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## United States Detention Operations in Afghanistan and the Law of Armed Conflict

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## **UNITED STATES DETENTION OPERATIONS IN AFGHANISTAN AND THE LAW OF ARMED CONFLICT**

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# UNITED STATES DETENTION OPERATIONS IN AFGHANISTAN AND THE LAW OF ARMED CONFLICT

*By Matthew C. Waxman\**

## INTRODUCTION

Looking back on US and coalition detention operations in Afghanistan to date, three key issues stand out: one substantive, one procedural and one policy. The substantive matter – what are the minimum baseline treatment standards required as a matter of international law? – has clarified significantly during the course of operations there, largely as a result of the US Supreme Court’s holding in *Hamdan v. Rumsfeld*.<sup>1</sup> The procedural matter – what adjudicative processes does international law require for determining who may be detained? – eludes consensus and has become more controversial the longer the Afghan conflict continues. And the policy matter – in waging counterinsurgency warfare, how do foreign military forces transition military detention operations to effective civilian institutions? – has emerged as a critical strategic priority for which the law of armed conflict provides little instructive guidance.

After briefly outlining the basis of US and coalition detention operations, this article addresses each of these issues in turn. It concludes with some general observations about the convergence of law and strategy.

## I. OPERATION ENDURING FREEDOM AND DETENTION OPERATIONS

In late 2001, the United States launched operations in Afghanistan, and almost immediately began capturing and holding suspected enemy fighters.<sup>2</sup> The United States’ legal authority for detention operations in Afghanistan began from the propositions that:

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<sup>1</sup> *Hamdan v. Rumsfeld*, 548 *U.S.* 557 (2006).

<sup>2</sup> See T. Bowman & G. Gibson, “U.S. Still Mulling Options on POWs”, *Baltimore Sun*, Dec. 8, 2001, at A1; P. Richter, “U.S. Lays Plans for Interrogation, Trials”, *L.A. Times*, Dec. 12, 2001, at A1.

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end. Still, we may detain combatants until the end of the war.<sup>3</sup>

Although many US allies participated in military operations there, US forces took the lead in conducting detention operations in Afghanistan,<sup>4</sup> eventually consolidating theater detention operations at facilities in Bagram air force base.

As explained by a commander of US detention forces in Operation Enduring Freedom (OEF), “[d]uring the execution of this campaign, the US Armed Forces and allied forces have captured or procured the surrender of thousands of individuals believed to be members or supporters of either al Qaeda or the Taliban”.<sup>5</sup> The purpose of these detentions has been to

[prevent] them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. and coalition forces. Detention also serves as a deterrent against future attacks by denying the enemy the fighters needed to conduct war. Interrogations during detention enable the United States to gather important intelligence to prevent future attacks.<sup>6</sup>

Seven years after the initial invasion, US detention operations go on, and the US military is modernizing its facilities in the expectation of their further

<sup>3</sup> UN Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999, Addendum (United States of America) Annex 1, at 47, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), at [http://www.state.gov/g/drl/rls/45738.htm#part\\_one](http://www.state.gov/g/drl/rls/45738.htm#part_one); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-21 (2004) (recognizing the executive branch’s authority to detain enemy combatants – at least those captured in the course of operations in Afghanistan – pursuant to the congressional “Authorization for Use of Military Force” against those responsible for the September 11 attacks).

<sup>4</sup> As well as transferring several hundred detainees from Afghanistan to Guantanamo, though I do not discuss those legal issues here.

<sup>5</sup> Declaration of Colonel R.M. Miller, para. 8, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Nov. 19, 2006).

<sup>6</sup> *Id.*

continuation.<sup>7</sup> While the new Obama Administration has pledged to close Guantanamo early in its tenure, plans for continued detention operations in Afghanistan move forward.<sup>8</sup>

In some respects US and coalition detention operations in Afghanistan are a valuable case study for examining contemporary application of the law of armed conflict. Aside from the thousands of individual detentions, the “data” include publicly released and declassified documents of internal US government legal and policy decision-making, as well as litigation that has pushed the US government to clarify its legal positions and has produced judicial interpretations of the law of armed conflict.

