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The Treatment of Detainees and the "Global War on Terror": Selected Legal Issues

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Introduction

This article will address selected legal issues relating to the treatment of detainees[1] in the context of the "Global War on Terror" as a "hook" on which to hang some ideas of more general application and significance about the international legal framework of the "war." Some general (i.e., *jus ad bellum*) international law aspects of the parameters of that framework have already been debated in the literature,[2] but the perspective adopted herein is of more specialist focus inasmuch as it concentrates on the practical issue that should resonate in the mind of all coalition military and associated personnel since the disclosure of ill-treatment of detainees in the custody of US and British forces in Iraq at Abu Ghraib and elsewhere:[3] namely, once suspects in the "War on Terror" are captured, in accordance with what rules and legal standards are they to be treated? The broader, fundamental, more theoretical (but no less important) issue lurking behind this question of detailed substance is one of the utmost practical significance for personnel deployed to military counterterrorist operations in the field in the setting of the "Global War on Terror": does the "War on Terror" constitute an armed

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conflict in the sense of international law? And if so, what kind of armed conflict is it: international, non-international or something else?

The premise contained herein, in a nutshell, is that military and political decisionmakers in the coalition countries (principally, for the purposes of this article, the United States and the United Kingdom) have mentally placed the proverbial "chicken before the egg," in that they have completely failed to consider the very real implications that these considerations have on armed forces from a legal point of view. When soldiers are deployed on military operations, they need to know the context of and legal framework governing their actions. When in action against "terrorists" in Afghanistan, are coalition troops subject to (and expected to apply) the 1949 Geneva Conventions,[4] or Additional Protocols I or II thereto?[5] If so, do they apply all their provisions, or only some of them? The legal problem has been particularly acute when armed forces have been given instructions which, while vague on details, have tended to undermine respect for the law of armed conflict in general.[6] As one noted former member of the US armed forces has succinctly put it:

> I can understand why some administration lawyers might have wanted ambiguity so that every hypothetical option is theoretically open, even those the President has said he does not want to exercise. But war doesn't occur in theory and our troops are not served by ambiguity. They are crying out for clarity.[7]

The structure of this article will be, first, to consider some specific issues in current legal proceedings in both the United Kingdom and the United States regarding treatment of detainees in custody, before moving to the broader picture of the general legal framework and classification of the "Global War on Terror." The latter discussion will involve a brief review of recent relevant decisions by the US and Israeli Supreme Courts as well as a comparison with the situation confronted by British security forces in Northern Ireland during the "Troubles"[8] as a limited predecessor for such a "war." At the end, we will return to the specific starting point about legal standards for the treatment of detainees in military custody in light of the foregoing discussion about the nature and classification of the conflict, and draw some conclusions with suggestions for a possible way forward in what has become a veritable legal and moral minefield.

Recent Legal Developments in the United Kingdom

The *Al-Skeini* Litigation

On June 13, 2007 the House of Lords (sitting in its judicial capacity as the highest court in the United Kingdom) gave its judgment in a long-running saga

concerning the treatment of detainees in Iraq, namely, the *Al-Skeini* case.[9] Claims for compensation are now being brought by the family of Baha Mousa against the British Ministry of Defence as a direct result of this judgment by the House of Lords,[10] although it represents the final stage in the instant litigation.

In the Al-Skeini affair there have been two separate limbs: the civil proceedings which culminated in the House of Lords decision, and military proceedings at court-martial. The situation which gave rise to both sets of proceedings involved the deaths of six Iraqi civilians at the hands of British troops in Basra between August and November 2003—in other words, during the period in which the United Kingdom, along with the United States, was internationally recognized as being in belligerent occupation of Iraq.[11] The court-martial case will be mentioned further below. The applicants in the civil litigation[12] were close relatives of the six dead Iraqi civilians. They sought an order of judicial review against the Secretary of State for Defence by way of challenge to his refusal to order an independent public inquiry into the circumstances in which their relatives died and his rejection of liability to pay compensation for their deaths. Five of the deceased were shot by British troops while exchanging fire with Iraqi insurgents, during patrols or house searches,[13] but the most famous one is the sixth, whose circumstances were somewhat different. Baha Mousa was a young hotel receptionist who was taken into custody by British troops during a search of his hotel. Within thirty-six hours he was dead, apparently having been beaten to death by British troops while in their custody at the military base of Darul Dhyafa in Basra.[14]

The legal issue in the case turned on the extraterritorial application of the Human Rights Act 1998 (HRA),[15] which is the domestic British incorporation of the United Kingdom's international obligations under the European Convention of Human Rights (ECHR).[16] The claimants' arguments were essentially that Iraqi civilian detainees in British military custody in Iraq were entitled to the protection of the HRA and therefore (indirectly) of the ECHR; the core question was thus one of jurisdiction. Throughout the earlier proceedings in the Divisional Court and the Court of Appeal,[17] and also in the House of Lords, a clear distinction was drawn between the five Iraqis who were shot on the street or in house searches by British troops and the one, Baha Mousa, who died in the actual custody of British troops.

This distinction was necessitated by the Convention's own insistence that "the High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in . . . this Convention."[18] In a confusing series of cases decided by the European Court of Human Rights (ECtHR), the Court introduced and elaborated upon a notion of "effective control" over territory for the purposes of ECHR jurisdiction outside the "*espace juridique*"[19] of the Convention, and a fundamental tension developed between two alternative conceptions of the extraterritorial

application of the ECHR during military operations by armed forces of ECHR State parties in States or other territorial entities that were not party to the Convention.[20] This was clearly the case in Iraq, as that State is not and never has been a party to the ECHR, whereas the United Kingdom is. The fundamental question, therefore, was whether the actions of British troops, deployed on military operations outside the United Kingdom, could be subject to provisions of the Convention (by way of the HRA, which applies to all "public authorities" of the United Kingdom and makes it unlawful for such authorities to act in a way that is incompatible with a right under the ECHR).[21]

Essentially what was conceded by the Ministry of Defence, and in the final stage of the House of Lords hearings[22] was no longer contentious, was that the ECHR was in principle applicable to these cases. The first five deceased, however, because they were shot on the street or during patrols or house searches but were not in the physical custody of British troops, were held not to fall within the jurisdiction of the UK courts for the purposes of the human rights legislation. In the House of Lords, the government was appealing against the findings (in both the Divisional Court and the Court of Appeal, albeit with slightly different reasoning) that it was liable in respect to Baha Mousa's death and that it could or should be ordered to hold the requested independent public inquiry into the circumstances thereof.

