

DEVELOPMENTS

Legal Issues in the “War on Terrorism” - Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger

*By Gabor Rona**

A. Introduction

It is an irony of our times. The 9/11 attacks catapulted international humanitarian law (IHL) – otherwise known as the “laws of war” or the “law of armed conflict” – into popular conversation as never before. Who ever heard of Common Article 3 before the U.S. invasion of Afghanistan? Can anyone recall arguing about the criteria for prisoner of war status before the Taliban and al Qaeda? Was anyone parsing the difference between civilian trials, courts martial and military commissions before Abu Ghraib and Guantanamo?

And yet, humanitarian law, human rights law and the humanitarian purposes they are meant to serve have since suffered. The cause of this suffering can largely be laid to another irony. While the Nazis, Pol Pot, Slobodan Milosevic and the Janjaweed may have the blood of millions on their hands, their brutality actually helped promote, crystallize and expand the reach of human rights and humanitarian law. Their atrocities encouraged the establishment of new treaties, monitoring mechanisms, judicial bodies and jurisprudence - an expanding web of international human rights protection and accountability.

The United States is, both thankfully and regrettably, different. Thankfully, it has no Janjaweed, no Milosevic, no Pol Pot. And America takes pride in its adherence to the rule of law – but regrettably, not so much as to obey it. Rather, the lawyers serving the American leadership have constructed a house of cards in a Potemkin village of legalisms to convince Americans, if not themselves, that “enhanced interrogation techniques,” “extraordinary rendition,” secret detention, military commission trials and the acceptance of “diplomatic assurances” from brutal states

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that they will not torture people America sends there to be detained and interrogated are perfectly consistent, thank you, with America's international legal obligations. And though the "torture memos," which counseled how the President can execute his constitutional duties by violating the Constitution have been rescinded (because they were leaked) secret memos continue to lurk. Attorney General Mukasey's continued inability to say that waterboarding is torture is a virtual reprise of the Yoo/Bybee standard that is no standard.¹ Talk about lawfare!²

To its credit, the U.S. Department of State, and to his credit, State Department Legal Advisor John Bellinger, have worked overtime while being paid with insults and marginalization from many quarters for their attempts to bridge chasms. They are smacked from within the administration and its American right-wing base for trying to curb the worst American excesses. Meanwhile, they are greeted with polite skepticism by America's European allies, and less politely by others as defenders of the indefensible.

But here's the rub. While those of us who prefer the view from the "reality based community"³ should count Mr. Bellinger one of our own, there's simply too much

¹ Judge Bybee is credited with having suggested that an act isn't torture unless the pain inflicted is "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A* (Aug. 1, 2002). Available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf. Professor Yoo contemporaneously opined that neither U.S. law nor U.S. obligations under the Convention against Torture impede the use of certain interrogation methods against "captured Al Qaida operatives." See John Yoo, Letter to Alberto Gonzales (Aug. 1, 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102ltr.html>. Bybee and Yoo were both members of the U.S. Department of Justice, Office of Legal Counsel when these opinions were rendered.

² The term "lawfare" has been used to criticize the invocation of legal mechanisms to assert rights relating to detention, treatment and trial. See, e.g., Rivkin and Casey, *Lawfare* (February 23, 2007), <http://online.wsj.com/article/SB117220137149816987.html>; and John Yoo, *Terror Suspects are Waging 'Lawfare' on U.S.*, (Jan. 16, 2008), http://www.philly.com/inquirer/opinion/20080116_Terror_suspects_are_waging_lawfare_on_U_S_.html. These critics seem to posit that while the administration can and must assert the law in defense of its practices, others who do so thereby give aid and comfort to the enemy. They also assume that any legal challenge to practices that the administration considers to be in the context of the "war on terror" is "lawfare," regardless of whether or not the specific case arises in a situation of armed conflict. A more nuanced analysis of the concept is offered by Maj. Gen. Charles J. Dunlap, Jr., Deputy JAG, USAF. See Charles J. Dunlap, Jr., *Lawfare and Warfare*, http://www.cspanarchives.org/library/index.php?main_page=product_video_info&products_id=202362-3.

