope of the laws of war, it would be along the following lines. First, common Article 3 does not expressly limit its scope to “internal” armed conflicts (or “civil wars”). The article does not, for example, refer to “armed conflict between the government of a High Contracting Party and an opposing resistance movement within its territory” or some such thing, as was later done in Protocol II.<sup>99</sup> Rather, the language speaks of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” While that language might be viewed as solely directed at civil war, the language is susceptible to a broader interpretation. In short, “not of an international character” is capable of meaning “between any state and a non-state actor,” rather than meaning “internal armed conflict.”

Second, “in the territory of one of the High Contracting Parties” can be interpreted as reference to conduct rising to the level of armed conflict between those two types of participants in any territory of a party to the Geneva Conventions. While it might normally be the case that a particular non-state actor is operating solely in the territory of a single state, if the non-state actor is operating in multiple territories against a state actor, then the conflict remains governed by common Article 3, except in states that have not joined the Geneva Conventions. Since all states of the world are now parties to the Geneva Conventions, that latter limitation has fallen into desuetude.

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<sup>98</sup> See, e.g., Jinks, *supra* note 33, at 38 (“the September 11 attacks constituted the initiation of an ‘armed conflict’ within the meaning of . . . the Geneva Conventions.”); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 211 (2003).

<sup>99</sup> Protocol II, *supra* note 35, art. 1 (“This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of [Protocol I] and 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.”) (emphasis added).

Third, application of common Article 3 to a state-versus-nonstate actor transnational conflict appears consistent with the thinking that emerged from the negotiations of the additional protocols. As has been discussed, Protocol I Article 1(4) extended the reach of protections associated with “international armed conflicts” to certain situations where a state is in armed conflict with a non-state actor (struggles against colonial domination, alien occupation, and racist regimes). There is no inherent reason why the protections associated with “non-international armed conflicts” might not be extended to other situations where a state is in armed conflict with a non-state actor. Indeed, Bothe, Partsch & Solf—who participated in the protocol negotiations—have maintained that an independent force engaged in a private war has a status akin to insurgents in a non-international armed conflict,<sup>100</sup> which suggests that the operative standards applicable to that war should be found in common Article 3.

Such points help explain the position taken by the Supreme Court in *Hamdan v. Rumsfeld*.<sup>101</sup> There the Court found that even if Hamdan was not a part of the state-versus-state (*i.e.*, coalition-versus-Taliban) conflict, he was part of an “armed conflict not of an international character” between the United States and a non-state actor (Al Qaeda) that occurred in the territory of a party to the Geneva Conventions. According to the Court, the phrase “conflict not of an international character” in common Article 3 is broad enough to encompass a conflict between a state and any individuals not associated with a state who are involved in a conflict in the territory of a state party.<sup>102</sup> The Court in part relied on the negotiating history of common Article 3.

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in

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<sup>100</sup> Bothe, Partsch & Solf write:

A question under the Hague Regulations and the Third Convention involves the status of an independent force which has no factual link to a party to an international armed conflict. In general, it may be said that such a force would probably be viewed as waging a private war. In any event, it would have no status better than that of insurgents in a non-international armed conflict, unless the movement they represent has such *de facto* objective characteristics of a belligerency that the movement itself could be recognized as a Party to an international armed conflict.

NEW RULES, *supra* note 33, at 235. They later note that “gangs of terrorists acting on their own behalf and no linked to an entity subject to international law are excluded” from the armed forces “of a party to the Conflict” under Article 43 of Protocol I. *Id.* at 237.

<sup>101</sup> 126 S.Ct. 2749 (2006).

<sup>102</sup> *Id.* at 2795-96.

one kind of "conflict not of an international character," *i.e.*, a civil war, see GCIII [Pictet] Commentary 36-37, the commentaries also make clear "that the scope of the Article must be as wide as possible," *id.*, at 36. In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. *See* GCIII Commentary 42-43.<sup>103</sup>

On the facts, the Court had before it a person who was detained on the battlefield in Afghanistan at the time of the armed conflict between the United States and the Taliban. Therefore, it is possible that the Court's reasoning about the "armed conflict" is limited to the situation of Al Qaeda persons detained in Afghanistan in the 2001-2002 time frame.<sup>104</sup> The Court did not speak to whether *any* persons associated with Al Qaeda who are detained *anywhere* around the world fall within the scope of common Article 3, which may be an important issue since several of the persons currently detained at Guantánamo Bay were not apprehended on the battlefield in Afghanistan.<sup>105</sup> At

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<sup>103</sup> *Id.* at 2796 (footnote omitted). In its footnote, the Court cited to the International Court's decision in the *Nicaragua v. United States* case referenced *supra* note 93.

<sup>104</sup> The D.C. Circuit Court of Appeals found (in the alternative) that the Geneva Conventions did not apply to Hamdan because he was captured as part of a global U.S. war with Al Qaeda, one that was separate from the war with the Taliban occurring in Afghanistan. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005) ("Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001."). In doing so, the circuit court was disagreeing with the district court, which had found that the conflict with Al Qaeda was not distinct from the conflict with the Taliban. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 161 (D.D.C. 2004). The Supreme Court, per Justice Stevens, did not expressly accept that there was a global conflict with Al Qaeda distinct from the conflict in Afghanistan with the Taliban. Instead, the Court found that even if a separate conflict existed with Al Qaeda, and even if Hamdan was detained as a part of that conflict, then he would still be protected by common Article 3. 126 S.Ct. 2749, \_\_\_\_ (2006) [see Part VI.D.ii]. The Court left open the possibility that Hamdan might be protected by the full range of the Geneva Conventions, but also left open the possibility that the Geneva Conventions may not apply at all to persons detained outside Afghanistan.

<sup>105</sup> For example, Bosnian Federation police in January 2002 transferred six Bosnian residents of Algerian origin from a Sarajevo prison to U.S. custody. The men were transported to Guantánamo Bay for detention. The detainees were said to be suspects in an alleged plot to attack the U.S. and U.K. embassies in Sarajevo. *See* European Parliament Press Release, MEPs Examine the Case of Six Prisoners Taken from Bosnia to Guantanamo (Apr. 26, 2006), at [http://www.europarl.europa.eu/news/expert/infopress\\_page/017-7559-115-04-17-902-20060424I](http://www.europarl.europa.eu/news/expert/infopress_page/017-7559-115-04-17-902-20060424I)



the same time, the Court did not expressly limit its holding to persons detained in Afghanistan and the language quoted above can be read to speak to military actions worldwide by the United States against Al Qaeda. In the aftermath of the *Hamdan* decision, the Department of Defense issued a directive stating that it is Department of Defense policy that all U.S. forces “shall apply, without regard to a detainee’s legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949,” for “all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>106</sup> The directive makes no distinction between persons detained in Afghanistan or abroad, nor limits its scope to persons associated with Al Qaeda.