Throughout the proceedings in *Al-Skeini*, at all three court levels, it was common ground that there were two possible legal reasons as to why the Iraqi claimants should be brought within the jurisdiction of British human rights laws, even though they were not citizens of the United Kingdom and the acts in question occurred outside the United Kingdom while British troops were engaged in military operations. These reasons were that, under the ECtHR decision in *Bankovic*,[23] extraterritorial jurisdiction of the ECHR could be based on either

(1) the effective control of a State over a territory and its inhabitants, either as a result of military occupation (whether lawful or unlawful in general international law), or with the consent, acquiescence or invitation of the government of that territory, such that the State in effective control actually exercises all or some of the public powers normally to be exercised by the government of that territory. This approach to extraterritorial jurisdiction is referred to for convenience as the "effective control of an area" (ECA) argument and was based on the ECtHR jurisprudence in the line of cases following *Loizidou*;[24] or

(2) the exercise of authority or control over a State's individuals by the activities of another State's official agents in its embassies, consulates,

> military bases or prisons, or on board aircraft or vessels registered in or flying the flag of that State, wherein agents of the State are exercising the authority of the State extraterritorially in a foreign country. This approach to extraterritorial jurisdiction is referred to for convenience as the "State agent authority" (SAA) argument, and was based on an alternative jurisprudence of the ECtHR as expressed in *Drozd and Janousek v. France and Spain*.[25]

The Divisional Court had limited the applicability of the ECA argument to territory within the *espace juridique* of the Convention and applied a narrow construction of the SAA argument, holding that it applied only in relation to "embassies, consulates, vessels and aircraft and . . . a prison."[26] Within those restrictive parameters, the case of Baha Mousa alone was considered justiciable. The SAA argument was also the preferred view of the Court of Appeal, although it additionally applied a broader interpretation of the ECA argument than the Divisional Court, in the sense that the majority opined that the ECA theory could apply anywhere in the world, even outside the *espace juridique* of the Convention, so long as the territory was under effective control. The appeals court was also more generous in its view of the SAA argument. It relied heavily on the decision in *Issa and Others v. Turkey*,[27] a case in which the ECtHR gave "an unequivocal statement of SAA responsibility in a military context"[28] (*Issa* concerned the deaths of a number of Iraqi shepherds, allegedly at the hands of Turkish soldiers operating against Kurdish guerrillas in northern Iraq). The Court of Appeal effectively held, largely on public policy grounds, that "Article 1 [of the Convention] could not be interpreted so as to allow a State party to perpetrate violations of the ECHR on the territory of another State which it could not perpetrate on its own territory"[29] and that the SAA theory applied whenever the individual in question was under the control and authority of the relevant State agents anywhere in the world.

However, in the House of Lords judgment in *Al-Skeini*, a majority of the Law Lords was uncomfortable with the extremely broad approach of the Court of Appeal, and chose to retrench the position considerably. In the leading judgment, Lord Brown dismissed the expansive extraterritorial application of the ECHR regime proposed by the Court of Appeal in reliance on *Issa* as

> altogether too much. It would make a nonsense of much that was said in *Bankovic* [as to the Convention being an essentially regional instrument that was not designed to operate throughout the world] . . . . It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of "authority and control" irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?[30]

In connection with military forces and the law of armed conflict, Lord Brown noted that the requirements of effective occupation required that the occupying power respect the laws in force, rather than introducing new laws and enforcement mechanisms; indeed, in most parts of the world outside Europe the probability would be that ECHR rights would be incompatible with local law in any event.[31] The cases of the first five claimants were therefore conclusively dismissed as falling outside the United Kingdom's jurisdiction for human rights purposes, while in respect to the sixth claimant, Lord Brown agreed that Baha Mousa's case did indeed fall within the scope of the United Kingdom's obligations under the ECHR, but "only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies."[32]

Although it is perhaps still too early to make a full evaluation of the impact of the final decision in *Al-Skeini*, and a claim against the Ministry of Defence pursuant to the judgment in the litigation has only recently been made public,[33] it is surely a decision of enormous significance because it means that British forces, when deployed outside the United Kingdom on certain kinds of military operations, effectively will be carrying the obligations of the ECHR and the HRA with them. In other words, for the United Kingdom (and all other States that are party to the ECHR) questions of human rights will become increasingly important in situations where British troops are either in belligerent occupation of foreign territory or stationed in any foreign territory in a situation other than full-scale international armed conflict. This is a trend that has been gathering strength for some years; as the International Court of Justice has put it:

> [T]he protection offered by human rights conventions does not cease in time of armed conflict . . . . As regards the relationship between international human rights law and international humanitarian law, there are . . . three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[34]

It is a fact that a major part of contemporary culture, especially in the West, is the demand for redress after injury. In the context of armed conflict, although there is a specialized mechanism for calling wrongdoers to account by criminal prosecution on charges of war crimes or similar, that is a lengthy and generally unsatisfying process from the victims' perspective. All too often soldiers accused of criminal conduct are either acquitted (which may of course be for a variety of reasons, some more readily understandable to the world outside the courtroom than others) or not even brought to trial. This is an allegation that might be made in the current context of securing accountability for misconduct by British troops in

Iraq,[35] but it is nothing new: there were notoriously few prosecutions of German military officers and soldiers in the *Reichsgericht* at Leipzig for offenses allegedly committed in World War I, and most of those that took place resulted either in acquittals or in derisorily lenient prison sentences.[36] The growth in the importance of human rights law in relation to situations of occupation or other military deployment is inevitable, given that civil litigation for compensation is easier for claimants to secure than criminal trials. In the United Kingdom, at least, we will doubtless be seeing more of these human rights cases for compensation being brought against the Ministry of Defence the longer our forces stay in theater.