In others respect, however, it is difficult to examine the law of armed conflict in the Afghanistan setting because of some peculiar aspects of detention operations there. First, most US allies participating in coalition operations in Afghanistan have done so not as part of anti-Taliban and Al Qaeda combat operations (Operation Enduring Freedom) but as part of the International Security Assistance Force (ISAF). The latter, which assists the Afghan government in maintaining security in certain parts of the country, is authorized by a series of Chapter VII UN Security Council resolutions that authorize participating contingents to “take all necessary measures to fulfil its mandate”.<sup>9</sup> Participating military forces therefore derive authority to detain certain captured militants from this UN Security Council mandate independent of the law of armed conflict. Additionally, US allies participating in both OEF and ISAF have almost entirely “opted out” of detention operations. In 2005, NATO adopted guidelines, which the European partners follow, calling for transferring detainees to the Afghan government within ninety-six hours of capture.<sup>10</sup> As explained further below, this has meant that US detentions form almost the only significant body of State practice in Afghanistan to measure against or help interpret the law of armed conflict related to detention.

<sup>7</sup> See E. Schmitt & T. Golden, “U.S. Planning Big New Prison in Afghanistan”, *N.Y. Times*, May 17, 2008, at A01.

<sup>8</sup> See W. Richey, “Next Flash Point over Terror Detainees: Bagram Prison”, *Christian Science Monitor*, Feb.12, 2009.

<sup>9</sup> See S.C. Res. 1707, para. 2, U.N. Doc. S/RES/1707 (Sept. 12, 2006); S.C. Res. 1386, para. 3, S/RES/1386 (Dec. 20, 2001).

<sup>10</sup> See A.S. Deeks, “Starting From Here”, in *International Law and Military Operations* (M. D. Carsten ed., 2008) (84 *US Naval War College Int’l L. Studies Series*).

## II. DETAINEE TREATMENT STANDARDS

In the early phases of military operations in Afghanistan, but especially after the Abu Ghraib crisis in Iraq, followed by gruesome disclosures of detainee abuses in Afghanistan and Guantanamo, the greatest public controversy focused on the issue of detainee treatment standards. Much of this debate centered on the appropriate classification of captured Taliban and Al Qaeda fighters, because most protagonists in this debate believed that the appropriate treatment baseline turned in part on captured individuals' legal status.<sup>11</sup>

On October 17, 2001, shortly before conventional combat operations began, US military commanders in charge of Afghanistan operations issued an order instructing that the 1949 Geneva Conventions were to be applied to all captured individuals. Belligerents would be screened according to standard doctrine to determine whether or not they were entitled to prisoner of war status.<sup>12</sup> This was consistent with existing military regulations and recent US military practice.

On February 7, 2002, however, the President determined that Taliban and Al Qaeda detainees were "unlawful combatants",<sup>13</sup> and therefore protected by neither the custodial standards of the Third Geneva Convention applicable to prisoners of war nor common Article 3 of the Geneva Conventions.<sup>14</sup> Prisoner of war protections did not cover Al Qaeda detainees

<sup>11</sup> See A. Roberts, "The Prisoner Question: If the U.S. Has Acted Lawfully, What's the Furor About?", *Washington Post*, Feb. 3, 2002, at B1.

<sup>12</sup> See J.R. Schlesinger *et al.*, *Final Report of the Independent Panel To Review Detention Operations* 80 (2004), at: [news.findlaw.com/wp/docs/dod/abughraibrpt.pdf](http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf).

<sup>13</sup> See Memorandum from G. Bush to Vice President *et al.*, "Humane Treatment of Al Qaeda and Taliban Detainees" (Feb. 7, 2002), repr. in *The Torture Papers – The Road to Abu Ghraib* 134 (K.J. Greenberg & J. Dratel eds., 2005), at: <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> [hereinafter: President's Memo].