³ Journalist Ron Suskin describes a meeting with a senior advisor to President Bush in the summer of 2002: "The aide said that guys like me were 'in what we call the reality-based community,' which he defined as people who 'believe that solutions emerge from your judicious study of discernible reality.' I nodded and murmured something about enlightenment principles and empiricism. He cut me off. 'That's not the way the world really works anymore,' he continued. 'We're an empire now, and when we

at stake in the purposes that human rights and humanitarian law are meant to serve to let the errors of his vision pass unremarked out of respect for his heroic efforts. Although torture as official policy will hopefully fade with the installment of a new administration in 2009, complex questions of detention powers, detainee status, and fair trial rights will remain. I hope, therefore, that my contribution to the fruitful dialogue that unfolded between Mr. Bellinger and Silja Voenekey in previous issues of the *German Law Journal* will be taken not as lack of gratitude for Mr. Bellinger's efforts, but rather, as useful in the service of a debate that will continue beyond the Bush era.⁴

Before diving into the several disagreements I have with Mr. Bellinger's views, a word is in order about the purposes served by human rights and humanitarian law. As concerns the former, no one has ever said it more succinctly than my mentor, Columbia Law Professor Lou Henkin. The purpose of human rights law, he taught me, is to protect and promote human dignity. The governments, including the United States, that laboriously negotiated the details, including the Universal Declaration of Human Rights⁵ and the International Covenant on Civil and Political Rights,⁶ surely understood that they were enhancing human security by establishing principles and rules to protect human dignity and liberty.

act, we create our own reality. And while you're studying that reality -- judiciously, as you will -- we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do." Ron Suskin, *Faith, Certainty and the Presidency of George W. Bush*, NEW YORK TIMES, October 17, 2004, at <http://www.nytimes.com/2004/10/17/magazine/17BUSH.html>.

⁴ In the years since 9/11, U.S. State Department Legal Advisor John Bellinger has participated in numerous public panels and roundtable discussions and has engaged in private discussions with European Union and Council of Europe legal advisors, defending U.S. interpretations of international human rights and humanitarian law and its practices and policies in the fight against international terrorism. See, John B. Bellinger III, *Legal Issues in the War on Terrorism*, 8 GERMAN L. J. 735 (2007), at http://www.germanlawjournal.com/pdf/Vol08No07/PDF_Vol_08_No_07_735-746_Developments_Bellinger.pdf. Dr. Voenekey, Head of the Independent Junior Research Group, Max Plank Institute of Public International Law, Heidelberg, Germany, replied to Mr. Bellinger's remarks, see Silja N.U. Voenekey, *Response - The Fight against Terrorism and the Rules of International Law - Comment on Papers and Speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department*, 8 GERMAN L. J. 747 (2007), at http://www.germanlawjournal.com/pdf/Vol08No07/PDF_Vol_08_No_07_747-760_Developments_Voenekey.pdf. Mr. Bellinger, in turn, responded. See John B. Bellinger III, *Legal Issues in the War on Terrorism - Reply to Silja N.U. Voenekey*, 8 GERMAN L. J. 871 (2007), at <http://www.germanlawjournal.com/print.php?id=856>.

⁵ G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁶ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

As concerns humanitarian law, its drafters also understood that, so long as war could not be abolished, it must be made as humane as possible, while preserving the right of states to use force in defense of their essential national interests. The organizing principle of IHL – the principle of distinction (combatants may be targeted, civilians who take no part in hostilities may not) – is at least as old as the chivalric codes of the Middle Ages.⁷ Christian theologians, including St. Augustine and Thomas Aquinas counseled that imposition of unnecessary suffering feeds the cycle of violence.⁸ In the 18th and early 19th centuries, scholars and philosophers including Vattel, Rousseau and Kant advocated these principles.⁹ These concepts were not borne of pure charity toward the enemy, but rather, out of an expectation of reciprocity and of expedience in the service of national security. With this in mind, the international community began codifying laws of war a century and a half ago. In doing so, they also hit upon the notion of the famous Maartens Clause contained in the Preamble to the 1899 Hague Convention, which established that international humanitarian law could be based on customary as well as codified law:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.¹⁰

There's a straight line from the Maartens Clause to the observation in the International Committee of the Red Cross's respected Commentary to the Geneva Conventions "that the Conventions deal with superior interests—the safeguarding of

⁷ David Bosco, *Moral Principle vs. Military Necessity*, THE AMERICAN SCHOLAR (2007), at <http://www.theamericanscholar.org/wi08/codes-bosco.html>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Preamble, 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (*reprinted in* A. ROBERTS AND R. GUELF, DOCUMENTS ON THE LAWS OF WAR 45 (2nd ed. 1989)). *See, The Maartens Clause and the Laws of Armed Conflict*, 317 IRRC 125-134 (1997), at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jnhy?opendocument>.

the lives and dignity of human beings...”¹¹ It is in the service of these “superior interests” that the application and rules of the laws of armed conflict must be interpreted.

