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APPLICATION OF THE LAW OF WAR TO THE GLOBAL WAR ON TERROR

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Although the Global War on Terror presents the military with new threats, in the form of transnational terrorist groups with a global reach, the law of war is currently capable of dealing with the threat on the modern battlefield. The law of war guides military operations across the spectrum of conflict, no matter how that conflict is characterized, as a matter of policy.¹ This is done without regard to whether or not it applies as a matter of law. That policy baseline is important for public discussion, or debate within the political branches, but it is even more important for the soldiers on the ground — they start with the default position of applying the laws for international armed conflict no matter where they are, no matter if the conflict is characterized as an international armed conflict, a non-international armed conflict (commonly called a civil war), or a peace-keeping operation. Thus, the law of war applied to international armed conflicts provides a standard that soldiers can train under and apply across the spectrum of conflict, no matter what type of armed conflict in which they are involved.

The application of a law of war (international law) standard, as a matter of law, as evidenced in two recent Supreme Court cases, *Hamdi v. Rumsfeld*² and *Hamdan v. Rumsfeld*,³ fills the gap identified by Dean Koh in his keynote speech at this symposium. There is no longer a “law-free zone” on the battlefield. Justice O’Connor, writing for the majority in *Hamdi*, recognized the efficacy of the administrative procedures

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¹ Dep’t of Def., Directive 2311.01E, Law of War Program § 3.1 (May 9, 2006), *available at*, www.fas.org/irp/doddir/dod/d2311_01e.pdf.

² 542 U.S. 507 (2004).

³ 548 U.S. 557 (2006).

established in Army Regulation (AR) 190-8,⁴ which are based on the requirements of Article 5 of the Geneva Prisoner of War (GPW) Convention.⁵ The GPW is the gold standard for review of detention on the battlefield. The second case, *Hamdan*, which was discussed a great deal at this symposium, provides for the use of the non-international armed conflict standards set forth in Common Article 3 of the Geneva Conventions.⁶

This paper will not address the decision to apply military force from a constitutional perspective, or a *jus ad bellum* analysis, nor will it address the decision to apply the law of war instead of a criminal justice model. Those are policy decisions made by the President, in consultation with Congress [through the Authorization for Use of Military Force (AUMF)⁷ and the Military Commissions Act (MCA)⁸], and recently with some input from the Supreme Court. Instead, this paper will address the trend to fully apply the appropriate law of war — *jus in bello* — standard to conduct the global war on terror (now called the “long war” by most military commentators) in five areas: (1) targeting, (2) status determination, (3) detention procedures, (4) interrogation or detainee treatment, and (5) prosecution. This trend, to increasingly apply international law, embodied in the law of international armed conflict, is going to continue, resulting in more agreement and even more unity of action, in some areas, with our allies in the war on terror.

There are several examples of this trend in the targeting discussion going on throughout the international community. A recent presentation given by a representative of the International Committee of the Red Cross (ICRC), Dr. Nils Meltzer, at the American Society of International Law headquarters in Washington, D.C., unveiled the general parameters of the “Interpretive Guidance for Direct Participation in Hostilities,” developed by a TMC Asser Institute and ICRC-led group of government experts.⁹ The study explores the parameters of Article 51 of Additional Protocol I (governing international armed conflict) and Article 13 of Additional

⁴ *Hamdi*, 542 U.S. at 538.

⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

⁶ *Hamdan*, 548 U.S. at 629-31. The provision is referred to as “Common” Article 3 because it is found identically in each of the four Geneva Conventions.

⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

⁹ See, e.g., Int’l Comm. Of the Red Cross, Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report, October 23-25, 2005, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).

Protocol II (governing non-international armed conflict), which protect an individual civilian from attack in armed conflict, “unless and for such time as they take a direct part in hostilities.”¹⁰ It appears from Dr. Meltzer’s presentation that the study will conclude that the phrase only applies to targeting and should be applied to two classes of civilians: members of an armed group and civilians directly participating in hostilities for a short period of time.¹¹

First, the targeting analysis applies to members of an armed group, including transnational terrorist groups, involved in either an international or a non-international armed conflict. So, in military rules of engagement terms, when forces are declared hostile, members of that group may be targeted upon positive identification. Second, those that demonstrate through their actions that they have joined the fray, or are directly supporting hostilities, may be targeted. This approach is consistent with the long-standing U.S. Rules of Engagement (ROE), which allow the targeting of “forces declared hostile” and targeting those that commit “hostile acts” or display “hostile intent.”¹² This approach is also entirely consistent with the rules of engagement employed on the current battlefield against an implacable foe, including armed non-state actors like Al Qaeda, that hides behind their civilian status to try and gain an asymmetric advantage. U.S. forces only target members of an armed group that can be positively identified; all other targeting decisions are based on a “hostile act/hostile intent” analysis. Arguably, the “direct participation” interpretive guidance conducted by these government experts enlarges the category of individuals that could be targeted on the modern battlefield; however U.S. military ROE are more restrictive and make this targeting decision — in the main — a matter of establishing an imminent hostile threat, prior to ever engaging civilians who may be “directly participating in hostilities.”

