The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III

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I. Introduction

On October 7, 2001, less than one month after the 9/11 terrorist attacks in New York and Washington, D.C., the United States commenced conflict operations in Afghanistan, with the express purpose of removing the Taliban from power and capturing and destroying al Qaeda leaders, agents, and bases of activity and training.[1] By late November, the legal status and treatment of combatants captured in the new 'Global War on Terror' (GWOT) became a matter of international debate and concern. However, in the succeeding five years, much of the controversy has shifted to the long-term detention, treatment and legal status of 'enemy combatants', particularly those held in US custody in Guantánamo Bay and other secret detention centers abroad.

Commencing with a general discussion of the applicability of international humanitarian law (IHL) to the initial conflict in Afghanistan, this article will examine, through a close textual analysis, the original contours of this debate as it emerged in memoranda produced by key members of the Bush executive from the fall of 2001

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[1] I am assuming, for the purposes of this paper, that the debate on the nature of the conflict in Afghanistan as an international armed conflict has been settled. Although there were clearly overlapping conflicts, e.g. the US versus the Taliban, the US versus al Qaeda and Northern Alliance versus al Qaeda, the definitive international aspect of the conflict in the end was the removal of the Taliban from power. This primary character of the conflict was recognized by the United Nations, v ia Security Council Resolution 1193, as well as the International Committee of the Red Cross (ICRC); see ICRC press release 1/47, (24 October 2001), online: ICRC <http://www.icrc.org>. Whether it was categorized as an 'internationalized civil war' (as argued by Adam Roberts) or as an internal conflict 'upgraded to an international conflict' (as suggested by Jordan Paust), by the time the issue of POW status determination became an issue, there was considerable agreement as to the triggering of international humanitarian law given the international nature of the conflict. See Adam Roberts, 'The Laws of War,' in Audrey Kurth Cronin and James M. Ludes, eds., *Attacking Terrorism: Elements of a Grand Strategy* (Washington, DC: Georgetown UP, 2004) 207; Jordan Paust, 'After 9/11: Attacks on the Laws of War' (Summer 2003) 28 Yale J. Int'l L. 325 at 325-335. For more on this debate, see J. Wouters & F. Naert, 'Shockwaves Through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism' in C. Fijnaut, J. Wouters, and F. Naert, eds., *Legal Instruments in the Fight against International Terrorism* (Leiden and Boston: Martinus Nijhoff Publishers, 2004) at 411-545. Whether or not it is appropriate to consider larger US claims about fighting an international armed conflict against al Qaeda, a non-state actor, or against a social and criminal phenomenon (terrorism), is still subject to debate. On this point, see Marco Sassoli, 'Use and Abuse of the Laws of War in the War on Terrorism' (2004) 22 Law & Ineq. J. 195 at 195-221.

through to the winter of 2002. This internal debate was broadly illustrative of a pattern of thinking with respect to the applicability of IHL to the GWOT that allowed difficult policy choices to both eclipse and displace adherence to international law. Indeed, this early American debate crystallized an approach to fighting terrorism based on the presumption that real or perceived 'gaps' in IHL exist, regardless of the condemnation of the international community and serious inconsistencies internal to the US approach. The International Committee of the Red Cross (ICRC), by contrast, has consistently taken what it perceives to be the moral high ground by refusing to engage in a debate about the difficulties of applying the Geneva Conventions to non-state actors or terrorists in this 'new kind of war.' While officially acknowledging the widening differential in practice, the ICRC publicly argues that there is no 'gap' in IHL – one is either a civilian or a combatant (lawful or unlawful) – and in *either* case is protected by the Geneva Conventions. While examining some of the arguments for and against the existence of such a gap, I suggest that given both the rhetorical and real intransigence of the Bush administration and the uncompromising position of the ICRC as the global custodians of IHL, a dispassionate opportunity for a fruitful examination of alternatives has been unfortunately lost for the last half decade. If we are indeed embarking on another 'Long War' akin to the Cold War, in which the United States is compelled to craft an effective foreign and defence policy response as structurally consistent and robust as containment, then this initial lack of consensus and ongoing controversy has been a key indicator of failure on the terrain of law, politics and international diplomacy. Nonetheless, potential alternatives or compromises *are* available and *do* merit further exploration, if only to shed light on the nested security dilemmas involved in a conflict that is incompatible with either a purely military or a criminal paradigm and involves largely non-state actors uninterested in compromise or immediate political or territorial gain. Particularly in light of the June 2006 *Hamdan v. Rumsfeld* decision of the US Supreme Court,[2] which minimally required adherence to Common Article 3 of the Geneva Conventions, while striking down the military commissions the Bush administration had proposed to try detainees, the time may yet be ripe for a sustained international and diplomatic effort to re-examine IHL and other alternatives that could assist in bringing the United States back 'into the tent' of IHL and, at the same time, allow for the effective prosecution of the GWOT.

II. Applicability and Relevance of International Humanitarian Law: Geneva Convention III

Geneva Convention III, relative to the Treatment of Prisoners of War, was signed in 1949 and remains the international standard of care with respect to their detention and overall treatment. Like the other Geneva Conventions, Common Article 2 applies to all cases of declared war or 'any other armed conflict which may arise between two or more of the High contracting Parties, even if the state of war is not recognized by

[2] *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al.,* 548 U.S. 4 (2006) (*Hamdan v. Rumsfeld*).

one of them.'[3] High contracting parties are responsible for the proper treatment of prisoners of war (POWs); at the same time, individuals who mistreat prisoners are also legally liable for their actions. POWs are defined as individuals in the following categories who have 'fallen into the power of the enemy': members of armed forces (as well as militias or volunteer corps that form part of the armed forces, or members of regular armed forces who profess allegiance to a government that is not recognized by the detaining power),[4] and members of other militias or volunteers corps, or members of organized resistance movements so long as they fulfill the conditions set out in Article 4(2):

> (a) that of being commanded by a person responsible for his subordinates;
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> (b) that of having a fixed distinctive sign recognizable at a distance;
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> (c) that of carrying arms openly;
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> (d) that of conducting their operations in accordance with the laws and customs of war [herein referred to as the four criteria].

As will be seen below, part of the debate turns on whether the four criteria apply to all belligerents, or simply to those specifically mentioned in Article 4(2). The Convention makes it clear that under Article 5, if there is any doubt as to whether or not persons 'having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.' The convention does not describe what a 'competent tribunal' means and this became an important issue in determining the status of detainees in the Afghan conflict.

The designation of an individual as a POW is highly relevant because POWs are afforded significant protection. Upon receiving POW status, one can no longer be considered a target and receives full combat immunity. In particular, POWs cannot be transferred by the detaining power to another power, which is itself not a party to the Convention (Article 12). Moreover, POWs must 'at all times be humanely treated' and cannot be denied medical treatment (Article 13). At the beginning of captivity, a POW is required to provide only her or his name, rank, date of birth and army, regimental, personal or serial number, or equivalent information (Article 17). Significantly, Article

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[3] *Geneva Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, online: ICRC <www.icrc.org/ihl>. Further references made in the text by article number.

[4] See Article 4 for full text. Also included but not relevant for my argument are persons such as civilian members of military air crews; war correspondents; supply contractors (at least some members of private security organizations could claim coverage here), members of merchant marine and civil air crews from parties to the conflict; and a *levée en masse*, or those who 'spontaneously take up arms to resist invading forces.' *Not included* as eligible for POW status are civilians who take part in a conflict other than through *levée en masse*, mercenaries, and spies. However, this does not excuse the detaining power from providing humane treatment for such classes of individuals. Somewhat different is the case of medical and religious personnel, who are considered retained persons and not POWs; however, they must be treated to the same standard of POWs.

17 also states: 'no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.' They cannot be held in danger in a combat zone (Article 19), cannot be used as human shields (Article 23), and must be quartered under the same, or as favourable, conditions as forces of the detaining power who are in the same area (Article 25).

Common Article 3 of the Geneva Conventions, which applies to armed conflicts 'not of an international character' (which can be interpreted literally to mean all conflicts not between sovereign states, that is, unconventional conflicts) that occur 'in the territory of one of the High Contracting Parties,' requires that 'each Party to the conflict' shall be bound to treat all individuals rendered *hors de combat* humanely. Common Article 3 also requires that such actions as violence and the taking of hostages are prohibited, and further provides that the wounded and sick shall be cared for.[5] Importantly, Common Article 3 demands minimal humanitarian guarantees for those detained or placed *hors de combat*, and thus specifically prohibits all kinds of murder, cruel treatment, and torture.[6] Finally, although the wording does not expressly *require* fair hearings, the 'passing of sentences and the 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,' suggests a high-level of procedural fairness.[7] Indeed, that is exactly the approach taken by Justice John Paul Stevens in *Hamdan v. Rumsfeld*, the US Supreme Court decision that affirmed the applicability of Common Article 3 in particular, and treaty obligations more generally, to US conduct in the GWOT. In addition, the wording of Common Article 3 is relevant because further arguments can be made that 'each Party to the conflict' presupposes situations may exist where the strict definition of combatants/non-combatants does not apply. One can easily imagine future militarily-executed counter-terrorist operations that do not amount to armed conflicts of an international character, likely involving special forces and

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[5] Neither the Geneva Conventions nor the Additional Protocols fully define an 'armed conflict' although, Common Article 3 aside, an interstate conflict is implicit. One authoritative definition is provided by the Appeals Chamber in the *Tadić* case in the ICTY: 'a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.' See *Prosecutor v. Duško Tadić*, [2 October 1995], Appeals Chamber, ICTY at para. 70.

[6] These guarantees are elaborated on more completely and comprehensively in Article 75 of Additional Protocol I and Articles 4 and 5 of Additional Protocol II. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, online: ICRC <www.icrc.org/ihl>. As well as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, online: ICRC <www.icrc.org/ihl>. Further references made in the text by article number.

[7] Article 6 of Additional Protocol II elaborates procedural and due process guarantees in penal prosecutions, such as full answer and defence, the presumption of innocence, the right against self-incrimination and to be present at a hearing, and the requirement of voluntariness of confessions.

counter-insurgency operations in a complex threat environment with multiple parties to the conflict.