The theme of good faith in interpretation of treaties in accordance with their purposes runs from the Vienna Conventions¹² to the recent U.S. Counterinsurgency Manual’s¹³ accompanying Rule of Law Handbook:

in light of the need to establish legitimacy of the rule of law among the host nation’s populace, conduct by US forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations.¹⁴

With these reminders of the purposes of human rights and humanitarian law in mind, and further, considering the interpretive bias toward protection of individual rights and dignity that they are meant to suggest, I turn to Mr. Bellinger’s recent comments.

B. Legal Status of Taliban Detainees

Mr. Bellinger asserts that the United States was within its rights to deny prisoner of war (PoW) status to Taliban detainees even while conceding that the conflict in Afghanistan was international and, thus, covered by the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC III). His argument is that the Taliban were merely the most powerful of rival armies and that “it is not clear that they ever rose to the level of the official armed forces of Afghanistan entitled to protection under Article 4(A)1” of GC III.¹⁵

¹¹ Pictet, *Introduction*, in I COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, p. 12 (International Committee of the Red Cross, 1952).

¹² Art. 26, Vienna Convention on the Law of Treaties: “*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

¹³ U.S. ARMY AND MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL (U.S. Army Field Manual No. 3-24; Marine Corps Warfighting Publication No. 3-33.5) (2007).

¹⁴ RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (V. Tasikas, T. B. Nachbar, and C. R. Oleszycki, eds., 2007).

¹⁵ John B. Bellinger III, *Legal Issues in the War on Terrorism – Reply to Silja N.U. Voenny*, *supra* note 4.

First, it is inconsistent to acknowledge that the conflict was international, meaning, between two or more High Contracting Parties to the Geneva Conventions,¹⁶ but then to effectively deny that there was an opposing state party. The US did not seriously contest the Taliban's hold on Afghani sovereignty, and as such, has no basis to deny that Taliban forces were then the armed forces of Afghanistan.¹⁷

Second, Mr. Bellinger claims that the Taliban were "better conceptualized as a militia belonging to a party to the conflict,"¹⁸ and thus, their entitlement to PoW status is determined under Article 4(A)2 of GC III, not 4(A)1. This is a misapplication of Article 4(A)2 for the reason mentioned above. If no armed group, including the Taliban, amounted to *the* armed forces of Afghanistan, in other words, if Afghanistan was a failed state in which no entity could be identified as the repository of state sovereignty, then neither could the conflict be considered international and no armed group would then "belong to a party to the conflict" as that term is understood in GC III Article 4(A)2. In short, Mr. Bellinger's assertion of Article 4(A)2 is inconsistent with his reasons for denying application of Article 4(A)1.

Third, even assuming application of GC III Article 4(A)2, and that it requires more than does Article 4(A)1,¹⁹ a procedure is clearly set out in GC III, Article 5 in cases of doubt: entitlement to PoW status is to be determined by a "competent tribunal." The president, who made the decision that Taliban members were not entitled to

¹⁶ See, Article 2, common of Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317; and of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516.

¹⁷ On November 10, 2001, President Bush clearly stated the U.S. view in a speech to the U.N. General Assembly: The United States will work closely with the United Nations and development banks to reconstruct Afghanistan after hostilities there have ceased and the Taliban are no longer in control. <http://www.september11news.com/PresidentBushUN.htm>. The Security Council likewise understood Afghanistan to be largely under Taliban control prior to the Taliban's overthrow following the terrorist attacks of September 11, 2001. Resolution 1363 of July 30, 2001 strengthens the enforcement of UN sanctions imposed on the Taliban authorities in Afghanistan and establishes a body to report back to the Council on the Taliban's compliance with sanctions. http://en.wikisource.org/wiki/United_Nations_Security_Council_Resolution_1363.

¹⁸ See *supra* note 15.

