

# The Law of War and Illegal Combatants

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### *Introduction*

#### *A. Anti-War and Anti-Law Attitudes*

The objections an increasing number of people raise to the continued war in Iraq and Afghanistan now seem to have produced distortions of the law of war itself. In their eagerness to display sympathy with those involved in the war, many, including Justices of the U.S. Supreme Court, now advocate that terrorists are given unprecedented protection and privileges contrary to the established legal rules of warfare.<sup>1</sup> In a sense, therefore, the anti-war sentiments appear to have contaminated the duty to uphold well-heeded rules of international law.

Attempts have been made to doctor the law to accommodate the zeal to treat terrorists as equals—or better than equals—to soldiers all in the name of human rights of detainees. Such efforts to provide terrorists with privileged treatment have extended to terrorists captured on the battlefield, or preparing ill deeds elsewhere. The general public, guided largely by emotional motivation, may have put pressure on both courts and organizations, for example the Red Cross, to afford extensive human rights to terrorists. Naturally, terrorists are entitled to some basic human rights. But exaggerated, well-meaning attitudes are perilous to the survival of the law of war, as they germinate seeds which undermine the legal system to the detriment of those who deserve to enjoy traditional privileges, such as regular soldiers and civilians. Attitudes unduly favoring terrorists also menace the very security of the state and its citizens. The state has a duty to protect its citizens and others in its territory. If terrorists are treated with excessive sympathy, this task of the state will be made impossible.

It may be that recent disconcerting developments are due to a lack of a detailed knowledge of the law of war, even among distinguished judges and many well-meaning members of the general public exercising considerable influence and pressure on the attitudes of many practicing and academic lawyers. In such cases, some clarifications may bring back the accurate contents to the law of war and restore the respect for this legal system.

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<sup>1</sup> See *infra* Part V.B.

### *B. Revival of the Law of War*

Before the terrorist attacks of 9/11, few took much interest in the law of war in spite of recurring African wars, the Gulf War, and the Croatian War of Independence in 1991. It took the 9/11 attacks to wake up statesmen and academics alike to the importance of the law of war. Now, a flood of books have been published on various aspects of war, admittedly more on international relations and political aspects than on international law. Furthermore, several universities now organize courses and conferences on the law of war.

However, conflicting tendencies show how international law is demoted, for example, by recently having been made optional in the law syllabus of both Oxford and Cambridge. It is a concern to many that students prefer to opt to study detailed bureaucratic rules of the European Union rather than international law. Such trends have moved the law of war even further down the list of academic priorities. The law of war should clearly form an integral part of courses on international law. However, this is rarely the case in law faculties, although international law should be a compulsory subject for all lawyers. Otherwise, how can judges or legal advisers to states deal with disputes in due course if they have no academic knowledge of this vital subject?

Yet, it is actually a breach of international law not to teach and dispense the knowledge of the law of war. There is an obligation under all the 1949 Geneva Conventions to teach the law of war so that the “entire population” is aware of the rules.<sup>2</sup> This duty applies in times of peace as well as war and is not activated, like some other provisions in the Conventions, only at the outbreak of armed conflict.<sup>3</sup> States have blatantly ignored this obligation to promote the knowledge of the rules of the Geneva Conventions, for example, by not ensuring that the law of war is taught in universities and often not even to members of the armed forces. Furthermore, certain commentaries have not been accurate in their representation of the law as it stands.<sup>4</sup>

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<sup>2</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 48, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 127, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV].

<sup>3</sup> See, e.g., Convention I, *supra* note 2, art. 3.

<sup>4</sup> See *infra* notes 42–58, 153–55, 215–12 and accompanying text.

### C. The Positivist Problem

One may ask why the study and knowledge of the law of war has been so neglected. As mentioned above, states have simply ignored the clear *obligation* under all the 1949 Geneva Conventions to teach and disperse knowledge of the provisions of the Conventions. In addition, it may be suggested that the refusal of states to ensure that universities teach the law of war is derived from certain misconceptions of academics; many may be unwilling to teach a subject which so violently conflicts with the notions they have set out in their traditional textbooks.

It is indeed impossible to teach the law of war, humanitarian law, or human rights without recourse to notions of natural law or minimum standards of behavior in international society. The positivist school has dominated the teaching of law during the last 150 years. Adherents to this school insist that all legal rules must be *jus positum*, that is to say all legal rules must be a concrete or enacted expression of the will of the state, in writing or in clear consent to customary rules. Positivists reject natural law and ethics and seek for every rule the clear consent of the state.<sup>5</sup> Thus, in the field of international law, positivists refuse to acknowledge any rules that states have not expressly concurred in forming, either by treaty or by “custom.”<sup>6</sup> For this reason academics are often unable to explain the binding force of the law of war, as the bulk of this system is based on natural law, on ethics, or on what is sociologically necessary,<sup>7</sup> and not necessarily on written and “accepted” rules.<sup>8</sup> Incidentally, the recent use of treating international humanitarian law (sometimes abbreviated “IHL”) as in any way representing the law of war is not accurate: humanitarian law is but a part of the legal system applicable in war; other rules concern, for example, the use of weapons<sup>9</sup> and methods.<sup>10</sup>

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<sup>5</sup> However, on different forms of consent and on implicit consent, see INGRID DETTER, *THE INTERNATIONAL LEGAL ORDER* 413–17 (2d ed. 1995) [hereinafter DETTER, *INTERNATIONAL LEGAL ORDER*].

<sup>6</sup> See generally INGRID DETTER, *THE CONCEPT OF INTERNATIONAL LAW* (2d ed. 1993) [hereinafter DETTER, *CONCEPT*] (rejecting customary law in its traditional form).

<sup>7</sup> See INGRID DETTER, *THE LAW OF WAR* 166–67 (2d ed. 2000) [hereinafter DETTER, *LAW OF WAR*]; DETTER, *CONCEPT*, *supra* note 6, at 46–49, 119–20.

<sup>8</sup> On “consent” to and “acceptance” of all rules, including those of natural law, ethics, and minimum standards that may be construed as indirect or tacit by virtue of a state being a member of international society, see DETTER, *INTERNATIONAL LEGAL ORDER*, *supra* note 5, at 157–65, 197–211, 220–24, 304, 439.

<sup>9</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 211–75 (chapter on restrictions on weapons).

<sup>10</sup> See generally *id.* at 276–314 (chapter on prohibited methods of warfare).

Human rights, on the other hand, apply in peace time but are, to some extent, suspended in war.<sup>11</sup> The War on Terror is not a “normal” war,<sup>12</sup> and hence human rights continue to operate as a parallel system in relation to persons not involved in hostilities. On the other hand, there are, as we shall see, important human rights rules which still apply in *all* wars, for example those which I have called *inherent rules*—rules inherent in the structure of international society. These rules often coincide with those which are often called *fundamental rules*, for example rules that forbid genocide, slavery, or torture, and other rules which impose certain minimum standards in international society.<sup>13</sup> Other human rights rules that continue to apply in time of war are those which ensure minimum standards in court procedures and with regard to treatment of detainees.<sup>14</sup>

It may be noted that minimum standards are also viewed as unacceptable intrusions in the sovereign sphere by communist and some post-communist states; according to the communist doctrine, the state is omnipotent and international law cannot impose any limitations on its power without its consent. Minimum standards represent a notion that was fiercely resisted by the Soviet Union and its satellite states and that is now still resented by states like China and Cuba.<sup>15</sup> Such states claim that there is an iron fence around them forbidding any application of external rules lest they give permission *in casu*. Such views ignore, for example, the traditional immunity granted to diplomats on the soil of a receiving state, the prohibition of gross violation of human rights, and the right to transit to the sea.<sup>16</sup>

For a long time—possibly for the last 150 years—the majority of scholars have, under the influence of the positivist school, pretended that international law consists of only those rules to which states have agreed in treaties or that can be demonstrated to form part of international customary law, which is notoriously nebulous,<sup>17</sup> as well as some fairly vague “general principles.” Furthermore, virtually every textbook (except mine) insists that only states and intergovernmental or-

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<sup>11</sup> See *id.* at 160–63.

<sup>12</sup> See *infra* Part IV.A.

<sup>13</sup> See DETTER, CONCEPT, *supra* note 6, at 46–49; DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 174–76, 198, 304–05; see also *infra* Part I.B (on *jus cogens* and minimum standards).

<sup>14</sup> See *infra* Part V.C.

<sup>15</sup> But see *infra* Part I.B.

<sup>16</sup> See generally INGRID DETTER, INTERNATIONAL LAW AND THE INDEPENDENT STATE (2d ed. 1992).

<sup>17</sup> See DETTER, CONCEPT, *supra* note 6, at 107–13.

ganizations are “subjects” of international law and thus capable of having direct rights and duties,<sup>18</sup> although it is blatantly clear that individuals also have direct rights and duties under the law of war, under humanitarian law, and under rules of human rights.<sup>19</sup> Certain fundamental rules of human rights that remain applicable in war break through the shield of the state and must be applied by courts for the benefit of individuals; such rules concern, above all, the prohibition of genocide, slavery, torture, and (at least nowadays) apartheid.<sup>20</sup> Furthermore, minimum standards in court procedures and for the general treatment of detainees also apply in war as in peace.<sup>21</sup> However, this does not mean that terrorists should be given special protection beyond these fundamental rules and minimum standards; terrorists may have forfeited the right to claim further privileged treatment.

### I. Foundations of the Legal Rights of Terrorists

#### A. The Absurd Notion of Negative Custom

As I have pointed out with regard to *customary law* and *custom in war*, such custom is not formed by states but by combatants in the field.<sup>22</sup> For such reasons, we are, with regard to custom of war, in the presence of *negative custom*:<sup>23</sup> *because* soldiers have *not* tortured prisoners of war, *because* soldiers have *not* attacked civilian targets without any military value, or, for example, *because* soldiers have *not* outright shot women and children, *states* would be precluded, by a legal obligation, from doing so in the future. Does this make sense? Is it not rather a peremptory rule, written in the conscience of combatants, to behave in a vaguely civilized way, even in armed conflicts? We need to return to the clear concepts of natural law and of ethics to supplement rules made by states in treaties, agreements, and “approved” customary rules. We need to resort to “peremptory rules,” at least for rules in war and armed conflict.

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<sup>18</sup> For a detailed discussion on the definition and identification of subjects of international law, see DETTER, CONCEPT, *supra* note 6, at 4–24 and DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 31–143.

<sup>19</sup> See DETTER, LAW OF WAR, *supra* note 7, at 160–63; *infra* Parts II.A–B. See also the Nuremberg and Tokyo Trials, as well as the cases tried by the United Nations tribunals for Former Yugoslavia (ICTY) and for Rwanda (ICTR).

<sup>20</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 175; *infra* Part I.B.

<sup>21</sup> See DETTER, CONCEPT, *supra* note 6, at 107–13; DETTER, LAW OF WAR, *supra* note 7, at 161–63; DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 186–90.

<sup>22</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 189; DETTER, LAW OF WAR, *supra* note 7, at 3 (describing how wars are fought by individuals and not states).

<sup>23</sup> See DETTER, CONCEPT, *supra* note 6, at 107–08.

### B. *jus cogens and Sociologically Necessary Rules*

So, from where, then, do such peremptory rules emerge? It is clearly not from any positive custom—or any form of custom at all—but from a set of legal norms which are sociologically essential to the survival of mankind.<sup>24</sup> It may be that rules of this kind are similar in their nature and origin to the rules of so-called “natural law” so vehemently discarded by the positivists. However, rules on natural law are not rooted in any religious precepts even if the great religions would respect similar precepts. On the contrary, such rules are intrinsic in the social fabric of world order.<sup>25</sup>

A predominant faction of writers on international law usually refer to the sources of international law as treaties, customary law, and general principles as set out in article 38 of the Statute of the International Court of Justice.<sup>26</sup> An overwhelming number of writers also accept the notion of *jus cogens*, that is to say peremptory norms from which states cannot contract out and that are binding for all, or *erga omnes*, irrespective of agreement by treaty or other form of acceptance.<sup>27</sup> But few scholars want to be pinned down to describe the exact contents of this notion. On the other hand, the International Court of Justice has clearly accepted that *jus cogens* concerns certain basic rights,<sup>28</sup> even if the exact ambit of *jus cogens* has not been finally decided.

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<sup>24</sup> See DETTER, CONCEPT, *supra* note 6, at 37; cf. DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 152–56 (discussing classifications of rules of international law). Note the influence of Hegel, who inspired both fascist and communist theories and gruesome practices. See G.W.F. HEGEL, VORLESUNGEN ÜBER DIE PHILOSOPHIE DER GESCHICHTE (1837); GEORG WILHELM FRIEDRICH HEGEL, PHÄNOMENOLOGIE DES GEISTES (1807).

<sup>25</sup> DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 153; see DETTER, CONCEPT, *supra* note 6, at 37. Even scholars of Soviet Russia accepted such rules as essential in international law at a lecture at the Institute for Law and State in 1989 as “sociologically necessary.” Ingrid Detter, Peremptory Rules of International Law, Lecture at the Moscow Institut Gosudarstva i Pravo (Nov. 1989).

<sup>26</sup> It may be important to mention that article 38 of the Statute of the Court refers to custom as “evidence of a general practice accepted as law,” which is not necessarily what enthusiasts of customary law mean in their analyses. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited July 5, 2007); see DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 146–211.

<sup>27</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 174–76. For various forms of indirect or implied “acceptance,” see *id.* at 157–249.

<sup>28</sup> See Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14, 100–01 (June 27); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 3, 54 (Jan. 26); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

It is indeed impossible to explain the binding nature of the law of war without reference to natural law or to *jus cogens*, and to the fact that individuals are also subjects of international law, directly having legal rights and duties under this legal system, and not only *indirectly through* the state. Individuals must not, for example, be subjected to genocide as they enjoy *rights* under binding rules of international law—even in the absence of treaties—as amply shown by the Nuremberg and Tokyo Trials. Individuals will also be held individually responsible when they are guilty of perpetrating the crime of genocide, as again amply shown by the Nuremberg and Tokyo Trials. This state of affairs demonstrates that individuals enjoy *direct* rights and are *directly* bound by duties, as individuals, by international rules.

The minimum contents of the concept of *jus cogens* may more conveniently be formulated as a set of duties rather than as rights. Thus, *jus cogens* contains the *prohibitions* of genocide, slavery, torture, and apartheid.<sup>29</sup> But the duties of some generate rights for others: the *right not to be subjected* to genocide, slavery, torture, or apartheid. The prohibitions and corresponding rights apply both in times of peace and war. What is essential to note, as state practice shows—especially in the Nuremberg Trials and Tokyo Trials—is that these rules bind both states *and* individuals, including terrorists.<sup>30</sup>

## II. Protected and Excluded Persons

Questions concerning the status of terrorists can probably only be answered in the context of general attitudes toward the nature and function of international law. In the absence of any plethora of works on the law of war, one is therefore obliged to turn to general textbooks to establish who is bound by the law of war.