The philosophical rationale for Geneva Convention III is straightforward. Underlying the clear distinction between combatants and civilians is the desire to limit the 'business' of war to the 'professional' armed forces of a state, whose job it is to conduct it. Under the principle of combatant immunity, professional soldiers are not held responsible for violence committed in lawful acts of war. They are exempt from the moral imperative not to kill, insofar as their obedience to the laws and customs of war has been secured.[8] To be considered soldiers, and thus eligible for POW status if captured, individuals who are *not* members of regular armed forces have to meet certain defining criteria, that is, those outlined in Article 4(2). Complying with the rules means that, if captured, such persons are considered 'privileged' and are accorded status as 'prisoners of war' and afforded considerable protection by their captors, as well as a particular kind of treatment. Obviously, the desired result is to reward fair fighting with fair treatment and, at the same time, discourage civilians from entering combat. The reasoning remains that the clearer the distinction can be drawn between combatants and civilians, the greater the likelihood and ability of conflicting forces to maximize the safety of civilians in the midst of conflict.

The principle of combatant immunity, as well as the status, definition, and protection of POWs, was not invented out of whole cloth and then inserted into the Geneva Conventions, but rather has a long history that predates initial efforts to codify the law of armed conflict, back to medieval ideas of chivalry, warriors' codes of honour and, not unimportantly, economic efficiency. Under such codes, the 'normal' rule of law in civil society was suspended for the noble soldier fighting under political authority for a just cause. One must keep in mind, however, that the Geneva Conventions of 1949 were drafted in the aftermath of the Second World War, a total war that signalled a historical turning point in the deliberate targeting of civilian populations, resulting not only in massive civilian casualties, but the unparalleled destruction of domestic infrastructure. Indeed, in reading the ICRC's detailed commentaries regarding the diplomatic and political history that led to the precise wording of the Conventions, references are continually made to the World War II experience.[9]

> Prompted by the conflict in Afghanistan, a core feature of the US debate is an assumption that the Geneva Conventions were stale-dated and inadequate to the complicated task of fighting a war against terrorism. Unlike the Cold War era, which was dominated by conventional state-based conflicts – whether of

[8] Article 43(2) of Additional Protocol I codified customary international law with respect to the principle of 'combatant immunity', which can be understood historically as a legal shield. Article 43(2) states: 'Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.'

[9] See *1949 Conventions & Additional Protocols & their Commentaries*, online: ICRC <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

the inter-state or intra-state variety – the GWOT is fought on global terrain where at least some of the parties to the conflict are not state-based, are 'networks' rather than militias, do not fight according to the laws and customs of war and are not specifically interested in territorial domination. How these concerns generated new, controversial and arguably incorrect interpretations of IHL became the subject of intense internal debate among senior members of the Bush administration in the fall of 2001. With the advantage of hindsight, we can see how the contours of the 'detention debate' were initially framed by intense deliberation among senior members of the Bush Executive.

III. The Gonzales Memo, the Executive Debate, and the US Argument

On November 13, 2001, the White House publicly released a military order concerning the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' (hereafter referred to as Military Order of November 13, 2001).[10] At the outset, it was clear that the United States government had construed the 9/11 attacks as creating a state of armed conflict, thus triggering the general application of the laws and customs of war (and, implicitly, the Geneva Conventions as well). The document states that to be able to protect US citizens and effectively conduct military operations, 'individuals subject to this order...[will be] tried for violations of the laws of war and other applicable laws by military tribunals.' Moreover, detainees charged would be subject to full and fair trials before military commissions.[11] During detention,[12]

[10] The memoranda circulating among members of the US Executive branch referred to in this section and later in the paper, which were not originally publicly released, are contained as appendices to Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004) as well as in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge UP, 2005). Subsequent references in this paper are made in the text according to author and date of the memoranda.

[11] Military commissions, according to this order, are triers of both fact and law, admit evidence that would 'have probative value to a reasonable person,' and may sit at any time and place as provided by the Secretary of Defense. In addition, convictions and sentencing can only occur with a majority of two thirds of the members of the commission present, and the only avenue of appeal is either to the President of the United States or to the Secretary of Defense if so designated by the president. Anyone subject to this order shall be tried for '...any and all offenses triable by military commission...and may be punished in accordance with the penalties provided under applicable law, including life imprisonment and death.' The phrase 'applicable law' is not elaborated upon but further executive analyses and memoranda clearly refer to earlier US jurisprudence involving the use of military commissions, e.g. the Civil War case of *Ex Parte Milligan* 71 US (4 Wall.) 2, 121 (1866) and the important Second World War case of *Ex Parte Quirin* 317 US 1, 45 (1942). Under *The Paquette Habana* (175 US 677, 700 (1900)), United States law incorporates the international law of war. In the US, military commissions are separate from military courts martial, which are set up to try service members for violations the US Uniform Code of Military Justice (UCMJ). In *Hamdan v. Rumsfeld*, *supra* note 2, the United States Court of Appeals held that *Ex Parte Quirin* and congressional approval for the War on Terror effectively authorizes military commissions; despite *The Paquette Habana*, the same court held that Geneva law could not be judicially

individuals would be treated humanely, given equitable treatment, afforded adequate food, drinking water, shelter, clothing and medical treatment and be allowed free exercise of religion.

On January 25, 2002, Alberto R. Gonzales, then-White House counsel, advised the president that Geneva Convention III applied neither to the conflict with al Qaeda nor the conflict with what are carefully referred to as 'Taliban fighters' (and not combatants). The now-infamous Gonzales memorandum was prepared in response to (a) an earlier opinion written by the Department of Justice which also concluded that Geneva Convention III did not apply to al Qaeda, stating that there were 'reasonable grounds' to conclude non-application to the Taliban; and (b) a request by then-Secretary of State Colin Powell to reconsider the carte-blanche rejection of the application of Geneva Convention III to al Qaeda and the Taliban, as this could be done only on a case-by-case basis. Clearly, the State Department read closely the Geneva requirement to hold a status determination hearing by a competent tribunal under Article 5, along with the concomitant requirement to presumptively treat persons as POWs until such a determination is made. Gonzales advised that the non-application of the Geneva Conventions vis-à-vis the Taliban can be argued on the basis that (a) Afghanistan was a failed state, where 'the Taliban did not exercise full control over its territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations;' and (b) 'the Taliban and its forces were, in fact, not a government, but a militant, terrorist-like group.' [13] Importantly, and central to my argument here, much of the Gonzales memo is not a *legal* analysis per se, but in reality a *policy options* document, wherein the advantages and disadvantages of the non-applicability of Geneva are compared and contrasted. Gonzales echoed previous presidential statements that this is a 'new kind of war,' not a traditional inter-state conflict and in an oft-quoted passage he discussed why Geneva may be obsolete in this context:

> The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring the captured enemy to

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enforced in the United States. This reasoning was overturned by the Supreme Court; see note 58 below.

[12] The Military Order states that those detained will be 'at an appropriate location designated by the Secretary of Defense outside or within the United States' – there is no mention that such a location shall be on the territory of a Detaining Power or another power which is a party to Geneva Convention III, as is required by Article 12. The first detainees arrived at Guantánamo Bay, Cuba in January 2002.

[13] Alberto R. Gonzales, 'Memorandum for the President,' January 25, 2002.

> be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments.[14]

However, Gonzales also noted that the US had never previously denied applicability of Geneva to either US or opposing forces in earlier armed conflicts, and pointedly reminded Bush that in the administration of George Bush Sr., the US publicly declared its policy of applying Geneva 'whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions ... are not met.'[15] Moreover, Gonzales added that the US could hardly invoke Geneva if 'enemy forces threatened to mistreat ... U.S. or coalition forces captured during operations in Afghanistan,' and that such an approach, even if accompanied by assurances that core humanitarian principles would be followed, would likely 'provoke widespread condemnation among our allies and in some domestic quarters' and could encourage others to look for 'technical loopholes' in future conflicts – thus lessening the effectiveness of the Conventions as a whole.

One day after the Gonzales memorandum, Secretary of State Colin Powell swiftly responded to Gonzales, copying then-National Security Advisor Condoleeza Rice. Alarmed by the argument that Geneva law did not apply to the conflict in Afghanistan *at all*, Powell firmly recommended an option that admitted the application of Geneva, as providing 'a more defensible legal framework,' while maintaining a more 'positive international posture,' ensuring potential POW status for detained US forces and reducing the likelihood of international criminal investigations directed against US officials and troops. Having maintained that the 9/11 attacks constituted the opening salvo in a sustained armed conflict, while construing US actions as both legal and legitimate self-defense, denying the applicability of Geneva was for Powell a slippery slope to delegitimizing the choice of the military paradigm.[16] Powell concluded his case with the following reservation: 'If, for some reason, a case-by-case review is used for Taliban, some may be determined to be entitled to POW status' and carefully added that this '...would not, however, affect their treatment as a

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[14] Gonzales, January 25, 2002.

[15] Gonzales, January 25, 2002. Prior to the GWOT, presumptive applicative of the Geneva Conventions had been the norm.

[16] The Bush administration was very keen early on to follow a military rather than a criminal paradigm in its conduct of the GWOT. It was aided in this portrayal by NATO's invocation on October 2, 2001 of Article 5 of the 1949 Washington Treaty, wherein armed attack on one or more of the Allies of Europe or North America is considered an attack against all, as well as UN Security Council Resolution 1368 which condemned the attacks as a 'threat to international peace and security,' and the State Parties of the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) which, on September 21, 2001, likewise construed the attacks as threatening to continental security. If the 9/11 attacks are viewed as part of a continuum of sustained al Qaeda efforts that include the 1998 embassy bombings in Kenya and Tanzania, as well as the 2000 attack on the USS Cole in Yemen, then the US government is strengthened in its case that (a) it is subject to an ongoing armed attack; and (b) its actions, particularly in the case of Afghanistan, are within Article 51 of the UN Charter which allows for self-defense.

practical matter.'[17] One can suppose from this wording that the Powell memo assumed the presumptive application of Common Article 3 regardless of combatant status. However, even Powell's memo, which is the most supportive of the Geneva Conventions in this series of memoranda, treats application as a matter of policy choice – where a state chooses to comply with international law *not* because it is the law but because there are more advantages than disadvantages in doing so.[18]

At this point, Attorney-General John Ashcroft entered the fray, voicing his support for the non-application of Geneva. In curious wording, Ashcroft stated that it was his 'understanding that the determination that al Qaeda and Taliban detainees are not prisoners of war remains firm' – the only item remaining for discussion was the applicability of Geneva III. Read as a whole, the memorandum is a singular example of putting the cart before the horse – rather than decide to apply IHL to Afghanistan and then figure out whether or not al Qaeda and Taliban detainees might be POWs, Ashcroft's approach was to foreclose any possibility of POW determination, but *then* consider the application of IHL to the conflict, presumably for the same reasons outlined above by Powell, that is, American soldiers would be better protected and American allies assuaged. As Attorney-General, Ashcroft seemed concerned primarily with preserving the legal latitude of the president and thus reminded President Bush that non-applicability would provide him with 'the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.'[19]

By February 2, 2002, William H. Taft, Legal Advisor to the Department of State, also responded to the Gonzales memorandum. Consistent with the earlier

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[17] Colin Powell, January 26, 2002.