The status discussion has been distorted, politically charged, and the

¹⁰ Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-434 (Protocol I); Protocol [No. II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609-699 (Protocol II). Although the U.S. has not yet ratified Protocol II, and is not likely to ratify Protocol I (in part due to its recognition of unprivileged belligerents), the provisions of both are identical.

¹¹ Dr. Nils Melzer, Legal Advisor for the International Committee of the Red Cross (ICRC), “Civilians on the Battlefield: Direct Participation in Hostilities under International Humanitarian Law,” presented at the American Society of International Law (Tiller House) on February 21, 2008.

¹² See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES, APPENDIX C: SPECIAL OPERATIONS ROE FOR OPERATIONS IN IRAQ C-20 (2000).

focus of much debate; it is not a creature of new law nor does it apply to a “new type of conflict.” The term “unlawful enemy combatants” was not made out of whole cloth. Rather, it signals an approach developed in the middle of the 20th century, in jurisprudence¹³ and literature,¹⁴ that was contemporaneous with the development of the Geneva Conventions. This approach posits that there is class of combatants that are “unlawful” or “unprivileged belligerents.” Such a class of combatants clearly exists in classic internal, or non-international armed conflict; for example, guerrillas may not only be targeted but are to be prosecuted for their warlike acts against the state.¹⁵ But this category of combatants also exists in international armed conflict – the partisans or *franc-tireurs* of European wars of the last century were all irregular combatants, who were often denied status as lawful combatants or prisoners of war. This categorization, or status determination, is still significant in the future: It may result in slightly different treatment standards, and it will determine which combatants should be tried for their belligerent acts.

The detention review standards were the subject of at least one case reviewed by the Supreme Court, *Hamdi*, and may soon be the focus again.¹⁶ But I would submit that *Hamdi* got us on the right track, applying a law of war analysis for detention on the battlefield, based on U.S. doctrine for “Article 5 Tribunals,” used to determine the status of Prisoners of War.¹⁷ The Combatant Status Review Tribunals already meet the *Hamdi* standard for individuals detained on the battlefield. Additionally, the same regulation referred to in *Hamdi*, Army Regulation 190-8 (AR 190-8),¹⁸ is currently being revised to ensure that either tribunals described in Article 5 of the GPW or those described as appellate administrative tribunals in Article 78 of the Geneva Civilians Convention (GC),¹⁹ are provided to all

¹³ *Ex Parte Quirin*, 317 U.S. 1, 31 (1942) (“Unlawful combatants are ... subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”).

¹⁴ Major Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L. L. 323, 326-27 (1951).

Outside these three classes of persons to whom international law has offered shelter from the extreme violence of war, there are other persons who traditionally have not benefited from a privileged status under international law, namely, guerrillas, partisans, so-called ‘war-traitors’, *francs-tireurs*, and other persons who, in the face of the enemy or behind his lines, have committed hostile acts without meeting the qualifications prescribed for lawful belligerents.

Id.

¹⁵ *Id.* at 328.

¹⁶ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004).

¹⁸ HEADQUARTERS OF DEP’T’S OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997).

¹⁹ Geneva Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12,

detainees on the battlefield. The clear message of *Hamdi* is that the level of due process used to determine the status of enemy combatants on the battlefield (in that case of an American citizen) is more than sufficient to meet basic standards of fairness for all detainees held abroad in Iraq or Afghanistan in the global war on terror.

The revisions of AR 190-8, coupled with the field manual on interrogation (FM 2-22.3)²⁰ published last year, are also significant in treatment and interrogation of detainees. The draft detention regulation prescribes use of GPW or GC standards for the treatment of all detainees (including “unlawful combatants”); procedures for civilians or unlawful combatants may only be modified for “imperative reasons of security,” consistent with Article 5 of the GC and FM 2-22.3, given the force of law by the Detainee Treatment Act of 2005,²¹ follows a GPW standard [with one minor exception for unlawful combatants]. In fact, the instructions provided in Coalition Provisional Authority Memorandum Number 3²² for detention of individuals in Iraq required the use of the GC standard for treatment, and that standard remains in effect today. These are considerably higher standards than the Common Article 3 approach endorsed in *Hamdan*,²³ Department of Defense Directive 2310.01E,²⁴ and a

1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁰ See Dep’t of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations (2006).

²¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1002(e), 119 Stat. 2680 (2005).

²² Coalition Provisional Authority Memorandum Number 3, Criminal Procedures, Section 1 (June 24, 2004), available at <http://www.ictj.org/static/MENA/Iraq/iraq.cpamemo3.062704.eng.pdf>.

²³ *Hamdan v. Rumsfeld*, 548 U.S. at 629-31. GPW, *supra* note 5, states the text of Common Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) 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.