As mentioned above, however, most textbooks on international law claim that only states and intergovernmental organizations are subjects of international law;<sup>31</sup> that is, only such entities enjoy direct rights and obligations under the international legal system. That this proposition cannot be correct is clear to anyone who analyzes attitudes and events in war. If only states and organizations have rights

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<sup>29</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 123.

<sup>30</sup> The Nuremberg Trials demonstrate that individuals—and not states—were convicted for war crimes. See generally, e.g., R.K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (2d ed. 1962). On state responsibility and individual responsibility, see DETTER, LAW OF WAR, *supra* note 7, at 413–30. For the Tokyo Trials, see generally RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIALS (1972).

<sup>31</sup> See *supra* note 18 and accompanying text. But see DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 123.

and duties and only states and organizations thus can be held liable for crimes under international law, we have problems explaining the Nuremberg Trials, and, indeed, all subsequent procedures whereby states seek to hold individuals responsible for actions allegedly incompatible with international law.

It is therefore almost a trite assertion that actual practice shows that *all* are bound by the law of war, including states, groups, aliens, and citizens. On the other hand, the law of war is only activated once there is a state of war.

The question then arises, are terrorists or suspected terrorists protected in any way by the law of war? And, a question rarely asked, do they have any obligations under the law of war?

#### A. *Qualifying Conditions for Protection*

For whom does the law of war exist? In other words, who is primarily protected by the law of war? Obviously, the answer is that it is precisely the soldiers in the field, in the air, and at sea, who, primarily, should enjoy privileges under the law of war. Protection was extended in 1949—both by treaty and by emerging rules on the status of civilians—to the civilian population.

The 1949 Geneva Conventions set forth the laws applicable to individuals in time of war. Convention I concerns wounded soldiers in the field,<sup>32</sup> Convention II wounded and shipwrecked soldiers and sailors at sea,<sup>33</sup> Convention III prisoners of war,<sup>34</sup> and Convention IV civilians.<sup>35</sup> There are two Additional Protocols to the Geneva Conventions adopted in 1977: Protocol I concerning primarily rights of liberation movements in international conflicts<sup>36</sup> and Protocol II concerning rights and duties in internal wars.<sup>37</sup> The Protocols have not been widely ratified<sup>38</sup> but incorporate certain rules which may reflect what is binding on other grounds in international law.

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<sup>32</sup> Convention I, *supra* note 2.

<sup>33</sup> Convention II, *supra* note 2.

<sup>34</sup> Convention III, *supra* note 2.

<sup>35</sup> Convention IV, *supra* note 2.

<sup>36</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

<sup>37</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>38</sup> The Protocols have not been ratified by, among others, the United States, Israel, Iran, Pakistan, Afghanistan, and Iraq.

Although some are protected by these Conventions and Protocols, certain categories of individuals are excluded. To be protected by the law of war a person must fulfill certain criteria. Whether or not such conditions are met is particularly important to how a captive is treated. In other words, a person who qualifies for protection will, in captivity, enjoy the status of prisoner of war; a person not so qualified will be classified as a detainee and enjoy very limited privileges.<sup>39</sup>

To qualify for protection, a person must wear a uniform, or at least a distinctive sign recognizable at a distance, wear arms openly, be under proper command, and abide by the rules of the law of war. These conditions have long applied in international law and are now formally incorporated in the Third Geneva Convention of 1949.<sup>40</sup> These conditions also applied under the 1929 Convention, however, as well as under general international law.<sup>41</sup> It is these conditions which separate combatants from civilians, and it is these principles which form the core of the law of war.

In stark violation of these principles, the International Committee of the Red Cross (“ICRC”) made the controversial statement in 2003 that there is no prohibition in the law of war for civilians to take part in hostilities and that “[d]irect participation in hostilities by civilians, it should be noted, is not a war crime.”<sup>42</sup> The ICRC Report also states that “[u]nder humanitarian law applicable in international armed conflicts, civilians enjoy immunity from attack ‘unless and for such time as they take a direct part in hostilities.’”<sup>43</sup> But immunity from attack does not mean civilians should be deprived of rights under the Conventions. A few lines further down, the report refers to the current debate about the treatment of captured civilians (terrorists?) *who have taken part in hostilities* and then fallen into enemy hands.<sup>44</sup> Such individuals are *also*, the ICRC claims, protected by the Geneva Conventions, as no one must be left unprotected.<sup>45</sup> The report states

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<sup>39</sup> See generally Convention III, *supra* note 2 (describing privileges granted to prisoners of war).

<sup>40</sup> Convention III, *supra* note 2, art. 4; see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 714–16 (2006).

<sup>41</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. For evidence of how these principles apply under general international law, see the Nuremberg and Tokyo War Crimes Trials.

<sup>42</sup> See ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10 (2003), available at <http://icrc.org/web/eng/siteeng0.nsf/htmlall/5xrdcc> [hereinafter ICRC, IHL AND CHALLENGES].

<sup>43</sup> *Id.* at 9 (quoting Protocol I, *supra* note 35, art. 51(3)).

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

<sup>45</sup> *Id.*

that “a minority” of commentators claim such persons do not enjoy any protection under humanitarian law whereas the “middle ground” commentators would consider such fighting civilians covered by Common Article 3.<sup>46</sup> Furthermore, the Red Cross mentions that civilians are always allowed to “fight[ ] for their country.”<sup>47</sup> The report does not discuss the fact that “civilians” acting like terrorists are not involved in any such fight “for their country” but in a global attack on Western values.<sup>48</sup> Also, there is no explanation why Common Article 3, which applies only in internal war,<sup>49</sup> would operate in international situations.

Fortunately—although slightly disconcerting—a year or so later, in 2005, the Red Cross changed its mind about the status of captured civilians who have taken part in hostilities. In an official statement, the Red Cross confirmed that if civilians directly engage in hostilities, they are considered “unlawful” or “unprivileged” combatants *or* belligerents.<sup>50</sup> Still, the Red Cross insists that they will be protected by the Fourth Geneva Convention on Civilians if they fulfill the nationality requirement.<sup>51</sup>

The reference by the Red Cross to the “nationality” requirement under the Fourth Geneva Convention on Civilians introduces a further confusing complication: the Convention concerns mainly civilians who are not nationals of a detaining state.<sup>52</sup> So what about Yaser Hamdi and José Padilla, who were citizens of the United States, the detaining power?<sup>53</sup> Should these two suspected terrorists not enjoy protection under the Fourth Convention whereas other noncitizen terrorists should have such privileges? The answer is surely that a suspected terrorist, if a civilian of whatever nationality, who does not

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<sup>46</sup> *Id.* There are no references as to who represents the “minority” or the “middle ground.” Furthermore, there is no other category listed apart from the “minority” at one end and the “middle ground” at the other. Common Article 3 refers to the identical Article 3 in each Geneva Convention. See Convention I, *supra* note 2, art. 3; Convention II, *supra* note 2, art. 3; Convention III, *supra* note 2, art. 3; Convention IV, *supra* note 2, art. 3 [hereinafter Common Article 3] (Common Article 3 to all four Geneva Conventions proscribing violence, murder, mutilation, cruelty, and torture).

<sup>47</sup> *Id.* at 10.

<sup>48</sup> See *infra* note 111 and accompanying text.

<sup>49</sup> See Convention I, *supra* note 2, art. 3.

<sup>50</sup> ICRC, OFFICIAL STATEMENT, THE RELEVANCE OF IHL IN THE CONTEXT OF TERRORISM (2005), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705> [hereinafter ICRC, RELEVANCE OF IHL]. To this document there is no “Disclaimer.”

<sup>51</sup> *Id.*

<sup>52</sup> See Convention IV, *supra* note 2, art. 4.

<sup>53</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

fulfill the requirements of being a privileged combatant<sup>54</sup> falls altogether *outside the protection* of the Geneva Conventions. However, such persons might enjoy protection under other rules, for example under the international minimum standards.<sup>55</sup>

The 2005 Red Cross Statement does not explain what “unprivileged” might mean if it does not imply that the person is deprived of privileges under the Conventions. On the contrary, says the Red Cross, there is no gap between the Third and Fourth Conventions as no one must be left unprotected by them.<sup>56</sup> But “unlawful” combatants cannot ever be protected by the Convention on Civilians, as civilians lose any privileged status if they take up arms.<sup>57</sup> Nor can they be protected by the Third Convention on prisoners of war, as they do not distinguish themselves from the civilian population.<sup>58</sup> The 2003 comments of the Red Cross about the legal nature of terrorists, and its later comments that everyone enjoys protection under Geneva Conventions, are thus erroneous and have no foundation in the law of war.

Attitudes that put “terrorists” on par with “civilians” as displayed in the 2003 Red Cross Report, and with regard to their protection repeated in the 2005 Statement, may be the beginning of a total disintegration of the law-of-war legal system: the principle of distinction is an essential feature of the law of war. The protective legal system only applies to soldiers who respect the rule of distinguishing themselves from civilians.<sup>59</sup> Beyond this, civilians are only entitled to protection *as civilians* under Geneva Convention IV, but they forfeit such privileges if they take part in hostilities.

Certain confusion was caused by a decision of the Fourth Circuit in June 2007—a decision which might still be appealed—in which the court held that a “lawfully resident” civilian could not be detained as

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<sup>54</sup> See *supra* note 40 and accompanying text.

<sup>55</sup> See *infra* Part V.C. A national may, however, benefit from certain constitutional privileges not available to aliens.

<sup>56</sup> See ICRC, RELEVANCE OF IHL, *supra* note 50. When the Supreme Court relied on the Red Cross’s views of the erroneous “no gap” argument as it did in *Hamdan v. Rumsfeld*, both the Supreme Court and the ICRC failed the noble motives of Henri Dunant, the founder of the Red Cross. See *infra* Part V.B. What must be remembered when considering such misleading comments by the Red Cross, which does not always rely on good legal advice, is that the Red Cross is only a nongovernmental organization (“NGO”), however important its earlier contributions have been to international law and practice, particularly during the Second World War.

<sup>57</sup> See Convention IV, *supra* note 2, art. 5 (indicating loss of civilian privilege upon taking action “hostile to the security of the State”).

<sup>58</sup> See *supra* note 40 and accompanying text.

<sup>59</sup> See *supra* note 40 and accompanying text.

an enemy combatant.<sup>60</sup> This is surely to misunderstand that in law anyone can become a terrorist and hence be deprived of all protection under the law of war as well as be prone to be punished under relevant rules of national law.

### B. *Types of Protected Persons*

One can distinguish between three types of protected persons corresponding to three different types of captured belligerents. The categories set out below are those where protection becomes relevant when a belligerent is captured by the enemy.

#### 1. *Regular Soldiers*

Soldiers are entitled, when captured, to be treated as prisoners of war (“POWs”) and accordingly entitled to privileges under the law of war. Such privileges are restricted to those who fight regular combat in uniform, carry weapons openly, are under responsible command, and follow the rules of war.<sup>61</sup>

A regular soldier, wearing a uniform and fulfilling the other criteria of a regular combatant, will thus, if captured, be entitled to POW status and will not be put to trial.<sup>62</sup> He will be released at the end of hostilities.<sup>63</sup>

The same type of soldier—a regular soldier in uniform—may have committed war crimes, such as unwarranted attacks on civilians.<sup>64</sup> If he is captured, he is entitled to POW status but will be tried, probably by a military tribunal, and, if guilty, punished.<sup>65</sup>

#### 2. *Uniformed Freedom Fighters*

There are some important distinctions between various types of soldiers. Certain irregular belligerents behave like soldiers and wear a uniform and clear insignia: for example, the *potential freedom fighters*. These are combatants who seek the independence of a country or part of a country, or union with another country. They may wear a uni-

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<sup>60</sup> See *Al-Marri ex rel. Berman v. Wright*, No. 06-7427, slip op. at 32 n.11, 52 (4th Cir. June 11, 2007).

<sup>61</sup> On various types of soldiers as members of regular forces, volunteers, *levée en masse*, etc., see DETTER, *LAW OF WAR*, *supra* note 7, at 135–50; see also *supra* note 40 and accompanying text.

<sup>62</sup> See Convention III, *supra* note 2, art. 33.

<sup>63</sup> See *id.* art. 118. For example, this occurred at the end of World War II.

<sup>64</sup> See, e.g., Common Article 3, *supra* note 46.

<sup>65</sup> See, e.g., *In re Yamashita*, 327 U.S. 1, 13–14 (1946) (concerning war crimes of a Japanese officer during World War II).

form, be under responsible command, and obey the rules of war but still not form part of a regular army, even though they appear, for all practical purposes, to be soldiers. A case-in-point would be persons who take up arms against their own state to achieve independence.<sup>66</sup>

If freedom fighters do not succeed, they may face severe punishment under national law for insurgency, treason, or rebellion. If such persons are detained they may have limited rights, as their captors might consider them rebels or insurgents. Their captors may treat them as outright traitors or common criminals having betrayed their allegiance to their country. They may be given protection under Protocol I,<sup>67</sup> either because the state which captured them has ratified that document or because that state applies the rules in the Protocol *ex gratia* without formally being obliged to do so. These freedom fighters are also typically those who will enjoy protection under Common Article 3 of the Geneva Conventions.<sup>68</sup> As long as they fight for the independence of some territory or nation within the territory of one of the parties to the Conventions, they will remain under the protection of the law of war.<sup>69</sup>

If freedom fighters succeed in their ambition, they will surge to the level of accepted representatives of a new state. If they fail, they may be prosecuted for treason by the state from which they sought to secede.<sup>70</sup>

### 3. *Civilians*

In 1949, a Fourth Geneva Convention was adopted to provide for the protection of civilians.<sup>71</sup> This was an innovation in terms of treaty stipulations, but general international law had long accepted that civilians must be excluded, if possible, from attacks and, in time of capture or occupation, be accorded special rights.<sup>72</sup> As demonstrated above, a civilian loses protection under the Fourth Convention if he takes up arms.<sup>73</sup>

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<sup>66</sup> For example, those who fought in the War of Independence in America and those who fought to establish a non-communist Croatia.

<sup>67</sup> See Protocol I, *supra* note 36, arts. 43, 44.

<sup>68</sup> See Common Article 3, *supra* note 46.

<sup>69</sup> See *id.*

<sup>70</sup> For example, this occurred when the efforts by Biafra to secede from Nigeria failed. See DETTER, *LAW OF WAR*, *supra* note 7, at 42, 186.

<sup>71</sup> Convention IV, *supra* note 2.

<sup>72</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 286–87.

<sup>73</sup> See *supra* note 57 and accompanying text.

To some extent, the Fourth Geneva Convention extended and specified rights of civilians, though most rules were already applicable under general international law.<sup>74</sup> The most relevant rule in the context of terrorists, who often claim to be “civilians,” is that a civilian who is captured must not be made a prisoner of war but be released at the end of the hostilities.<sup>75</sup> The notion of “end of hostilities,” however, is notoriously nebulous in relation to the War on Terror.<sup>76</sup>

### C. *Types of Excluded Persons*

Among excluded persons who cannot demand the protection of the law of war are terrorists who are thus unlawful combatants. Other excluded categories are mercenaries and spies. These are well-established rules of war which not even a supreme court of any country can alter.