All of which is not to say that British forces will no longer be applying the law of armed conflict when they are deployed on operations abroad or will be looking at every military situation through the distorting lens of human rights obligations; it simply means that in certain limited situations, where for example they may be occupying territory or they may be based in a foreign State with the consent of that State, as is the case with both Iraq and Afghanistan, they are under an obligation to apply the ECHR and HRA in relation to persons who are in their custody. But it would be inconceivable for them to be required to apply human rights law to field operations on the battlefield, where the law of armed conflict is and will remain the applicable *lex specialis*.

Court-Martial Proceedings

Since the period of belligerent occupation in Iraq by the Coalition Provisional Authority in 2003–04, there have been two principal British courts-martial which resulted in the convictions of soldiers accused of transgressions in relation to the treatment of detainees in Iraq, as well as two other high-profile court-martial cases that failed for lack of evidence. The same facts that led to the civil proceedings in the *Al-Skeini* litigation, in relation to the death of Baha Mousa in British military custody, resulted in the court-martial of seven servicemen in the United Kingdom in 2006. The trial, although not entirely a success, made legal history on two counts: it involved the first instance of a British soldier pleading guilty to a war crimes charge under the International Criminal Court Act 2001[37] and it saw the first modern instance of criminal charges being brought against senior British Army officers for dereliction of duty—in international law the basis for such a charge would have been the doctrine of command responsibility. Four soldiers of The Queen's Lancashire Regiment were charged with inhumane treatment of the Iraqi civilians in September 2006. Of these, one (Corporal Donald Payne) was additionally charged under the Army Act 1955[38] with manslaughter and perverting the course of justice, and another (Sergeant Kelvin Stacey) was charged with actual bodily

harm or assault. Two Intelligence Corps officers were charged with negligently performing a duty, as was Colonel Jorge Mendonca, the regimental commander.[39]

Corporal Payne pleaded not guilty to manslaughter and perverting the course of justice but guilty to the charge of inhumane treatment of civilians and was sentenced to dismissal from the Army and one year's imprisonment in consequence.[40] The other six accused were all acquitted due to lack of evidence.[41] Although the charge against Colonel Mendonca was eventually thrown out,[42] he was notable for being the highest-ranking British military officer in modern history to be charged with a war crime, and particularly on command responsibility principles. When he subsequently decided to resign from the Army, despite his acquittal, rather than face possible further internal disciplinary action, there was much criticism of the Attorney General and the Army Prosecuting Authority, who were accused of treating him as a scapegoat. There is clearly a fine line to tread here. On the one hand, if there was not enough evidence to convict Colonel Mendonca of any crime, then it was obviously right that he was acquitted. But the criticism of putting him on court-martial simply "because the Army wanted to put an officer on trial"[43] is beside the point: the system of hierarchy and command responsibility, whereby every commander is legally responsible for the troops under his command, is a lynchpin of the modern law of armed conflict. The case of *Payne and Others* teaches us that we should not shy away from calling senior officers to account when troops under their command commit criminal offenses. If the officer either ordered the crimes or knew or should have known that they were occurring and "failed to take all necessary and reasonable measures" to "prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution"[44] then he must face investigation and, if appropriate, prosecution. It will not do to concentrate on the ordinary soldiers and non-commissioned officers who commit the actual abuse; they are easy targets for a prosecution.

The *Al-Skeini* litigation and its associated courts-martial, although the highest-profile matter concerning treatment of detainees by British forces abroad, is not the only case that we have had in the United Kingdom. Two specific cases have gone to courts-martial within the last three years, although one of them did not result in a full trial as Fusilier Gary Bartlam, the soldier concerned, pleaded guilty.[45]

In *The Queen v. Mark Paul Cooley, Darren Paul Larkin and Daniel Kenyon*,[46] the three accused (all non-commissioned officers in The Royal Regiment of Fusiliers) faced a total of nine charges under the Army Act.[47] These included the same charges as in *Bartlam* in relation to the same facts and others, namely, forcing two detainees "to undress in front of others" and forcing two naked males "to simulate a sexual act." In addition, offenses of conduct to the prejudice of good order and military discipline (contrary to Section 69 of the Army Act) and committing a civil

offense (contrary to Section 70 of the Army Act) were also charged. The Section 69 charges related to simulating the punching and kicking of an unknown male and (in the case of Corporal Kenyon, the most senior of the defendants) failing to report unlawful acts by soldiers under his command. The Section 70 charge involved the assault and beating of an unknown male who was being detained by British forces. All the incidents, both in *Bartlam* and in *Cooley, Larkin and Kenyon*, arose out of an operation in "Camp Breadbasket" in the British Zone of Iraq near Basra in May 2003, in which British troops rounded up a number of Iraqi civilians and proceeded to "work them hard" (as the British commanding officer apparently instructed his men). This vague order, coupled with apparent failures in reporting and supervision of conduct, led to several situations in which Iraqi detainees were physically and mentally abused by British soldiers. The specific acts alleged included punching and kicking detainees, stripping them and forcing them to simulate sexual acts. One soldier stood on a detainee; a group of others tied another detainee to a forklift truck and raised him off the ground. Astonishingly, some of these misdeeds were photographed by some of the soldiers, and it was when one of the latter took his film to be developed back in Britain that the matter was reported to the police for investigation. A particularly disturbing aspect of the case was the failure to bring charges against the officer who gave the original order and subsequently failed to supervise his men. However, Camp Breadbasket covered quite a large area and the particular abuses that were the subject of the court-martial occurred in a discrete area of the camp some distance from where the commanding officer was located, such that it would have been infeasible for him to have known what was going on. Consequently, the Army Prosecuting Authority did not feel that there was sufficient evidence to charge him with an offense under the doctrine of command responsibility. Of the actual defendants in the case, Larkin pleaded guilty to assault and was jailed for 140 days, while Kenyon and Cooley were both convicted and sentenced to eighteen months' and two years' imprisonment, respectively.[48] Cooley's sentence was subsequently reduced to four months' imprisonment by the Army Reviewing Authority.[49]

There has been much generalized concern as to allegations of ill-treatment of civilians (in some cases allegedly amounting to torture) by British troops in Iraq and the subsequent investigations into such conduct by those troops.[50] The issue remains one of the greatest topical interest and a number of investigations are currently ongoing.[51] Only time will tell how many more cases arise and can be prosecuted.