Deputy Secretary of Defense Memorandum²⁵ (both of which followed shortly after the *Hamdan* decision). Common Article 3 serves as a baseline, minimum humane treatment standard, preventing further abuse of detainees. The GPW and GC standards adopted in the Army regulations and doctrine will serve to raise the standards to an international armed conflict standard for all detainees, wherever they are detained, in whatever kind of conflict.

Finally, the prosecution of unlawful enemy combatants, under the provisions of the MCA, is entirely consistent with international standards. As the MCA was the topic of several other articles in this volume, I won't dwell on this issue. However, I would submit, when looking at the military commissions from an international law perspective, that the commissions provide all the judicial guarantees recognized by civilized peoples, as defined in international criminal tribunal jurisprudence and Article 75 of Additional Protocol I,²⁶ or Article 6 of Additional Protocol II.²⁷ Both articles provide a detailed list of the minimum "judicial guarantees" referred to in Common Article 3, including notice, individual responsibility, the presumption of innocence, the right to be present at trial, an *ex post facto* provision, the right to obtain witnesses and cross-examine them, the right not to testify against oneself, and appellate rights. All of these rights and procedures are embodied in the MCA. The conduct of the commissions will stand up well in comparison to similar international criminal tribunals conducted in recent years at the Hague, in Sierra Leone, and in Tanzania.²⁸

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

²⁴ See Dep't of Def., Directive 2310.01E, Detainee Program § 4 (Sept. 5, 2006) (adopting Common Article 3 as the "humane treatment standard").

²⁵ Memorandum from Gordon England, Deputy Secretary of Defense, on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense to Department of Defense Officials (Jul. 7, 2006), available at <http://www.fas.org/sgp/other/gov/dod/geneva070606.pdf>.

²⁶ Protocol I, *supra* note 10.

²⁷ Protocol II, *supra* note 10.

²⁸ See, e.g., United Nations Document IT/32/Rev. 41, Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

Clearly, the application of the law of war to the global war on terror is a journey. There have been twists and turns along the way. The United States remains committed to the application of the international law of armed conflict, the law of war, in this conflict. Current efforts in public diplomacy have emphasized the continued vitality of international law and the law of war. In a recent speech at The Hague, Netherlands, U.S. Department of State Legal Advisor John B. Bellinger III emphasized the continuing importance and influence of international law to the United States in confronting the deep and difficult problems facing the international community. According to Mr. Bellinger, the U.S. government has always recognized that “international law has a critical role in world affairs, and is vital to the resolution of conflicts and the coordination of cooperation.”²⁹ As Mr. Bellinger has recognized, we didn’t necessarily get it right in this challenging and difficult area of the law the first time, as we struggled to identify the appropriate legal standards for detention.³⁰ That is clear if you look at the Supreme Court jurisprudence on this issue. But the approach we have taken over the last several years, and are currently taking in the Global War on Terror, has led to the conduct of disciplined military operations and has guided us toward the increased application of the law of war standards in this conflict.

I also believe that there will be increased realization by our allies of our principled approach and increasing agreement as to the way ahead (particularly in operational matters like targeting and battlefield detention operations). There is an opening window of opportunity to speak with our European allies as to the application of the law of war paradigm to the global war on terror. For example, the detention standards applied in *Al Jedda*³¹ by the High Court in the United Kingdom and the UN peacekeeping operation standards applied in the recent European Court of Human Rights Kosovo cases, *Behrami* and *Saramati*,³² allow us to apply a “displacement” approach – replacing human rights standards imposed by the European Convention on Human Rights with the *lex specialis* of the law of war, particularly when the operation is sanctioned by the United

International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, available at <http://www.un.org/icty/legaldoc-c/basic/rpe/IT032Rev41eb.pdf>.

²⁹ See John B. Bellinger III, Legal Advisor, U.S. Dep’t of State, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007), available at <http://www.america.gov/st/texttrans-english/2007/June/20070607114415eaifas0.7869684.html>; see also William H. Taft, IV, *A View From the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT’L L. 503 (2006).

³⁰ Bellinger, *supra* note 29.

³¹ *Al-Jedda v. Secretary of State for Defence*, 1 A.C. 332 (H.L. 2007).

³² *Behrami v. France and Saramati v. France*, 45 Eur. Ct. H.R. 10 (2007).

Nations Security Council. Although complete agreement with our allies as to the particular rules to apply in military operations has still eluded us, these cases bring us much closer together in applying armed conflict standards to our military operations.

Contrary to popular belief, there is no “law free zone” on the modern battlefield. The law of war will continue to inform and constrain U.S. military operations in the global war on terror, despite the challenges of conforming modern military conduct to the treaty rules developed in 1907 at the Hague³³ or 1949 in Geneva.³⁴ In targeting, status determination, detention procedures, interrogation and detainee treatment, and military commissions procedures, the United States military continues to demonstrate a commitment to the rule of law, in general, and the law of war, in particular, on the modern battlefield.

³³ See Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

³⁴ See, e.g., GPW, *supra* note 5.