[18] The Powell memorandum also makes several factual corrections to the Gonzales memorandum, noting that any claim to Afghanistan as a 'failed state' was counter to the official US government position and that the 'positive consequences' of the application of Geneva Convention III would apply 'equally if the President determines that GPW [the Geneva Convention on the treatment of Prisoners of War] does apply but that the detainees are not entitled to POW status' (Colin Powell, January 26, 2002). The Gonzales memorandum tended to conflate Geneva coverage with the particular issue of POW status, thus confusing the application of Common Article 3 with the articles covering the detention and treatment of POWs. Finally, Powell strategically reminded his colleague that application had been the norm in the past wherever the US forces had been engaged (even in Panama, regardless of the assertion to the contrary). Gonzales, like Powell, speaks of the 'policy reasons' to comply with Geneva Convention III, as well as the 'policy of providing humane treatment' (as opposed to the legal requirement to do so) bringing 'credibility' (rather than international legal compliance). Thus, when Gonzales speaks of the US 'commitment to treat the detainees humanely,' it is unclear whether or not this commitment is a result of presidential choice or compliance with international law, and thus the distinction is again obscured.

[19] John Ashcroft, Attorney General, Letter to the President, February 1, 2002. Ashcroft reminded Bush that in cases of presidential interpretation of treaty protections (in this case the Geneva Conventions), courts have in the past refused to defer to such interpretation, as in *Perkins v. Elg*, 307 US 325 (1939). In essence, shutting down Geneva also served the useful purpose (in Ashcroft's view) of shutting down judicial review.

Powell memorandum, the Taft letter argued in favour of Geneva applicability, because such an approach 'demonstrates that the United States bases its conduct not just on its policy preferences, but on its international legal obligations.'[20] Again, one is reminded in re-reading the memoranda that policy and law are consistently juxtaposed in a manner that reduces international law to policy choice. Taft reminded Gonzales that Geneva applicability was consistent with UN Security Council Resolution 1193, which called for all parties to the conflict in Afghanistan to comply with IHL. Finally, Taft reminded the president of the risks to US service members if deprived of any reciprocal claim to the Geneva Conventions in the event of capture.[21]

The final volley in this fusillade of advice received by the Bush White House was a very long and detailed memorandum written for Gonzales and William J. Haynes II, General Counsel of the Department of Defense, by Jay S. Bybee, Assistant Attorney-General. Bybee first dismissed the idea that the Taliban could be classified as a 'militia' under Geneva Convention III and then found that the Taliban also does not constitute the 'armed forces' of Afghanistan.[22] On evidence provided from the Department of Defense, Bybee noted that the Taliban lacked the characteristics of a military organization; they did not function under centralized command, wear uniforms with distinct insignia nor conduct operations in accordance with the laws and customs of war and thus could not be categorized as either a militia or the regular armed forces of Afghanistan. On this point, Bybee also referred to ICRC commentary – generally considered to be highly authoritative – on the application of the four criteria to the *regular* armed forces of a state, presumably to reinforce the view that the Taliban could not be considered as regular armed forces and thus the four criteria did not apply.[23] Finally, Bybee concluded that, given his presidential powers of treaty interpretation, President Bush could legally determine that the Taliban do not fit any of the categories of coverage in potentially obtaining POW status, thus obviating the need for any tribunals under Article 5. Bybee carefully quoted Article 5 which requires

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[20] William H. Taft IV, February 2, 2002.

[21] This has remained a concern for current American soldiers and veteran's groups, who argue that deliberately blurring Geneva Convention III (and Common Article 3) will continue to endanger US troops and create a recruiting and propaganda tool for terrorist networks such as al Qaeda. See in particular Paul Riekhoff, 'Do unto your enemy,' and Arthur T. Hadley, 'Firing potent words, from a tank,' both in *International Herald Tribune* (26 September 2006).

[22] Bybee also supported Gonzales' view that Afghanistan was a 'failed state' and argued on that basis presidential authority to suspend treaty obligations could be justified in a decision to suspend Geneva Convention III obligations. See Jay S. Bybee, January 22, 2002.

[23] Although Bybee presents this unproblematically, there is considerable debate as to the applicability of the four criteria to regular armed forces and other classes of combatants referred to in Article 4 or simply as a practical and legal means whereby POW coverage can be extended to non-members of armed forces (such as militias) or other groups that nonetheless meet the requirements imposed by the four criteria. See the contrasting legal opinions of Robert Kogod Goldman, A.P.V. Rogers, H. Wayne Elliot, and Michael Noone in the discussion 'POWs or Big Unlawful Combatants? September 11th and its Aftermath' from January 2002, written contemporaneously with the Bush administration memoranda discussed here, archived online: Crimes of War <http://www.crimesofwar.org>.

status determination by a competent tribunal only in 'cases of doubt.' If no doubt exists, reasoned Bybee, then there is no need for a status determination by a competent tribunal.[24] Finally, the Bybee memorandum reinforces the opaque distinction between policy and law, again casting presidential decision-making in a policy options framework. The subtitle of Section D of the Bybee memorandum is particularly telling: 'Application of the Geneva Conventions as a matter of *policy*' (emphasis added). A later subtitle makes it clear that Geneva Convention requirements are justified but again the reasoning collapses the policy/law distinction.

President Bush brought the debate to a close on February 7, 2002 in a memorandum directed to the Vice-President, Secretary of State, Secretary of Defense, Attorney-General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff. Pursuant to his authority as Commander in Chief and Chief Executive of the United States, Bush confirmed that 'none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan' and, while reserving the right under the Constitution to suspend Geneva in the conflict between the US and Afghanistan, declined to do so. Further, Bush denied the applicability of Common Article 3 to either conflict, thus reaffirming the international nature of the conflict.[25] Following the advice of Taft, Bush made a blanket determination that Taliban detainees were 'unlawful combatants' and thus not eligible for POW protection; since the Geneva Conventions were was not found to apply in the final analysis to al Qaeda, neither were members of al Qaeda determined to qualify for POW protection. This memorandum, which was not declassified in full until June 17, 2004, also states that the US would continue to support Geneva principles: 'As a matter of *policy*, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva' (emphasis added).[26]

Essentially, the views of Bybee and Gonzales won out over those of Taft and Powell. A traditional bipartisan consensus on the applicability of IHL to conflicts had effectively been replaced by the more radical vision of the Bush lawyers – what journalist Anthony Lewis has referred to as *la trahison des avocats*.[27] Thus, until the trio of Supreme Court decisions of June 28, 2004, it remained the position of the United States that there never was any need for Article 5 tribunals and that neither al Qaeda nor the Taliban were eligible for POW status (the former as a non-state group, the latter as having not complied with the four criteria).[28] The US claimed it was

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[24] Jay S. Bybee, January 22, 2002. It should be noted that Article 5 is not clear as to *who* must have the doubt for the status determination requirement to be triggered.

[25] This argument was later rejected by the Supreme Court in *Hamdan v. Rumsfeld*.

[26] George W. Bush, 'Humane Treatment of al Qaeda and Taliban Detainees,' February 7, 2002.

[27] Anthony Lewis, 'Making Torture Legal,' *The New York Review of Books* (15 July 2004) at 6.

[28] In *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al*, Justice Sandra Day O'Connor, writing for the majority, examined whether the President's exercise of congressional authority (to detain

acting within well-established authority to detain combatants until hostilities ceased, although the law and customs of war posit the detention of POWs and non-combatants, not a third category of 'enemy combatants'.[29]

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enemy combatants without serious judicial review) violated the US Constitution's Fifth Amendment, which states that no person may be deprived of liberty without 'due process of law.' She wrote that a 'proper balance' must be struck between the individual rights of prisoners and the dangers to national security from allowing prisoners to claim judicial review of their detentions. According to Justice O'Connor, this balance requires that 'a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker' (at 26). Thus, the court held that citizen-detainees designated as 'enemy combatants' have the right to challenge their detainment under the 'due process of law' clause. However, she further elaborated some detailed suggestions about what, exactly, this might entail; for example, (1) a 'neutral tribunal' need not be an ordinary court – it could be a kind of military commission; and (2) the normal burden of proof might be reversed – a detainee could be required to prove that he was *not* an enemy combatant. Furthermore, and more disturbingly, O'Connor said that while Hamdi must be freed at the cessation of fighting, that juncture would be determined by the government, when they feel that the 'war against terrorism' has finally been won.

Jose Padilla's petition of habeas corpus in *Rumsfeld, Secretary of Defense, et al. v. Padilla et al.* 542 U.S. 426 (2004) (*Padilla*) also yielded important legal precedents. Padilla's lawyer filed the petition in the New York federal court naming Donald Rumsfeld as the defendant. The Supreme Court later held that Padilla's lawyer had wrongly sued Rumsfeld as (1) Padilla's immediate custodian was not Rumsfeld, but Melanie A. Marr, the Commander of the naval brig in which he was being held; and (2) the district of custody was South Carolina, where the brig is located. While this might appear to have only procedural importance, this ruling had considerable substantive impact because the decision meant the government could go 'forum shopping' in search of the most sympathetic court.