Recent Legal Developments in the United States

The long saga of detainee matters in the US courts has continued unabated and there have been interesting developments in two cases in particular: *United States v. Hamdan* and *United States v. Khadr*.[52] In June 2007, two different US military judges in two different sets of proceedings in military commissions threw out all charges in the two cases, on the grounds that the accused had not been properly determined to be "unlawful enemy combatants" in terms of the Military Commissions Act of 2006; therefore all the charges were thrown out for lack of jurisdiction. In respect to Hamdan, the judge held that the Combatant Status Review Tribunal's (CSRT) determination that he was an "enemy combatant" was made for the purpose of determining whether or not he was properly detained, rather than whether or not he was subject to trial by military commission, and using a different legal standard. He concluded:

> [Hamdan] is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful enemy combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government [has] failed to determine, by means of a competent tribunal, that he is an "unlawful enemy combatant" using the definition established by Congress . . . .[53]

In respect to Khadr, the judge declared that "the military commission is not the proper authority, under the provisions of the [Military Commissions Act], to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr."[54] The Court of Military Commissions Review (CMCR), however, has since reversed that ruling on the grounds that the distinction between "enemy combatant" and "unlawful enemy combatant" status was purely semantic and that the judge had erred in his conclusion that a CSRT determination of "unlawful enemy combatant" status was a prerequisite to trial by military commission, because the military commission itself had jurisdiction so to determine.[55] The CMCR accordingly reinstated the charges against Khadr, and the Department of Defense has now indicated that it intends to press ahead "expeditiously" with the full prosecutions of Khadr and other detainees in the same position.[56] Although some might have thought that the twin rulings in June would provide a substantive obstacle to the entire system for the prosecution of detainees in the "War on Terror," throwing it into disarray and causing a general rethink on the part of the Pentagon, clearly the setback to the Administration's plans was only a temporary, procedural one.

The "Global War on Terror": Comments on the General Legal Framework

In the last part of this article I will consider the broader issues mentioned at the beginning, namely, the broader international legal framework that might govern the "Global War on Terror." In short, is it an armed conflict or not? And if it is, then what kind of armed conflict is it? This is prompted by another detainee case that has been heard recently in the United States. It is not a military case but a civilian case: *Al-Marri v. Wright*,[57] in which the applicant is a civilian citizen of Qatar who was legally resident in the United States. Al-Marri had been detained by US military authorities without charge and had been so detained for some four years. In brief, the Court of Appeals ruled that he could not be detained indefinitely by the military authorities and was entitled to *habeas corpus*. However, I do not intend to dwell on that aspect of the case, but rather on something else that the Court said, almost as an aside. It is in a couple of sentences in one of the paragraphs buried in the middle of the Court's opinion; it has apparently escaped the attention of most observers.

The Court in *Al-Marri* said that because the US Supreme Court had determined in *Hamdan v. Rumsfeld*[58] that the armed conflict with Al-Qaeda is a conflict "not of an international character" and because there are no categories of combatants in non-international conflicts, neither lawful combatants nor unlawful combatants, the Military Commissions Act did not apply to Al-Marri and the only remaining possible classification of him was that he was a civilian.[59] Because he was a civilian and legally resident in the United States, he was entitled to certain constitutional protections; as a civilian, he could not be transformed "into an enemy combatant subject to indefinite military detention, any more than allegations of murder in association with others while in military service permit the Government to transform a civilian into a soldier subject to trial by court martial."[60] This is interesting because it represents, in my opinion, one of the two best options for classifying detainees in the "War on Terror" for the purposes of ensuring that they receive the benefit of the best possible treatment in captivity.

This leads to a comparison of the *Hamdan* decision with the Israeli Supreme Court's decision on targeted killings[61] and with certain aspects of the situation that the United Kingdom had in relation to Northern Ireland. The view of the plurality in *Hamdan* was that "there is at least one provision of the Geneva Conventions that applies here, even if the relevant conflict is not one between signatories."[62] This the plurality identified as Common Article 3 of the Geneva Conventions, which applies as a minimum standard for humanitarian protection in all armed conflicts, although on the face of it the provision is directed specifically to armed conflicts not of an international character, in which it provides basic protection to

persons taking no active part in hostilities, including those placed *hors de combat* by wounds or sickness and those who have surrendered or have otherwise been detained. The key to this part of the decision in *Hamdan* was the phrase "armed conflict not of an international character," a phrase which the plurality held to have a meaning "in contradistinction to a conflict between nations": effectively a negative definition, such that it could be interpreted as bringing within its ambit any and all armed conflicts that do not fit within the traditional inter-State armed conflict paradigm. The plurality asserted that this was the "literal meaning" of the phrase "armed conflicts not of an international character," and that in any event the intention behind the provision, while ostensibly restricted specifically to non-international armed conflicts in the classic sense of international law, was for the purposes of its scope of application and protection to be as wide as possible.[63] Of the dissenting opinions in *Hamdan*, only Justice Thomas dealt directly with the issue of the nature of the conflict between the United States and Al-Qaeda. He held that "the conflict with Al-Qaeda is international in character, in the sense that it is occurring in various nations around the globe. Thus, it is also occurring in the territory of more than one of the High Contracting Parties."[64] Although he described the plurality's interpretation of the phrase "armed conflicts not of an international character" as "admittedly plausible" he nevertheless felt constrained by a judicial duty of deference to the Executive's determination of matters of war and peace.[65]

So the plurality of the US Supreme Court held that the totality of the "Global War on Terror" is an armed conflict not of an international character, proceeding from what was essentially a functionalist perspective: the necessity to determine the legality of the military commissions established by President Bush, and applying a literalist reading of the letter of the law. Turning now to a comparison with the decision of the Israeli Supreme Court in respect to a much more limited scenario—namely, Israel Defense Forces (IDF) actions against Palestinian militants in the Occupied Palestinian Territories and in areas under the jurisdiction of the Palestinian Authority—a much more holistic approach was applied by the Court in seeking to explain the whole legal framework underpinning IDF operations in this theater. The Israeli Supreme Court reached a diametrically opposite conclusion to that of its American counterpart, namely, that the conflict between Israel and the Palestinians is an international armed conflict.