#### 1. *Unlawful Combatants*

The most radical group between the two extremes—of soldiers on the one hand and civilians on the other—are the “illegal” or “unlawful” combatants. It is this type of excluded person that is of most interest in relation to terrorists.

The distinction between legal and illegal, or between lawful and unlawful, combatants is not always easy to draw. A passage in the Supreme Court decision *Ex parte Quirin*<sup>77</sup> lends guidance, stating:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>78</sup>

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<sup>74</sup> See *supra* note 72 and accompanying text.

<sup>75</sup> See Convention IV, *supra* note 2, art. 45.

<sup>76</sup> See David B. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT'L L.J. 123, 139 (2006).

<sup>77</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>78</sup> *Id.* at 30–31 (citations omitted). This passage was quoted with approval by the Attorney General in the district court proceedings of *Hamdi v. Rumsfeld*. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus at 7, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02cv439), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004). *Quirin* concerned saboteurs, 317 U.S. at 21, while *Hamdi* concerned a modern-day suspected al Qaeda terrorist, 243 F. Supp. 2d at 529.

There is a duty for anyone who seeks the protection of the law of war to distinguish himself from the civilian population.<sup>79</sup> This rule of distinction is not, as some suggest, a “new rule” in the law of war. On the contrary, throughout the history of warfare there has been a rule that those who do not openly show that they are belligerents, especially by wearing a uniform, *are excluded from protective rules of the law of war*.<sup>80</sup> This category traditionally includes combatants who seek to blend with the civilian population.<sup>81</sup> The reason for the insistence that soldiers must show themselves as such by distinctive insignia is that warfare would otherwise become chaotic and confused. No one would know where the enemy is if he does not show himself as such. Consequently, those who seek to blend in with the civilian population (“civilian by day and terrorist by night”) do not deserve the protection of the law of war and are to be considered “unlawful” combatants. Terrorists form part of this group and are thus neither soldiers nor civilians.

The situations are different when a soldier is captured and when an unlawful combatant is taken prisoner. The illegal combatant—someone who does not fulfill the abovementioned criteria, especially by not wearing a distinguishing uniform—is not protected by the law of war.<sup>82</sup> If he is captured, he will not have the right to POW status.<sup>83</sup> He will be a detainee. If he is caught *in flagrante delicto*, his intention to side with the enemy may be inferred from his overt acts.<sup>84</sup> If he is planning to commit a terrorist act, he may be charged with conspiracy, or as the case may be, as a spy.<sup>85</sup> If, in addition to having taken illegal part in the hostilities, he has further violated the law of war,<sup>86</sup> he may be tried and punished before a military tribunal or whatever court the detaining power considers appropriate.<sup>87</sup> Illegal combatants may be held, if considered necessary, until the end of hostilities.<sup>88</sup> On the

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<sup>79</sup> See *supra* note 40 and accompanying text.

<sup>80</sup> See *supra* notes 40–41 and accompanying text.

<sup>81</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 144.

<sup>82</sup> See notes 79–81 and accompanying text.

<sup>83</sup> See Convention III, *supra* note 2, art. 4.

<sup>84</sup> Cf. DETTER, *LAW OF WAR*, *supra* note 7, at 136–37 (describing when insurgents cross the threshold to become recognized belligerents).

<sup>85</sup> See *infra* Part II.C.3.

<sup>86</sup> For example, by taking hostages, killing civilians, or committing any other serious crimes under the law of war. See *supra* note 64 and accompanying text.

<sup>87</sup> See, e.g., *Ex parte Quirin*, 317 U.S. 1, 45 (1942).

<sup>88</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 328 (discussing the treatment of some guerrillas and spies as prisoners of war). Such illegal combatants would also include, for example, those held at Guantanamo Bay.

other hand, charges must be brought within a reasonable time and there are minimum standards for the treatment of captured unlawful combatants.<sup>89</sup>

## 2. *Mercenaries*

Mercenaries are also, under recent developments, excluded from the protection of the law of war. Mercenaries sometimes wear uniforms thereby indicating they form part of an organized unit of troops.

The 1989 United Nations Convention Against the Recruitment, Use, Financing and Training of Mercenaries<sup>90</sup> sought to prohibit the use of mercenaries,<sup>91</sup> though not many states have ratified this document.<sup>92</sup> The distinction between mercenaries and “security forces” or “military companies” is highly arbitrary. The conditions for being a mercenary are also so narrow that few will fall into this category.<sup>93</sup>

The nebulous definition of mercenaries in the law of war could also, by analogy, lead to the inclusion of terrorists in this group. Mercenaries are defined as those who join another army for “private gain.”<sup>94</sup> But how does one assess the subjective motives of another?

The al Qaeda members and the Taliban are excluded from the protection of the law of war, as they are unlawful combatants, not wearing a uniform and not abiding by the law of war.<sup>95</sup> They could additionally be excluded on another ground, namely that of being “mercenaries.”<sup>96</sup> Combatants clearly take part in the surreptitious or open attacks of al Qaeda for obvious reasons of personal benefit, just like mercenaries. It is just that the criterion “for private gain” that characterizes a mercenary will not, in the case of terrorists, be financial value<sup>97</sup> but rather religious rewards.<sup>98</sup>

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<sup>89</sup> See *infra* Part V.C.

<sup>90</sup> International Convention Against the Recruitment, Use, Financing and Training of Mercenaries Dec. 4, 1989, 2163 U.N.T.S. 96 [hereinafter Convention Against Mercenaries].

<sup>91</sup> *Id.* art. 3.

<sup>92</sup> Only thirty States have ratified this Convention, and the major powers are not among these. See ICRC LIST OF STATES RATIFYING CONVENTION AGAINST MERCENARIES, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P> (last visited July 5, 2007).

<sup>93</sup> DETTER, LAW OF WAR, *supra* note 7, at 147. Members of so-called security companies are likely to be excluded and will probably enjoy privileges under the law of war as “accompanying personnel.”

<sup>94</sup> See Convention Against Mercenaries, *supra* note 90, art. 1.

<sup>95</sup> See *supra* Part II.C.1.

<sup>96</sup> See DETTER, LAW OF WAR, *supra* note 7, at 147.

<sup>97</sup> The Convention Against Mercenaries requires that a mercenary, by definition, be moti-

### 3. *Spies*

Spies constitute a third group of individuals excluded from the protection of the law of war. By definition, spies are not distinguishable and blend surreptitiously with civilians.<sup>99</sup> A reconnaissance terrorist who operates without distinguishing himself from the civilian population will fall into this category.<sup>100</sup>

## III. *The Legal Status of Terrorists*

### A. *Types of Terrorists*

It may be useful to point out that terrorists, by definition, use terrorist methods: they resort to surreptitious, irregular, and unexpected attacks, often on civilians, often using bombs and other devices to disrupt the functioning of everyday life and to instill fear in the civilian population.<sup>101</sup> But there are, from time to time, lawful combatants—that is to say soldiers in uniform in a command chain—who employ terrorist *methods*. This may be the case, for example, with freedom fighters<sup>102</sup> or “guerrillas,”<sup>103</sup> although this latter group would normally concentrate on targets of military importance.<sup>104</sup> The status of such combatants must be assessed *in casu*. Thus, the status of “terrorists” should not be confused with those who use terrorist tactics.

Terrorists are, as set out above, unlawful combatants.<sup>105</sup> After the arrival of al Qaeda, it may be possible to distinguish two subcategories of terrorists.

#### 1. *“Traditional” Terrorists*

Not long ago, in 2000, it was possible to propose a definition of terrorism as “the intermittent use or threat of force against person(s) to obtain certain political objectives of international relevance from a

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vated at least in part by material compensation. See Convention Against Mercenaries, *supra* note 90, art. 1 §§ (1)(b), (2)(b).

<sup>98</sup> For example, seventy-two virgins in Paradise and other rewards that may provide just as much incentive as money to a more mundane combatant.

<sup>99</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 148.

<sup>100</sup> See Ingrid Detter, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 62–67 (1984).

<sup>101</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 23–25 (attempting to define “traditional” terrorism).

<sup>102</sup> See *supra* Part II.B.2.

<sup>103</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 58–61.

<sup>104</sup> See *id.* at 61.

<sup>105</sup> See *supra* Part II.C.1.

third party.”<sup>106</sup> On reflection, it must be admitted that this definition only applies to “traditional” terrorism, and that al Qaeda’s type of operations cannot be subsumed in this formula.

For a long time, however, there have been persons who perhaps cannot be called “traditional” terrorists, who disguise themselves, blend with the civilian population, and use treacherous means and methods to achieve their goal to obtain something from a third party.<sup>107</sup> In these cases, the pressure or force is not normally directed against the entity which has the power to grant the demands but often against innocent civilians who cannot grant the demands.<sup>108</sup> The goals of these terrorists may be to establish their own state, merge with another state, or pressure a state to release prisoners.<sup>109</sup> These combatants do not wear uniforms and do not carry arms openly. Thus, they are excluded from the protection of the law of war.<sup>110</sup>

## 2. “Genocidal” Terrorists

The nature of terrorism changed when the terror organization al Qaeda started its operations in the 1990s, largely out of hatred of Western values and, especially, of the United States.<sup>111</sup> Initially, there may have been a “goal” that al Qaeda pursued—that of forcing the United States out of Saudi Arabia—but this objective was soon obscured by a general anti-Western offensive, especially directed against Christians, against the United States, and against the State of Israel.<sup>112</sup>

Such a general goal would appear to include elements required for the definition of attempted genocide, as the target groups for extermination are clearly identifiable.<sup>113</sup> Al Qaeda operatives do not wear any distinctive marks or uniforms, do not carry their arms openly and are, for these reasons, excluded from the protection of the law of

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<sup>106</sup> DETTER, *LAW OF WAR*, *supra* note 7, at 25.

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 24.

<sup>109</sup> *See id.* at 22–23.

<sup>110</sup> *See supra* note 40 and accompanying text.

<sup>111</sup> *See* WORLD ISLAMIC FRONT, *JIHAD AGAINST JEWS AND CRUSADERS* (Feb. 23, 1998), available at [http://www.ciaonet.org/cbr/cbr00/video/cbr\\_ctd/cbr\\_ctd\\_28.html](http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_28.html) [hereinafter WORLD ISLAMIC FRONT, *JIHAD*]. This document was published by an umbrella organization calling itself the “World Islamic Front Against Crusaders and Jews,” which is a vehicle used by Osama bin Laden to build working relationships between al Qaeda and other Islamic groups. Michael Scheuer, *Coalition Warfare: How al-Qaeda Uses the World Islamic Front Against Crusaders and Jews, Part I*, 2 *TERRORISM FOCUS* (Mar. 2005), <http://www.jamestown.org/terrorism/news/article.php?articleid=2369530>.

<sup>112</sup> *See id.*

<sup>113</sup> *See infra* notes 136–38 and accompanying text.

war if and when they are captured.<sup>114</sup> For these reasons, a state has the right to interrogate such prisoners when they are captured, and the captives, as mere detainees, enjoy no privileges of prisoners of war in this respect.<sup>115</sup>

As discussed herein, al Qaeda is guilty of genocide because its acts are directed against whole identifiable groups without any discrimination.<sup>116</sup>

### B. *The Legal Status of “Genocidal” Terrorists*

Leaving aside, for the moment, “traditional” terrorists, it may be noted that “genocidal” terrorists are excluded from the protection of the law of war on several counts. These are persons who are illegal combatants, as they prefer to blend with the civilian population and do not wear a uniform; on this score they are excluded persons.<sup>117</sup>

Furthermore, they can probably also be classified as mercenaries, as they, once recruited in one country, join military forces in another for the sake of “private gain,” albeit of a religious character.<sup>118</sup> Some mercenaries may occasionally be given privileges in war if they have been acting in uniform,<sup>119</sup> but those fighting for al Qaeda have not been classified in this category by the United States.<sup>120</sup>

Genocidal terrorists may furthermore be excluded if they are saboteurs,<sup>121</sup> and if they are on reconnaissance missions, they might be excluded as spies.<sup>122</sup>

If these persons are detained, they will be considered terrorists and will have very limited rights.<sup>123</sup> In the interest of the security of the state they attack, there may be far-reaching curtailment of their normal rights with regard to the length of their detention, their right to legal representation, and their right to trial.

The illegal combatant may be a citizen and take part in attacks against his own country by activities abroad. He can clearly not be

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<sup>114</sup> See *supra* note 61 and accompanying text.

<sup>115</sup> Cf. Convention III, *supra* note 2, art. 17 (outlining the specific privileges of prisoners of war during questioning).

<sup>116</sup> See *infra* Part III.B.

<sup>117</sup> See *supra* Part II.C.1.

<sup>118</sup> See *supra* Part II.C.2.

<sup>119</sup> See DETTER, LAW OF WAR, *supra* note 7, at 148.

<sup>120</sup> Instead, they have primarily been classified as unlawful combatants. See *infra* note 232 and accompanying text.

<sup>121</sup> *Ex parte Quirin*, 317 U.S. 1, 7–8, 12 (1942) (excluding a saboteur from protection).

<sup>122</sup> See DETTER, LAW OF WAR, *supra* note 7, at 148; *supra* Part II.C.3.

<sup>123</sup> See *supra* note 39 and accompanying text.

made a prisoner of war if he is captured, firstly because he is not a combatant and secondly because he is a national. This type of illegal belligerent will be a detainee but can avail himself of certain constitutional privileges, as in *Hamdi v. Rumsfeld*.<sup>124</sup>

An illegal combatant who is a citizen and commits belligerent acts *in* the territory of his home country may also be held as a detainee with the normal constitutional guarantees. In most other countries, intent could be inferred from overt acts if caught *in flagrante delicto*.<sup>125</sup>

What appears to be the core of the situation is that the al Qaeda terrorists and those who side with them are guilty of genocide. The formidable guilt of these terrorists has been largely disguised and camouflaged by those who campaign for their “rights” as well as their protection under the law of war and/or under the legal system of human rights. These terrorists have violated the most basic rules of the law of war with their indiscriminate attacks.

The al Qaeda movement claims it will do anything to harm America or American interests anywhere in the world.<sup>126</sup> Its 1998 exhortation that it is a personal duty of every Muslim to kill Americans and their allies, civilians or military,<sup>127</sup> is a clear incitement to genocide, which is a crime not only under American law<sup>128</sup> but under international law.<sup>129</sup>

The Genocide Convention of 1948<sup>130</sup> applies both in peace and in war<sup>131</sup> and leads to both state and individual responsibility.<sup>132</sup> The United States<sup>133</sup> as well as Iraq<sup>134</sup> and Afghanistan<sup>135</sup> are bound by the Genocide Convention. As evidenced by the Nuremberg and Tokyo

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<sup>124</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

<sup>125</sup> Cf. *Padilla v. Rumsfeld*, 352 F.2d 695, 701 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004) (describing defendant’s involvement with plan to build and detonate bomb within United States).