Thus, as was the case with the other types of conflicts, common Article 3 emerges as an important set of default rules when considering post 9/11 armed conflict. Yet the *Hamdan* analysis will not be the last word on this subject. There remain proponents for the proposition that Al Qaeda detainees should be accorded greater protections than just those contained in common Article 3—as POWs under Geneva Convention III, as protected civilians under Geneva Convention IV, or simply as humans under otherwise applicable human rights law. Conversely, despite the *Hamdan* decision, there will no doubt remain some skeptics as to whether even common Article 3 should apply to Al Qaeda detainees, especially those who were not battlefield detainees in Afghanistan.

As demonstrated by the post-9/11 events, contemporary rules on the laws of war were not designed to take account of irregular forces or guerillas, and certainly not to take care of persons who conducted themselves as brigands or outlaws. One can formulate various arguments for why members of irregular forces, whether they be Taliban or Al Qaeda, should be accorded a full range of protections under the Geneva Conventions, but historically the fit is not a good one. Moreover, the resistance of the United States to fitting the square peg of the Geneva Conventions to the round hole of the conflict with Al Qaeda is not particularly surprising, especially in light of its vigorous rejection of the efforts in Protocol I to extend traditional protections to non-state actors fighting oppressive regimes. Nevertheless, while the full panoply of Geneva Convention protections may not be available, the historical trend is also one that has favored development of certain core protections for all persons engaged in armed conflict. That trend is discussed in the next section.

#### IV. *The Dictates of Public Conscience*

Despite the failure to apply the full panoply of Geneva Convention protections to irregular forces, there can be little doubt that the world has changed since Lieber’s time. The idea of simply subjecting a brigand to death upon capture is today unacceptable. One can point to many developments in international law that have fostered protections for even persons who are

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PR07546-25-04-2006-2006-false/default\_en.htm.

<sup>106</sup> Dep’t of Defense Directive No. 2310.01E, paras. 2.2 & 4.2 (Sept. 5, 2006), at [http://www.fas.org/irp/doddir/dod/d2310\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2310_01e.pdf).

responsible for even the most heinous of acts. Though senior leaders in the government of Nazi Germany had committed horrific atrocities, it was ultimately accepted by the Allied Powers that those leaders would be punished only after a public prosecution before a tribunal at Nuremberg, at which they would be represented by counsel and able to challenge the evidence against them (some were in fact acquitted). The past dozen years have seen a flourishing of such international criminal tribunals, from the Hague to Tanzania, from Sierra Leone to Cambodia and East Timor. The relative successes and failures of those tribunals is less relevant than the fact that our contemporary global society regards even individuals who appear to have committed genocide, crimes against humanity, and grave war crimes to be entitled to certain core standards of treatment.

The parallel development of human rights law since World War II reinforces the idea of core protections even for persons allegedly responsible for heinous acts. Modern human rights law centers around important treaties and institutions that have had a significant, if not systematic, influence on the constitutions, laws, judicial decisions, and policies of states worldwide.<sup>107</sup> A key fount for human rights law, the 1948 Universal Declaration on Human Rights,<sup>108</sup> heralded a series of important rights possessed by individuals as against government power: all persons are born free and equal in dignity and rights (art. 1); all persons have the right to life, liberty, and security (art. 3); no one shall be held in slavery or tortured (arts. 4-5); all persons are entitled to equal protection under the law (arts. 6-7); there shall be no arbitrary arrest, detention, or exile (art. 9); all persons have the right to a fair trial (arts. 10-11); and each person has a right to sue to vindicate these rights (art. 8). The 1966 International Covenant on Civil and Political Rights<sup>109</sup> embellishes on such core standards, and further sets forth certain fundamental rights that cannot be derogated from even in time of national emergency,<sup>110</sup> including the right not to be arbitrarily deprived of life, the right not to be tortured, the right not to be held in slavery, the right not to be found guilty of an offense made criminal *ex post facto*, and the right to recognition as a person before the law. As of 2006, the ICCPR has 154 parties, including the United States.

The application of such instruments as a matter of law to particular detained persons raises

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<sup>107</sup> See Christof Heyns & Frans Viljoen, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* (2002); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003); but see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (arguing that such treaties are relatively ineffective); Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185 (2003) (same).

<sup>108</sup> G.A. Res. 217 (Dec. 10, 1948).

<sup>109</sup> Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>110</sup> *Id.*, art. 4(1).

special issues, since the Universal Declaration is not a binding treaty and the ICCPR is interpreted by the United States as not applying to U.S. conduct outside U.S. territory. Yet regardless of such technical arguments, the historical arc of such human rights law helps explain why common Article 3 has emerged as a common denominator for all persons captured in the course of armed conflict. While the full range of Geneva Convention protections are not easily grafted onto the contemporary threat of global terrorism, common Article 3 expresses those “elementary considerations of humanity” that the global community has come to embrace.

Adapting the laws of war to address new circumstances is a notion readily accepted within such laws. An enduring element of the 1899 and 1907 Hague conferences is the recognition that codes of conduct cannot address all conceivable actions that may occur, especially as new technological developments arise. Consequently, the drafters of the 1907 Hague Convention on land warfare inserted a clause providing that even if a law-of-war code did not expressly apply to a specific situation, states were still bound to certain dictates of humanity.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>111</sup>

This clause—known as the Martens Clause after the Russian diplomat who called for its insertion—is binding treaty law upon states, including the United States. The clause was maintained in the 1949 Geneva Conventions<sup>112</sup> and adopted in a somewhat more modern form in Protocol I without any controversy.<sup>113</sup> Though it has not figured in the U.S. government’s discussions of the application of the Geneva Conventions in the “war on terror,” the Martens Clause is an important means for clarifying law of war instruments where they fall short. Thus, in the 1996 advisory opinion

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<sup>111</sup> 1907 Hague Convention, *supra* note 24, pmbl.

<sup>112</sup> See the “denunciation clause” common to the four conventions. Geneva Convention I, *supra* note 26, art. 63(4); Geneva Convention II, *supra* note 26, art. 62(4); Geneva Convention III, *supra* note 25, art. 142; Geneva Convention IV, *supra* note 26, art. 158(4) (Denunciation “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.”)

<sup>113</sup> Protocol I, *supra* note 34, art. 1(2) (“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”); see NEW RULES, *supra* note 33, at 38.

of the International Court of Justice on the legality of nuclear weapons, the Court found no treaty provision or customary international law norm specifically prohibiting the use of nuclear weapons. However, the Court relied upon the enduring significance of the Martens Clause to find that certain cardinal principles contained in law of war treaties (the need to distinguish combatants from non-combatants and the need to avoid unnecessary suffering to combatants) must be applied to new forms of military technology.<sup>114</sup> As such, the Court found that the use of nuclear weapons was generally prohibited.