<sup>14</sup> Art. 3 is referred to as "common" because it is found identically in each of the four 1949 Geneva Conventions. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, Art. 3, 75 *U.N.T.S.* 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949, Art. 3, 75 *U.N.T.S.* 85; Convention Relative to the Treatment of Prisoners of War, 1949, Art. 3, 75 *U.N.T.S.* 135 [hereinafter: Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War, 1949, Art. 3, 75 *U.N.T.S.* 287 [hereinafter: Geneva Convention IV]; all repr. in *Documents on the Laws of War* (A. Roberts & R. Guelff eds., 3d ed., 2000) at 197, 222, 244 and 301, respectively. Art. 3 applies to all cases "... of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .".

because Al Qaeda was not a “High Contracting Party” to the Conventions, and they did not cover Taliban because those forces failed the tests of Article 4 of the Third Convention, which stipulates requirements for legitimate military forces.<sup>15</sup> Common Article 3 did not apply, by its own terms, because this was believed to be an international armed conflict, whereas Common Article 3 rules apply in conflicts “not of an international character”.<sup>16</sup>

The President further directed in his February 2002 instructions, however, that “[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva”.<sup>17</sup> But while ostensibly protective, this directive also opened holes in the law of armed conflict’s barriers. First, it applied by its terms only to armed forces, hinting that intelligence services might not be similarly constrained. Second, by emphasizing humane treatment as a matter of policy, it suggested that humane treatment was not required as a matter of law. And third it suggested that the Geneva Conventions’ principles could validly be compromised in pursuit of security requirements.

Well known is the storm of criticism that erupted over the initial US government position that the Geneva Conventions – and, presumably, customary law of armed conflict – provided no legal guarantee of minimum detention treatment standards. Many critics have attributed detainee abuses in Afghanistan to these foundational legal decisions. Critics of the US position consistently rejected the notion that unlawful combatants fall into a “legal gap” in protection, and they asserted a range of plugs, including that captured fighters (at least Taliban) were entitled to prisoner of war status; that all captured fighters are entitled at least to minimum protections of Common Article 3, Article 75 of the first Additional Protocol to the Geneva Conventions,<sup>18</sup> and the customary law of armed conflict; and/or that any detainees are protected by international human rights law, including prohibitions on “cruel, inhuman and degrading” treatment.<sup>19</sup>

<sup>15</sup> See President’s Memo, *supra* note 13. For a contrary view, see Memorandum from W.H. Taft IV, Legal Adviser, Dep’t of State to Counsel to the President, Comments on Your Paper on the Geneva Conventions (Feb. 2, 2002), repr. in *Torture Papers*, *supra* note 13, at 129, at: [http://www.nytimes.com/packages/html/politics/20040608\\_DOC.pdf](http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf).

<sup>16</sup> See President’s Memo, *supra* note 13.

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

<sup>18</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, Art. 4, 1125 *U.N.T.S.* 4, repr. in *Documents on the Laws of War*, *supra* note 14, at 422.

<sup>19</sup> See J.B. Bellinger, US State Dep’t Legal Advisor, “Oxford Leverhulme Programme Lecture on the Changing Character of War”, (Dec.10, 2007).

In June 2006 the US Supreme Court resolved much of this debate, at least as a matter of international law incorporated into US law. It held in *Hamdan v. Rumsfeld*, a petition brought by a Yemeni detained during OEF and transferred to Guantanamo, that common Article 3 affords minimal protections to individuals captured within the territory of a signatory but engaged in a conflict not between two nations. This would include not only civil wars (as common Article 3 is more traditionally understood) but also conflicts with transnational actors like Al Qaeda.<sup>20</sup> Soon after, on July 7, 2006, the Deputy Secretary of Defense directed that “all DoD personnel adhere to [common Article 3] standards” and that each Department component “review all relevant directives, regulations, policies, practices and procedures . . . to ensure that they comply with [them]”.<sup>21</sup>

*Hamdan*’s holding that common Article 3’s minimum treatment standards apply to individuals captured in Afghanistan significantly narrowed the scope of controversy over international legal constraints on US detention operations. Common Article 3 demands that detainees “in all circumstances be treated humanely”, and it prohibits, among other things, “cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment”.<sup>22</sup> Some of these terms are vague. But they contain basic care and custody requirements that match closely the minimal treatment standards of human rights law that many critics argued applied.<sup>23</sup> While not matching the enhanced protections afforded prisoners of war, this holding nevertheless answered the criticism of those critics who argued that the Geneva Conventions contain no “gaps” in their coverage of individuals detained in armed conflict. Perhaps most important, this holding clarified that these minimal treatment standards apply as a matter of treaty law of armed conflict, not merely policy.

### III. DETENTION ADJUDICATORY PROCEDURES

The *Hamdan* holding went far in clarifying the minimal treatment standards applicable to Afghanistan detention operations, but the sparse terms of

<sup>20</sup> *Hamdan v. Rumsfeld*, *supra* note 1, at 629-31.