<sup>126</sup> See WORLD ISLAMIC FRONT, JIHAD, *supra* note 111.

<sup>127</sup> *Id.*

<sup>128</sup> 18 U.S.C. § 1091(c) (2006).

<sup>129</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. III(c), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>130</sup> *Id.*

<sup>131</sup> DETTER, LAW OF WAR, *supra* note 7, at 417.

<sup>132</sup> See *id.* at 419–30 (describing statutes regarding instances of individual responsibility for war crimes).

<sup>133</sup> Deposited ratification November 25, 1988. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, LIST OF STATES RATIFYING THE GENOCIDE CONVENTION, <http://www.ohchr.org/english/countries/ratification/1.htm> (last visited July 5, 2007).

<sup>134</sup> Deposited ratification March 22, 1956. *Id.*

<sup>135</sup> Deposited ratification January 20, 1959. *Id.*

Trials, no individual can escape responsibility for genocidal acts, so it is clear that not only states are bound by the Genocide Convention. The 1945 War Crimes Tribunals also demonstrate that relevant rules operate even outside the Convention, as they adjudged their cases *before* the 1949 Convention.

Article II (a), (b), and (c) of the Genocide Convention provide:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a *national*, ethnical, racial or *religious* group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . . .<sup>136</sup>

Furthermore, article III provides:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.<sup>137</sup>

These articles therefore implicate all al Qaeda members due to their incitement to commit genocide against Americans.<sup>138</sup>

<sup>136</sup> Genocide Convention, *supra* note 129, art. II(a)–(c) (emphasis added).

<sup>137</sup> *Id.* art. III. Notably, conspiracy is classified as a crime. *Id.* art. III(b). As the Convention is of universal application, we should note that the test for conspiracy in most countries will not involve any specific intent as, under English law and under the law of a number of civil law countries, at least a different and more limited *mens rea* is required for the conspiracy itself. *See, e.g., R v. Attorney-General ex parte Rockall* (1999) 1 W.L.R. 882 (Q.B.) (applying English law); *see also* JAMES WALLACE BRYAN & J.W. DRYAN, DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (LAW, POLITICS AND HISTORY) (1970). The United States, however, appended a reservation to the Convention, though it used the term “understanding” which may imply that there was a matter of “clarification” rather than a “reservation” properly so called. Reservations and Understandings of the United States of America upon Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, Nov. 25, 1988; *see* INGRID DETTER, ESSAYS ON THE LAW OF TREATIES 52 (1967) (discussing distinction between a “classification” and “reservation”). This reservation indicated a specific intent requirement for crimes listed in article II, such as conspiracy, but not in article III. This, to English lawyers, perhaps reflects a disproportionate attention to the *mens rea*, whereas in other jurisdictions any type of intent will be easily inferred from overt acts. Therefore, conspiracy under implementing legislation in the United States should also be based on overt acts or facts rather than on intent or inferred intent.

<sup>138</sup> *See* Genocide Convention, *supra* note 129, arts. II(a), III(c).

Furthermore, under article IV, “[p]ersons committing genocide or any of the other acts enumerated in article III *shall* be punished, whether they are constitutionally responsible rulers, public officials or *private individuals*.”<sup>139</sup> The members of al Qaeda and those who adopt similar objectives “shall” thus be punished, a phrasing which indicates the compulsory character of this obligation. The following article, article V, stipulates how this should be done. The Convention provides that it is for the Contracting States, including the United States, to “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”<sup>140</sup> The United States is thus *obliged* under the Convention to provide sufficient internal legislation for the punishment of persons guilty of this crime.

As prescribed by article VI of the Genocide Convention:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>141</sup>

Does this therefore mean that, for example, Padilla, accused of complicity in the 9/11 attacks,<sup>142</sup> should be tried and punished in the United States and Hamdi, accused of fighting for the Taliban,<sup>143</sup> in Afghanistan? It would seem reasonable to assume that the contracting parties could not have visualized trials in a country where a war was ongoing and, furthermore, it would seem that the United States should be able to claim clear interest jurisdiction in *Hamdi*. On the other hand, the Convention does not exclude the possibility that trials shall be held by a military tribunal, and the wording even suggests such a preference as the term “court” is not used.

The legal status of genocidal terrorists implies that they cannot benefit from prisoner of war privileges.<sup>144</sup> The question then arises whether genocidal terrorists merit *other* special treatment under the

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<sup>139</sup> *Id.* art. IV (emphasis added).

<sup>140</sup> *Id.* art. V.

<sup>141</sup> *Id.* art. VI.

<sup>142</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004).

<sup>143</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

<sup>144</sup> *See supra* notes 114–15 and accompanying text.

law of war. To analyze the merit of this argument it is necessary to first verify whether a war actually exists.

#### IV. "War" Between States and Terrorists

##### A. *The Existence of War sui generis*

The first question which must be answered is whether a situation of "war" actually exists in the relationship between the United States and its allies ("Allies"), and al Qaeda.

Because of the constant reference to the "War on Terror," many have been led to believe that there is a war of traditional character going on and that the law of war apply in all their details to the conflict.<sup>145</sup> As for the terrorists, it is patently obvious that they do not fulfill the criteria of distinction to receive protection under the law of war, that is to say, they do not abide by the obligation to wear a uniform and carry their arms openly.<sup>146</sup> Still, the United States Supreme Court found that detainees are protected by the Geneva Conventions,<sup>147</sup> which form an important part of the law of war. It is worth analyzing whether this conclusion is based on logical and factual arguments or on misunderstanding of international law.

The present situation with regard to al Qaeda terrorists involves more than "uneasy peace." There are armed surreptitious attacks by the terrorists, nearly always directed against civilians<sup>148</sup> in flagrant violation of the law of war.<sup>149</sup> There have been responses by the Allies to root out terrorist training camps<sup>150</sup> and to capture members of the terrorist organization.<sup>151</sup> The enhanced level of intensity due to terrorist surprise attacks<sup>152</sup> certainly would seem to amount to armed conflict, albeit *of a different nature* than traditional wars. The situation with regard to terrorists, their past actions, and their threats about future action would authorize the war powers of the Executive. It may be

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<sup>145</sup> On the definition of "war" and the distinction between traditional "war" and other hostilities, see DETTER, *LAW OF WAR*, *supra* note 7, at 17–25.

<sup>146</sup> See *supra* note 114 and accompanying text.

<sup>147</sup> See *infra* Part V.B.

<sup>148</sup> DETTER, *LAW OF WAR*, *supra* note 7, at 23–25.

<sup>149</sup> See Protocol I, *supra* note 36, art. 51; DETTER, *LAW OF WAR*, *supra* note 7, at 235 (discussing the illegality of the use of weapons of mass destruction).

<sup>150</sup> See, e.g., Bryan Bender, *U.S. Search for Qaeda Turns to Algeria*, BOSTON GLOBE, Mar. 11, 2004, [http://www.boston.com/news/world/articles/2004/03/11/us\\_search\\_for\\_qaeda\\_turns\\_to\\_algeria](http://www.boston.com/news/world/articles/2004/03/11/us_search_for_qaeda_turns_to_algeria).

<sup>151</sup> See, e.g., Dana Priest & Ann Scott Tyson, *Bin Laden Trail 'Stone Cold'*, WASH. POST, Sept. 10, 2006, at A1.

<sup>152</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 25.

suggested that the War on Terror is a “war *sui generis*” and that powers corresponding to such a “war” are authorized under the Constitution.

The Red Cross suggests that there is no “war” and that we should instead speak of a “fight against terrorism.”<sup>153</sup> In that case, if there is no “war” and no “armed conflict,” why did the Red Cross demand to be allowed to inspect conditions in Guantanamo?<sup>154</sup> The Red Cross suggests further that terrorists cannot be a “party” to an armed conflict as “terrorism” itself is a “phenomenon” rather than the activities of a party.<sup>155</sup> This ignores political and military realities.

In December 2006, the Foreign Office of the United Kingdom issued instructions to British diplomats to refrain from using the expression “War on Terror” to avoid reinforcing and giving succor to the terrorists’ view of the conflict by using language which, taken out of context, could be counterproductive.<sup>156</sup> But states may be wrong when they assume that such retraction will pacify the terrorists. Furthermore, changing the terminology will not alter the existence of an armed conflict. Indeed, the expression did not originate from the terrorists but from a statement by the President of the United States.

The absurd position of international lawyers not to accept non-state subjects of international law<sup>157</sup> may have contributed to the conceptual confusion that war cannot exist between states and a non-state *international* terrorist organization.

It has long been established in international practice that there might well be a war between a state and a non-state enemy: this is even the traditional situation in civil war as well as in a number of recent secession and liberation wars.<sup>158</sup> It is also well accepted in case law that an “enemy” may exist before full scale war commences.<sup>159</sup>

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<sup>153</sup> ICRC, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM: QUESTIONS AND ANSWERS* (2004), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev> [hereinafter ICRC, IHL AND TERRORISM].

<sup>154</sup> See Associated Press, *Red Cross Renews Demand to See All Detainees*, Dec. 9, 2005, <http://www.msnbc.msn.com/id/10397336>.

<sup>155</sup> See ICRC, *IHL AND CHALLENGES*, *supra* note 42, at 17–19; see also ICRC, *IHL AND TERRORISM*, *supra* note 153. The ICRC appended the disclaimer to the latter: “The following document is for information purposes only and does not provide the comprehensive institutional position of the ICRC on the issues raised,” but then refers to the abovementioned report, which takes the same position.

<sup>156</sup> John Steele, *Christmas Terror Strike ‘Highly Likely,’* DAILY TELEGRAPH (London), Dec. 11, 2006, at 1, 2.

<sup>157</sup> See *supra* notes 17–19 and accompanying text.

<sup>158</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 47–61.

<sup>159</sup> Cf. *The Prize Cases*, 67 U.S. (2 Black) 635, 665–66 (1863).

What might have changed in the present situation is that the new type of war is not fought between lawful “combatants,” because such individuals will only appear on the side of the Allies; on the side of al Qaeda, the participants cannot be lawful “combatants” in the traditional sense as they do not wear uniforms and do not distinguish themselves from the civilian population.<sup>160</sup> Therefore, a new definition of war may be required.<sup>161</sup> The correct position is possibly that the present situation does amount to “war,” but to “war” of a new and different kind.

Some—especially those who deny that groups and movements are subjects of international law—say that it is not possible to declare “war” on a terrorist movement.<sup>162</sup> The reply to this must be that international law is a flexible system; it is a system of law which exists to protect the interests of states and their citizens and, if no applicable rule exists, one will emerge to cater to a specific need. This phenomenon is coupled with the assumption that international society has a “hypothetical goal” consisting of a duty of survival.<sup>163</sup> Rules to protect this goal must be inferred or assumed in the interpretation and further development of international law.<sup>164</sup>

An analysis of the situations in Iraq and Afghanistan leads to the conclusion that we are facing a new international type of armed conflict, certainly amounting to “war” but in a lopsided situation. On one side, we have the United States and its allies—all properly constituted states—and on the other side, as the “enemy,” a number of highly organized but dissipated non-state groups of terrorists. These terrorists are not motivated by any ambition other than hatred of states with Western, especially Christian, traditions.<sup>165</sup> They do not seek their own state<sup>166</sup> like the liberation movements of the 1960s, they do not seek to show the futility of any state structures like the anarchists of the 1970s, and they do not seek financial reward like some of the hijackers of the 1980s. As Justice Thomas stated in his dissenting opinion in *Hamdan v. Rumsfeld*:

We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks

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<sup>160</sup> See *supra* Part II.C.1.

<sup>161</sup> Cf. DETTER, LAW OF WAR, *supra* note 7, at 25–26 (defining “war” in the traditional sense).

<sup>162</sup> See, e.g., *supra* note 155 and accompanying text.

<sup>163</sup> See DETTER, CONCEPT, *supra* note 6, at 37.

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* note 111 and accompanying text.

<sup>166</sup> Note, however, the efforts to support Palestine in this respect.

in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers.<sup>167</sup>

The armed activity in Afghanistan, in terms of the law of war and of international law, was initially an “*invasion*,” or an “*intervention*”<sup>168</sup> directed at the Taliban-led government. But since the Taliban lost control of the government of Afghanistan, this operation is now much on par with the action in Iraq as an *intervention* with the goal of tracking down the training camps and leaders of the terrorists. The action in Iraq was also initially an *invasion* to remove a dictator similar to the operations which removed Pol Pot in Cambodia and Generalissimo Idi Amin in Uganda. In Iraq, however, internal structures crumbled rapidly and Shi’ite, Sunni, and Kurdish factions melted into a strife of considerable proportion. In Iraq, as in Afghanistan, we are not facing a war in the traditional sense; the terrorists are directing a great deal of effort to oust the intervening forces rather than to gain terrain from competing factions.

With the United States and its allies overlooking the importance of devising an exit strategy, both in Afghanistan and in Iraq, the armed conflicts have been prolonged with a tragic loss of life on all sides. It certainly has become more acceptable in common words to speak about “The War.” Yet, from a strictly legal point of view, this is indeed a war of a new type. In Iraq, there is an interventionary force seeking to establish internal order,<sup>169</sup> while at the same time that force is capturing those who are considered to be possible terrorists.<sup>170</sup> Similar efforts are being pursued in Afghanistan to apprehend terrorists and members of al Qaeda. Al Qaeda and other like-minded terrorists have responded globally to this Allied action.

We therefore face, with the genocidal terrorist attacks and armed responses in the form of self-defense and preemptive military action, not a traditional war but a war *sui generis*.

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<sup>167</sup> Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2838 (2006) (Thomas, J., dissenting).

<sup>168</sup> See DETTER, LAW OF WAR, *supra* note 7, at 70–75 (defining “intervention” as “any type of ‘interference’ in the affairs of another State”).

<sup>169</sup> These are the “Alliance” Forces that were established under fairly dubious U.N. authority.

<sup>170</sup> Note, for example, the capture of suspected terrorists, including Yaser Hamdi, who were transferred to Guantanamo.

### B. *Declarations of War*

The United States declared shortly after the 9/11 attack a “War on Terror.” A declaration of war is no longer necessary the law of war to apply.<sup>171</sup> In this *new* situation of a war *sui generis*, however, it was the terrorists who first declared war. In 1996, Osama bin Laden declared war against the United States,<sup>172</sup> a formal declaration which was reiterated in a 1998 statement ordering all Muslims to pursue the indiscriminate killing of American civilians and military personnel.<sup>173</sup>

“War” was thus formally declared by Islamist fundamentalists on the United States and on its allies. A 1998 Fatwah signed by bin Laden, Ayman al-Zawahiri, the leader of the Egyptian Islamic Jihad,<sup>174</sup> and others, as translated, contends that the activities of the “crusader-Zionist alliance,” and in particular the United States, constitute “a clear declaration of war on God, His messenger, and Muslims.”<sup>175</sup> It states:

The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip . . . .<sup>176</sup>

A later part of the document reads:

We—with Allah’s help—call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah’s order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid . . . .<sup>177</sup>

The scale of operations of the al Qaeda terrorists and of those who have similar objectives may be illustrated by *R ex rel. Abbasi v. Secretary of State for Foreign & Commonwealth Affairs*<sup>178</sup> before the House of Lords in the United Kingdom in 2001. The facts of this case

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<sup>171</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 14.