Unlike *Hamdi* and *Padilla*, the third in the trio of June 2004 cases, *Rasul et al v. Bush, President of the United States,* 542 U.S. 466 (2004) (*Rasul*), provided a clear step forward for detainee rights. The federal habeas corpus statute states that federal district courts have the authority to hear applications for habeas corpus 'within their respective jurisdictions.' The Bush administration built its facility in Guantánamo Bay, Cuba precisely around this requirement, arguing that because the United States is not the sovereign power in Cuba, the premises are not under the jurisdiction of any federal court, ruling out any habeas corpus actions. In *Rasul*, the court ruled against this argument stating that 'respective jurisdictions' refers to the jurisdiction in which the officials responsible for the detention may be found. The Court further stated that when the government holds prisoners in foreign territory under effective and permanent US control – e.g. in the facility in Guantánamo Bay – a habeas corpus petition could be brought to a federal court in the US, which has jurisdiction over the President. Essentially, the ruling in *Rasul* made the later decision in *Hamdan* possible. For an excellent summary of the implications of all three rulings, see Ronald Dworkin, 'What the Court Really Said' *The New York Review of Books* (12 August 2004).

[29] There is considerable controversy over the legal meaning of the 'enemy combatant' designation. For example, Joanna Woolman argues that based on its legal roots, the US government's use of the term is inaccurate and unprecedented. Indeed, she states that the term 'enemy combatant' has 'no formal legal authority at home or abroad.' Tracing the origins of the term from its first appearance in the 1942 *Ex parte Quirin* case to the present, she finds a number of faults with affixing the term to supporters of al Qaeda and/or the Taliban. For instance, the court in *Quirin*

The decision, made public on February 7, 2002, provided the Bush administration with some key advantages. First, by denying POW status, combatants could be tried by military commissions rather than courts-martial.[30] Second, the

uses 'the terms "unlawful combatant", "enemy combatant", and "enemy belligerent" seemingly interchangeably to refer to enemy soldiers who had violated the rules of war.' The court even expressly defined 'unlawful combatant'. *Inter alia*, 'unlawful combatants' are subject to trial and punishment by military tribunals for 'acts which render their belligerency unlawful.' In other words, they are considered 'unprivileged combatants' who do not receive POW treatment and can be tried by military tribunals for their violations of the rules of war. After the *Quirin* case, the term 'unlawful combatant' went on to become an established term of international law, when it was referred to in the 1949 Geneva Conventions. According to Woolman, there is no reason to assume that the *Quirin* court intended to carve out a distinct meaning for the term 'enemy combatant' separate from 'unlawful combatant'. See Joanna Woolman, 'Enemy Combatants: The Legal Origins of the Term "Enemy Combatant" Do Not Support its Present Day Use' (Fall 2005) 7 J.L. & Soc. Challenges 145 at 145-167.

[30] This is matter of some debate. Lt. Col (Ret.) H. Wayne Elliott, former Chief, International Law Division of the US Army, suggested in early 2002 that policy choice and not law historically dictated the use of courts-martial rather than military commissions. Under customary international law and Common Article 3, one could argue that combatants, whether privileged with POW status or not, are entitled to a fair hearing, in accordance with due process and with access to legal counsel. At this early stage, some US arguments began to hinge on the precedent of *Ex Parte Quirin*, wherein eight German saboteurs challenged the constitutionality of President Roosevelt's 1942 military order creating a military tribunal. In its decision, the Supreme Court used the terms 'unlawful combatant' and 'unlawful belligerent' to refer to a person who 'having the status of an enemy belligerent enters or remains, with hostile purpose, upon the territory of the United States in time of war without uniform or other appropriate means of identification.' Roosevelt's actual declaration is revealing: Presidential Proclamation 2561 states as follows:

> ...the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory invasion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried *in accordance with the laws of war* (emphasis added).

The language here is clear: the proclamation deliberately refers to the laws of war, still then undefined by statute and a less-settled body of principles and customs in international law. If Roosevelt had chosen instead to use the phrase 'Articles of War', the statutory apparatus for courts-martial enacted by Congress would have been triggered. The proclamation also made it clear that 'all persons...[that would be]...charged with committing or attempting or preparing to commit sabotage, espionage, hostile, or warlike acts, or *violations of the laws of war*, shall be *subject to the law of war* and to the jurisdiction of military tribunals' (emphasis added). There are a number of problems with reliance on the *Quirin* precedent. First, it was decided before the Geneva Conventions of 1949. Second, the alleged saboteurs were essentially charged with attempting to commit war crimes, which was already one of the exceptions to combat immunity under customary law. Indeed, Jordan J. Paust has interpreted *Ex Parte Quirin* at a minimum as providing *implicit* support for the principle of combat immunity for *lawful* acts of combat, given that the judgment represents the defendants as enemy belligerents or combatants who were in *violation* of the law of war applicable to enemies. Finally, at issue in the end was not their status *per se*, but the fact that they were planning to engage in acts of sabotage by bombing railroads,

administration could argue that, while being treated humanely, and thus in accordance with the 'spirit' of Geneva, unlawful combatants without the privilege of POW status could be more effectively interrogated – an important goal of the administration being the collection of 'actionable intelligence.'[31] Third, the US position meant that there was no requirement to release them upon the cessation of the conflict – already an issue given the open-ended nature of the GWOT.

Clearly these memoranda were not written for public consumption, but their eventual release illustrates much of what is at stake in the GWOT. First, the debate about the applicability of Geneva affirmed suspicions about the Bush administration's view that compliance with IHL is optional, something subject to debate, with decisions based upon a policy analysis of advantages and disadvantages. Second, the arguments play very superficially with the idea that Geneva does not and cannot apply to 21st century conflicts in the GWOT given their unconventional and non-state based nature. Thus, Afghanistan-as-a-failed-state is offered up as one rationale, or terrorists-as-not-being-state-parties as another rationale, but the memoranda never engage seriously or thoughtfully with these arguments, their potential long-term ramifications or possible compromises that might be multilaterally negotiated via diplomatic conference among the state parties to Geneva. Third, the memoranda display a deep-seated ambivalence about the ongoing designation of 'prisoner of war' *as a legitimate status* in conflict, hence Gonzales' famous quip that this new kind of war rendered much of the Geneva Conventions 'quaint' or 'obsolete'. This ambivalence has carried over into the US-led intervention in Iraq, where a distinction has been made between former members of the Iraqi National Army (who have received POW status) and those classed as 'insurgents', who do not.[32] Fourth, this understandable ambivalence about potentially

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bridges, and other strategic targets in the US. See opinions of H. Wayne Elliott, 'Terrorism and the Laws of War: September 11th and Its Aftermath,' (21 September 2001), online: Crimes of War <http://www.crimesofwar.org/expert/attack-elliott.html>; Jordan J. Paust, 'After 9/11: Attacks on the Laws of War' (Summer 2003) *28 Yale J. Int'l L.* 325 at 331-332; and Jordan J. Paust, 'There is No Need to Revise the Laws of War in Light of September 11,' paper prepared for The American Society of International Law Task Force on Terrorism, online: ASIL website <http://www.asil.org/taskforce/paust.pdf>.

[31] However, even though POWs are not *required* to provide more information than the 4 items of information listed in Article 17, they could be *asked* to provide further information, provided there is not mental or physical coercion.

[32] Under IHL, the US, UK and other coalition members are considered 'occupying powers' in Iraq. As insurgents are not part of Iraqi forces, they are not entitled to combatant immunity; moreover, they can be prosecuted under Iraqi domestic law (i.e. they are criminals, not soldiers). Civilians may also be detained in a conflict under Geneva IV 'for imperative reasons of security.' A major concern, from the US and coalition perspective, remains 'actionable intelligence'. My argument here is that, given the trend and approach established early on with respect to Afghanistan, there has been a strong policy desire to override legal determination; in Iraq this has translated into the classification of as many as possible of those captured as either insurgents or security threats. See Bill Gertz, 'Most prisoners in Iraq jails called "threat to security",' *The Washington Times* (6 May 2004) and Human Rights Watch, 'Legal Aspects of the Ongoing Fighting in Iraq: Frequently Asked Questions,' at < http://hrw.org/campaigns/iraq/ihlfaq042904.htm> last updated 29 April 2006.

'legitimizing' terrorists by considering possible POW status has been, unfortunately, negatively reinforced with the repeated labeling of US adversaries in public pronouncements since 9/11 as *terrorists*, regardless of the specific location or particular circumstances of the conflict (Afghanistan versus Iraq, for example, or alleged terrorists detained in the United States or in other states). The overall approach has arguably contributed to an organizational and political culture of disrespect for longstanding and widely-held humanitarian norms, thus making easier the willfully blind violation of such norms, as is evidenced by the now well-documented inhumane treatment of detainees at Guantánamo Bay and the Abu Ghraib prison torture and abuse scandal.[33]

Because of how the detention debate was originally framed by these memoranda, followed by subsequent concerns about the humane treatment of detainees at Guantánamo, Bagram air base, and elsewhere, an opportunity to look dispassionately and without prejudice at the potential future applicability of the Geneva Conventions to the GWOT has been lost, at least in the short-to-medium term future. Understandably under these circumstances, the ICRC response has remained rigid and absolute.

IV. ICRC Response to the United States and Related Commentary

After the memo of February 7, 2002, the International Committee of the Red Cross, as the global guardian of Geneva law, stated that it 'stands by its position that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.'[34] This was a fairly bold statement for the ICRC, which has carefully preserved its neutral status and generally does not criticize or challenge detaining powers publicly or directly. However, the issue of status determination goes to the heart of the protection afforded to POWs under IHL. More recently, the ICRC elaborated its views in the July 21, 2005 Official Statement, 'The relevance of IHR in the context of terrorism.'[35] First, the ICRC stated that IHL applies to the 'Global War on Terror' only to the extent that it coincides with either an international armed conflict or a non-international armed conflict. Second, the ICRC reiterated its longstanding position that IHL allows armed forces and militias (at least those who fulfill the requisite four criteria) to lawfully engage in conflict and upon

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[33] Regular updates and reports are provided by Human Rights Watch and Amnesty International (www.hrw.org and www.amnesty.org). Violations of international humanitarian law have been reported regularly in the US media, particularly in *The Washington Post* and *The New York Times*. See also Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Vancouver and Toronto: Douglas & McIntyre, 2005) for an excellent discussion of the protection of civilians, combatants, and prisoners of war and violations of international humanitarian law by the US since 9/11.