¹⁹ The four criteria for PoW status under GC III Article 4(A)2 are: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly, and; (d) that of conducting their operations in accordance with the laws and customs of war. Experts disagree on whether these criteria are also implicitly part of Article 4(A)1 and whether they are individual or group requirements. See, e.g., JENNIFER ELSEA, CRS REPORT FOR CONGRESS, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM, (updated January 13, 2005), at <http://www.fas.org/irp/crs/RL31367.pdf>.

PoW status,²⁰ is not a tribunal. This much was determined by a U.S. District Court in one of the first challenges to Guantanamo detention.²¹

While Mr. Bellinger correctly identifies the criteria of GC III Article 4(A)2, his application of them is questionable. As for the requirement of distinguishing oneself from the civilian population, Mr. Bellinger claims that news reports "from the Allied invasion" indicate that the Taliban dressed like civilians. A closer look at the evidence would show that the Taliban wore a distinctive black headdress not used by civilians.²² This is not to suggest that PoW entitlement is clear. It is, however, a perfect example of why GC III requires individualized determinations by a "competent tribunal" in cases of doubt.

Another requirement of GC III Article 4(A)2 that the Taliban fail to meet, according to Mr. Bellinger, is that of observing the laws and customs of war. He cites allegations of targeting civilians and resort to suicide bombings. Indeed, these are serious war crimes. But reasonable scholars differ over whether they disqualify just the individuals who commit them or the entire entity of which they are a part.²³ In any case, it cannot be that some violations by some members of the armed forces disqualify all from PoW status. Were that the case, no U.S. military personnel would ever qualify for PoW status, so long as some "special forces" operated out of uniform or some soldiers abused detainees, especially if done systematically, i.e., pursuant to policy.

Fourth, another aspect of GC III Article 5 is the requirement that detainees are to be treated as PoWs unless and until a competent tribunal decides otherwise. For a long time, Guantanamo detainees had no status determination. In response to U.S. Supreme Court decisions regarding challenges to detention at Guantanamo,²⁴ Combatant Status Review Tribunals (CSRTs) were established.²⁵ The government

²⁰ *Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*; <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

²¹ *Hamdan v. Rumsfeld*, Civil Action No. 04-1519 (JR) United States Court For the District of Columbia, Memorandum Opinion, November 8, 2004, p. 18.

²² See, e.g., Transcript of November 27, 2001 broadcast, Jim Clancy, CNN Correspondent: "Seven Taliban fighters with their distinctive black headdress tried to get into Pakistan but were forced back." <http://transcripts.cnn.com/TRANSCRIPTS/0111/27/nr.00.html>.

²³ See ELSEA, *supra* note 19.

²⁴ See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁵ See, Department of Defense (DoD) Press Release, *Combatant Status Review Tribunal Order Issues*, (June 7, 2004), <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

has argued that the CSRT process “clearly discharges any obligation under Article 5.”²⁶ Navy Secretary Gordon England declared CSRTs to go “beyond” the regulations implementing Article 5.²⁷ Some have described the CSRTs as “article 5 tribunals on steroids.”²⁸ But it is an inescapable fact that CSRTs have no role in determining whether a detainee is or is not a PoW. Instead, they are charged with determining whether or not the detainee is an “enemy combatant,” a status that does not exist in IHL. To the extent that CSRTs are used in lieu of Article 5 tribunals, detainees in international armed conflict are being deprived of their right to determination of entitlement to PoW status and to be treated as PoWs pending a determination.

C. Common Article 3

While Mr. Bellinger concedes the application of Common Article 3 (CA 3) to U.S. detainee operations, much mischief remains in what is left unsaid. For example, although he notes that the President expressly ordered application of CA 3 to the CIA,²⁹ he fails to mention that so-called “enhanced interrogation techniques”³⁰ are

²⁶ See, Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE LAW JOURNAL 667 (2006), available at SSRN: <http://ssrn.com/abstract=972356> (quoting Brief for the Respondents at 42 n.18); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

²⁷ Gordon England, Sec’y of the Navy, Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), <http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html> (“Justice O’Connor . . . said [in *Hamdi v. Rumsfeld*] that one of the remedies she felt was to have a process like Army Regulation 190-8 [implementing Article 5]. So we have implemented that for all of the detainees. And as I said before, we’ve actually gone beyond that.”).

²⁸ See, Joseph Blocher, *The Guantanamo Three-Step*, available at <http://yalelawjournal.org/2007/07/04/blocher.html>.