This confluence of events—the receptivity to change as reflected in the Martens Clause, the rise of human rights protections, and the belief that even those believed to have committed atrocities are entitled to certain rights—helps explain why common Article 3 has gained such traction in the post-9/11 era; why all roads led to it. Yet there are also less altruistic explanations. International humanitarian law is built, to a certain extent, on a belief by countries that they can maintain better discipline among their armed forces if they operate in accordance with certain standards of decency; the path to anarchy is too well-trod when no standards exist. Further, there is a deep-seated belief (or at least hope) that by one side promoting such standards, there is a greater likelihood that the other side will apply them as well, at least in some measure. With a terrorist organization such as Al Qaeda, or a government such as the Taliban, placing faith in minimum standards of protection may be misplaced, but even the most heinous of actors have been known to show mercy, and efforts to promote such compassion, all things being equal, are rational and understandable.

Yet our understanding of the core protections of common Article 3 should not stop with its language, for common Article 3 also has experienced refinement since 1949. When Protocol I was adopted in 1977, it contained in Article 75 on *Fundamental Guarantees* a series of provisions that track the core protections of common Article 3 and deepen our understanding of them. Thus, whereas common Article 3 refers to a prohibition on “outrages against personal dignity, in particular, humiliating and degrading treatment,”<sup>115</sup> Article 75 embellishes by reference to “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”<sup>116</sup> Similarly, whereas common Article 3 briefly speaks to the right of detainees to be tried only by “a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples,”<sup>117</sup> Article 75 describes over the course of several paragraphs what constitutes “principles of regular judicial procedure,” including the right to conduct one’s defense and be present at one’s trial, the presumption of innocence, the right to remain silent,

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<sup>114</sup> See Nuclear Weapons Advisory Opinion, *supra* note 92, para. 78.

<sup>115</sup> See *supra* text accompanying note 31.

<sup>116</sup> Protocol I, *supra* note 34, art. 75(2)(b).

<sup>117</sup> See *supra* text accompanying note 31.

the right to cross-examine witnesses, and protection against double jeopardy.<sup>118</sup>

Article 75 is directed at persons who are “affected” by the conflict, are in the hands of a Party, and who do not already benefit from more favorable treatment outside Article 75's protections. As such, the “main function of the article is *to fill gaps* in treaty law by providing protection for categories of persons not already protected by such law,”<sup>119</sup> such as captured persons who engaged in hostilities but are not entitled to POW status.<sup>120</sup> Article 75 thus is an appropriate touchstone for determining the rights of non-state actors, such as alleged members of a terrorist organization, engaged in armed conflict against a state. At the same time, Article 75 provides that it does not limit or infringe upon other applicable international law; it is not a *lex specialis* that displaces other human rights protections.<sup>121</sup>

Since the United States is not a party to Protocol I (nor Afghanistan for that matter), its terms are not binding as a matter of treaty law with respect to the conflicts discussed above. Nevertheless, there is strong evidence that Article 75 has passed into customary international law. More than 160 states have adhered to Protocol I, including Article 75, and that no state has announced that Article 75 does not reflect customary international law. The ICRC views these fundamental guarantees as having passed into customary international law.<sup>122</sup> Most scholars in the field<sup>123</sup> and international tribunals that have addressed the issue, such as the Eritrea Ethiopia Claims Commission, have maintained that Article 75 reflects customary international law. That Commission has stated:

30. The Commission views Article 75 of Protocol I as reflecting particularly important customary principles. . . . These guarantees distill basic human rights most important in wartime. Given their fundamental humanitarian nature and their correspondence with generally accepted human rights principles, the Commission views these rules as part of customary international law.

31. Article 75 of Protocol I “acts as a “legal safety net” guaranteeing a minimum

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<sup>118</sup> Protocol I, *supra* note 34, art. 75(4).

<sup>119</sup> NEW RULES, *supra* note 33, at 457.

<sup>120</sup> Protocol I, *supra* note 34, art. 45(3).

<sup>121</sup> *Id.*, art. 75(8).

<sup>122</sup> See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 299-383 (Jean Marie-Henckaerts & Louise Doswald-Beck eds., 2005).

<sup>123</sup> See, e.g., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 233 (Dieter Fleck ed., 2005) [hereinafter THE HANDBOOK OF HUMANITARIAN LAW ].

standard of human rights for all persons who do not have protection on other grounds."<sup>124</sup>

While the United States did not ratify Protocol I, it also did not object to Article 75 as a part of customary international law, and thus has not placed itself in the position of being a persistent objector to such a rule. Indeed, the U.S. government has publicly embraced Article 75. After the adoption of Protocols I and II, the U.S. government "completed an extensive review of the Additional Protocols, both from the viewpoint of military considerations and from the viewpoint of national policy."<sup>125</sup> That internal review concluded in 1986 that the United States should not submit Protocol I to the Senate, but also determined that "the United States will consider itself legally bound by the rules contained in Protocol I . . . to the extent that they reflect customary international law, either now or as it may develop in the future."<sup>126</sup> Among the rules found in Protocol I that were already customary international law, according to the relevant Department of Defense memorandum, were the fundamental guarantees of Article 75.<sup>127</sup> Describing publicly the outcome of the review, the U.S. Department of State Deputy Legal Adviser stated in 1987:

We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria. We support the principle that these

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<sup>124</sup> See Eritrea Ethiopia Claims Commission, Partial Award on Civilian Claims, Eritrea's Claims (Dec. 17, 2004), 44 I.L.M. 608 (2005) (citing to THE HANDBOOK OF HUMANITARIAN LAW).

<sup>125</sup> See 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 (1987) (statement by the U.S. Department of State Deputy Legal Adviser). Matheson recently reiterated that the Reagan Administration "accepted as customary law . . . Article 75 of Additional Protocol I, which set forth a series of fundamental guarantees that would apply to all persons in the hands of a party to a conflict, even if they did not qualify for POW treatment. This provision was of course designed to fill the gaps in the 1949 Conventions to some degree." Michael J. Matheson, *Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs*, 38 GEO. WASH. INT'L L. REV. 543, 546-47 (2006).

<sup>126</sup> *Id.* at 420.