[34] See 'Red Cross, jurists' group fault US on status of prisoners,' *Vancouver Sun* (9 February 2002) A.19.

[35] ICRC Official Statement, 'The relevance of IHL in the context of terrorism' (21 July 2005), online: ICRC <www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument >.

capture be entitled to POW status. Without intending to be coy, the only meaning the ICRC ascribes to 'enemy combatant' is a combatant who is fighting for the other side in an armed conflict, but it acknowledges a very different use of 'enemy combatant'. While not mentioning the United States by name, the ICRC stated that the term is 'currently used – by those who view the 'global war against terror' as an armed conflict in the legal sense – to denote persons believed to belong to, or believed to be associated with, terrorist groups, regardless of the circumstances of their capture.' The ICRC further stated that, regardless of what a person is called, if captured in an international armed conflict, the provisions and protections of IHL still apply. If combatants do not qualify for POW status, then they are either minimally covered by Common Article III or Geneva Convention IV, which covers the treatment of civilians. As well, at a minimum, all detainees regardless of status are afforded the fundamental guarantees of Article 75 of Additional Protocol I to the Geneva Conventions.[36] The ICRC reiterated that Additional Protocol I does not provide POW status to persons who unlawfully participate in hostilities – but it does not use the label 'enemy combatants' or 'unlawful combatants' for such persons. Additional Protocol I, just like the antecedent Geneva Conventions, 'does not provide protection to either organizations or individuals who act on behalf of a State or an entity that is a subject of international law.' The ICRC also clarified that '"terrorist" groups acting on their own behalf and without the requisite link to a State or similar entity are excluded from prisoner of war protections.'[37] Essentially, a terrorist acting under her or his own authority is a criminal, not a soldier.

While the ICRC claims to speak with monopolistic authority, Adam Roberts interprets the ICRC position at the time as an overstatement of Geneva law. Roberts emphasizes Geneva Convention III requires 'not that in all cases prisoners should be considered to be POWs but that *in all cases of doubt* prisoners shall be *treated as* POWs' (emphasis in original).[38] The ICRC, together with NGOs such as Amnesty International and Human Rights Watch, are incorrect in Roberts' view in claiming that all detainees must be first *presumed* to be POWs. In many cases, the status of prisoners is quite clear; only if there is a doubt must the capturing state treat such individuals *as if* they are POWs until assessed by a competent tribunal. In this respect, Roberts both follows and mimics the logic of the Bybee memorandum. Moreover, he suggests that denying the existence of the category of the unprivileged or illegal combatant falsely denies both its 'long history' and the fact that it '...is implicit in the criteria for POW status in the 1949 Geneva Convention III, and is more or less explicit

[36] Although the US is not a state party to Additional Protocol I, the fundamental guarantees provided in Article 75 essentially codify international customary law, for example, the right to humane and equitable treatment, as well as protection against violence and information regarding reasons for detention, including the requirement that no sentence be passed without conviction by a 'regularly constituted court' which follows 'principles of regular judicial procedure.'

[37] Article 4(2)(d) of Additional Protocol II also prohibits 'acts of terrorism', however, these are undefined.

[38] See Roberts, *supra* note 1 at 207.

in Article 75 of the 1977 Geneva Protocol I.'[39] In essence, he argues that the wording of the Geneva Conventions posits a potential gap; the 'Global War on Terror' provides a concrete example for the reality of the gap.

Contrary to Roberts and reinforcing the ICRC position, Jordan J. Paust has argued that under the Geneva Conventions, it is not logically possible to 'become' an unlawful combatant or lose POW status because *other* members of the armed forces violate the laws and customs of war. Moreover, although individual transgressors can be charged with war crimes, the denial of status to a group on the basis of the actions of one or more individuals amounts to reprisals, which are also prohibited under Geneva law. Paust also interprets the four criteria as expressly applying only to one group under the treaty, those who are not 'members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.'[40] Requiring the four criteria to apply to the armed forces of a party to the conflict would, in his view, '…result in a nonsensical policy-thwarting denial of POW status to all members of the armed forces of a party to an armed conflict whenever several members do not wear a fixed distinctive sign recognizable at a distance or several members violate the laws of war.'[41]

V. A 'Gap' in International Humanitarian Law? Evidence and Arguments

The US administration's 'detention debate' highlighted by the various memoranda outlined above speaks to the possibility of a 'gap' in IHL that, if real, remains an ongoing challenge for both reasons of policy and law. In this sense, the debate lives on and has significant and contemporary relevance for the current and future conduct of the GWOT, not only in Afghanistan but in other theatres as well. However, it is still critical to understand the debate and potential gap by examining its genesis with respect to the conflict in Afghanistan in the 2001-2002 timeframe, as here the stage is set for all subsequent legal arguments.[42] More broadly, however, the arguments against the existence of a gap in IHL can be made, first in the realm of interpretation;

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[39] *Ibid*. at 208.

[40] Paust, *supra* note 1 at 333. Paust also argues such an approach is inconsistent with current general state practice, which informs treaty interpretation. Paust uses the example of the My Lai massacre in Vietnam: if denying POW protections to regular forces is primarily contingent on not violating the laws and customs of war, then the actions of a few (regrettably always possible) will condemn the status of many. Under this logic, Lt William Caley's war crimes could have resulted in a blanket denial of POW status for all US soldiers captured in Vietnam (at 325-335).

[41] See Paust, *ibid*. at 334. Paust, echoing concerns of Colin Powell, also argues that the current US approach could have 'dire consequences' for US soldiers as current and future adversaries could adopt the same precedent as pretext. Moreover, many elite units, which are nonetheless members of the armed forces, often do not wear distinctive uniforms in an attempt to 'blend in.'

[42] Keep in mind that several of the key cases before the Supreme Court decided in 2004 (e.g. *Hamdi*, *Padilla* and *Rasul*) and 2006 (*Hamdan*) concern detainees from this time period. See note 28 above, and notes 44, 62, and 63 below.

second, by looking at diplomatic history; and third, by examining on-the-ground historical practice. At the outset, if Geneva Convention III is interpreted in a broad and purposive manner, there is less of an opportunity to draw a sharp distinction between combatants who comply to some degree with the four criteria, and those who do not. For example, authoritative ICRC commentary makes it clear that carrying arms openly is not the same thing as carrying them 'visibly' or 'ostensibly'. The goal of the provision is not to undermine surprise or camouflage, but to be inclusive. Similarly, soldiers must have some kind of 'fixed distinctive sign', but this need not be a uniform or even conventional insignia – it could be a particular t-shirt or kind of headgear. The purpose of such provisions, according to this line of reasoning, is not to render the criteria overly restrictive; the intent, rather, is to evidence some display of loyalty and identification. In the end, what is critical in modern warfare is not the wearing of uniforms *per se*, but whether or not belligerent forces recognize members of their own force, and those they are fighting against, and that members of parties to a conflict do not confuse each other with civilians and thus enlarge the opportunity for greater civilian casualties. An additional and critical rationale is that soldiers cannot fight in each other's uniform or wear the other's insignia as an effective battlefield tactic. The final criterion is that operations must be conducted in accordance with the laws and customs of war. This, after all, is the entire purpose of international humanitarian law – not to render war obsolete, but to establish well-founded and followed rules for its practice. Again, however, this should not be deployed as a weapon to deny POW status to members of armed forces or militias.

Applying the four criteria to alleged al Qaeda terrorists and members of the Taliban was difficult in the fall of 2001, and remains so. The sociological evidence of a command structure and common identifying insignia (or lack thereof) in the information provided by the US Department of Defense has not been made fully available to the public or legally defended. More complicated was the original US assertion that POW status did not apply to the Taliban because they did not operate in accordance with the laws and customs of war. Unfortunately, individuals do transgress the laws and customs of war with unhappy regularity: that is why we have domestic and international laws regarding war crimes, as well as the newly-constituted International Criminal Court (ICC). Finally, the empirical case for particular Taliban fighters as violating the laws and customs of war has never been argued before any competent tribunal or international body. Theoretically, such war crimes could be prosecuted by any state with appropriate legislation wishing to claim universal jurisdiction.

A further interpretive argument suggests that, status determination aside, Geneva Convention III must also be read in context and in light of Geneva Convention IV. Thus, Marco Sassoli argues that in looking at the 'text, context, and aim' of both Conventions, '[N]o one can fall in between the two categories and therefore be protected by neither....'[43] One is either a civilian or a combatant, but in either scenario is legally deserving of protection. In his view, no one is outside the purview of Geneva

[43] See Sassoli, *supra* note 1 at 207.

law, logically, legally, or practically. Minimally, Common Article 3 would apply to unlawful or unprivileged combatants, and maximally Geneva Convention IV would cover them as civilians.

A second approach to expanding interpretive reach is to search deeply into the diplomatic and political history of the Conventions. For example, in the ICRC commentary on Geneva Convention III, there is a discussion of the 'Report on the Work of the Conference of Government Experts,' produced at the time of the negotiation of the conventions. At this time, the Committee imagined 'situations analogous to those of war, but not explicitly covered by the International Conventions,' but their intent was clear – that 'the principles of international law and humanity should nevertheless be regarded as applicable.'[44] Although this is but one example and a thorough examination is clearly beyond the scope of this article, a cursory view of the diplomatic history suggests (a) that the government experts involved imagined conflicts beyond conventional inter-state conflicts and beyond the minimal requirements of Common Article 3; and (b) that the express intention of the experts was to have the conventions apply insofar as possible to such conflicts. It is certainly typical in domestic law that doctrines of interpretation allow the 'reading in' of provisions that accord with the spirit of the intention of the framers although they could not posit all future instances of possible applicability. As well, at international law, Article 32(b) of the Vienna Convention on the Law of Treaties (VCLT) states that 'the preparatory work of the treaty and the circumstances of its conclusion' are a valid recourse that can be used as a supplementary means of interpretation, when the meaning of a treaty is ambiguous or obscure.' Combining the further protections afforded via the Additional Protocols, some provisions of which have arguably attained the status of customary law, along with an overall goal to regulate conflict, a generous and substantive interpretation of IHL is to assume coverage of all conflicts, regardless of their type, location, and status of belligerents. Such an approach accords with the underlying values of Geneva law.