<sup>21</sup> Memorandum from G. England, Deputy Secretary of Defense, to the Secretaries of the Military Departments *et al.*, “Application of Common Art. 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense”, (July 7, 2006), *at*: <http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html>.

<sup>22</sup> *Supra* note 14.

<sup>23</sup> See International Committee of the Red Cross, “US Detention Related to the Fight Against Terrorism – the Role of the ICRC”, Feb. 24, 2009, *at*: <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-states-detention-faq-240209>.

common Article 3 do little to clarify the separate issue of what minimal procedural requirements govern decisions to detain or continue to detain individuals in Afghanistan.<sup>24</sup> Procedural mechanisms for reviewing detention decisions in Afghanistan have received remarkably little public scrutiny compared with those at Guantanamo, even though in many respects – at least as initially characterized by the US government – the detainees in both are similarly situated. Thus far the war in Afghanistan does more to highlight the difficult issue of procedural safeguards in the law of armed conflict than it does to answer it.

In the early phases of coalition operations in Afghanistan, much of the legal debate about procedural detention issues focused on Article 5 of the Third Geneva Convention, the Prisoner of War Convention. It provides that “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy” qualify as prisoners of war, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”.<sup>25</sup> Then, as now, however, little State practice or detailed authoritative commentary existed interpreting these terms. US military regulations called for a three officer panel that would take testimony from reasonably available witnesses, including the detainee, and make judgments.<sup>26</sup> And US military forces were preparing to conduct such tribunals for individuals captured in Afghanistan until they were directed otherwise, eventually by the President’s February 7, 2002 legal determinations which rendered any captured Taliban and Al Qaeda fighters “unlawful combatants” as a matter of law; hence there was not “any doubt” as to their status for Article 5 tribunals to adjudicate.<sup>27</sup>

Some critics contested this claim, arguing that Article 5 requires case-by-case determinations; that group designations of this sort are impermissible.<sup>28</sup> Others have argued that this provision means that when there is doubt

<sup>24</sup> Some of the sparse State practice on this issue, for example US practice during the Vietnam War and procedures employed by Canadian and British militaries, is described in R. Chesney & J. Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models”, 60 *Stanford L. Rev.* 1079, 1090-92 (2008).

<sup>25</sup> Geneva Convention III, *supra* note 14, Art 5.

<sup>26</sup> See Headquarters, Departments of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190–8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997), at: <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>.

<sup>27</sup> See K.Q. Seelye, “Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare”, *N.Y. Times*, Jan. 28, 2002, at A6.

<sup>28</sup> See M. Ratner, “Letter to the Editor, When Are Captives Prisoners of War?”, *N.Y. Times*, Jan. 16, 2002, at A18.

whether a captured individual is even an enemy fighter or not, he is entitled to a hearing before a tribunal; therefore, the argument goes, suspected Al Qaeda and Taliban combatants in US custody at Guantanamo and elsewhere should have been entitled upon capture to such review.<sup>29</sup> Article 5's language begins with the notion that a subject detainee has "committed a belligerent act", suggesting that the drafters intended to mandate minimum procedures for resolving factual doubt as to a subject's *type* of combatant or belligerent, not the prior question whether he is or is not a combatant. Nevertheless, in practice any process to adjudicate an individual's type of combatancy, and hence the Geneva protections to which he is entitled, would likely uncover some cases of mistaken identity or otherwise erroneous detentions.<sup>30</sup>

Regardless of its precise meaning, it seems quite clear that Article 5 was drafted with very different circumstances in mind than those of the Afghanistan conflict. In particular, it was intended for a conflict pitting professional armies and of limited duration.<sup>31</sup> A relatively simple front-end adjudicatory review was sufficient in such conflicts because sorting combatants from noncombatants (for detention purposes) was relatively easy and conflicts would likely end within a few months or years anyway, whereupon any remaining captives would be released. Afghanistan, by contrast, involves a set of conflicts already lasting over seven years and likely to continue many more and an enemy force (especially Al Qaeda forces, but also residual Taliban) that routinely obscures its identity among civilian populations.<sup>32</sup>

In this context, the more important issue than appropriate front-end status screening is to what form of review and perhaps adversarial process are detainees entitled to contest the factual basis of their detention, given the relatively high probability and cost of errors. Three main positions have emerged, though there are many sub-positions within each one.<sup>33</sup>

<sup>29</sup> See, e.g., W.M. Reisman, "Rasul v. Bush: A Failure to Apply International Law", 2 *J. Int'l Crim. Just.* 973 (2004).