<sup>172</sup> See U.S. DEP’T OF STATE, *FACT SHEET: USAMA BIN LADIN (1998)*, [http://www.state.gov/www/regions/africa/fs\\_bin\\_ladin.html](http://www.state.gov/www/regions/africa/fs_bin_ladin.html) [hereinafter *FACT SHEET: USAMA BIN LADIN*].

<sup>173</sup> See *WORLD ISLAMIC FRONT, JIHAD*, *supra* note 111.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *R (Abbasi) v. Sec’y of State for Foreign & Commonwealth Affairs*, [2002] EWCA (Civ) 1598.

also amply illustrate the ambition to attack the United States and its allies as far back as 1996.<sup>179</sup>

Al Qaeda has committed horrendous acts of war, some before and some after its first “declaration” of war. Al Qaeda bombed the World Trade Center in New York City in 1993, the Khobar Towers in Saudi Arabia in 1996, and the United States embassies in Kenya and Tanzania in 1998, attacked the U.S.S. Cole in Yemen in 2000 and, of course, carried out the most severe attack on the World Trade Center Twin Towers in New York and the Pentagon in Washington, D.C., on September 11, 2001.

The United States responded to these acts of war in 1998 when they attacked facilities belonging to Osama bin Laden’s network.<sup>180</sup> And after 9/11, of course, the President ordered the invasion of Afghanistan to track down the strongholds of al Qaeda in 2001 and, later, the more controversial invasion of Iraq in 2003.

In view of the abovementioned declarations of war by the terrorists, we should possibly be speaking of the “War of Terror.” It was the terrorists who attacked and the United States and its allies that responded to stifle further attacks.

### C. *The Theater of War*

Every war has a theater of action. Such theaters may be multiple and many wars have been fought on many fronts.<sup>181</sup> The War on Terror does not have a limited theater or theatres of military action. The differences here from traditional wars are that the theaters in the War on Terror are largely unforeseeable and there will rarely be an opportunity for the Allies to respond in the same theater in which the terrorists have attacked.

The al Qaeda terrorists have, without warning, struck in the United States, in Spain, in Yemen, in the United Kingdom, and many other places. The United States and its allies responded to these terrorist actions by bombing some of Osama bin Laden’s facilities in 1998, an isolated action, and then by the comprehensive invasion of Afghanistan in 2001. It is questionable whether the intervention in Iraq was related to a terrorist problem, as it seems likely that the United States had other motives.

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<sup>179</sup> *Id.*

<sup>180</sup> FACT SHEET: USAMA BIN LADIN, *supra* note 172.

<sup>181</sup> See, for example, the situation in World War II with at least two important fronts.

When an American citizen, Padilla, was apprehended at Chicago's O'Hare Airport some seven months after 9/11 and suspected of planning to set off a "dirty" nuclear bomb in the United States,<sup>182</sup> the President appeared entitled to reconfirm that United States territory formed part of the battlefield.<sup>183</sup> After all, al Qaeda itself had nominated such territory a "battlefield" by its attack on 9/11. Therefore, there seem to be a number of theaters, or battlefields, in this particular war.

With regard to normal strategic rules, the War on Terror is also, in this sense, a war *sui generis*.

### V. Application of International Law to Terrorists

#### A. Different Regimes for Different Terrorists?

Some suggest that different rules would apply to the situation in Afghanistan and Iraq: terrorists in Afghanistan would be subject to the rules of the Geneva Conventions, as Afghanistan is a party to the Conventions, whereas terrorists in Iraq would not be ruled by this conventional system.<sup>184</sup> This is a contrite argument. The Geneva Conventions may simply not be applicable at all to either dispute.

Afghanistan is thus a "Party" to the Geneva Convention and, to the extent the Allied intervention in Afghanistan was triggered by the interest to control the Taliban-led government, one can see the argument that this was a conflict between two parties to the Geneva Conventions. However, the Taliban soon lost control of the government. Once the Taliban was no longer in power, it is difficult to see why the Conventions would be applicable to the Taliban but not to al Qaeda. To the extent there are al Qaeda or other terrorists in Iraq, it is hard to understand what legal justification there could be for different legal regimes for the two groups.

One example may illustrate how far-fetched it would be to introduce different regimes for different terrorists. Padilla was caught at O'Hare Airport in Chicago.<sup>185</sup> Should he receive different treatment from Hamdi, another American citizen, who was caught in Afghani-

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<sup>182</sup> See *Padilla v. Rumsfeld*, 352 F.2d 695, 699, 701 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

<sup>183</sup> See *Rumsfeld v. Padilla*, 542 U.S. 426, 431 n.2 (2004) (referring to the President's determination that military detention of Padilla was necessary to prevent terrorist attacks against the United States).

<sup>184</sup> See ICRC LIST OF STATES RATIFYING THE GENEVA CONVENTIONS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited July 5, 2007).

<sup>185</sup> See *supra* note 182 and accompanying text.

stan?<sup>186</sup> The two cases were heard at the same time by the Supreme Court. To afford different treatment to terrorists depending on the place of capture is far-fetched indeed.

Thus, it is possibly incorrect to contend that the conflict with the Taliban and the conflict with al Qaeda should be treated differently in law. Under international law and specifically under the law of war, the situation of Taliban detainees and al Qaeda detainees should be the same, given the similarities of declared objectives, the open link between the two groups, and, above all, the fact that neither faction wears uniforms distinguishing themselves from civilians. For the last reason, the Geneva Conventions might not even apply to the situation in Afghanistan if no Taliban fighter fulfills the requirements of being a legal combatant by wearing a uniform or other distinguishing insignia.<sup>187</sup>

*B. Application of the Geneva Conventions to Terrorists in Hamdan v. Rumsfeld*

In *Hamdan v. Rumsfeld*,<sup>188</sup> the Supreme Court had to consider the legal status of a Guantanamo detainee who stood accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Osama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp.<sup>189</sup> The government claimed authority to continue to detain him based on his status as an enemy combatant regardless of the outcome of the criminal proceedings at issue.<sup>190</sup>

The Supreme Court was wrong in law when it suggested that one isolated article of the Geneva Conventions—Common Article 3<sup>191</sup>—would in any way apply to members of al Qaeda or to those who side with that movement. Common Article 3 provides that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting

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<sup>186</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

<sup>187</sup> See *supra* note 40 and accompanying text. However, President Bush has stated that the Geneva Conventions do apply to the conflict with the Taliban. See Memorandum from President George W. Bush, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), [http://www.justicescholars.org/pegc/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf).

<sup>188</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>189</sup> *Id.* at 2804–05 (Kennedy, J., concurring in part).

<sup>190</sup> *Id.* at 2805.

<sup>191</sup> See Common Article 3, *supra* note 46. This article is called “common” as it appears in the same formulation in all four Geneva Conventions of 1949.

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.

(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.<sup>192</sup>

In holding that Common Article 3 should not be applied according to its own clear wording, the Supreme Court deviated from international law, as the Convention on the Law of Treaties specifically states that treaties and conventions must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>193</sup> If there is any doubt as to the plain meaning of the treaty, the context can be

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<sup>192</sup> *Id.*

<sup>193</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention, federal courts have relied on it “as an authoritative guide to the customary international law of treaties.” *See, e.g.,* *Avero Belgium Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 79 (2005) (internal quotations omitted).

verified against the preparatory work and against subsequent practice.<sup>194</sup> Both the *travaux préparatoires* and subsequent practice confirm that Common Article 3 is only applicable in armed conflicts which are non-international, that is to say internal with limited geographical ambit.<sup>195</sup>

The Court singled out Common Article 3 and claimed, in spite of its clear wording, that it would indeed protect genocidal terrorists and benefit detainees everywhere.<sup>196</sup> Despite the fact that it only applies in internal conflicts of limited geographical impact,<sup>197</sup> the Supreme Court insisted that its wording would cover terrorists.<sup>198</sup> The Court reached this conclusion by relying largely on the nonauthoritative commentaries of the Red Cross which suggested that the article should receive a “wide” meaning.<sup>199</sup> The Supreme Court arrived at this conclusion despite acknowledging that “the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character,’ *i.e.*, a civil war.”<sup>200</sup>

It may be noted the Red Cross, an NGO with no special standing with regard to the Convention of which it is not even the depository, has no competence to provide any authoritative interpretation of the Conventions. Besides, not even the Red Cross has suggested that an article in the Geneva Conventions should be interpreted *contrary* to its wording.

A textual analysis of Common Article 3 does not warrant the conclusions in *Hamdan*. The Article says very clearly that it applies to an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>201</sup> So how can this Article apply in relation to either the Taliban or to al Qaeda? The conflict with al Qaeda is clearly of a *highly* international character. Furthermore, the Article stipulates that the conflict is to take place in

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<sup>194</sup> *Id.* arts. 31(3)(b), 32.

<sup>195</sup> See DETTER, LAW OF WAR, *supra* note 9, at 201–02.

<sup>196</sup> See *Hamdan*, 126 S. Ct. at 2795–97.

<sup>197</sup> See Common Article 3, *supra* note 46.

<sup>198</sup> See *Hamdan*, 126 S. Ct. at 2795–96 (categorizing the conflict with al Qaeda as not “international in scope” and describing how Common Article 3 protects a member of al Qaeda as part of its protection of “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention”).

<sup>199</sup> See *id.* at 2796.

<sup>200</sup> *Id.*

<sup>201</sup> See Common Article 3, *supra* note 46.

the territory of one of the High Contracting Parties.<sup>202</sup> But that is clearly not the case with al Qaeda where the “theater of war” is wherever the terrorists attack—that is to say, worldwide.<sup>203</sup> Moreover, where the Allies respond is not limited to the territory of “one of the High Contracting Parties,” as the United States and its allies will apprehend a member of al Qaeda wherever he is found.

Justice Thomas forcefully disagreed with the plurality of the Court and emphasized in his dissenting opinion that “Common Article 3 applies to ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.’”<sup>204</sup> Furthermore, Justice Thomas deferred to the President’s finding that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world, because, among other reasons, al Qaeda is not a High Contracting Party.”<sup>205</sup>

However, in *Hamdan*, the Supreme Court sought to make polemics about the simple expression “not of an international character,” suggesting that this would mean “not . . . between nations” (on the level of sovereigns) and therefore that the Article would apply between anyone else.<sup>206</sup> These are absurd arguments even though put forward by the highest court in the United States. As support for this contrite argument about a term which lies at the foundation of *international* law, the Court cited Jeremy Bentham’s *Introduction to the Principles of Morals and Legislation*.<sup>207</sup> But Bentham, hardly a leading authority on international law, used the phrase “international law” to apply “betwixt nation and nation”<sup>208</sup> including “mutual transactions between sovereigns.”<sup>209</sup> Many of us probably use the phrase in the same way. Logically it still does not follow that “not of an international character” would mean anything but “internal,” “limited to one state,” or “not of a world-wide nature.” Even Bentham would probably have agreed with that negative.

In support of its curious interpretation of this simple phrase, the Supreme Court further cited the nonauthoritative Red Cross Commentaries to the Additional Protocols—which, of course, were not rel-

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<sup>202</sup> *Id.*

<sup>203</sup> See *supra* Part IV.C.

<sup>204</sup> *Hamdan*, 126 S. Ct. at 2846 (Thomas, J., dissenting).

<sup>205</sup> *Id.* at 2849.

<sup>206</sup> See *Hamdan*, 126 S. Ct. at 2795–96.

<sup>207</sup> See *id.* at 2796.

<sup>208</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, preface, 6 (The Legal Classics Library 1986) (1780).

<sup>209</sup> *Id.* ch. XVII, § 1, pt. XXV, at cccxxv.

evant at all to the matter at hand—which stated that a “non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other.”<sup>210</sup> But from this it does not follow that legal entities, like non-state structures, could never be involved in an international law. The Supreme Court did not seem to consider basic concepts of logic or Venn diagrams while examining the question. By such logic, all non-state entities are not engaged in internal war, all international wars are not fought by states, and some non-state entities do fight international wars.

In the end, the Court does not have the authority to alter what is the patently clear meaning that Common Article 3 applies to a conflict “not of an international character.” The Article does not apply to the situation in Afghanistan, Iraq, or elsewhere.

The Supreme Court also ignored many other relevant provisions of the law of war. The Court even refrained from examining which requirements must be fulfilled before a person qualifies as a prisoner of war.<sup>211</sup> It is curious how the Court could consider Geneva Convention III on prisoners of war at all applicable or relevant without justifying such a conclusion. Geneva Convention III could only apply if Hamdan had been a combatant in some form;<sup>212</sup> otherwise he might be a civilian, possibly entitled to protection under article 3 of Geneva Convention IV.<sup>213</sup> Justice Kennedy, in his opinion concurring in part, referred to Hamdan as a “battlefield captive.”<sup>214</sup> There must be a heavy presumption that anyone captured on the battlefield is a combatant.

As mentioned above, the Red Cross has provided some surprising statements about the War on Terror, suggesting that terrorists are somehow civilians who take part in armed conflict.<sup>215</sup> No one, says the Red Cross, must be left unprotected by the Conventions: “*There is no intermediate status; nobody in enemy hands can be outside the law.*”<sup>216</sup> The Red Cross insisted again in 2005 that there is no gap

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<sup>210</sup> See *Hamdan*, 126 S. Ct. at 2796 (citing ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1351 (1987)).

<sup>211</sup> See *supra* note 40 and accompanying text.

<sup>212</sup> See Convention III, *supra* note 2, art. 4.

<sup>213</sup> See *supra* Part II.B.3.

<sup>214</sup> *Hamdan*, 126 S. Ct. at 2808 (Kennedy, J., concurring in part).

<sup>215</sup> See *supra* notes 42–58 and accompanying text.

<sup>216</sup> OSCAR M. UHLER & HENRI COURSIER, AM. RED CROSS, COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958). The same mistake is made by the International Criminal Tribunal for the For-

between the Third and Fourth Conventions allowing for unprotected combatants.<sup>217</sup> This ignores the traditional positions with regard to spies<sup>218</sup> and to mercenaries (which the Red Cross assisted in drafting into the Additional Protocols),<sup>219</sup> and certainly with regard to terrorists, who have no privileges under the law of war.<sup>220</sup>

The Red Cross takes the position that, somehow, Common Article 3 applies in all noninternational armed conflicts together with “the few” rules in Protocol II.<sup>221</sup> But Protocol II can never apply to states that have not ratified it. It is of considerable legal importance to emphasize that *similar, parallel rules of jus cogens apply*.<sup>222</sup> It is thus essential to properly identify the basis of this obligation.