<sup>127</sup> Memorandum of the Department of Defense Law of War Working Group, May 9, 1986 ("We view the following provisions as already part of customary international law: . . . Fundamental guarantees: Article 75.")

persons not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and that no sentence be passed and no penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.<sup>128</sup>

Thus, the U.S. government as of 1986 regarded Article 75 as reflecting customary international law. Today, twenty years later, there can be little doubt that Article 75 is well-settled customary international law. Indeed, the Department of State Legal Adviser in 2003 asserted that "the United States . . . does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."<sup>129</sup> In the *Hamdan* case, the plurality opinion cited to that statement when finding that the provisions of Article 75 relating to trial protections are "indisputably part of . . . customary international law."<sup>130</sup> The four justices had no difficulty in using the more detailed provisions of Article 75 as a means of illuminating the more general obligations set forth in common Article 3. In short, the "dictates of public conscience" are aptly captured in common Article 3 of the 1949 Geneva Conventions, and are further elaborated in Article 75 of Protocol I, both of which are legally binding upon the United States.

Assuming that these are the principal sources of international humanitarian law with respect to the treatment of persons in armed conflict with terrorist organizations, do they help answer some of the key questions that will arise in years to come? Considerable attention has already been paid to whether the conditions of captivity accorded to detainees in the "war on terrorism" are compatible with international humanitarian law, including the methods employed by the United States in interrogating detainees and the rendition of detainees to countries where they are tortured and abused. One issue that has not received sufficient attention in legal commentary to date concerns the duration of detention of unprivileged combatants and the conditions under which their captivity should be terminated. The remainder of this essay briefly addresses that issue.

#### V. *Termination of Captivity*

One of the most important issues at present is whether terrorist suspects initially classified as unlawful combatants may be detained virtually indefinitely by the United States without trial.

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<sup>128</sup> *Id.* at 427-27 (footnote omitted).

<sup>129</sup> William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 29 YALE J. INT'L L. 319, 322 (2003).

<sup>130</sup> 126 S.Ct. 2749, \_\_\_\_.

Most of the 430 detainees<sup>131</sup> at Guantánamo Bay in late 2006 have been in U.S. custody for five years, longer than the duration of U.S. involvement in World War II. Detaining individuals without trial, even in time of war, is an extraordinary measure that imposes significant physical and mental burdens on the detainee. In June 2006, three of the detainees committed suicide. Consequently, the obligations of humane treatment both during the detention and in repatriation should be taken quite seriously.

*Applicable Law.* To the extent that the issue of termination of captivity has been addressed, the standard assertion by the U.S. government is that the detainees may be held for “the duration of the hostilities,” after which they must be repatriated to their country of nationality.<sup>132</sup> The Supreme Court in *Hamdi v. Rumsfeld*, appears to have adopted that view in the context of considering Hamdi’s objection that Congress, in the 2001 Authorization to Use Military Force (AUMF) statute,<sup>133</sup> had not authorized indefinite detention. The Court stated that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.”<sup>134</sup>

The general assertion that all detainees at Guantánamo Bay may be detained for the “duration of hostilities” is doubtful. First, that assertion may be overbroad in covering all persons detained worldwide in the “war on terrorism.” While detention of persons on the battlefield in Afghanistan, whether the person is associated with the Taliban or with Al Qaeda, seems fairly to fall within the scope of the evolving laws of war, the detention of persons outside Afghanistan who are suspected of connections to global terrorism is more problematic. The laws of war operate within temporal and geographic realms; considerable attention is given to when it can be said that an “armed conflict” has arisen and ended, and to where it is that protected persons are located (in enemy territory, in occupied territory, in neutral territory, etc.) These rules do not fit well the new paradigm of an armed conflict between a state and a non-state actor that is transnational in nature, especially when that non-state actor is not a centralized organization. Links to Al Qaeda may be found in numerous countries, not because the indigenous factions there are actively engaged in a coordinated fight against the United States, but because Al Qaeda attracts movements that seek to reduce Western influence in

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<sup>131</sup> See U.S. Dep’t of Defense Press Release, Detainee Release Announced (Nov. 17, 2006), at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204>.

<sup>132</sup> See, e.g., U.S. Dep’t of State Press Release on Remarks Upon Her Departure for Europe: Secretary Condoleezza Rice (Dec. 5, 2005), at <http://www.state.gov/secretary/rm/2005/57602.htm> (“International law allows a state to detain enemy combatants for the duration of hostilities.”).

<sup>133</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>134</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, \_\_\_\_ (2004).



their countries or region, be it Somalia, Algeria, or elsewhere.<sup>135</sup> A principal architect of the radical thinking that came to characterize Al Qaeda, Abu Musab al-Suri, has written that Al Qaeda is not an organization, it is not a group, nor do we want it to be. . . . It is a call, a reference, a methodology."<sup>136</sup> If that is correct, it becomes very strained to view all persons suspected of ties to Al Qaeda as unlawful combatants engaged in an armed conflict with the United States. It would be as if, during the Cold War, the United States decided to treat all persons suspected of being communists as combatants because communist groups were fighting the United States in places like Vietnam or Korea.

While it may be the case that Al Qaeda persons detained outside Afghanistan fall within the same rules as those detained on the battlefield, it may also be the case that the rules are different. Perhaps in recognition of this fact, the Supreme Court in *Hamdi*, after stating the general principle of the law of war that detention may last no longer than active hostilities, went on to note that "[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, that understanding may unravel."<sup>137</sup> Indeed, the Court appears to have been influenced by the fact that Hamdi allegedly took up arms with the Taliban and that active fighting against Taliban forces remained ongoing in Afghanistan.

If Al Qaeda suspects picked up in places other than the battlefield in Afghanistan are not regarded as combatants under the laws of war, then they would fall under the same rules that apply to any transnational criminal; they could be arrested and tried in regular courts for transnational crime, and otherwise could be closely monitored by law enforcement authorities. They could not, however, simply be detained without trial indefinitely.

Second, even if one assumes that all the detainees at Guantánamo Bay should be treated alike, the general assertion that they may be detained for the "duration of hostilities" still is problematic. That general assertion appears based on Article 118 of Geneva Convention III ("[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities"), and perhaps on the analogous Article 133 of Geneva Convention IV (any internment of civilians "shall cease as soon as possible after the close of hostilities"). Persons who have been prosecuted in accordance with the conventions, of course, may be held even after the cessation of hostilities, but they remain under the protections of the conventions until the completion of their

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<sup>135</sup> See Editorial, *Somali Simmers*, WASH. POST, Oct. 18, 2006, at A20 (recounting the Islamic fundamentalist movement in Somalia and its willingness to shelter Al Qaeda members); Craig Whitlock, *Al-Qaeda's Far Reaching Partner*, WASH. POST, Oct. 5, 2006, at A1 (recounting an Algerian underground network's decision to partner with Al Qaeda).