<sup>30</sup> In the 1991 Persian Gulf War, the US military conducted about twelve hundred such hearings for captured Iraqi individuals thought to be pro-Saddam fighters, and found about nine hundred of them to be displaced civilians, who were promptly released. See Dep't of Defense, *Conduct of the Persian Gulf War Final Report to Congress* 578 (2002).

<sup>31</sup> *Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC, J.S. Pictet ed., 1960).

<sup>32</sup> See M.C. Waxman, "Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists", 108 *Columbia L. Rev.* 1365 (2008).

<sup>33</sup> For a discussion of this debate, see M. Hakimi, "International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide", 33 *Yale J. Int'l L.* 369, 389-92 (2008).

The United States has generally taken the position that the law of armed conflict is the exclusive body of international law dictating procedural constraints on detention of captured fighters in Afghanistan. This position assumes the continued existence of armed conflict (in the US view, it remains an international armed conflict, though *Hamdan* at least adds new questions to this view), and that the law of armed conflict operates as *lex specialis* displacing otherwise applicable legal norms.<sup>34</sup> Beyond consistently arguing against the reach of judicial *habeas corpus* protections to Afghanistan,<sup>35</sup> however, the US government has not articulated any clear procedural mandates imposed by the law of armed conflict for sorting out who is or is not a combatant. Instead it has preferred to maintain flexibility, relying (as explained further below) on procedural mechanisms adopted as a matter of policy.

Some human rights organizations have taken the position that, especially since the establishment of the new Afghan government following the 2002 *Loya Jirga*, international human rights law, not the law of armed conflict, governs procedural protections, along with Afghan domestic law.<sup>36</sup> This view generally assumes that the war in Afghanistan evolved from an international armed conflict to an internal armed conflict and that the law of armed conflict provides no independent authorization for detention in the latter category.<sup>37</sup> Holders of this view look to – among other sources – the 1966 International Covenant on Civil and Political Rights, which states:

<sup>34</sup> See J.B. Bellinger, US State Dep't Legal Advisor, "Remarks to the Committee Against Torture", (May 5, 2006), at: <http://www.state.gov/g/drl/rls/68557.htm>; Bellinger, *supra* note 19.

<sup>35</sup> See, e.g., Government's Motion to Dismiss, *Al Maqaleh v. Gates*, Civ. Action No. 06-CV-01669 (JDB), D.D.C., Filed Mar. 5, 2007; Government's Response to Order to Show Cause and Motion to Dismiss for Lack of Jurisdiction, *Ruzatullah v. Rumsfeld*, Civ. Action No. 06-CV-01707 (GK), filed Nov. 20, 2006, D.D.C. The Obama Administration has so far indicated it will retain this position, opposing federal *habeas* jurisdiction at Bagram. See C. Savage, "Obama Upholds Detainee Policy in Afghanistan", *N.Y. Times*, Feb. 22, 2009; N. Pickler & M. Apuzzo, "Obama Backs Bush: No Rights for Bagram Prisoners", *Assoc. Press*, Feb. 21, 2009.

<sup>36</sup> See "Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan", Human Rights First, Apr. 2008; T. Golden & D. Rohde, "Afghans Hold Secret Trials for Men That U.S. Detained", *N.Y. Times*, Apr. 10, 2008, at A6 (citing criticisms from human rights organizations).

<sup>37</sup> Human Rights Watch has taken the position that the transfer of power in Afghanistan to the Karzai government converted the conflict from an international one to a non-international one. See Human Rights Watch, *Enduring Freedom*, Mar. 7, 2004, Part IV, at: <http://www.hrw.org/en/reports/2004/03/07/enduring-freedom>.