Most international lawyers outside the Middle East would have thought that that is a counterintuitive position to take, because normally for it to be an international armed conflict, there have to be two or more States, and the Palestinians are not a State in international law. So it looks a bit unlikely from that perspective, although there are other grounds on which it could be plausible. For example, areas that are still under Israeli occupation could be said to be still in a state of

international armed conflict by virtue of being under belligerent occupation. Conversely, the conflict between Israel and the Palestinians could not intuitively have been considered a non-international armed conflict either, because some parts of the Occupied Territories remain under the occupation of Israel and other parts are under the jurisdiction of the Palestinian Authority and in neither case are they legally part of the State of Israel. So it cannot be a non-international armed conflict, because it is not occurring on the territory of only one State. The classification of the armed conflict was a point of agreement between the petitioners and the State. The latter made a very interesting point in its submissions:

> The question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there is no need to decide that question in order to decide the petition. That is because according to all of the classifications of armed conflict, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are a party to the armed conflict and take an active part in it, whether it is an international or a non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law: a category of armed conflicts between States and terrorist organisations. According to each of these categories, a person who is a party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him.[66]

I think this is interesting for a number of reasons, one of which in this context is that it amounts to saying that many of the rules in armed conflicts are now basically the same, irrespective of the classification of the conflict in question, so it is not necessary to worry too much about whether the conflict is international or not. This is certainly a tendency that has been gathering force, albeit in the slightly different context of application of penal sanctions for violations of the law of armed conflict, since the jurisprudence of the International Criminal Tribunal for the former Yugoslavia began to develop some twelve years ago. To the extent that the State of Israel, through its counsel in this litigation, expressed the same view or a variant thereof, it could be viewed as an example of the accumulation of *opinio juris* on this point.

The Supreme Court of Israel, nevertheless, did not choose to go down the particular path opened to it by the State's submissions on the character of the armed conflict between Israel and the Palestinians. Instead, it ruled simply that the applicable law was that governing international armed conflicts and it did so for two particular reasons:

(1) the fact of the armed conflict crossing the frontiers of the State, i.e., the pre-1967 frontiers, and taking place within a context of belligerent occupation;[67] and

(2) by reference to the military capabilities of modern terrorist organizations. This point is, I think, of more general application than the specific situation that the Court was dealing with.

The latter point, in particular, is quite innovative. The Court expressed it thus:

> The fact that the terrorist organisations and their members do not act in the name of a State does not turn the struggle against them into a purely internal State conflict. Indeed, in today's reality, a terrorist organisation is likely to have considerable military capabilities. At times, they have military capabilities that exceed those of States. Confrontation with those dangers cannot be restricted within the State and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of an international character.[68]

The decisions of the US and Israeli Supreme Courts in these two cases represent two alternative classifications of the "War on Terror," or at least certain aspects thereof, as an armed conflict. While I think that there is much to commend the contextual analysis that was adopted by the Israeli Court, the American approach seems somewhat literal by comparison. Nevertheless, at the very least the US Supreme Court decision might signal a resurgence of an emphasis on the usefulness of Common Article 3 of the Geneva Conventions.[69] That can be broadened for those States that are parties to Additional Protocol I to the "fundamental guarantees" contained in Article 75 thereof. What is innovative about the decision in *Hamdan* in this particular respect is that it applies Common Article 3 to what is not really a non-international armed conflict as traditionally understood in international law at all, but might rather be called a transnational armed conflict. That is to say, the conflict is neither specifically international nor specifically non-international in nature within the traditional framework of the law of armed conflict, but it is transnational because it occurs in more than one State in the world simultaneously within the same context of hostilities. Common Article 3, in any event, is the lowest common denominator for humanitarian protection: it should have the widest scope of application possible, which essentially means it should be applied in all armed conflicts, no matter how they are classified.

The Israeli decision, on the other hand, is seductive in the clarity and logic of its analysis. However, it is quite clear that the Court there was only seeking to deal with the situation as between Israel and Palestinian militants. Nevertheless, the

passages quoted above might be interpreted as suggesting that a broader, more sweeping statement of the law might have been intended, however peripherally, by the Court.

Let me very briefly consider the Northern Ireland example, which is often mentioned as a predecessor in some ways for dealing with the "Global War on Terror." In terms of the latter phrase, the experience of Northern Ireland clearly shows that there is nothing new, at least rhetorically, in the use of such language. When the power of internment—indefinite detention without charge or trial—was introduced in the province in 1972, its Prime Minister, Brian Faulkner, said that Northern Ireland was "quite simply at war with the terrorist."[70] The Irish Republican Army (IRA) tried to claim prisoner of war (POW) status for its operatives who had been detained by British security forces, a status which was not accepted by the British authorities.[71] Indeed, the perspective of the British government was that the situation in Northern Ireland did not amount to an armed conflict of any kind in the sense of international law; the legal framework within which it operated in the United Kingdom being that of Military Aid to the Civil Power, wherein the armed forces were deployed in Northern Ireland pursuant to a request from the Northern Ireland government, which felt that the normal police forces could not contain the escalating situation and needed military assistance to restore law and order. It could not in any event have been an international armed conflict because Northern Ireland is a part of the United Kingdom. It could not have been an Additional Protocol I situation, as a war of national liberation, even though that is what the IRA sought to claim, first, because the United Kingdom was not at the time a party to Additional Protocol I, and second, because the IRA failed to make the declaration that is required of a national liberation movement under Article 96(3). Finally, it could not have been a situation under Additional Protocol II, again because the United Kingdom was not at the time a party to that instrument. In any event, the threshold of application would not have been met by the IRA in terms of control of territory, and the violence was for the most part too sporadic and isolated to meet the Protocol's requirements.

The contemporary British position in terms of the "Global War on Terror" as an armed conflict is that the United Kingdom does not accept the notion that such a "war" exists as an armed conflict of any classification in international law. Any determination as to the type of an armed conflict in which British forces are engaged will be made on a case-by-case basis, depending on the facts on the ground in each given situation.[72] The legal basis of the decision in any event is the international law definition of an international or non-international armed conflict, in conjunction with the facts on the ground. If British forces are in action against the government or other official forces of any other State, the situation will be dealt with as one of

international armed conflict. In any other situation in which British troops are deployed, the situation will be regarded as one of de facto non-international armed conflict. Thus, from the official UK point of view, hostilities that are currently taking place in Afghanistan and Iraq are in effect treated as internal conflicts in which the United Kingdom is participating on the side of the governments of those States. The conflict in Iraq, for example, is not a conflict between the British and Iraqi States: it is a conflict between the Iraqi State and Iraqi insurgents, and the former invited British troops to assist it in certain parts of Iraq in combating the insurgency. Although this might, again, seem a counterintuitive position to take, it is not entirely devoid of sense from a strictly legal perspective, in the same way that the US Supreme Court's decision in *Hamdan* has a certain logic to it.