<sup>136</sup> Lawrence Wright, *The Master Plan*, NEW YORKER, Sept. 11, 2006, 48 at 50.

<sup>137</sup> 542 U.S. at \_\_\_\_.

sentences and their release.

The sentiment expressed by the 1949 Geneva Convention provisions in favor of expeditious release after the cessation of hostilities was animated by the problems that were experienced prior to 1949. The 1907 Hague Regulations<sup>138</sup> and the 1929 Geneva Conventions on Prisoners of War<sup>139</sup> were interpreted as allowing a detaining power not to repatriate until either the conclusion of an armistice agreement or even a final peace agreement. Since those agreements might take months or even years after the cessation of active hostilities, the repatriation of millions of prisoners of war in both the world wars were considerably delayed.<sup>140</sup> Consequently, the 1949 Geneva Conventions (and Protocol I) sought to detach the issue of repatriation from the conclusion of a formal agreement, and instead tie the matter to core justification for detention—*i.e.*, whether the individual would pose a threat to the detaining power after release. In this sense, the obligation became a unilateral one imposed on the detaining power, and not one contingent on some formal of consent from the opposing belligerent. For the 1949 Geneva Conventions, the threat no longer existed once the hostilities were over.

Yet, regardless of the duration of the conflict, Geneva Convention III and Geneva Convention IV are oriented toward an individualized assessment of the circumstances arising with respect to individual POWs and civilian internees. Under Geneva Convention III, a detaining power may release a particular POW on “parole or promise,”<sup>141</sup> and may also “conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.”<sup>142</sup> Likewise, the standard set forth in Geneva Convention IV for release of civilian internees is not tied to the cessation of hostilities; it provides that civilian internees “shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”<sup>143</sup>

Moreover, as previously noted, the most relevant standards for the detainees in Guantánamo

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<sup>138</sup> Article 20 of the 1907 Hague Regulations provides that “[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.”

<sup>139</sup> Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 75, 47 Stat. 2055 (“When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war.”).

<sup>140</sup> See 3 PICTET COMMENTARY, *supra* note 67, at 541.

<sup>141</sup> Geneva Convention III, *supra* note 25, art. 21.

<sup>142</sup> *Id.*, art. 109.

<sup>143</sup> Geneva Convention IV, *supra* note 26, art. 132.

are not those relating to POWs or civilian internees, since the Guantánamo detainees have not been classified as such. The more relevant standards arise under common Article 3 and Protocol I Article 75. Common article 3 is silent about termination of captivity. Article 75(3) of Protocol I, however, does address the matter, stating:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offenses, such persons *shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist*.<sup>144</sup>

The first sentence tracks the language of Article 9(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR),<sup>145</sup> a treaty that had been adopted before the Protocol I negotiations and that the Supreme Court plurality in *Hamdan* used to inform its understanding of Protocol I Article 75.<sup>146</sup> The second sentence indicates that unless the person is arrested or detained for a penal offense, then they are to be released with “minimum delay” and as soon as the circumstances justifying the detention cease to exist. There is no linkage here to the conclusion of a peace agreement as is the case for POWs under the 1907 Hague Regulations. Yet neither is there any linkage to release only after cessation of active hostilities, as is the case generally for POWs under 1949 Geneva Convention III. Rather, the standard is closer to that of Geneva Convention IV, whereby regardless of the duration of the conflict, the individual is to be released once the reasons necessitating the detention no longer exist.

The official ICRC commentary on the protocol maintains that there is an important link between these two sentences. The first sentence speaks to a particular temporal period: the period between the time that the person is detained and the time that they are informed of the reasons for the detention. According to the ICRC, this period should last no more than ten days:

Legal practice in most countries recognizes preventive custody, i.e., a period during which the police or public prosecutor can detain a person in custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offences (acts of terrorism) and in time of armed conflict it is often prolonged. Useful indications can be found in national legislation. In any case, even in time of armed conflict, detaining a person for longer than, say, ten days without

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<sup>144</sup> Protocol I, *supra* note 34, art. 75(3) (emphasis added).

<sup>145</sup> Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>146</sup> 126 S.Ct. 2749, \_\_\_\_.

informing the detainee of the reasons for his detention would be contrary to this paragraph.<sup>147</sup>

Turning to the second sentence, the ICRC commentary states that

it seems clear that detainees not charged with a criminal offence within the period mentioned must be released; this is laid down in all national legislation. However, in time of armed conflict States often assume the right to take security measures with regard to certain persons who are considered dangerous.<sup>148</sup>

The implication of this commentary is that the decision whether to charge a detainee must be taken within ten days after capture; if the decision is not to charge, then the person should be released. If the person is considered dangerous, then the detention can continue, but it must end once person is no longer viewed as dangerous. If that analysis is correct, then the standards applicable to persons detained by the United States in the "war" against Al Qaeda require that the United States release such detainees immediately upon determination that they no longer represent a threat to the United States or its allies, not upon the cessation of hostilities. The process that has now unfolded for the release of detainees, as discussed in the next subsection, supports this conclusion, in that the United States is releasing detainees upon determining that they no longer constitute a threat to the United States and its allies.

*Process for Determining if Continued Detention is Merited.* Neither common Article 3 nor Protocol I Article 75 addresses the method by which a detaining power should determine whether a detainee is considered dangerous. However, Protocol I Article 75(3) "was based on Articles 43 and 132 of the Fourth Convention, which are concerned with periodic review of internment decisions."<sup>149</sup> The standards set forth in those articles called for: (1) review of the internment by an appropriate court or administrative board; (2) periodic reviews conducted at least twice a year; (3) communication to a protecting power, which could be the ICRC, of the names of the detainees and the decisions of the court or board; and (4) release "as soon as the circumstances which necessitated his internment no longer exist." These standards appear to be appropriate ones to apply in considering the process for a detaining powers compliance with Article 75(3).

In March 2004, the United States initiated two types of review processes concerning the detainees. First, it established a system of combatant status review tribunals (CSRT), which were

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<sup>147</sup> SANDOZ COMMENTARY, *supra* note 91, at 876-77.

<sup>148</sup> *Id.* at 877.