It explains: "During a non-international armed conflict, international humanitarian law as the *lex specialis* (specialized law) takes precedence, but does not replace, human rights

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>38</sup>

Under the strictest form of this view, any long-term detention of suspected Taliban or Al Qaeda agents in Afghanistan requires criminal trial with universally-recognized due process safeguards; a standard that leaves US practice in Afghanistan falling far short.<sup>39</sup>

A third view holds that neither the law of armed conflict nor human rights treaty law provide sufficiently clear or comprehensive procedural safeguards to persons detained for security reasons. Thus, the International Committee of the Red Cross (ICRC) has developed a set of principles and safeguards that should govern security detention in all circumstances, *i.e.*, in both armed conflicts and outside of them. The guidelines are based on law of armed conflict and human rights treaty rules, as well as on non-binding standards and best practice, and are to be interpreted on a case by case basis. According to the guidelines, detainees have – among other things – the right to challenge the lawfulness of their detention and to have an independent and impartial body decide on continued detention or release.<sup>40</sup> The ICRC considers that Afghanistan is a situation of non-international armed conflict: it would argue that detainees in US or other international force hands should enjoy far more robust procedural rights than currently afforded and that detainees in Afghan custody should be granted judicial review.<sup>41</sup>

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law. . . . [W]here [international humanitarian law] is absent, vague, or inapplicable, human rights law standards still apply”. *Id.*

<sup>38</sup> International Covenant on Civil and Political Rights, 1966, Art. 9, 999 *U.N.T.S.* 171.

<sup>39</sup> See, e.g., “US Detentions in Afghanistan: An Aide-Memoire for Continued Action”, Amnesty International, June 7, 2005, *at*:

<http://www.amnesty.org/en/library/asset/AMR51/093/2005/en/dom-AMR510932005en.pdf> (“When [the] armed conflict ended [in 2002], those who were captured by the USA during hostilities . . . were required to be released, unless charged with criminal offenses. Civilians detained in that conflict . . . too were required, when that conflict ended, to be released, unless charged with recognized criminal offences”).

<sup>40</sup> See ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, Official Working Document of the 30th International Conference of the Red Cross and Red Crescent, Geneva, Nov. 2007, Annex 1; J. Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, 87 *Int’l Rev. Red Cross* 375 (2005).

<sup>41</sup> See ICRC, “US Detention Related to the Events of 11 September 2001 and Its Aftermath – The Role of the ICRC”, July 30, 2008, *at*:

The experience in Afghanistan offers intuitive support for the third approach, but it does little to resolve the difficult issue of exactly which international human rights law provisions should apply. The fact that the nature of fighting there – an enemy that deliberately obscures its identity and moves in and out of local communities – creates a high likelihood of erroneous, long-term detentions supports the call for thorough screening procedures.<sup>42</sup> But the combat conditions, resource constraints and weak state of Afghan justice would complicate efforts to establish formal judicial mechanisms by either coalition or the Afghan governments.<sup>43</sup>

Meanwhile, the US Supreme Court recently held in *Boumediene v. Bush* that enemy combatants at Guantanamo are entitled to constitutional *habeas corpus* rights.<sup>44</sup> The issue of *Boumediene*'s reach beyond Guantanamo, especially to Afghanistan, will be litigated for some time, though that case turned on interpretation and application of US domestic law. In any event, the Supreme Court did not clarify exactly what procedural structures and protections apply even in *habeas* cases for Guantanamo detainees, and the Court seemed to have Afghanistan in mind when it cautiously suggested that practical considerations and exigencies of foreign combat zones might limit the reach of constitutional *habeas* rights to enemy combatant detainees beyond Guantanamo.<sup>45</sup>

Law aside, US forces have instituted more formalized procedural mechanisms for adjudicating detention decisions as time has gone on.<sup>46</sup> The little detail on review processes in Afghanistan shared openly by the US government appears mostly in court filings in *habeas corpus* actions brought by Bagram detainees. These documents explain that by 2006 all individuals brought to theater detention facilities for long-term confinement have their cases reviewed by a five-officer panel, sitting as an Enemy Combatant Review Board, usually within seventy-five days of capture and thereafter every six months. The Review Board may recommend by a majority vote to the commanding general or his designee whether the individual should continue to be detained.<sup>47</sup> Note that while the US government maintains that

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<http://icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument>.

<sup>42</sup> See Waxman, *supra* note 32, at 1402-29.

<sup>43</sup> How much these efforts would be complicated is the source of significant debate between the US government and human rights organizations.

<sup>44</sup> 128 S. Ct. 2229 (2008).