Concluding Remarks

I think that there are six possibilities that we could consider in terms of the broad legal framework of the "Global War on Terror" in the sense of the law of armed conflict.

(1) The "war" is an armed conflict and it is international in nature—that would essentially be an extension of what the Israeli Supreme Court held in the targeted killings case;

(2) The "war" is an armed conflict and it is non-international in nature—that is what the US Supreme Court said in *Hamdan*;

(3) The "war" is an armed conflict and it has a new kind of hybrid status which might be described as a "transnational armed conflict"[73]—the issue here is going to be that if we call it a "transnational armed conflict" what actual rules do we apply? While this looks attractive as a classification in some respects because it is factually realistic in terms of the actual situation on the ground, it is not ultimately that helpful because it does not tell us much about the details of the law to be applied;

(4) The "war" is an armed conflict and its precise classification in terms of the law of armed conflict does not really matter because in any event we will apply the minimum yardstick of Common Article 3 and—if the State in question is a party to Additional Protocol I—we are also going to apply the fundamental guarantees contained in Article 75;

(5) The "war" does not constitute an overarching armed conflict for the purposes of international law—the various counterterrorist military operations which have been taking place since September 2001 should be viewed as falling primarily within the framework of large-scale criminal law enforcement, albeit they are undertaken either largely or entirely by military forces; and

(6) The "war" does not constitute an overarching armed conflict, but each individual counterterrorist military operation in the context thereof should be designated separately as either international or non-international in nature, depending on the international law definition and the facts on the ground—this is the position currently maintained by the British government.

Ultimately, the most important issue here is the practical one of the standards according to which detainees captured in counterterrorist military operations are treated. The fundamental point is that the purpose of the law of armed conflict in the context of detainee treatment has to be to provide the maximum amount of protection possible, and if that means applying Common Article 3 at the very least, then perhaps that is the best thing that we can do. But in some respects I would say that it should not even matter too much if we treat detainees as POWs. This is not the same thing as saying that they *are* POWs, just that we treat them *as if they were* POWs. It does not stop the State from prosecuting them after capture, and by doing so we would be applying the maximum possible humanitarian protection and would be complying with the spirit and letter of Geneva Convention III.[74]

There is no logical reason, other than State pride, for this to be taken as a commentary on the legitimacy or otherwise of the terrorist organizations—such attitudes are in any event outmoded by the contemporary paradigm of asymmetrical warfare and the inevitable diminution in the importance of reciprocity as a primary basis of obligation in the international law of armed conflict. I concede that the view expressed herein is unlikely to be widely adopted at the present time, but it seems to me to be a rational and practical one. At the end of the day, the law in war has to protect detainees, and what we need is not more law but agreement on the basic parameters of applying Common Article 3, what that means in practice, and firm and consistent application of Article 75 of Additional Protocol I for those States that are parties thereto.[75]

Notes

1. This article will not as such consider the preliminary issue of the status or classification of detainees under the international law of armed conflict, although that aspect of the analysis is of obvious relevance to the broader framework of the discussion. For a representative sample of the vast legal literature thereon, see George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 891 (2002); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARVARD INTERNATIONAL LAW JOURNAL 301 (2003); Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency and the International Laws of Armed Conflict*, 55 AIR FORCE LAW REVIEW 1 (2004); John C. Yoo, *The Status of Soldiers and Terrorists under the Geneva Conventions*, 3 CHINESE JOURNAL OF INTERNATIONAL LAW 135 (2004); Derek Jinks, *The Declining Significance of POW Status*, 45 HARVARD INTERNATIONAL LAW JOURNAL 367 (2004); Marco Sassòli, *The Status of Persons Held in Guantánamo under International Humanitarian Law*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 96 (2004); Luisa Vierucci, *Is the Geneva Convention on Prisoners of War Obsolete? The Views of the Counsel to the US President on the Application of International Law to the Afghan Conflict*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 866 (2004); Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE LAW JOURNAL 667 (2006).

2. Again, the literature on *jus ad bellum* aspects of the "Global War on Terror" is extensive. For a representative sample, see Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 401 (2002); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE JOURNAL OF INTERNATIONAL LAW 341 (2003); Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Force*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 97 (2003); Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 AIR FORCE LAW REVIEW 87 (2004); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 141 (2007).

3. The various public reports, both from US official sources and international non-governmental sources, collectively summarize the substance of the mistreatment that is known to have occurred at Abu Ghraib and in other detention facilities under US or British control in Iraq. *See, e.g.*, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions [*sic*] in Iraq During Arrest, Internment and Interrogation (Feb. 2004), *available at* www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf; Article 15-6 Investigation of the 800th Military Police Brigade (Mar. 2004) (the "Taguba Report"), *available at* www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm; Final Report of the Independent Panel to Review DoD Detention Operations (Aug. 2004) (the "Schlesinger Report"), *available at* www.humanrightsfirst.org/us_law/PDF/abuse/Schlesinger_report.pdf.

4. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of

Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. For the purposes of this article, only Geneva Convention III will be relevant to the discussion hereafter.

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

6. E.g., the infamous dismissal of much of the Geneva Conventions as "quaint" and "obsolete" by then–US Attorney General Alberto R. Gonzales in his Memorandum to the President Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 118 (Karen L. Greenberg & Joshua L. Dratel eds., 2005), *available at* www.gwu.edu/~nsarchiv/NSAEBB127/02.01.25.pdf.

7. 151 CONG. REC. S11062 (daily ed. Oct. 5, 2005) (statement of Senator John McCain).