In *Hamdan*, the Justices did not even touch on the meaning of the Martens Clause, which could have provided some guidance for the treatment of detainees, but was totally ignored. The clause provides that, in situations not covered by international agreements, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>223</sup>

The United States Supreme Court also failed altogether to discuss Geneva Convention IV on civilians, a category that arguably could have been relevant, at least for exclusionary purposes.<sup>224</sup> Nor was there any discussion of the Additional Protocols of 1977, which

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mer Yugoslavia (“ICTY”), a tribunal charged with prosecuting war crimes and crimes against humanity committed during the recent conflicts in the Balkans. See ICTY General Information, <http://www.un.org/icty/cases-e/factsheets/generalinfo-e.htm> (last visited July 5, 2007). The ICTY explicitly affirmed this principle in a 1998 judgment, stating:

[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied.

Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 271 (Nov. 16, 1998).

<sup>217</sup> See *supra* note 56 and accompanying text.

<sup>218</sup> See *supra* Part II.C.3.

<sup>219</sup> See *supra* Part II.C.2.

<sup>220</sup> See *supra* note 117 and accompanying text.

<sup>221</sup> Noam Lubell, Senior Researcher, Human Rights Ctr., University of Essex, Statement at the Conference to Mark the Publication of the ICRC Study on “Customary International Humanitarian Law”: Challenges in Applying Human Rights Law to Armed Conflict (May 30, 2005).

<sup>222</sup> See *supra* Part I.B.

<sup>223</sup> DETTER, *LAW OF WAR*, *supra* note 7, at 187. The clause, in one form or other, has been included in conventions on war since 1899, often cited independently as a basic and essential rule of the law of war.

<sup>224</sup> See *supra* Part II.B.3.

may reflect some rules forming part of the law of war even to those states that have not ratified these agreements.<sup>225</sup> Nor did the Court cast more than a cursory glance into the case law of the Hague Tribunal of former Yugoslavia,<sup>226</sup> which has issued extensive rulings on conspiracy as a war crime. The Court also ignored what could have been of paramount importance in terms of the nature of al Qaeda genocidal action: conspiracy to commit genocide, criminalized under the Genocide Convention.<sup>227</sup> On the whole, the Supreme Court appears to have worked in an intellectual vacuum, designed by itself to limit the impact of its judgment.

The Supreme Court thus seems to seek to alter the contents of the law of war by incorrect pronouncements on the reach of the Geneva Conventions. It may be useful to point out that, however important this Court may be, it does not have the competence to change rules of international law. The Supreme Court is only one among the courts of some 200 states. However politically and economically important the United States Supreme Court may be, international law is not made by a single state. One must be wary of adopting such a lopsided understanding of treaties; the opinion of one court in the United States is still the judicial view of just one state.

Some scholars think that *Hamdan* has profoundly changed the meaning and the application of the 1949 Geneva Conventions. But, as noted above, the Supreme Court (fortunately) does not have that competence. On the other hand, it may be that the Court is wrong on the law. It would seem that a correct interpretation of the Conventions leads to different results and that the findings of the Court are based on misunderstandings of the law of war.

The Supreme Court came down with the worrying conclusion in *Hamdan* that all detainees everywhere are protected by Common Article 3 of the Geneva Conventions.<sup>228</sup> But is this really in the interest of the law of war? If the law of war also protects terrorists, the result will be that relevant rules are watered down and will not afford adequate protection to those who better deserve such protection. If the Supreme Court were correct in its findings, the result would be that the wounded in the field and at sea, as well as civilians, would have

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<sup>225</sup> The Protocols may in some parts apply to nonratifying parties by force of relevant clauses forming part of rules binding *erga omnes*. See *supra* text accompanying note 33.

<sup>226</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 n.40 (2006).

<sup>227</sup> Genocide Convention, *supra* note 129, art. III(b).

<sup>228</sup> Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 98 (2006).

their rights severely reduced as protection extends to unworthy participants in unlawful war efforts.

C. *Rights of Terrorists: Minimum Standards*

The rights of terrorists are extremely limited. States, however, must treat suspected genocidal terrorists in accordance with an international minimum standard which prohibits the use of torture and which guarantees certain basic procedural rights, such as the right to be present at a trial and to hear evidence unless disclosure will endanger the life of others.

Some international lawyers do not accept the existence of an international minimum standard, typically the same positivist writers who dispute the existence of natural law or of sociologically necessary rules.<sup>229</sup> In practice, however, it is clear that those countries that deviate from acceptable minimum rules of behavior are subjected to immediate condemnation by other states or by the United Nations.<sup>230</sup> But some states—especially the few communist states remaining and some post-communist regimes—emphasize notions of virtually absolute sovereignty, not allowing any interference from outside in the form of any international standards. Such states, however, are now in a small minority.<sup>231</sup>

It is clear that detainees may be tried as unlawful combatants; the Supreme Court stated in *Hamdi* that “the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war,’” and therefore “an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”<sup>232</sup>

Minimum standards indicate *legal* thresholds of behavior and thus, in this context, guarantee fair court procedures as well as humane treatment of detainees.<sup>233</sup> Minimum standards cannot be enforced in internal courts, but courts are likely to be obliged to take such standards into consideration *ex officio* in their deliberations. If courts ignore minimum standards, the international responsibility of the state will be engaged.<sup>234</sup> In view of the impact of modern media,

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<sup>229</sup> See *supra* notes 6–14 and accompanying text.

<sup>230</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 414–15.

<sup>231</sup> China, Vietnam, North Korea, and Cuba are almost the only states that retain the communist system.

<sup>232</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)).

<sup>233</sup> DETTER, *INTERNATIONAL LEGAL ORDER*, *supra* note 5, at 304–05.

<sup>234</sup> *Id.* at 523–26.

world opinion will also ensure that states abide by such minimum standards.<sup>235</sup> But minimum standards provide a realistic legal foundation for duties of states in relation to treatment of detainees. This is preferable to constructing illusory obligations from Conventions which cannot conceivably apply to the treatment of detainees in international armed conflicts.

There are two relevant categories of minimum standards in cases concerning terrorist detainees. One concerns the trial and the evidence presented in court or to a military commission. The other concerns the physical and psychological treatment of the detainees.

### 1. *Standing of Detainees in Courts*

The rights of indicted persons in court proceedings will depend on relevant rules in the state in which the terrorists are being held. The state itself decides to what remedies citizens and noncitizens are entitled, provided that treatment before a court meets the international minimum standard. For example, in *Rasul v. Bush*,<sup>236</sup> the Supreme Court found it legal under federal law to allow suspected terrorists who are noncitizens the privilege of filing habeas corpus petitions.<sup>237</sup>

The concept of a “regularly constituted court,” is not defined in the text of the Geneva Conventions, but it must be understood to incorporate some minimum basic standards. In *Hamdan*, the Supreme Court held that court procedures should provide “at least the barest of those trial protections” recognized by international law,<sup>238</sup> for example as listed in article 75 of Protocol I to the Geneva Conventions of 1949 and in article 14 of the International Covenant on Civil and Political Rights,<sup>239</sup> probably reflecting an international minimum standard.

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<sup>235</sup> See DETTER, LAW OF WAR, *supra* note 7, at 414–15; DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 555.

<sup>236</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>237</sup> *Id.* at 484.

<sup>238</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006). For example, the Court cited Protocol I to the Geneva Conventions and the International Covenant on Civil and Political Rights, which specify a right to a trial for any detainee. See Protocol I, *supra* note 36, art. 75(4)(e) (setting forth the right of an accused “to be tried in his presence”); International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, 999 U.N.T.S. 171 (setting forth the right of an accused “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”).

<sup>239</sup> These articles specify a right to a trial for any detainee. See Protocol I, *supra* note 36, art. 75(4)(e) (setting forth the right of an accused “to be tried in his presence”); International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999

Most commentaries on *Hamdan* have concerned matters of relevance to the internal constitutional and administrative rules of the United States<sup>240</sup> or procedural rules.<sup>241</sup> It may come as a surprise to American lawyers, but the majority of states have civil law systems to which the constitutional and administrative matters discussed in *Hamdan* would not apply. Furthermore, petitions of habeas corpus are unknown in civil law countries. Civil law lawyers would indeed be intrigued to hear views that hearsay is forbidden in evidence, as in these countries evidence would be admitted but hearsay would reduce the weight of the evidence. Furthermore, courts in civil law countries have a much reduced power to “make law,” as they are merely applying the laws made by the legislature; there is no rule of *stare decisis*. But international law is a universal system, so we must find a compromise or at least some minimum understanding of the contents of the rule of the law of war that are applicable to all.

It is essential to establish that suspected terrorists do have a right to some form of trial, that international minimum rules would demand that they are present at their trial, that they are charged and tried within a limited time period, and that they are informed of the evidence against them insofar as it would not endanger other persons. There is an important balance to be struck in allowing a suspected terrorist a fair trial while also safeguarding other persons who might be exposed to danger by certain evidence. It is also relevant that courts in other jurisdictions do not always disclose all evidence.<sup>242</sup>

As for evidence, there must clearly be special rules in case a court holds such evidence to be secret to prevent further damage to interests of the state and its citizens. As Justice Thomas pointed out in his dissenting opinion in *Hamdan*, “the cardinal principle of the law of war [is] protecting non-combatants.”<sup>243</sup> In emphasizing the severity of the “threat to reveal our Nation’s intelligence gathering sources and methods,” Thomas invoked past precedent stating that “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling

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U.N.T.S. 171 (setting forth the right of an accused “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing”).

<sup>240</sup> For example, the relationship between Congress and the President with regard to war powers, the constitutionality of war commissions, and the competence of federal vis-à-vis military courts.

<sup>241</sup> For example, applications for habeas corpus, extraterritorial application of conventional rules, and evidentiary rules on hearsay.

<sup>242</sup> See *infra* notes 279–73 and accompanying text.

<sup>243</sup> *Hamdan*, 126 S. Ct. at 2838 (Thomas, J., dissenting).

than the security of the Nation.”<sup>244</sup> Thomas would have deferred to the government’s rationale that

“[b]ecause Al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network operates—identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate.”<sup>245</sup>

In an opinion concurring in part with the plurality, Justice Kennedy balanced the relative need for evidence against the security risk, stating that “while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses.”<sup>246</sup>

With regard to the right of legal representation, it is noteworthy that in a democracy like England, those arrested did not have a right to demand legal representation or legal advice before the 1984 Police and Criminal Evidence Act.<sup>247</sup> Terrorists arrested in the United Kingdom did not have such rights before the 1984 Act.

It may be a better argument to claim that *all* states are obliged to afford court procedures meeting a certain minimum standard and, indeed, that the treatment of detainees should also be compatible with a minimum standard which excludes, for example, the use of torture. Such standards apply both in peace and in war, irrespective of combatant status.

On the other hand, such standards are not incompatible with the interest of the state to deal with certain terrorists before military commissions; such tribunals may be more suitable to deal with cases that, after all, have more to do with military law than with ordinary civilian life. The dilemma is illustrated by a recent case before a military commission in Guantanamo where, for what appears to be semantic reasons, the tribunal was not allowed to try a person, as he had not been qualified as an “unlawful combatant” but only as an “enemy combatant.”

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<sup>244</sup> *Id.* at 2848–49 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

<sup>245</sup> *Id.* at 2849 (citing Brief for the United States at 9, *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (No. 03-4792)).

<sup>246</sup> *Id.* at 2808 (Kennedy, J., concurring in part).

<sup>247</sup> Police and Criminal Evidence Act, 1984, c. 60, § 58 (Eng.); see DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 367 (2d ed. 2002) (recognizing right to consult privately with legal representation).

On June 5, 2007, military judges in the United States dismissed charges against Yemeni Salim Ahmed Hamdan, concerning whom the Supreme Court had earlier held substantial hearings.<sup>248</sup>

Hamdan had been Osama bin Laden's personal driver and was charged with conspiracy for his membership in al Qaeda, plotting to attack civilians and civilian targets, and supplying material support for terrorism.<sup>249</sup> Hamdan appeared before the military commission together with the Canadian Omar Khadr who allegedly had killed a U.S. soldier in Afghanistan.<sup>250</sup> The Commission held that the government had failed to establish jurisdiction and that the detainees are not subject to the commission under existing legislation under which only "unlawful enemy combatants" can be tried by the military commissions.<sup>251</sup> The two detainees did not qualify as such, as both Khadr and Hamdan had previously been identified by military panels only as enemy combatants, without the "unlawful" qualification.<sup>252</sup>

Apparently none of the detainees held at Guantanamo has been classified as an "unlawful" enemy combatant, although Navy Commander Jeffrey Gordon at Guantanamo stated in connection with the case heard in June 2007 that the entire system in Cuba was set up to detain "unlawful enemy combatants" operating outside any internationally recognized military without uniforms, military ranks, or other things that would make them party to the Geneva Conventions. The Commander emphasized that the distinction is important because if the combatants had been "lawful," they would be entitled to prisoner of war status.

The "combat status" can, however, be changed, either by "review tribunals" or by retrial as the case was dismissed without prejudice. On the other hand, soon afterwards, in June 2007 the Supreme Court made an end-of-term Order, without comment, that detainees can use the civil court system to challenge their indefinite confinement at Guantanamo. This might signal the end of the military trial system for the Guantanamo detainees. The wisdom of treating suspected terrorists on par with civilians in the court system may perhaps be ques-

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<sup>248</sup> The Supreme Court had ruled in favor of Hamdan in June 2006 when the previous military tribunal system, set up after 9/11, was held inapplicable. *See supra* Part V.B. Congress responded with new guidelines for war-crimes trials in the Military Commissions Act passed by Congress and signed by President Bush in 2006. *See generally* 47A U.S.C. §§ 948–950 (2006).

<sup>249</sup> *See Hamdan*, 126 S. Ct. at 2761.

<sup>250</sup> William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, June 5, 2007, at A1.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

tioned unless civilian judges are informed, in some detail, about the rules of the law of war.

## 2. *Treatment of Detainees*

The intense discussion of the treatment of detainees held as suspected genocidal terrorists shows that many wish to give such detainees the privileges of prisoners of war or other far-reaching rights under the law of war. It is important to underline that detainees may be interrogated and prisoners of war may not, beyond the obligation to provide their name and rank.<sup>253</sup>

On the other hand, it is clear that a detaining power has a duty to afford civilized treatment to detainees; that is, a strict obligation to refrain from torture and degrading treatment. It is irrelevant whether a detaining power has or has not ratified the Torture Convention,<sup>254</sup> as such prohibitions operate in all cases, in war as in peace, as part of the peremptory norms of international law or of *jus cogens*.<sup>255</sup>

One important case decided by the House of Lords on June 13, 2007 confirmed that human rights in war are not enjoyed by victims of military operations such as, for example, civilians in attacked areas.<sup>256</sup> On the other hand, military units which are holding detainees are obliged to afford human rights to such persons.<sup>257</sup> It may be assumed that such rights would include normal rights to a fair trial under the civilian judicial system, but this is not clear from the judgment.