Finally, an examination of the on-the-ground practice of the more than half a century of application of Geneva law yields a fairly uniform interpretation of application.[45] Among inter-state conflicts involving state parties, two conclusions can be drawn. First, presumptive application of POW status has been the norm. This is true of both regular armed forces and militias specified under Article 4(2). A pointed example is American practice in Vietnam, where captured Viet Cong were regarded as POWs. Second, members of regular armed forces have not been held strictly to the four criteria *as a precondition* for obtaining combatant status, combat immunity, or POW status. This is particularly the case with respect to the important fourth criterion

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[44] See Convention (III) relative to the Treatment of Prisoners of War, Commentaries, online: ICRC <www.icrc.org>. Although the authoritative status of ICRC commentaries at customary international law is open to debate, notably, Justice Stevens in *Hamdan v. Rumsfeld* accepted the ICRC commentary as authoritative (for example, at 123-33).

[45] Article 31(3) b of the VCLT states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' may be taken into account, together with the context, as a general rule of interpretation.'

of respecting the laws and customs of war. Accusations of violating the Geneva Conventions have often been hurled among belligerents in the fog of war. Indeed, one could argue that this is one of the more effective off-battlefield tactics to be used in winning 'hearts and minds'. However, such accusations have never been used to deny POW status to members of a regular armed force; here US treatment of the German Wehrmacht is a useful example.[46] Practice also accords with the historical logic of reciprocity. Moreover, since the implementation of Geneva, where the US has engaged in an assessment of status and actually convened tribunals for such purpose (as in Vietnam and the 1991 Gulf War), POW status was accorded presumptively. Only in the GWOT has the US attempted to eliminate the possibility of doubt, thus erasing the need for competent tribunals under Article 5.

The ICRC and respected NGOs such as Human Rights Watch, who offer what they see as an uncompromising and principled approach, have suggested that to the extent the GWOT exists outside the realm of international humanitarian law, it is more properly the province of domestic criminal or international criminal law. Since 9/11 the US government has chosen a largely military paradigm to fight this 'war', but it does still resort to the criminal law for prosecution of terrorist suspects, as has been the case of the 'twentieth hijacker' Zacarias Moussaoui and will occur with the upcoming trial in civilian court of José Padilla.[47]

Those in the Bush administration who claimed to identify and exploit a real gap in Geneva Convention III may not have been convinced by such arguments. The United States government has repeatedly stressed the non-state nature of al Qaeda, which therefore cannot be a high contracting or state party to the Geneva Conventions.

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[46] Sassoli, *supra* note 1 at 204-205.

[47] The Padilla case is particularly important to note, since the US government has switched back and forth between paradigms as the case has progressed. Padilla is an American citizen who was captured on American soil. Federal officials, who had been tracking Padilla for months, arrested him at Chicago's O'Hare Airport on May 8, 2002. They suspected that he was planning to detonate a radioactive 'dirty bomb' on behalf of al Qaeda and he was subsequently detained as a material witness without any charge. On June 9, 2002, Padilla was swept out of the civilian justice system and into military custody when President Bush designated him an 'enemy combatant'. Two days later, Padilla's legal counsel filed a writ of habeas corpus questioning the power of the president to indefinitely detain American citizens in the United States without charge or trial. In January 2006, after three and a half years in the Charleston naval brig, the US government switched strategies again. The government asked that Padilla be transferred from military custody back to the civilian justice system to stand trial for new charges, which are unconnected to the earlier 'dirty bomb' accusations. On January 4, 2006, the Supreme Court agreed to let the military transfer Padilla to Miami to face criminal charges. Padilla is now charged with one count of conspiracy and one count of providing material support for terrorists. His civilian trial has been scheduled to begin in January 2007. See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003) at 43; Jonathan Freiman, 'Padilla's Real Message: The Grace Period is Over' *Jurist* (4 April 2006), online: Jurist <http://jurist.law.pitt.edu/forumy/2006/04/padillas-real-message-grace-period-is.php>; David Stout, 'Supreme Court Allows Transfer of Padilla to Civilian Court' *The New York Times* (4 January 2006); and Eric Lichtblau, 'Judge Throws Out Overlapping Charges in Padilla Case' *The New York Times* (22 August 2006).

Moreover, terrorism is a substantially different kind of asymmetric threat than that posed by guerrillas, insurgents, or even national liberationist movements who were nonetheless historically labelled as terrorists by their adversaries. Terrorism, on this logic, is not a method, but a new kind of war, not fought on state terrain, but globally and without clearly-defined military or territorial objectives. Terrorists have no regard for the soldier/civilian distinction, and their attacks are indiscriminate, purposefully target civilians, are lacking in proportion and designed to induce fear. Such an analysis demands a creative interpretation or indeed a re-working of IHL and the customary law of armed conflict to fit 21st century realities. We have moved beyond state-based conflict into a post-Westphalian world of contested sovereignty, multiple and disaggregated sites of global governance and increasing prevalence and power of non-state actors.[48] Without such a context-relevant interpretation and re-examination of the Geneva Conventions, and international humanitarian law more generally, the existing rules governing armed conflict may become irrelevant and fall into disuse. In an extreme case, future state practice that disregards the Geneva Conventions, combined with expressions of *opinio juris* – along the lines of the Gonzales memorandum of January 25, 2002 – could produce an interpretation of the Geneva Conventions as increasingly irrelevant at customary international law. If Geneva Convention III is seen as less binding, numerous negative consequences might ensue for US, Canadian, and other international armed forces engaged in the GWOT. Obviously, mutual reciprocity would be undermined in such a scenario.

Although Canada and European allies of the United States have not adopted the US approach and continue to argue for the presumptive application of POW status to all combatants, one does not have to be friendly to the American position to recognize the legal and practical difficulties in addressing terrorism. IHL is stretched – some would say to the breaking point – when opting for a 'military' solution to the problem of transnational terrorist networks. However, Geneva law itself does not refer to terrorists, either in terms of applicability, as in the case of militias or regular armed forces, or non-applicability, as with mercenaries. At present, there is no comprehensive UN terrorism convention, which speaks to the potential difficulty of obtaining an international consensus on the highly contestable concept of terrorism. Moreover, the new ICC does not have jurisdiction over terrorist offences.

VI. Toward Alternatives

Ronald Dworkin has argued strongly in favour of setting aside the 'enemy combatant' label, which would force the US government to choose whether or not an individual is subject to POW status and protection or not, in which latter case the same individual

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[48] On these issues specifically, see Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, N.J.: Princeton University Press, 1999), especially at 9-42; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, (Cambridge: Cambridge UP, 1996), especially at chapter 4; and Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

could be tried as a criminal, with the normal safeguards of due process.[49] Dworkin's 'principled approach' involves elements of both the criminal and military paradigms, where terrorists might be pursued first as criminals, through concerted international police action, and when that approach proves inadequate, by means of a military campaign.[50] However, once an individual is detained on the battlefield or by conventional arrest, the government must determine status within a reasonable period of time (Dworkin suggests a matter of months, not years). POW status would involve the likelihood of a more indefinite detention (although Dworkin suggests a congressionally-imposed cap of three years to avoid the problem of an indefinite war on terrorism) but is more legally defensible given the strict requirements of adherence to the Geneva Conventions. Domestic criminal prosecution is the other alternative, particularly since the US government has 'unsigned' the Rome Treaty establishing the International Criminal Court.

Sassoli pushes Dworkin's point further. Logically following his argument that there is 'no gap' and that battlefield detainees are both *de facto* and *de jure* either civilians or combatants, he suggests that categorizing terrorists as civilians (and thus covered by Geneva Convention IV, not III) might make more sense. If civilians unlawfully participate in hostilities, reasons Sassoli, they are unlawful combatants and can be attacked and if necessary punished for war crimes. Such an approach would permit 'administrative detention for imperative security reasons and ... allows for derogations from protected substantive rights of civilians within the territory of a State and from communication rights within occupied territory.'[51] There is an inherent logic consistent with Geneva values in this argument: soldiers get combat immunity and protection as a group; terrorists-as-renegade-civilians are prosecuted and held responsible for their actions individually. This mirrors the model of individual guilt for war crimes (and crimes against humanity) adopted at Nuremberg and continued

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[49] The normal safeguards of the criminal process would apply and hearsay evidence and involuntary confessions – i.e. extracted via some form of coercive interrogation – would not be permitted. However, this is a far cry from the standard of 'probative value to a reasonable person.' For an elaboration of Ronald Dworkin's evolving views, see both 'Terror and the Attack on Civil Liberties' *New York Review of Books* (6 November 2003) at 1-11 and 'What the Court Really Said' *New York Review of Books* (12 August 2004) at 26-29.

[50] Dworkin also suggests that, under such an approach, the US could revise its decision to detain an individual as a POW or charge as a suspected criminal based on fresh evidence. However, Paust argues that even a POW prosecuted or convicted of war crimes does not lose POW status or protections; see Paust, *supra* note 1 at 332. This argument assumes that future military action conforms to the UN Charter, which prohibits unilateral action except under Article 51, which provides for self-defence. At minimum, compliance should conform with the proposed 'legitimacy criteria' for intervention outlined in the recent report *A More Secure World: Our Shared Responsibility*, authored by the Secretary-General's High-level Panel on Threats, Challenges and Change, consonant with UN adoption of the 'responsibility to protect' approach. The five criteria are (1) seriousness of threat; (2) proper purpose; (3) last resort; (4) proportional means; and (5) balance of consequences. Full report online: United Nations <www.un.org/secureworld>.

[51] Sassoli, *supra* note 1 at 208-209.

through the ICTY and ICTR and finally to the ICC. Moreover, law should apply to everyone; inherent in the rule of law is its universal applicability.