8. The "Troubles" is the euphemistic term used to refer to the period between 1969 and 1998 in Northern Ireland, when high levels of violent activities by the Irish Republican Army (IRA) and other armed paramilitary groups on both the Nationalist/Catholic and Unionist/Protestant sides of the province's sectarian divide necessitated the deployment of British military forces on the streets of the province to assist in the restoration and maintenance of law and order. The troops were initially deployed in August 1969 and, although the period of the "Troubles" can be said to have substantively ended in June 1998, when elections for the Northern Ireland Assembly took place against the background of a referendum approving the "Good Friday Peace Agreement" of April 1998 and ceasefires by most of the various paramilitary organizations active in the province, Operation BANNER (Army operations in Northern Ireland pursuant to the state of emergency that was declared in 1969) was only formally terminated in July 2007. *See* Defence News, Operation BANNER ends in Northern Ireland after 38 years (Aug. 1, 2007), www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/OperationBannerEndsInNorthernIrelandAfter38Years.htm.

9. Al-Skeini and Others v. Secretary of State for Defence, [2007] UKHL 26 [hereinafter Al-Skeini (HL)].

10. *See* Michael Evans, *Family of dead Iraqi assaulted by British troops can sue MoD*, THE TIMES (London), June 14, 2007, at 32, *available at* www.timesonline.co.uk/tol/news/world/iraq/article1929367.ece.

11. See United Nations S.C. Res. 1483, UN Doc. S/RES/1483 (May 22, 2003), in which the Council expressly recognized "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command."

12. Al-Skeini (HL), *supra* note 9.

13. The facts in these first five cases are described in some detail in the first instance judgment of the Divisional Court of the Queen's Bench Division of the High Court: The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence, [2005] 2 W.L.R. 1401, paras. 55–89 [hereinafter Al-Skeini (DC)].

14. *Id.*, paras. 81–89.

15. Human Rights Act, 1998, c. 42 [hereinafter HRA].

16. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter ECHR].

17. The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence, [2006] 3 W.L.R. 508 [hereinafter Al-Skeini (CA)].

18. ECHR, *supra* note 16, art. 1 (emphasis added).

19. Literally, the "juridical space" of the Convention, i.e., (for the purposes of the present analysis) the geographical area within which the Convention rights can apply.

20. The ECtHR jurisprudence is confusing and contradictory but its two principal approaches to the extraterritorial application of Convention rights by military forces of a State Party are derived from *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 Mar. 1995, ECHR Series A no. 310 (holding that, as Turkey exercises "effective control" in northern Cyprus, a territory that had formerly had the benefit of Convention rights as part of the Republic of Cyprus, Turkey must apply the Convention in that territory); and *Bankovic and Others v. Belgium and 16 Other Contracting States* [GC], no. 52207/99, ECHR 2001-XII (holding that "effective control" means the exercise of some or all of the public powers of the government, and that as the ECHR is an essentially regional treaty instrument with limited geographical reach, it was not intended to apply throughout the world in States that had never been parties to the Convention, even in respect to conduct by States that were parties thereto). The effect of the decision in *Bankovic*, clearly, was to construe narrowly the "effective control" doctrine elucidated in *Loizidou*. Thus, bombing the Federal Republic of Yugoslavia (FRY) from a height of 30,000 feet was not considered to amount to effective control of the territory for the purposes of extraterritorial application of the ECHR, because the FRY was not within the "*espace juridique*" of the Convention. *Id.*, para. 80.

21. HRA, *supra* note 15, sec. 6(1).

22. The government conceded the point already in the wake of its defeat in respect to Baha Mousa in the Divisional Court. *See* Al-Skeini (CA), *supra* note 17, para. 6.

23. *Supra* note 20.

24. *Id.*

25. Judgment of June 26, 1992, ECHR Series A no. 240.

26. Al-Skeini (DC), *supra* note 13, para. 287.

27. Judgment of Nov. 16, 2004, ECHR no. 31821/96.

28. Al-Skeini (CA), *supra* note 17, para. 91.

29. *Id.*, para. 96.

30. Al-Skeini (HL), *supra* note 9, para. 127.

31. *Id.*, para. 129.

32. *Id.*, para. 132.

33. *See* Michael Evans, *MoD sued over '36 hours of hell' in Basra*, THE TIMES (London), Nov. 16, 2007, at 25, *available at* http://www.timesonline.co.uk/tol/news/world/iraq/article2879821.ece.

34. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9).

35. *See, e.g.,* Paul Adams, *Army verdict throws up questions*, BBC NEWS, June 7, 2006, http://news.bbc.co.uk/1/hi/uk/5056944.stm.

36. *See generally Current Notes, German War Trials – Report of Proceedings before the Supreme Court in Leipzig*, 16 AMERICAN JOURNAL OF INTERNATIONAL LAW 628 (1922).

37. International Criminal Court Act, 2001, c. 17. The Act does not provide for the International Criminal Court (ICC) to have jurisdiction over British servicemen, despite its title. On the contrary, it provides for comprehensive definitions of, and UK criminal court jurisdiction over, the crimes that are contained in the ICC Statute.

38. Army Act, 1955, c. 18.

39. The Queen v. Donald Payne and Others, General Court-Martial, charge sheet *available at* www.army.mod.uk/apa/courts_martial_trials/payne_and_others/_charge_sheet.htm.

40. *UK soldier jailed over Iraq abuse*, BBC NEWS, Apr. 30, 2007, http://news.bbc.co.uk/1/hi/uk/6609237.stm.

41. *'Historic' abuse court martial ends*, BBC NEWS, Mar. 13, 2007, http://news.bbc.co.uk/1/hi/uk/6445633.stm.

42. Duncan Hooper, *Colonel cleared over mistreatment of Iraqis*, TELEGRAPH.CO.UK, Feb. 14, 2007, http://www.telegraph.co.uk/news/main.jhtml;jsessionid=AXNGII3LURBQXQFIQMGSFFOAVCBQWIV0?xml=/news/2007/02/14nmendonca114.xml.

43. Stewart Payne & Nigel Bunyan, *Officers attack MoD over 'scapegoat' Mendonca*, TELEGRAPH.CO.UK, June 2, 2007, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/06/02/narmy02.xml.

44. Rome Statute of the International Criminal Court art. 28(a), July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 37 INTERNATIONAL LEGAL MATERIALS 999 (1998).