## D. *Operation of Fundamental Rules in War*

In war, certain rules concerning individuals are displaced. Most conventions on human rights provide that they will not operate—or certain of their provisions will not operate—in wartime. This is the case with the International Covenant on Civil and Political Rights,<sup>258</sup>

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<sup>253</sup> See Convention III, *supra* note 2, art. 17.

<sup>254</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

<sup>255</sup> See *supra* Part I.B.

<sup>256</sup> R v. Sec'y of State for Def. [2007] UHKL 26, [2007] 3 W.L.R. 33 (appeal taken from Eng.).

<sup>257</sup> *Id.*

<sup>258</sup> See International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171.

the American Convention on Human Rights,<sup>259</sup> as well as the European Convention on Human Rights.<sup>260</sup>

Other rules will continue to operate and will give rise to both duties and rights of individuals. One such important set of rules is the Convention on Genocide, combined with general rules in adjacent, relevant fields. That general rules prohibiting genocide are not suspended is easily demonstrated by the events of the Second World War. The Nuremberg Trials, held before the Genocide Convention came into force, proved that no one can pretend to be ignorant about rules forbidding massive killings of civilians, as such minimum prohibitive rules form the basis of the fabric of human society.

The rules of the Conventions also operate largely in relation to states that are not parties to the Conventions and in relation to individuals in general, as the Conventions reflect the view of the civilized world in establishing minimum standards for the treatment of soldiers, POWs, and civilians in armed conflict.<sup>261</sup> These fundamental and intrinsic rules, especially with regard to the treatment of *all* captured persons, including detainees, form an important part of the law of war. It is, however, important to underline that such rules of humane treatment also bind the terrorists, and violations of the minimum standards by terrorists who have captured soldiers or civilians will aggravate their guilt.

#### *E. "Clean Hands" of Terrorists?*

In many legal systems, a person may forfeit his human rights, his humanitarian rights, and even his constitutional rights if he seriously violates basic rules.<sup>262</sup> The tendency to restrict one's rights in proportion to the violation one has committed is reminiscent of the rule in equity that the person who comes to the bench for relief must himself have "clean hands."

Therefore, genocidal terrorists must be tried as "enemy combatants," as they are guilty of violations of the law of war and guilty of genocide under both national and international law.<sup>263</sup> Because these terrorists so thoroughly disregard the rules and customs of war, they

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<sup>259</sup> American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>260</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

<sup>261</sup> See *supra* Part V.C.

<sup>262</sup> See, for example, the rules of equity in English law.

<sup>263</sup> See *supra* Part III.B.

should not derive any rights or benefits for themselves under this system of law.

On the other hand, it may be suggested that privileges granted to terrorists who have violated the law of war are given on the basis of *ex gratia* concessions by civilized states. The question of reciprocity should lead to the exclusion of certain rules if one party so grossly violates the basic standards of the law of war as the genocidal terrorists. But the essence of decent behavior in war is entrenched in a general obligation of fair treatment rather than on the basis of reciprocity,<sup>264</sup> which would endanger treatment of captives if the enemy does not respect the minimum standard.

#### *F. Universal Crimes Warrant Universal Responses*

As the newly encountered form of terrorism involves different elements than in the past, it may also warrant new responses. Traditionally, terrorists have been involved in a triangular situation in which they have sought to obtain something from another party, often a state, by committing criminal acts such as the murder, maiming, or kidnapping of innocent persons who normally would not be in the position of being able to grant the demands of the terrorists themselves.<sup>265</sup>

Genocide is an international crime which, in war, is also classified as a war crime.<sup>266</sup> Attacking civilians also violates the law of war.<sup>267</sup> The attack on the World Trade Center in 2001 violated both those precepts. The attack is also on par with attacking dangerous installations, a further war crime,<sup>268</sup> as it could be foreseen that catastrophic damage would ensue if the buildings were hit at the relevant angle. Hijacking planes is another universal crime as codified in a series of conventions.<sup>269</sup> Terrorism on this scale is also a universal crime, as

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<sup>264</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 409–13 (discussing the fact that certain international norms apply regardless of reciprocity).

<sup>265</sup> See *supra* Part III.A.1.

<sup>266</sup> See DETTER, *LAW OF WAR*, *supra* note 7, at 417–18.

<sup>267</sup> *Id.* at 285–88.

<sup>268</sup> *Id.* at 293. This is probably a general rule; specific prohibition is laid down in Protocol II, *supra* note 37, art. 15.

<sup>269</sup> See Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft arts. 1(1), 11, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

codified in extradition treaties under which terrorists cannot claim that they are “political” and thus entitled to asylum.<sup>270</sup>

Virtually all these serious crimes warrant universal jurisdiction.<sup>271</sup> Therefore, one may expect coordinated views on the treatment of persons suspected of such terrorist involvement. This leads to the assumption that the U.S. Supreme Court would take into account the attitudes and case law of other states on the subject of terrorism.

Those who claim that the executive power in the United States is “excessive” at the present time will note that similar executive prerogatives have been held to be compatible with the stringent demands of the European Convention on Human Rights.

Ireland took the United Kingdom to the European Court for Human Rights in the early 1970s claiming, *inter alia*, that its detention practices for terrorists violated articles 5 and 6 of the European Convention on Human Rights.<sup>272</sup> These articles guarantee the due process rights of personal liberty and a fair trial.<sup>273</sup> Ireland claimed that the 1922 Civil Authorities (Special Powers) Act (Northern Ireland) of the United Kingdom<sup>274</sup> violated these articles by allowing internment without trial.<sup>275</sup>

The United Kingdom phased out internment as the case was pending<sup>276</sup> but insisted that ordinary processes of law would not provide adequate protection against terrorists. When the Secretary of State suspected a person of having committed or planning to commit terrorist acts, he could issue an interim order under which the person could be held for twenty-eight days.<sup>277</sup> Then, the Secretary of State would refer the case to a Commissioner who could make a detention

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<sup>270</sup> See, e.g., International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, annex arts. 2, 11, U.N. Doc. A/RES/52/164 (Dec. 15, 1997). Note that possession of nuclear material is a universal crime even at the attempt or threat stage. See Convention on the Physical Protection of Nuclear Material, art. 7, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124.

<sup>271</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 413–17.

<sup>272</sup> See generally Ireland v. United Kingdom (*Torture Case*), 25 Eur. Ct. H.R. 1 (1978).

<sup>273</sup> See European Convention on Human Rights, *supra* note 260, arts. 5, 6.

<sup>274</sup> Civil Authorities (Special Powers) Act, 1922, 23 & 23 Geo. 5, c.12 (N. Ir.).

<sup>275</sup> See *Torture Case*, *supra* note 272.

<sup>276</sup> The Special Powers Act was replaced by the Detention of Terrorists Order, 1972, S.I. 1632 (N. Ir.). The Order provides for the appointment of legally qualified Commissioners who have held judicial office or are barristers, advocates, or solicitors of at least ten-years standing.

<sup>277</sup> After the threat of the Irish terrorists had waned, the time of detention without charge in the United Kingdom was reduced to fourteen days. The Terrorism Act of 2000 further reduced the time that a suspected terrorist could be held to forty-eight hours. Terrorism Act, 2000, c. 11, § 41(3) (Eng.). The Terrorism Act of 2006 most recently amended the length of detention to twenty-eight days. See Terrorism Act, 2006, c. 11, § 23(7) (Eng.). Prime Minister Blair had

order. This arrangement would avoid the ordinary courts as the United Kingdom declared an emergency situation to the Council of Europe.

Under article 15 of the Convention, a contracting state may “[i]n time of war or other public emergency threatening the life of the nation . . . take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”<sup>278</sup> Such a situation of public emergency existed due to terrorist activities in the United Kingdom perpetrated by the Irish Republican Army.

The European Court of Human Rights decided in the *Lawless Case*<sup>279</sup> that a state, in this case Ireland, may resort to administrative procedures when detaining terrorists.<sup>280</sup> In particular, the court held that the amassing of evidence necessary to convict persons involved in terrorism was extremely difficult because of the military, secret, and, above all, terrorist nature of the groups involved and the fear they caused among the population.<sup>281</sup> The checks and balances demanded by the European Court of Human Rights in *Lawless* were, however, far less stringent than those the United Kingdom had introduced in the detention order system.<sup>282</sup>

The United Kingdom has always taken the line that the primary aim of the authorities is to use ordinary courts for terrorists. If there are strong reasons to believe that a person is implicated in terrorist offenses, however, the nature of the evidence will sometimes be such that it cannot be adduced in a normal court. Then, special mechanisms, such as the detention order system, must be used.<sup>283</sup> The Euro-

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sought a rule of ninety days but his proposal was defeated by a vote in the House of Commons of 322 to 291. See 439 PARL. DEB., H.C. (6th ser.) (2005) 310.

<sup>278</sup> European Convention on Human Rights, *supra* note 260, art. 15.

<sup>279</sup> *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A), ¶ 29, 36 (1961).

<sup>280</sup> *Id.* ¶ 36.

<sup>281</sup> *Id.*

<sup>282</sup> The court held in later cases that the term “court,” as defined in the Convention, merely means that this organ must have a “judicial” character; that is, it must be “independent” both of the executive and of the parties to the case. *Neumeister v. Austria*, 8 Eur. Ct. H.R. (ser. A) at 44 (1968); see *Matznetter v. Austria*, 10 Eur. Ct. H.R. (ser. A) at 31 (1969) (summarily agreeing with the result on this point in *Neumeister*). This, however, does not preclude it from being an administrative organ exercising a judicial function.

<sup>283</sup> See HOME OFFICE, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY 1 (2004). Detention orders can be made under Part 4 of the Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 23 (U.K.).

pean Court of Human Rights has accepted this as a possibility in case of a national emergency.<sup>284</sup>

As set out above, human rights usually enjoyed in times of peace are normally displaced by a state of war.<sup>285</sup> The law of war then activates other rules for the protection of individuals.<sup>286</sup> One such set of safeguarding rules are the minimum standards for treatment of detainees; these rules form an important part of the law of war.<sup>287</sup>

#### VI. *A New Legal Perspective: Al Qaeda Terrorists as hostes gentium*

Genocidal terrorists are, *ipso facto*, excluded from the protection of the law of war as they can generally be classified as illegal combatants, mercenaries, saboteurs, or spies.<sup>288</sup> By its unprecedented actions and by its insatiable aims, al Qaeda—and those who adopt its brand of terrorism—not only puts itself outside the body politic of one state but of all mankind. Al Qaeda members cannot be defined as freedom fighters due to the unprecedented ferocity of their techniques and the incompatibility of their world view with *any* other. In this way, these new terrorists place themselves outside the normal framework of international relations. They are outlaws. In this sense, they are best compared to pirates.<sup>289</sup> The al Qaeda members are thus both “outlaws” and “enemies of mankind.” The 9/11 criminals and other al Qaeda followers have much in common with the pirates of yesteryear who were considered to be enemies of mankind, having placed themselves deliberately outside the protection of the law by their acts and their incompatibility with any form of world order.<sup>290</sup>

Rules on piracy may provide further guidance for responses to genocidal terrorists. Apart from some eccentric examples like the taking of the *Santa Maria* by some opponents of President Antonio de Oliveira Salazar in Portugal in 1961 or the seizure of the *Achille Lauro* by Palestinian Liberation Organization hijackers in 1985, there are not many modern-day examples of traditional piracy. Some say that

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<sup>284</sup> See *supra* note 278 and accompanying text.

<sup>285</sup> See *supra* Part V.D.

<sup>286</sup> See, e.g., *supra* Part II.B.

<sup>287</sup> See *supra* Part V.C.

<sup>288</sup> See *supra* Part III.B.

<sup>289</sup> See, e.g., *Republic of Bolivia v. Indemnity Mut. Marine Assurance Co.* (1909) 1 K.B. 785 (referring to pirates as *hostes humani generis*).

<sup>290</sup> See Douglas R. Burgess, Jr., *The Dread Pirate Bin Laden*, LEGAL AFF., July–Aug. 2005, at 32, 35–36; see also Darin Phaovisaid, *Where There's Sugar, the Ants Come: Piracy in the Strait of Malacca*, 14 INT'L AFF. REV. 81, 87–88 (2005) (classifying “political piracy” as terrorism).

piracy has sunk into desuetude. In 1926, the United States did not hesitate to declare “that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement.”<sup>291</sup> But, if we examine the rules and the consequences of old-fashioned piracy, the situation of terrorists becomes clearer.

So, who is a pirate? Under the High Seas Convention of 1958<sup>292</sup> and the Law of the Sea Convention of 1982,<sup>293</sup> pirates are those who resort to unauthorized violence against a ship outside the jurisdiction of a state.<sup>294</sup>

Piracy has traditionally been a crime committed on the High Seas but this condition has gradually been mitigated and in 1929 the Harvard Draft on Piracy<sup>295</sup> widened the crime to extend to attacks in the air,<sup>296</sup> which may be relevant to an analysis of the 9/11 attack on the Twin Towers. Article 3 of the Draft stated that piracy involved “[a]ny act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property . . . on or from the sea or *in or from the air*.”<sup>297</sup>

Like pirates, genocidal terrorists place themselves outside the family of nations and make themselves *enemies of mankind*.<sup>298</sup> The result is that they leave themselves open to universal jurisdiction, allowing any state to apprehend and convict them.<sup>299</sup> An element of the crime of piracy was originally that the pirate acted “for private ends.”<sup>300</sup> However, as scrutiny of the mind is impossible and as the subjective intention of the pirate cannot be ascertained, this element was gradually abandoned.<sup>301</sup> On the other hand, the current al Qaeda motive of “hatred” may rate as a “private” motive.<sup>302</sup>

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<sup>291</sup> Jesse S. Reeves, *Progress of the Work of the League of Nations Codification Committee*, 21 AM. J. INT’L L. 659, 665 (1927).

<sup>292</sup> Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

<sup>293</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Law of the Sea Convention].

<sup>294</sup> See *id.* art. 101; High Seas Convention, *supra* note 292, art. 15.

<sup>295</sup> Harvard Research in Int’l Law, *Draft Convention on Piracy*, 26 AM. J. INT’L L. SUPP. 739 (1932) [hereinafter Harvard Draft on Piracy].

<sup>296</sup> *Id.* at 743.

<sup>297</sup> *Id.* (emphasis added).

<sup>298</sup> See Burgess, *supra* note 290, at 36.

<sup>299</sup> Law of the Sea Convention, *supra* note 293, art. 105.

<sup>300</sup> See *id.* art. 101(a); High Seas Convention, *supra* note 292, art. 15(1).

<sup>301</sup> See Harvard Draft on Piracy, *supra* note 295, at 743.

<sup>302</sup> Cf. *supra* note 98 and accompanying text (discussing how terrorists’ intangible religious motives can still be classified as “for private gain”).