Some version of the Dworkin or Sassoli approach assumes that, given an ongoing 'Global War on Terror', Geneva is not broken and does not need fixing – a partial solution lies outside of Geneva law in the greater use of a criminal paradigm, or by an expansive application of all Conventions read and applied together. Taken together, one might even argue that such a response, which 'disaggregates' into multiple or overlapping approaches, responds to the disaggregated nature of 21st century global governance and decentralized terrorist networks.

The following five suggestions, however, are more radical approaches and would require either amending Geneva law or focusing on other institutional alternatives. The first would require the amendment (and widespread adoption) of Additional Protocol I; the second imagines the negotiation of a 'new status' of combatant within Geneva Convention III; the third posits an extension of jurisdiction to the ICC to include terrorism; the fourth would be to envision a new international body directly responsible for terrorism; and the fifth would be to create a new federal 'terrorist' or 'national security' court in the US.

(a) Historically, Geneva law has restricted POW status and protection to another group of 'soldiers' who do not easily fit the mold of domestic or international criminals: mercenaries. Article 47 of Additional Protocol I denies mercenaries lawful combatant status regardless of their much longer and deeper historical connection to legitimate war fighting. Essentially, mercenaries belong to a prohibited class of fighters that have no combat immunity and, if captured, are subject to domestic or international criminal law. It would certainly be a conceptual stretch to imagine terrorists legally construed in the same category as mercenaries, as both the foreignness of the mercenary and the compensation received for services rendered can hardly be assumed and is not definitive regardless, given the variable and mixed motives of terrorist operations and/or operatives.[52] However, to the extent that terrorism is entering the lexicon of customary law in a military rather than a criminal context, one way of addressing the problem head-on is to class terrorists in a separate category, as is the case with mercenaries. If mercenaries have been considered undeserving of POW status, then it is certainly logically consistent to argue that terrorists, with proven proclivity to target civilians, are even less so. Additional Protocol I could be amended to both define and specifically exclude terrorists from having the right to be considered combatants (unlawful or otherwise) or eligible for POW status. Thus, they would be afforded no combatant immunity and be subject to both detention and prosecution. Such an approach would require agreement on a *de minimus* definition of 'terrorist', unfortunately, a term as contestable as 'terrorism'. Even assuming such a consensus might be reached, the United States is not currently a state party to Additional Protocol I. However, a future US administration, with fewer options given

[52] On this point, see, for example, Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (New York: HarperCollins, 2003); Walter Laqueur, *Voices of Terror* (New York: Reed Press, 2004); and Bruce Hoffman, *Inside Terrorism* (New York: Columbia UP, 1998).

recent Supreme Court jurisprudence, may be more inclined to look for alternative legal means under the umbrella of the Geneva Conventions to justify differential treatment, yet within a continued militarization of the conflict.

(b) Rather than focus on Additional Protocol I, amendment efforts could instead concentrate on Geneva Convention III itself. A third class of combatants could be defined as not entitled to full POW protection for demonstrable reasons of (a) knowingly and willingly engaging in any conspiracy, attempt, or action to violate the laws and customs of war; (b) being an ongoing danger to international peace and security; and (c) not belonging to a state party or having allegiance to either a state party or a detaining or occupying power. Such an approach would have the advantages of meeting US concerns about the applicability of Geneva to the 'Global War on Terror'; would amount to a recognition on the part of the international community that the traditional paradigm of state-based conflict must be adapted to consider the challenges of 21st century terrorism; would potentially bring the US back 'into the fold' in terms of both *de jure* commitment and *de facto* implementation of international humanitarian law; and afford a level of transparency and accountability to the process. Obviously, such a 'third class' would have to be treated in accordance with at least the minimal humanitarian guarantees that are currently provided in Common Article 3. However, this is a very high-risk strategy, entailing the same kind of logic currently employed by noted American legal scholar Alan Dershowitz in his advocacy of 'torture warrants' to ticking time bomb scenarios.[53] Such a radical rethinking of the Geneva Conventions might serve only to provide a mirage of justice, given persistent difficulties regarding detention, eventual prosecution, or controlled release that would not necessarily be answered by a third status. Furthermore, such an approach could set a dangerous precedent which would be perceived as dramatically weakening or undermining the morally robust purpose and intention of the Conventions while ending what Dershowitz calls the 'hypocritical exploitation' of the laws of war. Nonetheless, the viability of any option that would involve serious multilateral discussion among state parties to amend the Geneva Conventions could be enhanced with the leadership of a significant and neutral state sponsor, quite possibly Switzerland.[54]

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[53] For a full elaboration of this controversial proposal, see Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven and London: Yale UP, 2002) especially at 149-163. Dershowitz advocates the use of 'torture warrants' as a means of keeping something that is going to happen anyway – and might be justified on a utilitarian calculus in any event – 'on the books' in a 'formal, visible, accountable, and centralized system.' A principled argument that opposes the Dershowitz approach that is nonetheless grounded in the creation of a 'morality' of counter-terrorism operations can be found in Michael Ignatieff, *The Lesser Evil: Political Ethics in An Age of Terror* (Princeton and Oxford: Princeton UP, 2004), especially at 139-145.

[54] The Swiss government has indirectly acknowledged many of the post-9/11 dilemmas discussed here by convening several conferences to discuss the Geneva Conventions and Protocols in light of the realities of the GWOT. With leadership and vision, a new round of codification could be as significant as the original diplomatic negotiations in the late 1940s in response to World War II or the 1970s effort to respond to the anti-colonial wars and intrastate conflicts of the postwar era. For

(c) A possible institutional alternative would imagine an extension of the current jurisdiction of the ICC to include the prosecution of terrorists and terrorist offences – within the context of existing or amended definitions of war crimes and crimes against humanity. Given current US opposition to the ICC, this seems at present a non-starter. A variant on this theme would be to set up a mixed or 'internationalized' court for a specific series of terrorist actions, such as the 9/11 attacks.[55] An approach that builds on extending the paradigm of international criminal law presumes an unlikely constellation of events: (a) US willingness to bend to international pressure that the presumption of innocence could be guaranteed only in the internationalized court; and (b) key alleged perpetrators such as Osama bin Laden and Ayman al-Zawahiri are captured alive. This might seem far-fetched, particularly considering the current debacle over the trial of Saddam Hussein in Iraq, which is a timely demonstration of the difficulty of trying a former head of state within that state in the midst of an ongoing conflict. At the same time, it seems likely that many rank-and-file terrorists and those recruited to be suicide bombers would evade capture, arrest, and extradition. Long term detention resulting from decisive military action may be illegal and morally reprehensible, but those in favour argue for its necessity given the high risks of leaving terrorists (potentially with access to weapons of mass destruction) at large. Unlike earlier conflicts, or in accordance with the logic of peacebuilding and transitional justice approaches, effective demobilization, disarmament, and reintegration cannot be safely assumed in dealing with ideologically committed terrorists. Moreover, such an asymmetric and unpredictable threat cannot be effectively met with the slow, partial, and dangerously after-the-fact approach of international justice.

(d) An even bolder proposal has been offered by William Carmines, a recent graduate of the Case School of Law at Case Western Reserve University in Cleveland, Ohio. Carmines has proposed the creation of an 'International Terrorism Tribunal' and has written a draft fifty-page treaty.[56] Modelled largely on the Rome Treaty, which created the International Criminal Court, the Carmines proposal suggests that, via ratification, states effectively 'pool' their domestic jurisdictions and in the process create a consistent body of international terrorism and security law, with a uniform

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some scholars, this kind of discussion is necessary to tailor and expand the existing corpus of IHL to respond to the security dilemmas of this new kind of warfare. See, for example, Ruth Wedgwood, 'The Supreme Court and the Guantánamo Controversy' in Peter Berkowitz, ed., *Terrorism, The Laws Of War, And The Constitution: Debating The Enemy Combatant Cases* (Stanford, CA: Hoover Institution Press, 2005) at 183. By contrast, Steven R. Ratner argues that multilateral diplomacy is unlikely to yield significant new norms, because demands for reform of IHL are premised on misconceptions about the existence of a gap. See Steven R. Ratner, 'Rethinking the Geneva Conventions' (30 January 2003), online: Crimes of War <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>.

[55] See a brief discussion of this possibility in Antonio Cassese, *International Criminal Law* (Oxford, Oxford UP, 2003) at 456-457.

[56] A link to the Carmines proposal can be found at the website for the Case Western School of Law Institute for Global Security Law and Policy, online: <http://law.cwru.edu/curriculum/news/pdfs/itt_treaty.pdf>.

definition of terrorism.[57] Unlike the ICC, however, there is no possibility of trying a suspected terrorist in a domestic court under the principle of complementarity; the case is automatically uploaded to the international arena. However, one can assume this would be even less acceptable to the US than the ICC, where the principle of complementarity was designed with US concerns in mind. Both approaches could be consistent with the negotiation of a new UN Convention on Terrorism, which would then be subject to the same difficulties of ratification and practical implementation as the Genocide Convention and the Convention Against Torture. Both approaches would essentially eclipse the POW status issue under the Geneva Conventions by forwarding the problem elsewhere, but by necessity only selectively. Large groups of people can be detained as POWs or detained illegally; only a select few could realistically and effectively be tried as terrorists, which begs the question of what to do with the remainder. Both the ICC approach and the Carmines proposal are also fraught with predictable but no less mundane concerns: such institutions are inherently reactive rather than proactive and require considerable financial and human resources, expertise, time and sustained international commitment.[58] Creating rules of evidence that could be balanced with demands of national and international security might prove insurmountable.[59] Finally, trials are lengthy, complicated, and cannot be easily framed to serve as a deterrent or fulfill a larger didactic purpose.[60]

(e) While Carmines proposes an international terrorist court, Harvey Rishikof has written a detailed analysis proposing a new federal 'national security' or 'terrorist' court.[61] Specifically, Rishikof suggests that since terrorists do not fit neatly into existing legal classifications, a new US federal court is required. Such a court, created by Congress, could function as a hybrid between criminal courts and administrative boards and tribunals, and could balance security concerns with demands for procedural fairness. A dedicated court would specialize in the crafting of

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[57] Carmines defines an act of international terrorism as involving the use or threat of violence made for the purpose of advancing a political, religious or ideological cause, and requires that use or threat be against either property or citizens. See Carmines' proposal, *ibid.* at 2.