<sup>45</sup> See *ibid.*, at 2259-62.

<sup>46</sup> For a general discussion of how enemy combatant adjudications have evolved during the course of the "Global War on Terrorism", see Chesney & Goldsmith, *supra* note 24.

<sup>47</sup> See Declaration of Col. J.W. Gray, para. 11-13, *Al Maqaleh v. Gates*, No. 06-CV-01669 (JDB) (D.D.C. Mar. 3, 2007)(discussing review process for detainees in Afghanistan); Declaration of Col. R.M. Miller, para. 10-12, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707

the Fourth Geneva Convention is inapplicable as a matter of law to Afghanistan detainees because that Convention applies to civilians, not combatants, the processes US forces eventually put in place roughly track the requirements of Article 78, which calls for, among other things, regular processes and periodic review (at least every six months) for security internees.<sup>48</sup>

So far, then, the Afghanistan case has produced little legal consensus on minimum procedural requirements in part because the spectrum of views span differing judgments on such basic questions as what type of conflict exists (international versus internal), what body of law applies (law of armed conflict versus human rights law versus domestic Afghan law, or some combination), and what specific minimum requirements those bodies of law impose (mandatory provisions versus a sliding scale depending on practicability). Meanwhile, US forces have adopted increasingly robust processes for adjudicating cases, suggesting at least a *partial* – though still far from complete – convergence between the aspirations of restrictive legal views and the pragmatic and ethical tendencies of those charged with waging the conflict.

#### IV. TRANSITIONING DETENTION OPERATIONS TO CIVILIAN INSTITUTIONS

A final issue to consider is the transition from a military detention to civilian criminal justice system in Afghanistan. Unlike the substantive and procedural standards issues discussed above, this is not a law of armed conflict issue in a strict sense (except for Geneva Convention rules governing repatriation). But it is entwined with the other legal issues, and the strategic necessity of resolving it effectively has implications for the future development of the law of armed conflict.

The law of armed conflict is generally understood as designed to minimize unnecessary suffering in wartime and to facilitate a return to peace and public order. In the context of conventional warfare, the law of armed conflict's detention authorities and rules generally serve well these goals: until order is restored through victory or settlement of the conflict they allow – with reduced procedural requirements compared to peacetime justice systems – the incapacitation of captured individuals presumed (or assessed) likely to fight again if released and they protect those individuals from

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(GK) (D.D.C. Nov. 19, 2006) (discussing detention procedures and review process for enemy combatants detained in Afghanistan).

<sup>48</sup> See Geneva Convention IV, *supra* note 14, Art. 78.

mistreatment. For the most part, the rules align with the law's policy objectives, including the strategic necessities of detention during combat.

US detention operations have taken place in Afghanistan amid a different and more complex strategic environment. Operations have evolved to include a major counterinsurgency component against Taliban and al Qaeda forces conducting guerrilla-style and terrorist operations aimed to undermine the new Afghan government. Of course, the role and rules of detention in counterinsurgency conflicts is not a new problem or unique problem. One aspect that distinguishes the Afghanistan case, however, is the weakness or embryonic condition of State institutions, including law and order systems, which needed to be almost completely reconstituted after coalition and Afghan forces overthrew the Taliban in 2001. Indeed, the collapse or weakness of governance in many parts of the country and the inability of the State to provide basic State services like policing and criminal justice creates an environment hospitable to insurgent forces.<sup>49</sup> Moreover, the Afghan government lacks effective institutions of governance, including a police and justice sector capable of maintaining order. This is not just a counterinsurgency campaign to save a mature government but a counterinsurgency campaign while building a new government in a region long accustomed to warlordism.

Against this backdrop, 2004 Pentagon inspection and assessment of US detention operations in Afghanistan concluded that "US detainee operations can only be normalized by the emergence of an Afghan justice and corrections system that can assume the responsibility for the long-term detention of low level enemy combatants currently held by the US".<sup>50</sup> The report continued:

The value of continuing to keep low-level enemy combatants in custody is simply to keep individuals that represent a proven threat to coalition forces off the battlefield. This is a function that can and should be undertaken by the Afghan government. . . . Despite efforts to improve the process, the press of a growing detainee population without an Afghan solution or continued transfer to GTMO will continue to create the potential for bad choices to be made at several points in that process.<sup>51</sup>

In 2005 the governments of the United States and Afghanistan reached diplomatic agreements to "allow for the gradual transfer of Afghan detainees

<sup>49</sup> See S.G. Jones, "The Rise of Afghanistan's Insurgency", 32 *Int'l Security* 7 (2008).