<sup>149</sup> *Id.*

instituted to determine whether the detainee was properly classified as a "combatant."<sup>150</sup> The sole purpose of this process was to determine whether each detainee at Guantánamo Bay was properly determined to be a "combatant," not to determine whether they were a "prisoner of war" since that determination had previously been made by the president on a generalized basis. Thus, the CRST process helped determine if an innocent tourist or relief worker was captured in the mistaken belief that he was a combatant. As a part of this process, the detainees were not assigned lawyers, but were assigned U.S. military personnel to assist them in representing their views to the tribunal. By March 2005, 558 proceedings had been held, resulting in a determination that 520 persons were combatants and 38 persons were non-combatants.<sup>151</sup>

Second, the United States initiated an annual review process in which each detainee would be assessed in order to determine whether the individual continued to pose a threat to the United States or its allies, or whether he should be released.<sup>152</sup> Final review procedures were adopted in May 2004<sup>153</sup> and an implementation directive was issued in September 2004.<sup>154</sup> Under this review process, an administrative review board (ARB), composed of three military officers with relevant training, assesses each detainee and recommends whether the individual should continue to be

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<sup>150</sup> See Deputy Secretary of Defense Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2004), at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; see also U.S. Secretary of the Navy, Memorandum on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>; John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A1.

<sup>151</sup> For the dates and results of the CSRT proceedings, see U.S. Dep't of Defense, Combatant Status Review Tribunal Summary (n.d.), at <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>

<sup>152</sup> U.S. Dep't of Defense, Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantanamo Bay Naval Base, Cuba (Draft Memorandum), para. 1 (Mar. 2, 2004), at <http://www.dod.mil/news/mar2004/d20040303ar.pdf>.

<sup>153</sup> See Deputy Secretary of Defense Paul Wolfowitz, Order on Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba (May 11, 2004) [hereinafter Order on Administrative Review Procedures], at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

<sup>154</sup> See U.S. Dep't of Defense, Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (Sept. 14, 2004), at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

detained.<sup>155</sup> The final decision, however, rests with a Department of Defense civilian, appointed by the president with the advice and consent of the Senate<sup>156</sup> (the secretary of the navy was so designated for this task). "To the extent consistent with security," the government of the detainee's nationality may submit to the review board written information "of any nature, including information related to the threat posed by the enemy combatant to the United States and its allies."<sup>157</sup> A designated military officer presents to the board the reasons and evidence for and against continued detention.<sup>158</sup> The detainee may present information to the board at a hearing and is supposed to have access to the presentations of his home government and the military officer "to the extent it is both necessary to his presentation . . . and consistent with national security."<sup>159</sup> The detainee is assisted by a military officer, who may also serve as his spokesman at the board hearing.<sup>160</sup> In December 2004, the Department of Defense began conducting these administrative review hearings.<sup>161</sup> By December 2005, a first round of 464 ARB proceedings had been held, resulting in decisions to continue to detain at Guantánamo 330 persons, to transfer to other countries 119 persons, and to release 14 persons.<sup>162</sup> By November 2006, a second round of ARB proceedings had resulted in no further decisions to release individuals,<sup>163</sup> but these reviews will continue on an annual basis.

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<sup>155</sup> Order on Administrative Review Procedures, *supra* note 153, paras. 2(B)(i)–(ii), 3(F)(i)–(iv).

<sup>156</sup> *Id.*, paras. 2(B)(i), 3(F)(v).

<sup>157</sup> *Id.*, para. 3(A)(i).

<sup>158</sup> *Id.*, para. 3(A)(ii).

<sup>159</sup> *Id.*, para. 3(A)(iii).

<sup>160</sup> *Id.*, para. 3(C).

<sup>161</sup> See U.S. Dep't of Defense News Release on Defense Department Conducts First Administrative Review Board, No. 1292-04 (Dec. 14, 2004).

<sup>162</sup> For the dates and results of the CSRT proceedings, see U.S. Dep't of Defense, Administrative Review Board Summary (n.d.), *at* <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf>.

<sup>163</sup> See Administrative Review Board Summary: ARB-2 (n.d.), *at* <http://www.defenselink.mil/news/arb2.pdf>.

The Detainee Treatment Act of 2005,<sup>164</sup> which was issued in part as a reaction to the Supreme Court's decision in *Rasul v. Bush*,<sup>165</sup> imposes certain requirements on the CSRT and ARB processes, and limits the remedy available to detainees who seek to challenge their status. The Secretary of Defense is required to report to the Senate and House Armed Services Committees regarding the CSRT and ARB procedures, as well as the procedures in operation for status determinations regarding detainees in Iraq and Afghanistan. The statute also sets forth the rules of evidence to be used regarding admissibility of coerced statements, the characteristics of the reviewing authority, and certain other procedural issues. Finally, it precludes federal court review of ARB determinations, and grants the D.C. Circuit Court of Appeals exclusive and limited<sup>166</sup> jurisdiction to hear appeals of the final decisions of the CSRT.

There would appear to be no basis for arguing on their face that the CSRT and ARB processes run afoul of the customary international law obligation regarding release of unprivileged combatants, as expressed in Protocol I Article 75 and read in light of Geneva Convention IV Articles 43 and 132. The need for continued detention is periodically considered by an administrative board composed of persons competent to make such decisions, after receiving relevant information from the detainee, and then is reviewed at a more senior level. Those decisions are likely communicated to the ICRC, which has been granted access to the Guantánamo detainees since their arrival in Guantánamo in early 2002. Further transparency exists in the reports provided to Congress regarding those determinations and the public release of associated documents, transcripts, and decisions

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<sup>164</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005 (2005).

<sup>165</sup> 542 U.S. 466 (2004).

<sup>166</sup> The D.C. Circuit Court of Appeals is limited to considering:

(1) whether the CSRT status determination with regard to the detainee was consistent with the standards and procedures specified by the Secretary of Defense for CSRTs (including the requirement that the tribunal's conclusion be supported by a preponderance of the evidence and allow a rebuttable presumption in favor of the Government's evidence); and

(2) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the CSRT determination is consistent with them.

*Id.*, § 1005(e).

from the proceedings.<sup>167</sup> Whether those procedures are being conducted in a manner that is truly meaningful is outside the scope of this essay and will no doubt be the subject of scrutiny as more information becomes available.

*Persons Transferred to Other Countries.* Most of the detainees were found by the CRST proceedings to be combatants and by the ARB proceedings to be a continuing threats to the United States and its allies. For many of these detainees, however, the ARB proceedings determined that they could be transferred to other countries, who could then take responsibility for monitoring, detaining or prosecuting them. From 2002 to 2006, approximately 345 detainees at Guantánamo were transferred to the custody of other countries.<sup>168</sup> As of November 2006, it appears that the United States plans to transfer approximately another 110 detainees, but has not yet done so.<sup>169</sup>

Where the detainee has been transferred to his country of nationality, any U.S. obligations arising under the Geneva Conventions would appear to end. If a detainee has not been transferred to his country of nationality, however, it seems appropriate to regard the United States as having a continuing obligation to ensure that the country of transfer abides by the standards of common Article 3 and Protocol I Article 75 in its treatment of the transferee, as is the case with respect to transfers of POWs under Geneva Convention III.<sup>170</sup>

*Persons Deemed Eligible for Release.* Between September 2004 and March 2005, the CSRT proceedings determined that 38 persons detained at Guantánamo—about five percent of the persons who spent time there—were not combatants.<sup>171</sup> The first round of ARB proceedings ending in 2005

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<sup>167</sup> See, e.g., Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents Released March 3, April 3, and April 19, 2006: Testimony of Detainees Before the Combatant Status Review Tribunal, at <http://www.dod.mil/pubs/foi/detainees/csrt/index.html> (visited December 1, 2006).