A further criterion for piracy was traditionally, and still is, an intent to rob, or to have an *animus furandi*.<sup>303</sup> It may be pointed out that the Latin verb *furari* does not really mean “to rob” but more accurately implies acting in rage, in a furious way, like a madman, or, as Cicero employed it, to act against the welfare of one’s own country.<sup>304</sup> The al Qaeda terrorists, like pirates, invariably have an *animus furandi*. It may be interesting to stress that, as shown in case law with regard to pirates, the motive may just be simple *hatred*.<sup>305</sup> By including a *mens rea* element in the crime, the law was not fashioned to sanction the placement of prospective pirates in a position to commit an *actus reus*. So, like conspirators, they can be considered criminals before they have actually committed a crime.

The pirate, like the terrorist or the plainclothes spy, has placed himself outside the protection of any state, and all states who can apprehend him have the right of jurisdiction and the right to punish him as they see fit.<sup>306</sup> Indeed, states even have a duty to hold pirates if they have the opportunity,<sup>307</sup> as pirates have become *hostes gentium*, or *hostes humani generis*: enemies of all mankind.<sup>308</sup> As the American Judge John Basset Moore said in *The Case of the S.S. Lotus*<sup>309</sup> before the Permanent Court of International Justice in 1927, the pirate “is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.”<sup>310</sup>

As any state has the right—and, indeed, the duty—to apprehend a pirate, it also has the unlimited right to interrogate and question him. Some writers specifically emphasize that a pirate can never be treated as a prisoner of war but instead has *lesser rights than a common criminal*.<sup>311</sup> Punishment and treatment are invariably harsh. In earlier days, the pirate was not even entitled to any form of trial but could, if caught *in flagrante delicto*, be summarily executed;<sup>312</sup> he

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<sup>303</sup> See Harvard Draft on Piracy, *supra* note 295, at 743.

<sup>304</sup> Cicero, *Against Verres*, (II.5, 76), at 53, in *ON GOVERNMENT* (Michael Grant trans. 1993).

<sup>305</sup> See *supra* text accompanying note 111.

<sup>306</sup> See *supra* note 299 and accompanying text.

<sup>307</sup> See Law of the Sea Convention, *supra* note 293, art. 100; High Seas Convention, *supra* note 292, art. 14.

<sup>308</sup> See Burgess, *supra* note 290, at 36.

<sup>309</sup> *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>310</sup> *Id.* at 77 (Moore, J., dissenting).

<sup>311</sup> See DETTER, *INTERNATIONAL LEGAL ORDER*, *supra* note 5, at 413–17.

<sup>312</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 *HARV. INT’L L.J.* 183, 190 (2004).

would normally be immediately hanged by the mast of the ship or drowned by the captor.<sup>313</sup> The reason for this was that the pirate, by his own volition, had placed himself outside the law.<sup>314</sup>

The United States Code also prescribes that “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”<sup>315</sup> As the pirate by his acts has placed himself outside the civilized world, he has forfeited the protection of its rules. There is no mention of any right to legal advice or judicial trial. The right of universal jurisdiction over genocidal terrorists appears warranted on the basis of parallels with pirates.<sup>316</sup>

Crimes have thus increasingly ceased to be territorially limited. As Lord Griffiths said in *Liangsiriprasert v. United States*:<sup>317</sup> “Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality.”<sup>318</sup> Therefore, neither comity nor good sense would warrant that the common law not be able to regard, as justiciable in England, inchoate crimes committed abroad that the perpetrators intend to result in criminal acts in England.

Of course, most conduct which states choose to regulate and punish is conduct occurring within their territory, including their ships and aircraft. But states may also choose to regulate and punish certain conduct which takes place outside their territory. For instance, the courts of England have for centuries had jurisdiction to try cases of murder allegedly committed by English and, later, British subjects anywhere in the world.<sup>319</sup>

There was now, said Lord Millett, a global village with regard to certain crimes. Although the general rule is to apply territorial jurisdiction, there is also nowadays “high authority for and sound sense in the proposition that extradition treaties should not be construed in a

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<sup>313</sup> 1 L. OPPENHEIM, INTERNATIONAL LAW 616 (H. Lauterpacht ed., 8th ed. 1955).

<sup>314</sup> See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 144 (2007); see also Kontorovich, *supra* note 312, at 205–06 (discussing how the “heinousness” of piracy is the reason for universal jurisdiction over the crime).

<sup>315</sup> 18 U.S.C. § 1651 (2000).

<sup>316</sup> See DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 413–17.

<sup>317</sup> *Liangsiriprasert v. Gov’t of the U.S.*, [1991] 1 A.C. 225 (P.C.) (appeal taken from H.K.). In *Liangsiriprasert*, the House of Lords held that a conspiracy entered into in Thailand with the intention of committing a criminal offense in Hong Kong was justiciable in Hong Kong, even if no overt act pursuant to the conspiracy had yet occurred in Hong Kong. See *id.* at 251.

<sup>318</sup> *Id.*

<sup>319</sup> See, e.g., *R v. Page*, [1954] 1 Q.B. 170, 177 (C.M.A.C.).

way which would ‘hinder the working and narrow the operation of most salutary international arrangements.’”<sup>320</sup> “This is even more the case,” Lord Millett said, “in today’s global village where national borders are no impediment to international terrorists and other criminals.”<sup>321</sup>

For example, in accordance with an international convention, the United Kingdom has passed laws granting itself extraterritorial jurisdiction when a hostage is taken<sup>322</sup> and when a public official commits torture.<sup>323</sup>

Of course, most conduct that states choose to regulate and punish is conduct that occurs within their territory, including their ships and aircraft. But civil law countries have traditionally exercised a wide jurisdiction to regulate and to punish within their own territory the conduct of their citizens while they are living or traveling abroad.<sup>324</sup> As a result of various conventions, there is a wide range of offences for which international law specifically permits, or even obliges, states to assert extraterritorial jurisdiction.<sup>325</sup> The *Abbasi* Case concerned the rights of British citizens held at Guantanamo Bay.<sup>326</sup> The appellants accepted that, as a matter of the internal law of the United States, the American courts have jurisdiction to try those held in that country but other states may also have jurisdiction, for example with regard to diplomatic protection.<sup>327</sup>

In this sense, the exercise of jurisdiction over genocidal terrorists is similar to that over piracy by the law of nations. Jurisdiction for such crimes is of an extensive nature, and it follows that the term “jurisdiction” in the context of, for example, the definition of a “fugitive criminal” is not synonymous with “territorial jurisdiction.” On the contrary, it must be wide enough to cover even the extreme form of

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<sup>320</sup> *R (Al-Fawwaz) v. Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 A.C. 556, 593 (appeal taken from Eng.) (quoting *Belgium v. Postlethwaite* [1988] 1 A.C. 924, 947 (H.L.) (appeal taken from Eng.)).

<sup>321</sup> *Al-Fawwaz*, [2001] UKHL 69 at 593.

<sup>322</sup> See Taking of Hostages Act, 1982, c. 28, § 1 (Eng.).

<sup>323</sup> See Criminal Justice Act, 1988, c. 33, § 134 (Eng.).

<sup>324</sup> For instance, the courts of England have for centuries had jurisdiction to try cases of murder allegedly committed by English and, later, British subjects anywhere in the world. See, e.g., *R v. Page*, [1954] 1 Q.B. 170, 177 (C.M.A.C.).

<sup>325</sup> See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 5, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; see also DETTER, INTERNATIONAL LEGAL ORDER, *supra* note 5, at 402–54.

<sup>326</sup> *R (Abbasi) v. Sec’y of State for Foreign & Commonwealth Affairs*, [2002] EWCA (Civ) 1598, ¶ 1.

<sup>327</sup> *Id.* ¶ 49.

extraterritorial jurisdiction applied to piracy. In other words, even piracy committed on the high seas must be a crime “committed within the jurisdiction” of the requesting state under the United Kingdom’s 1989 Extradition Act.<sup>328</sup>

The Court in *Abbasi* referred to *In re Tivnan*,<sup>329</sup> in which the United States sought the extradition from England of persons charged with piracy against an American ship.<sup>330</sup> The terms of the extradition treaty between the countries provided for the delivery of any person charged with certain crimes, among them piracy, committed “within the jurisdiction” of the United States.<sup>331</sup> The majority accepted the argument on behalf of the prisoners that “jurisdiction” in the treaty meant the exclusive and peculiar jurisdiction of the United States, and that as piracy *iure gentium* was triable by all states, the charge against the prisoners was thus not within the exclusive jurisdiction of the United States, and that therefore the prisoners should be discharged.<sup>332</sup>

The House of Lords considered a group of extradition crimes, namely “piracy by law of nations,” in *In re Piracy Jure Gentium*.<sup>333</sup> In its opinion, it said:

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but “*hostis humani generis*” and as such he is justiciable by any State anywhere.<sup>334</sup>

It was also emphasized in *Al-Fawwaz*:

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<sup>328</sup> Extradition Act, 1989, c. 33, § 20, sched. 1 (Eng.). The same must have applied to the equivalent provision in the 1870 Act. See Extradition Act, 1870, 33 & 34 Vict., c. 52 (Eng.).

<sup>329</sup> *In re Tivnan*, (1864) 122 Eng. Rep. 971 (Q.B.).

<sup>330</sup> *Id.* at 972.

<sup>331</sup> See *id.* at 974.

<sup>332</sup> See *id.* at 976.

<sup>333</sup> *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.) (appeal taken from H.K.).

<sup>334</sup> *Id.* at 589. It is interesting to note that the court, in arriving at this conclusion, relied on Grotius’s *De Jure Belli ac Pacis*.

[I]n the modern world of international terrorism and crime proper effect would not be given to the extradition procedures agreed upon between states if a person accused in a requesting state of an offence over which that state had extraterritorial jurisdiction (it also being an offence over which the requested State would have extraterritorial jurisdiction) could avoid extradition on the ground that the offence was not committed within the territory of the requesting state.<sup>335</sup>

There exists a maxim that a court should not construe a statute or a treaty to have a certain effect unless the wording compels it to do so. As such, the arguments advanced on behalf of alleged terrorists that “jurisdiction” means “territorial jurisdiction” had been powerfully answered by Chief Judge Cockburn in his dissenting judgment in *Tivnan*, which foreshadowed statements of the House of Lords in *Belgium v. Postlethwaite*<sup>336</sup> and *Liangsiriprasert v. Government of the United States of America*.<sup>337</sup> In *Tivnan*, Chief Judge Cockburn stated:

It is said, and with truth, that the primary and original mischief, which the statutes of extradition meant to prevent, was that of persons committing crimes in one state, and escaping beyond the reach of the law of that state, and so enjoying impunity; and it is also contended that for that purpose alone were those statutes passed. That that was their primary and principal object I entertain no doubt, but that that was the only one I entertain great doubt; for it is impossible not to see that the mischief which it is the object of all civilized states to prevent is not limited to such cases.<sup>338</sup>

The al Qaeda terrorists and other groups with similar objectives—and the contempt with which they, like pirates, are regarded by civilization—warrant that rules of international law and those of the law of war are acknowledged, adapted, and adjusted to the need of contemporary disorders. The rules on pirates appear, *mutatis mutandis*, to be admirably suited to how we should deal with the 9/11 outlaws and with others who dare to follow in their path.

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<sup>335</sup> R (Al-Fawwaz) v. Governor of Brixton Prison [2001] UKHL 69, [2002] 1 A.C. 556, 580–81 (appeal taken from Eng.).

<sup>336</sup> *Belgium v. Postlethwaite* [1988] 1 A.C. 924, 947 (P.C.) (appeal taken from Eng.).

<sup>337</sup> *Liangsiriprasert v. Gov't of the U.S.*, [1991] 1 A.C. 225, 251 (P.C.) (appeal taken from H.K.).

<sup>338</sup> *In re Tivnan*, (1864) 122 Eng. Rep. 971 (Q.B.) (Cockburn, C.J., dissenting). This dissent foreshadowed statements of the House of Lords in future cases. See *supra* notes 317–11 and accompanying text.

### *Conclusion*

There is always an important and pervading duty of a state—of its executive, of its legislature, and of its courts—to defend its citizens against attacks. This duty is clearly heightened if such attacks are of a genocidal nature. In return for the allegiance citizens pay to their state in terms of loyalty and contributions, such as taxes, dues, or military service, the state has a serious duty to protect its citizens.

If persons such as al Qaeda attack or threaten to attack citizens, the state must design a system which guarantees its citizens full security while taking every possible action to prevent attacks. If terrorists are apprehended and detained, as is now the case in Guantanamo, the state will have the right to interrogate the detainees at length because these detainees have, by their own decision not to wear uniforms, excluded themselves from any protection under the law of war. It is for the state to decide the length of detention, which might be tied to the length of hostilities.

It is patently clear that torture and degrading treatment are forbidden, that the detaining power must bring charges within a reasonable time, and that the suspected terrorists have the right to be present at their own trial. Detainees further have the right to hear all evidence except secret military evidence which might endanger the lives of others; there is a fine balance as to the extent of privileges a genocidal terrorist can demand in court procedures.

Such rights enjoyed by suspected terrorists do not come from the Geneva Conventions. The Supreme Court was wrong in law when the plurality in *Hamdan* claimed that somehow Common Article 3 should apply to terrorists in an international conflict. Instead, the suspected terrorists benefit from an *international minimum standard* which applies outside the Geneva Conventions.

The Geneva Conventions do not apply to genocidal terrorists who can derive no protection or any rights under these instruments. The duty of a detaining state under the Conventions is limited to the Martens Clause and to respecting basic minimum standards. The root of the obligation of a state with regard to the treatment of genocidal terrorists thus comes from general international law; not from “customary” law but from legal rules that are rooted in public conscience and from legal minimum standards of civilized behavior.

The Red Cross betrays its noble heritage of humanitarian work through its misguided and erroneous ideas that civilians can take up arms, operate like genocidal terrorists on an international scale, and then derive benefits under Common Article 3 of the Conventions.

The Supreme Court has a right to rely, as it did in *Hamdan*, on the ostensible authority of the Red Cross, but after its misinterpretations and distortions of international humanitarian law, the previously important NGO has lost much prestige.

By their attacks, the genocidal terrorists have changed the fabric of war. They have violated the precepts of traditional warfare and contributed to fierce reactions and international instability. It is a duty of other states in international society to ally themselves in defense, as one of the fundamental rules of international society has been violated: the duty of a solidarity of states to join in the defense of fundamental rules of international law.<sup>339</sup>

There is an essentially sound legal basis in international law to deal with “outlaws” who flaunt all normal rules of civilized behavior. The situation must be seen against the background of previous “outlaws” in international society, especially the situation when any state could apprehend pirates, as these individuals had willingly placed themselves outside the normal framework of law.

The detaining power is obliged to grant privileges to genocidal terrorists with regard to court procedure and with regard to general treatment of detainees. However, there is little ground for claiming that a state must afford such treatment under any contractual obligations under the Geneva Conventions which, as stated above, do not apply to terrorists. Nor is this treatment purely discretionary or granted *ex gratia*.

The better view is that, because the state is not obliged under the Geneva Conventions to grant privileged treatment to terrorists, it does so to comply with a legally binding international minimum standard of civilized behavior.

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<sup>339</sup> On such solidarity and duty to uphold fundamental rules, see DETTER, CONCEPT, *supra* note 6, at 124–28.