²⁹ See Sec. 3(a) of *Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, July 20, 2007. “I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section.” <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

³⁰ The term “enhanced” distinguishes techniques such as water-boarding (mock drowning), exposure to extreme cold (including induced hypothermia), stress positions, extreme sensory deprivation and overload, shaking, striking, prolonged sleep deprivation, and isolation, among others that were authorized in March 2002 for use by the CIA, from more humane techniques detailed in the Army Field Manual and permitted for use against persons in Department of Defense custody. See, Detainee Treatment Act of 2005, 42 U.S.C.S § 2000dd (2006). See also, *Leave No Marks: ‘Enhanced’ Interrogation Techniques and the Risk of Criminality: A Report by Human Rights First and Physicians for Human Rights*, July 2007, available at http://www.humanrightsfirst.org/us_law/etn/nomarks/exec-summary.asp#_ftn4. See also, Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC News Online, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

considered by the Administration to be within the "humane treatment" provision of the Article.³¹ He finds no cause to mention that the use of such techniques has been prosecuted as war crimes³² and that waterboarding, at least, would be considered torture by no less than the U.S. Attorney General and the Director of National Intelligence if committed on them!³³ He also fails to mention the government's position that even what is commonly understood outside the U.S. to be prohibited treatment under CA 3 may escape prohibition due to a conveniently flexible reading by the U.S. of its obligations under the Torture Convention.³⁴

³¹ See, e.g., Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at <http://www.washingtonpost.com/ac2/wp-dyn/A8534-2004Jun26?language=printer> (According to the *Washington Post* article, the enhanced interrogation techniques were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders, and required the authorization of CIA Director George J. Tenet for use).

³² In 1947, the United States prosecuted a Japanese military officer, Yukio Asano, for waterboarding a U.S. civilian during World War II. Yukio Asano received a sentence of 15 years of hard labor. See, Walter Pincus, *Waterboarding Historically Controversial; In 1947, the U.S. Called It a War Crime; in 1968, It Reportedly Caused an Investigation*, WASHINGTON POST, October 5, 2006, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>. The charges against Asano also included "beating using hands, fists, club; kicking; burning using cigarettes; strapping on a stretcher head downward." http://socrates.berkeley.edu/~warcrime/Japan/Yokohama/Reviews/Yokohama_Review_Asano.htm. Charges of torture as a war crime were also brought in a post-WW II tribunal in Norway for the use of "verschärfte Vernehmung" (enhanced interrogation) techniques, including induced hypothermia. See, Case No. 12 - Trial of Kriminalsekreter Richard Wilhelm Hermann Bruns and two others by the Eidsivating Lagmannsrett and the Supreme Court of Norway, 20th March and 3d July, 1946. <http://www.ess.uwe.ac.uk/WCC/bruns.htm>.

³³ See, David Stout, *Mukasey Demurs on Waterboarding*, NY TIMES, January 30, 2008, at <http://www.nytimes.com/2008/01/30/washington/30cnd-mukasey.html?partner=rssnyt&emc=rss> ("So let me ask you this, Mr. Kennedy said. 'Would waterboarding be torture if it was done to you?' 'I would feel that it was,' Mr. Mukasey said."); Lawrence Wright, *The Spymaster: Can Mike McConnell fix America's intelligence community?* THE NEW YORKER, January 21, 2008, at http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright?currentPage=1 ("For him, he said, 'waterboarding would be excruciating. If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me it would be torture.'")

³⁴ The U.S. is a party to The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51, (1984). http://www.unhchr.ch/html/menu3/b/h_cat39.htm. In addition to torture, the Convention prohibits "in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment (CID) or punishment which do not amount to torture." The U.S. ratification of the Torture Convention was accompanied by a Reservation stating that the U.S. understands the phrase "CID" to mean conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments. See, <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>. The Eighth bans cruel and unusual punishments, the Fifth, as interpreted by the Supreme Court, bans official conduct that "shocks the conscience," and the Fourteenth applies these to the states. Prof. David Luban explains that "(The Justice Department's Office of Legal Counsel) looped this definition of CID in two ways. First, it seized on the fact that the (Supreme) Court has held that the Fifth and Eighth Amendments apply only within U.S. territory. Ergo, nothing outside U.S. territory can possibly count as CID." The second loophole, according to Prof. Luban, stems from the government's misguided interpretation of the

Mr. Bellinger goes on to note that CA 3 does not require detainees in non-international armed conflict to be granted *habeas corpus* review of their detention and treatment. This is both true and misleading. It is true because CA 3 says nothing about the right to challenge detention. It is misleading because of a general understanding, contrary to the apparent U.S. position, that domestic law, as tempered by international human rights obligations, including the right to challenge detention in a court, continues to apply in situations of non-international armed conflict.³⁵ It therefore makes absolute sense that CA 3 would not enumerate detainee rights that apply by virtue of the operation of domestic criminal and international human rights law.