[58] An oft-quoted example that illustrates the problem of international terrorist trials is the difficulty in establishing an ad hoc tribunal set up for the express purpose of trying the Lockerbie bombing suspects, which involved a lengthy process of negotiation, was time-consuming and expensive and resulted in one acquittal.

[59] This has proven to be a difficult exercise in the GWOT; for example, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the military commission proposed to try Hamdan was in violation of Article 36 (a) of the Uniform Code of Military Justice, because he would have been excluded from hearing some of the evidence and hearsay evidence would have been permitted given the proposed (and relaxed) standard of probative value.

[60] For an authoritative account and defence of the 'didactic' purpose of trials and legal discourse more generally, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven and London: Yale UP, 2001).

[61] See Harvey Rishikof, 'A New Court for Terrorism' *New York Times* (8 June 2002); and Harvey Rishikof, 'Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes' (2003) 7 Suffolk Univ. L. J. of Trial and Appellate Advocacy 1 at 1-38.

procedures for the admission of sensitive and classified evidence, support the creation of a dedicated defence bar whose members had appropriate security clearance and even oversee the construction of a special fortified courthouse to protect against security risks. The right to counsel would be assured and appeals could be made from the proposed court to appellate court and, assuming certiorari, ultimately to the Supreme Court. Rishikof points out existing precedents: there are already specialized courts in the federal system in banking and international trade. Moreover, under the *War Crimes Act* of 1996, Federal courts have been given jurisdiction over 'grave breaches' of the Geneva Conventions and violations of Common Article 3. Rishikof also grants potential drawbacks: there would again be the difficulty of defining 'terrorism' and 'terrorist' (although this would be done in one state, rather than being subject to interstate negotiation) and that not enough care would be taken to ensure defendants' rights, thus opening the entire enterprise to constant judicial review, which would in turn delegitimize and undermine the jurisdiction of the court.

None of the options posited above completely 'solves' a central security dilemma, which is that neither a military paradigm for fighting terrorism within the norms of international humanitarian law nor a prosecutorial approach premised upon the rule of law and relying on norms and practices – either existing, extended, or newly created – of international or domestic criminal justice effectively addresses the particular nature of terrorism as an ongoing threat. Fundamental questions of effective deterrence and interdiction will remain and these can only be solved in the long-term in the political arena.

VII. Conclusion

To some degree, the earlier debate on status determination in the detention debate has been eclipsed with the trio of landmark US Supreme Court decisions of June 28, 2004 and, more recently, by the *Hamdan* decision of June 26, 2006. In *Rasul,* a majority of six justices overruled the practice of status determination by executive fiat, and held that detainees who are not citizens can petition for *habeas corpus* relief in US Federal Courts.[62] In *Hamdan v. Rumsfeld*, a decision made possible by *Rasul*, the Supreme Court struck down the military commissions designed by the Bush administration in response to the 2004 decisions as violating both the US Uniform Code of Military Justice (UCMJ) as well as Common Article 3.[63] Justice John Paul Stevens, following

[62] In the earlier ruling, *Hamdan v. the United States*, the Unites States Court of Appeals ruled that *Rasul* had no bearing on the enforcement of any Geneva Convention, even going so far as to conclude that Geneva law cannot be judicially enforced in the United States. This logic was reversed in the majority decision penned by Justice Stevens at the Supreme Court and his confirmation of the applicability of the Geneva Conventions to US law.

[63] The Bush administration has now responded to *Hamdan v. Rumsfeld* with the *Military Commissions Act* (MCA), the result of a negotiated compromise with Congress, largely via the efforts of Senators John W. Warner, John McCain, and Lindsey O. Graham. Although the three senators have argued that under the MCA detainees will not lose their right of habeas corpus, the window opened by *Rasul v. Bush* that made *Hamdan v. Rumsfeld* possible. It is expected that, like the previous military commission proposals effectively defeated by *Hamdan*, the legislation will

up Justice Sandra Day O'Connor's earlier and much quoted admonition in *Hamdi v. Rumsfeld* that 'a state of war is not a blank cheque' for executive authority, has also trimmed the aggressive legal sails of the Bush administration. Stevens was particularly troubled that the military commissions proposed to try Hamdan and others would have excluded the detainees from the hearings and that relaxed rules of evidence would not meet the requirement of procedural fairness explicit in Common Article 3.[64] Although these decisions have not addressed the merits of the al Qaeda/Taliban distinction or the ongoing issue of POW status, the Supreme Court has made it clear that, minimally, Common Article 3 must apply to all detainees regardless of their status.[65] At the congressional level, 'cruel, inhuman, and degrading treatment' has been prohibited by the so-called McCain Detainee Amendment, which has been incorporated into the US *Detainee Treatment Act* of 2005.

However, the underlying contradictions of the Bush administration approach, evident early after 9/11 as my previous analysis has illustrated, have yet to be fully addressed. Similarly, the ICRC may be technically correct in saying that terrorist detainees must either be treated as combatants or civilians under the current rules; however, American concerns about the ongoing relevance of those rules have not been thoroughly examined either. As my brief discussion of possible alternatives attests, there are no uncomplicated answers, no cases where advantages significantly outweigh disadvantages and international humanitarian law can easily be respected. Nonetheless, early foreclosure of the POW option has had very infelicitous consequences.

In the immediate aftermath of the Abu Ghraib prison abuse and torture scandal, Pierre Krähenbühl, Director of Operations for the ICRC, was reported at a news conference as saying that Abu Ghraib 'represented more than isolated acts, ... a pattern and a system.'[66] In documenting the processes and internal debates of executive decision-making that allowed such a culture of impunity to develop,

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be tested in the courts. Critics also suggest the MCA weakens the legal standard requiring evidence to be shared with the defendant, and that the definition of 'illegal enemy combatant' in the Act legitimizes and legalizes this status under US law, thus undercutting the Geneva Conventions. See John W. Warner, John McCain, and Lindsey O. Graham 'Look Past the Tortured Distortions' *Wall Street Journal* (2 October 2006) at A10; and Draft *Military Commissions Act of 2006*, (25 September 2006).

[64] The proposed rules of evidence were distinctly different from those used in US criminal courts. For example, hearsay evidence would have been permissible, a relaxed standard of probative value would have applied, and no sworn statements would have been required. See Barbara J. Falk, '*Hamdan v. Rumsfeld*: What the Supreme Court said and how the US government responded' *The Bulletin* (Summer 2006) at 5-7.

[65] Edited transcripts of status review cases have now been released on the website of the US Defense Department, in response to a lawsuit brought under freedom of information legislation by The Associated Press <http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html>. See also Tim Golden 'Voices Baffled, Brash and Irate in Guantánamo' *New York Times* (6 March 2006).

[66] Quoted in Hendrik Hertzberg 'Comment: Unconventional War' *The New Yorker* (24 May 2004) at 32.

investigative journalists such as Mark Danner and Anthony Lewis for the *New York Review of Books* and Seymour Hersh and Jane Maher at *The New Yorker* traced the abuse not simply to a number of enlisted men and women – mostly reservists and intelligence officers – but back to these original discussions in the memoranda drafted in late 2002 and early 2003.[67] A President and a Secretary of Defense who labelled detainees variably as 'enemy' or 'unlawful combatants' effectively separated out a group of persons exempt from the protections of the Geneva Conventions. White House Counsel derisively referred to the Geneva Conventions as both obsolete and inflexible, even quaint. Given the expressed need to allow for interrogation as required by the exigencies of this new kind of war, 'enemy combatants' were denied any doubt as to their status determination. None of these actions alone were directly causative but they collectively signalled a deep ambivalence toward the effectiveness and future relevance of the Geneva Conventions, which in turn was translated as both disrespect for and an outright violation of international humanitarian norms. Throughout 2003 and 2004, shocking and troubling information became known about the Guantánamo detainees: they were kept shackled and incommunicado, subject to sensory deprivation, humiliation and coercion and without access to legal counsel.[68] By the time of the invasion of Iraq in March 2003 (a clearly international conflict with defined armies that met every possible condition under Geneva law), the desire for 'actionable intelligence' had already overshadowed any concern for conducting hostilities in a manner consonant with international humanitarian law. The methods of physical and psychological coercion reported by the ICRC in February 2004 – months before the Abu Ghraib photos were displayed on American newsstands and on American television – were part of a process that had been developed and deployed by American interrogators since 9/11, and pioneered at Guantánamo Bay. With no possibility of status determination on a case-by-case basis, hundreds of detainees have been subjected to considerably less than the humane treatment that even the Bush memorandum of February 7, 2002 suggested would be the case. The 'spirit' of the Geneva Conventions was not respected, despite Bush's assurances to the contrary. By revisiting this early debate five years hence, we can see with the unfortunate clarity of hindsight not only 'what went wrong', but also how policy choices, however difficult, essentially eclipsed international law and adherence to law was reduced to policy

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[67] See especially Mark Danner, 'Torture and Truth' *The New York Review of Books* (10 June 2004), 'The Logic of Torture' *The New York Review of Books* (24 June 2004), and 'Abu Ghraib: The Hidden Story' *The New York Review of Books* (7 October 2004); Seymour Hersh 'The Gray Zone' *The New Yorker* (24 May 2004); Jane Maher, 'Outsourcing Torture' *The New Yorker* (14 and 21 February 2005); Anthony Lewis, 'Un-American Activities' *The New York Review of Books* (23 October 2003), and 'Making Torture Legal' *The New York Review of Books* (17 June 2004).

[68] See for example, the 'emerging' story in Joseph Lelyveld, 'In Guantánamo' *The New York Review of Books* (7 November 2002), and Ted Conover, 'In the Land of Guantánamo' *New York Times Magazine* (29 June 2003). For a more recent discussion of the same problem at Bagram, see Tim Golden & Eric Schmidt, 'A Growing Afghan Prison Rivals Bleak Guantánamo' *New York Times* (26 February 2006).

choice. Finding a mixture of solutions and a combination of political and legal policy instruments is regrettably no easier than in the days and months after 9/11. Although the many contradictions and difficulties highlighted here help to provide an explanation, there is no convenient excuse not to engage in an important debate that will shape the contours of a conflict that, at present, has no discernable end in sight.