<sup>50</sup> Combined Forces Command-Afghanistan Area of Operations, Detainee Operations, Report of Inspection, June 26, 2004, at 20.

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

to the exclusive custody and control of the Afghan Government”.<sup>52</sup> But this gradual transition has been slowed since then by the shakiness of Afghan security institutions and inability to put in place domestic legal authorities and processes capable of handling or prosecuting captured militants.<sup>53</sup>

These contextual factors raise several policy questions onto which the law of armed conflict no longer maps so neatly: does the long-term reliance on military detention strengthen versus deplete or build versus undermine public confidence in parallel civilian justice institutions? As coalition forces turn over more and more security and governance functions to Afghan authorities, how should responsibility for detaining militants, including those already in custody, be transferred? Many features of this conflict are unique to Afghanistan, but these basic problems could likely recur in other areas where governance collapses, such as Somalia.

One set of the lessons that the US military appears to have drawn in Afghanistan, as well as Iraq, is the strategic imperative of high substantive and procedural standards of detainee treatment, especially when seeking to bolster rule of law institutions.<sup>54</sup> The Army and Marine Corps’ new *Counterinsurgency Field Manual* emphasizes these principles, not only for legal and ethical reasons, but also for military effectiveness.<sup>55</sup> After noting, for example, that the “nature of [counterinsurgency] operations sometimes makes it difficult to separate potential detainees from innocent bystanders, since insurgents lack distinctive uniforms and deliberately mingle with the local populace”,<sup>56</sup> the Manual goes on to warn that “treating a civilian like an insurgent is a sure recipe for failure”.<sup>57</sup> It continues:

[Counterinsurgency] operations strive to restore order, the rule of law, and civil procedures to the authority of the [host nation] government. . . . Multinational and U.S. forces brought in to support this objective must remember that the populace will scrutinize their actions. People will watch to see if Soldiers and Marines stay consistent with this avowed

<sup>52</sup> Press Release, US Embassy, Kabul, Afghanistan, “Detainee Transfers to Afghanistan”, Aug. 4, 2005, at: <http://kabul.usembassy.gov/pr080405.html>.

<sup>53</sup> See Human Rights First, *supra* note 36; Schmitt & Golden, *supra* note 7.

<sup>54</sup> See C. Gall, “U.S.-Afghan Foray Reveals Friction on Antirebel Raids”, *New York Times*, July 3, 2006, at A9; A. Rubin, “U.S. Remakes Jails in Iraq, but Gains Are at Risk”, *N.Y. Times*, June 2, 2008 at A1.

<sup>55</sup> Headquarters, Dep’t of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, *Counterinsurgency*, paras. 7-38, 7-40 (2006).

<sup>56</sup> *Ibid.*, paras. 7-38

<sup>57</sup> *Ibid.*, paras. 7-40.

purpose. Inconsistent actions furnish insurgents with valuable issues for manipulation and propaganda.<sup>58</sup>

While the law of armed conflict has little to say directly on the issue of transferring detention responsibilities from military to civilian systems, the substantive and procedural legal issues described earlier indirectly relate to this transition process insofar as adherence to their standards helps lay a foundation of support and legitimacy upon which rule of law can be built.

### CONCLUSION

These military doctrinal emphases on detention standards imply several conclusions about the future development and refinement of the law of armed conflict, bringing the discussion back to the legal controversies discussed earlier. As to substantive treatment standards, the strategic rationale is likely to further reinforce the idea of universally applicable minimum requirements, despite initial efforts by the Bush administration to reserve greater flexibility. As to procedural requirements, in thinking about the future trajectory of the law of armed conflict (or the application of human rights law in armed conflict), the more that rule-of-law promotion features as a strategic objective the more robust procedural protections for detainees will align with military necessity, rather than collide with it. While this convergence is unlikely to produce legal consensus anytime soon, it narrows the debate and allows for more constructive dialogue between competing schools of legal thought.

<sup>58</sup> *Ibid.*, paras. 8-42.