The logic of this understanding becomes apparent with a review of the distinction between the law of international and non-international armed conflict. IHL generally addresses conduct of hostilities and protection of persons in the power of

Supreme Court's statement that the "shocks the conscience" standard applies "only the most egregious conduct," such as "conduct intended to injure in some way unjustifiable by any government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998). Obviously, (in the government's view) interrogation of detainees is justifiable by a government interest. If so, it doesn't shock the conscience, doesn't violate the Fifth Amendment, and therefore doesn't count as cruel, inhuman or degrading." See David Luban, *Were You Really Surprised?* Balkinization, October 5, 2007. <http://balkin.blogspot.com/2007/10/were-you-really-surprised.html>.

³⁵ Mr. Bellinger only concedes the application of human rights law to armed conflict occurring on one's own territory. See *supra* note 15. But the continued applicability of international human rights law in non-international armed conflict more generally has been recognized in the preamble of Additional Protocol II to the Geneva Conventions: "Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person . . .". Other authorities in support of the continued application of human rights law in armed conflict include The International Court of Justice (see, ICJ), *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, 1996 (July 8) and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 (July 9)); The Human Rights Committee (see, General Comment 29, *States of Emergency* (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 3) and General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/74/CRP.4/Rev. 6, April 21, 2004); The Committee on Economic, Social and Cultural Rights (see, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69); The International Criminal Tribunal for the former Yugoslavia (see, *Prosecutor v. Furundzija*, No. IT-95-17/i-T, Judgment, Para. 183 (Dec. 10, 1998), reprinted in 38 ILM 317 (1999)); The Inter-American Commission on Human Rights (see, *Coard et al v. United States*, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, para. 38). Amongst others, see L. Doswald-Beck and S. Vité, *International Humanitarian Law and Human Rights Law*, 75 INTERNATIONAL REVIEW OF THE RED CROSS 94 (No. 293, March-April 1993); R.E. Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 69-110 (1998); R. PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); H. Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 798 (No. 856, December 2004).

the enemy. In the IHL of international armed conflict, this includes questions about targeting, the right to detain and to challenge detention, treatment of detainees and trial of detainees. The IHL of non-international armed conflict also addresses these questions, with one exception. CA 3, as Mr. Bellinger notes, is silent on the question of detention challenges. Here's why. International armed conflict features the armies of opposing sovereigns who are immune from domestic criminal law for their mere participation in hostilities. In non-international armed conflict (namely any armed conflict that does not feature State A in conflict with State B, whether involving a rebel group against a State, rebel groups against each other, or even State against a transnational armed group) those who take up arms against the State are not privileged belligerents, but rather, mere criminals. CA 3's silence on the question of detention challenges cannot be taken as evidence of its permission to withhold *habeas corpus* review. Instead, it is evidence of what the drafters took for granted: that detainees would not only be subject to, but would enjoy the protections of, other applicable legal frameworks, such as criminal law and human rights law. One such protection, not available to persons detained in international armed conflict and covered by GCs III and IV, is the right to challenge detention in a court, as per Article 9.4 of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party.³⁶

Mr. Bellinger defends the substitution of CSRTs for ordinary *habeas corpus* review in the U.S. courts by noting that "never in our nation's history have alien enemy combatants detained overseas been given the right to habeas corpus."³⁷ Again, even if this is true it is misleading. The hole in this claim's application to present circumstances lies in the government's bait-and-switch use of the term "enemy combatant," discussed below.

D. Combatant? Enemy Combatant? Unlawful Combatant? Civilian?

I. Scope of Application of the Term "Enemy Combatant"

The first logical assumption to be drawn from Mr. Bellinger's comment about *habeas corpus* review being denied to enemy combatants is that the "enemy combatant" tag applies only to persons detained in conjunction with armed conflict (war). But the U.S. does not limit its definition of enemy combatant, or for that matter, its assertion of the laws of war, to persons detained in war, such as the hostilities in Afghanistan and Iraq. Rather, it appears to claim that the laws of war and thus, the right to detain "combatants," apply throughout the "global war on terror" (or "long

³⁶ See *supra* note 6.