<sup>168</sup> See U.S. Dep't of Defense Press Release on Detainee Release Announced, *supra* note 131 (reporting that detainees had been transferred to Albania, Afghanistan, Australia, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kuwait, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen.)

<sup>169</sup> *Id.*

<sup>170</sup> Geneva Convention III, *supra* note 25, art. 12.

<sup>171</sup> See U.S. Dep't of Defense, Combatant Status Review Tribunal Summary, *supra* note 151; see also U.S. Dep't of Defense News Release, Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), at



determined that 14 detainees were no longer a threat to the United States or its allies and could be released, and similar findings presumably will occur in the future. Given such findings, the United States was under an obligation to release the individuals immediately; there was no basis for stating that the detention remained permissible due to ongoing hostilities against the Taliban in Afghanistan or against Al Qaeda worldwide.

These persons, however, have not been released immediately. The U.S. Department of State sought to coordinate the return of the 38 individuals deemed to be non-combatants to their countries of nationality,<sup>172</sup> but experienced difficulties in doing so.<sup>173</sup> The first five were released by March 2005,<sup>174</sup> yet it took as long as November 2006 before all 38 detainees were released.<sup>175</sup> The speed with which persons are released who are no longer deemed a threat under the ARB process is unclear; the Department of Defense seems to lump such persons together in its data on persons awaiting transfer to other countries. The reasons for the continued delay in releasing persons who have been found either not to be combatants or not to pose any further threat appear to fall into three categories: detainees who could not be returned to their country of origin out of a fear they would be mistreated; detainees whose country of origin would not allow their return; and detainees who were either stateless or whose apparent country of origin challenged their nationality.

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<http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html> (statement by Secretary of the Navy that of the "558 CSRT hearings conducted, the enemy combatant status of 520 detainees was confirmed. The tribunals also concluded that 38 detainees were found to no longer meet the criteria to be designated as enemy combatants. So 520 enemy combatants, 38 non-enemy-combatants.") These persons have been referred to at times as "No Longer Enemy Combatants" or "NLEC."

<sup>172</sup> These persons had various nationalities: Afghanistan; Algeria; China; Egypt; France; Jordan; Maldives; Russia; Saudi Arabia; Sudan; Turkey; and Yemen. See Washington Post News Summary, *Guantanamo Bay Detainees Classified as "No Longer Enemy Combatants"* (n.d.), at <http://projects.washingtonpost.com/guantanamo/nlec/> (listing the detainees, their nationality, and providing links to transcripts of their CRST proceeding).

<sup>173</sup> See Craig Whitlock, *U.S. Faces Obstacles to Freeing Detainees*, WASH. POST, Oct. 17, 2006, at A1.

<sup>174</sup> See U.S. Dep't of Defense News Release, Defense Department Special Briefing on Combatant Status Review Tribunals, *supra* note 171.

<sup>175</sup> See U.S. Dep't of State Press Release, Release of Three No Longer Enemy Combatant (NLEC) Detainees from Guantanamo (Nov. 17, 2006); at <http://www.state.gov/r/pa/prs/ps/2006/76275.htm>.

With respect to the first category, Article 75 does not provide for an exception where the detainee does not wish to return to his country of origin for fear of mistreatment. Although that issue was discussed in the course of negotiations of both Geneva Convention III and Protocol I regarding repatriation, exceptions were not adopted out of a concern that prisoners might not be able to make a free choice while still in captivity.<sup>176</sup> Nevertheless, contemporary human rights must be viewed as now informing this obligation to repatriate, especially in light of Article 75(8). For example, Article 3 of the Convention against Torture prohibits the return of an individual to a country where a person would likely be tortured.<sup>177</sup> The United States implements this obligation through a statute that declares that it "shall be the policy of the United States not to expel, extradite or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the persons would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*"<sup>178</sup> With respect to the second and third categories, the United States presumably impresses upon the detainee's country of origin that it is a violation of international law to render a person stateless.

Yet for all three categories, the United States was under an obligation to release the detainees with the minimum delay possible, and that release is *not* contingent upon an ability to return the detainee to a particular country. Consequently, in my view, the United States was obligated, at a minimum, to parole such individuals into the United States pending a final resolution of their status. Our immigration laws are fully capable of handling persons in non-immigrant status who are paroled

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<sup>176</sup> 3 PICTET COMMENTARY, *supra* note 67, at 543.

<sup>177</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85. The convention entered into force for the United States in 1994.

<sup>178</sup> 8 U.S.C. § 1231 note (2000). For the Immigration and Naturalization Service implementing regulations, see 8 C.F.R. §§ 208.16(c) & 208.18 (2005). For the Department of State implementing regulations, see 22 C.F.R. pt. 95, §§ 95.2-4 (2005).

Taking account of such concerns is consistent with the practical implementation of the laws of war. As far back as the aftermath of the Korean War, it has been accepted that in exceptional cases prisoners need not be forced to return to their homeland against their will, and that the obligation to treat them humanely includes taking account of the conditions of they might face upon repatriation. *See* G.A. Res. \_\_\_\_\_, para. 2 (Dec. 3, 1952) (affirming that force shall not be used against POWs either to prevent or to effect their repatriation, and that they shall at all times be treated humanely); *see also* 3 PICTET COMMENTARY, *supra* note 67, at 547-48; Jaro Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414 (1953); R.R. Baxter, *Asylum to Prisoners of War*, 30 BRIT. Y.B. INT'L L. 489 (1953). Having said that, the soundest course of action in the event that detainees are not to be repatriated is to have their consent verified by an entity other than the detaining power, such as the ICRC.

in the United States pending proceedings for their removal to another country. The only reason not to do so is a political one; the embarrassment of bringing into the United States and allowing free movement to persons previously declared to be terrorists/unlawful combatants. Yet it was the choice of the United States, for its own benefit, to bring these individuals to Guantánamo from the places they were abroad; to the extent that the United States experienced difficulty in returning those persons, it should bear the burden of that difficulty, not the individuals.