45. This was the case of *The Queen v. Gary Paul Bartlam* (unreported, General Court-Martial, Jan. 7, 2005). Fusilier Bartlam pleaded guilty to three charges of aiding and abetting another soldier who "placed an unknown male, who was being detained by British Forces and whose hands were tied, on the forks of a forklift truck, raised the forks and drove the forklift truck," and of photographing "two unknown males who were being detained by British Forces and who were being forced to simulate a sexual act." He was given a dishonorable discharge and sentenced to eighteen months in a young offenders' establishment, although this was subsequently reduced by the Army Reviewing Authority to twelve months' military detention.

46. Unreported, General Court-Martial, Feb. 23, 2005.

47. *Supra* note 38.

48. Martin Hickman, *British soldiers who abused Iraqis are jailed and dismissed from the Army*, THE INDEPENDENT, Feb. 26, 2005, http://news.independent.co.uk/uk/politics/article13012.ece.

49. Daniel McGrory, *Iraq abuse soldier to be freed after four months*, TIMESONLINE, June 2, 2005, http://www.timesonline.co.uk/tol/news/world/iraq/article528925.ece.

50. *See* UK Parliament, Joint Committee on Human Rights, Session 2005–2006, Nineteenth Report, The UN Convention Against Torture (CAT), May 26, 2006, HL Paper 185-1/HC 701-1, paras. 68–89.

51. *See, e.g.*, Richard Norton-Taylor, *Lawyers take MoD to court over Iraqi mutilation claims*, THE GUARDIAN (London), Oct. 18, 2007, (Top Stories) at 1, *available at* http://www.guardian.co.uk/uk/2007/oct/18/iraq.iraq.

52. United States of America v. Salim Ahmed Hamdan (Decision and Order – Motion to Dismiss for Lack of Jurisdiction), Guantánamo Bay Military Commission, June 4, 2007, *available at* www.nimj.com/documents/Hamdan%20Order.pdf; United States of America v. Omar Ahmed Khadr (Order on Jurisdiction), Guantánamo Bay Military Commission, June 4, 2007, *available at* www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf.

53. Hamdan, *supra* note 52, at 3.

54. Khadr, *supra* note 52, at 2.

55. United States of America v. Omar Ahmed Khadr (CMCR 07-001), Sept. 24, 2007, *available at* www.defenselink.mil/news/Sep2007/KHADR_Decision(24_Sep_07)(25_pages).pdf.

56. Caitlin Price, *Pentagon to move ahead on Khadr trial after court approves jurisdiction*, JURIST, Sept. 25, 2007, http://jurist.law.pitt.edu/paperchase/2007/09/pentagon-to-move-ahead-on-khadr-trial.php.

57. Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

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

59. Al-Marri, 487 F.3d at 184–90.

60. *Id.* at 186.

61. Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, Dec. 13, 2006, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

62. Hamdan, 126 S. Ct. at 2795.

63. *Id.* at 2795–96.

64. *Id.* at 2846 (Thomas, J., dissenting).

65. *Id.*

66. Public Committee Against Torture, *supra* note 61, para. 11.

67. *Id.*, para. 18.

68. *Id.*, para. 21.

69. The latest reissue of the US Army Field Manual on Human Intelligence Collector Operations incorporates reference to Common Article 3 as the benchmark for a single humane standard of treatment for all detainees in military custody, regardless of their status. *See* Headquarters, Department of the Army, Human Intelligence Collector Operations, FM 2-22.3 (2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf. *See also* Deputy Secretary of Defense, The Department of Defense Detainee Program, DoD Directive 2310.01E (2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf.

70. *Northern Ireland activates internment law*, BBC NEWS, Aug. 9, 1971, news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_4071000/4071849.stm.

71. See C.P. Walker, *Irish Republican Prisoners – Political Detainees, Prisoners of War or Common Criminals?*, XIX THE IRISH JURIST 189, 189–90 (1984).

72. *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT paras. 3.1–3.1.3 (2004).

73. For a similar argument developed in much more detail, see the interesting discussion in Geoffrey S. Corn, *"Snipers in the Minaret—What Is the Rule?" The Law of War and the Protection of Cultural Property: A Complex Equation*, THE ARMY LAWYER, July 2005, at 28, 31 n.27. Corn argues cogently for a pragmatic characterization of military operations by States against non-State transnational terrorist elements as either "simply 'armed conflicts'" or transnational armed conflicts, reflecting the global reach of such operations, which trigger application of the basic principles of military necessity and humanity (the latter as reflected in Common Article 3 and Additional Protocol II) as a matter of customary international law. There is much to commend this analysis. In its application of Common Article 3, at least, it uses principles of the law of armed conflict on which there is universal agreement, while simultaneously respecting the peculiar characteristics of such conflicts. Nevertheless, it remains vague as to what specific rules on the conduct of hostilities would be applicable.

74. Article 5 of Geneva Convention III, *supra* note 4, specifies that "[s]hould any doubt arise as to whether persons . . . belong to [the category of POW], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." In my opinion, it is abundantly clear from the continuing controversy over the status and treatment of detainees that doubt has indeed arisen.

75. It is regrettable to conclude on a negative note, but for a contrary view to the one espoused herein, see the comments of John B. Bellinger, Legal Advisor to the US Department of State:

> Critics have suggested that the United States is backing away from the Geneva Conventions or ignoring them, and I want to be crystal clear, the United States remains absolutely committed to the Geneva Conventions. We support them, we apply them. But one does have to read what they say. They do not apply to every situation. They in fact apply to conflicts between states. So therefore the Geneva Conventions do not give

> you the answers about who can be held in a conflict with a non-state actor. They do not tell you how long you can hold someone in a conflict with a non-state actor. They do not tell you what countries to return people to . . . . The United States is firmly committed to the law that applies. We're also committed to working with other countries around the world to develop new legal norms in cases where existing law does not give one the answers. But what we do think is problematic is to simply suggest that the Geneva Conventions provide all the answers in fighting international terrorism, and that countries simply need to follow the Geneva Conventions and that is the end of the matter.

US Mission to the United Nations in Geneva, Press Conference by the US Delegation to the 30th International Conference of the Red Cross and Red Crescent Movement (Nov. 27, 2007), http://geneva.usmission.gov/Press2007/1127RedCross.html.

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The treatment of detainees and the "Global War on Terror": selected legal issues

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