³⁷ See *supra* note 15.

war,” or war against Al Qaeda and its supporters), whether or not manifested in armed conflict.³⁸ The U.S. claims that it may avail itself of the prerogatives of the laws of war anywhere and everywhere until this “war” is won, despite the fact that hostilities may not rise to the level of armed conflict and that neither the enemy, nor the locus of the conflict, nor the components of victory can be defined.³⁹ Curiously, the U.S. has been less expansive about applying commensurate international humanitarian law obligations of humane treatment and fair trial for detainees.⁴⁰

Commentators have argued that the post-9/11 congressional Authorization for the Use of Military Force (AUMF), the like-minded NATO invocation of its mutual assistance provisions, and Al Qaida’s various declarations of war against the U.S. amount to proof of an armed conflict.⁴¹ This is a classic case of confusion between *jus ad bellum* (the law pertaining to the right to use force in international relations) and *jus in bello* (the laws applicable to conduct of war). Neither the right to use force, nor even a declaration of war, establishes the existence of war and the commensurate application of the laws of war. Facts on the ground do. And IHL does not apply, and there are no “enemy combatants,” outside of war.

II. International Law Definition and Consequences of Being an “Enemy Combatant” vs. Civilian in Armed Conflict

Only once the fact of armed conflict is established is it appropriate and necessary to ask: “Who is an enemy combatant?” I prefer to start with the laws-of-war concept of combatant as someone who possesses a “combatant’s privilege,” or, something akin to a license-to-kill in war. This would include members of the armed forces. Thus, the other term used by the U.S. administration, “unlawful combatant,” is an oxymoron, while the term “lawful combatant” is redundant. A combatant is immune from criminal responsibility for lawful acts of belligerency, but may be prosecuted for war crimes such as targeting civilians or using prohibited means of

³⁸ Mr. Bellinger asserts that the U.S. is at war against ‘Al-Qaeda, its supporters and affiliates.’ See, statement by Mr. Bellinger at a session of the UN Committee against Torture attended by the author on May 8, 2006 at which the Committee reviewed the U.S.’s Second Periodic Report to the Committee, <http://www.ohchr.org/english/bodies/cat/cats36.htm>.

³⁹ See, e.g., *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003), p. 4, fn. 1: “The President determined that ‘none of the provisions of Geneva apply to our conflict with Al Qaida in Afghanistan or elsewhere throughout the world,’” (emphasis added), <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>.

⁴⁰ *Id.*

⁴¹ See, e.g., Glenn Sulmasy, *The Legal Landscape after Hamdan: The Creation of Homeland Security Courts*, 13 *NEW ENG. J. INT’L & COMP. L.* 1, 4-5 (2006).

combat, such as biological weapons or rape. In turn, a combatant may be targeted and detained without charge or trial for the duration of the armed conflict.

Civilians who take part in hostilities in an armed conflict do not thereby become combatants. These "unprivileged belligerents" do not qualify for prisoner of war status upon capture. They may be targeted, and in international armed conflict, civilians may be detained without charge or trial so long as they pose a serious security risk to the detaining authority. In other armed conflicts (non-international ones, be they civil wars or conflicts such as the U.S. vs. Al Qaeda - a "war" that pits a state against a trans-national, non-state armed group), civilians may be detained and tried in accordance with national law, as tempered by international human rights obligations. This national law may have extraterritorial scope, as does the U.S. War Crimes Act.⁴²

The term "enemy combatant" appears nowhere in U.S. criminal law or international law, including the law of war. Administration supporters cite the World War II era *Quirin* case to buttress the claim that an unprivileged belligerent is a form of enemy combatant - an unlawful combatant.⁴³ They are mistaken. That case involved combatants who entered the United States in civilian garb to commit acts of war. This is the war crime of perfidy.⁴⁴ It was their specific conduct that rendered their belligerency unlawful, not their status as unprivileged belligerents. The case simply does not address, let alone decide, the claim that an unprivileged belligerent is an unlawful combatant.

⁴² 18 U.S.C. 2441 (1996).