By way of example, the United States captured in Afghanistan and brought to Guantánamo Chinese nationals who were ethnic Uighur Muslims.<sup>179</sup> In 2004 (even before initiation of the CSRT and ARB proceedings), the U.S. government determined that these individuals were either not enemy combatants or posed no risk to the United States and its allies, and therefore could be released. Since many Chinese Uighurs oppose the government of China, these individuals feared that they would be imprisoned, persecuted or tortured if returned to China. The United States apparently agreed and engaged in an extensive effort to find a country willing to accept the Uighurs.<sup>180</sup> Ultimately it succeeded for all of them, but only two years after they had been determined to pose no threat to the United States.<sup>181</sup> Such lengthy detention of innocent persons is unconscionable and a violation of the United States obligations under common Article 3 and Protocol I Article 75.

*Persons Neither Transferred Nor Released.* As of late 2006, there remain 430 persons detained at Guantánamo who are regarded as threats to U.S. security. Perhaps some 60 to 80 of those persons will be tried before the U.S. system of military commissions that will now operate under Military Commissions Act of 2006.<sup>182</sup> While the United States is still engaged in an aggressive effort to transfer many of these individuals to other countries, it has encountered considerable resistance to these transfers, including from close allies such as the United Kingdom. These detainees present the most difficult scenario for balancing the needs of the security of the detaining power against the rights of protected persons to humane treatment.

With respect to the Taliban detainees, the United States, its allies, and the government of Afghanistan should be permitted to continue the detentions so long as the individuals remain a threat,

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<sup>179</sup> For background, see John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 Am. J. Int'l L. 690, 710-11 (2006).

<sup>180</sup> See Robin Wright, *Chinese Detainees Are Men Without a Country*, WASH. POST, Aug. 24, 2005, at A1. Two of the men filed suit in U.S. court seeking habeas relief, but were unsuccessful before the district court. See *Qassim v. Bush*, 407 F. Supp. 2d 198 (2005).

<sup>181</sup> See Associated Press, *3 Detainees at Guantanamo Are Released to Albania*, WASH. POST, Nov. 18, 2006, at A13.

<sup>182</sup> Pub. L. No. 109-366 (2006).

which may be the case as long as the Taliban remain involved in active hostilities against the government of Afghanistan.<sup>183</sup> If those hostilities conclude, the detainees should be repatriated as soon as possible to their country of origin. Such repatriation should not be delayed based on the lack of a formal agreement concerning the cessation of hostilities, the integration of the Taliban into the Afghan government, amnesty, or any related matter. If it is more likely than not that the detainee will be subject to human rights abuses upon his repatriation, such as torture, then the repatriation should not go forward, and an alternative means of release should be developed until circumstances change. In the event that the United States withdraws its forces from Afghanistan prior to the cessation of those hostilities, the United States would be withdrawing from the conflict and would no longer have a basis under the laws of war for detaining Taliban personnel.

With respect to Al Qaeda detainees, the United States must continue to engage in periodic reviews of the threat posed by each individual detainee. Obviously, that threat can diminish over time, in light of the age, health, and psychological condition of the detainee. Moreover, the process for review must take account of the exact relationship of the detainee to Al Qaeda. As indicated before, Al Qaeda is a network of groups or cells, some of which are rather peripheral to its strategic activities. Splinter groups in Iraq, Somalia, and elsewhere may fall under the rubric of Al Qaeda, but their fortunes may change dramatically over time in terms of their vitality and significance. As such, if a detainee is connected to a group that, for whatever reason, has been thoroughly routed, and if it is probable that the detainee would return to his homeland without re-engaging with his Al Qaeda faction, then that fact should be taken into account in any threat assessment. In other words, Al Qaeda should not be viewed as a monolithic entity; the threat of the detainee should be gauged based on the part of Al Qaeda to which he relates, rather than the overall threat of the existence of Al Qaeda.

*Wounded or Sick in Detention.* The longer the United States holds detainees, the more likely significant issues will arise with respect to their health and well-being. Already, difficult issues have arisen, such as whether a detainee should be transferred to the United States (or another country) for

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<sup>183</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, \_\_\_\_ (2004) (emphasis added):

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, *for the duration of the particular conflict in which they were captured*, 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.

heart surgery, or whether it should be performed at Guantánamo Bay.<sup>184</sup> Ultimately, questions must be addressed about whether certain detainees should be released for health reasons.

The standards set forth in common Article 3 and in Protocol I Article 75 do not address the issue of repatriating detainees who are sick or severely injured. Yet given the requirement for humane treatment in both common Article 3 and Article 75, there are compelling reasons to view the standards set forth in Geneva Convention III Article 110 as establishing general benchmarks for humane treatment on this issue. Article 110 provides that the following POWs should be repatriated even during the course of the conflict:

- (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.<sup>185</sup>

To the extent that any of the detainees at present or in the future reach such stages of mental or physical fitness, the obligation of humane treatment imposed upon the United States requires termination of their captivity.

## VI. *Conclusion*

The dominant paradigms of the 1949 Geneva Conventions, which concern either inter-state or internal armed conflict, do not sit well with the new face of armed conflict presented by Al Qaeda. The non-state actor who engages in heinous conduct has been an outcast to the laws of war, whether one looks at the terrorism of William Quantrill in the 1860's or the terrorism of Al Qaeda today. For that reason, it is understandable that the full protections envisaged by those conventions were not applied in the types of conflicts that emerged after 9/11. Nevertheless, influenced by developments in the fields of human rights and international criminal law, the laws of war have now evolved to a point where the "public dictates of conscience" compel the application of core protections even for the outcast. Those protections are reflected in both conventional and customary international law, and may be seen in common Article 3 of the 1949 Geneva Conventions, and Article 75 of their Additional Protocol I. If the United States wishes to act in accordance with international law, such

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<sup>184</sup> *Detainee Wants to be Relocated for Surgery*, WASH. POST, Nov. 19, 2006, at A10.

<sup>185</sup> Geneva Convention III, *supra* note 25, art. 110.

standards should guide the United States in the conditions of the detention and the mechanisms by which detainees are prosecuted for crimes.

Moreover, those standards should guide the United States in its decision-making on the release of detainees. Detainees in the "war on terror" may *not* be held until the "cessation of hostilities." They may only be held so long as the particular detainee at issue represents a danger or threat to the detaining power. The detaining power is obligated to undertake periodic reviews, by an appropriate court or administrative board, of whether that threat continues to exist. Once the detainee is determined not to be a threat, or their mental or physical fitness has been gravely diminished, the detainee must be released immediately. If the detainee will likely be exposed to abuse by being sent back to his country of origin, he may not be returned. In that case, or in the case of a detainee whose country of origin will not accept his return or recognize his nationality, the United States is obligated to release the detainee in the United States until an appropriate alternative place for relocation can be resolved. Continued detention of persons deemed not to be a threat is unlawful and unconscionable.