⁴³ Ex Parte Quirin 317 U.S. 1 (1942). See, e.g., Lee A. Casey, David B. Rivkin, Jr. & Darin R. Bartram, *Unlawful Belligerency and its Implications Under International Law*, Federalist Society White Paper (2003); at <http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm>.

⁴⁴ See, Protocol I Additional to the Geneva Conventions of 12 August 1949, Article 37. Prohibition of perfidy: 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) The feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) The feigning of an incapacitation by wounds or sickness;
- (c) The feigning of civilian, non-combatant status; and
- (d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

The incompatibility of the “enemy combatant” designation with a state’s obligations under international law was the subject of a recent decision by the Israeli Supreme Court, *Public Committee against Torture in Israel v. Israel*,⁴⁵ in which the Court rejected the government’s position that international law must recognize the distinct status “unlawful combatant.” The Court, in an opinion authored by President Barak, held:

[i]t is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a category has been recognized in customary international law.⁴⁶

President Barak also made clear that in the absence of a legal category of “unlawful combatant,” there remain only two categories for individuals in armed conflict, *combatant* and *civilian* – the categories recognized by the 3d and 4th Geneva Conventions, respectively. He states that “an unlawful combatant is not a combatant, rather a civilian.”⁴⁷ Likewise, Antonio Cassese explains in his Expert Opinion for the Court that

unlawful combatant” is a shorthand expression useful for describing those civilians who take up arms without being authorized to do so by international law. It has an exclusively *descriptive* character. It may not be used as proving or corroborating the existence of a third category of persons ...⁴⁸

In the face of this language and logic, it is difficult to understand Mr. Bellinger’s suggestion that the Israeli decision did not reject the existence of a “category of

⁴⁵ *The Public Committee Against Torture in Israel v The Government of Israel* (2006) HCJ 769/02 (‘PCATI’), December 13, 2006, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

⁴⁶ *Id.* at para. 28.

⁴⁷ *Id.* at para. 26.

⁴⁸ PCATI (2006) HCJ 769/02 (Expert Opinion of Antonio Cassese, ‘On Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law’), <http://www.stoptorture.org.il>. ((Emphasis in original)).

individuals labeled unlawful enemy combatants."⁴⁹ Mr. Bellinger claims that what the Israeli Court held "instead" was that fighters "not in regular armies or militias meeting the requirements of Article 4(A)(2) of the Third Convention were in fact civilians, who lost their comprehensive protections against attack 'for such time as they take a direct part in hostilities.'"⁵⁰ This is correct with one caveat: the Court's holding was in addition to, not instead of, its conclusion that there's no such thing as "enemy combatant."

Mr. Bellinger also asserts that the Israeli decision "largely agreed" with U.S. views on treatment of "terror groups like al Qaida" because it, like the U.S., accepts that they are not entitled to protection from attack merely because they are "civilians" and rejects PoW status for their members in detention.⁵¹ This is false. These two correct statements of IHL provide no support for the U.S. position on "enemy combatant" status, i.e., that members of al Qaida are strangers to the protections of either the Fourth Geneva Convention when detained in a context of international armed conflict, or to the protections of international human rights law when detained in the context of non-international armed conflict.

Mr. Bellinger continues to defend the practice of treating "unlawful enemy combatants" as strangers to IHL. He cites pirates, spies and saboteurs as examples of persons historically relegated to "unlawful combatant" status and he states that civilians in the battlefield who take up arms are not protected by the Civilian Convention. In so doing he conflates two very different issues: (a) whether or not an act is a war crime; and (b) whether or not a person is a privileged belligerent. Pirates, spies and saboteurs, by virtue of the acts of their trade, may be war criminals, but they remain civilians unless they are members of armed forces or associated militia, as those terms are understood in GC III, Article 4. As for civilians who take up arms, participation in hostilities absent a privilege to do so is not, in itself a violation of the laws of war (war crime). It is merely a disqualifier for PoW status. A civilian who attacks an enemy combatant may be violating domestic criminal law (assault, murder, etc.) but does not thereby violate IHL. Mr. Bellinger's reference to the claim that such civilians fall outside the Conventions because "The Civilians Convention certainly does not protect civilians who are in the battlefield taking up arms . . ." is, again, misleading. It is absolutely true that civilians who take part in hostilities are not protected in the sense of being immune from targeting. Indeed, they may be targeted so long as they are taking direct part in

⁴⁹ John Bellinger, *Unlawful Enemy Combatants*, *Opinio Juris*, www.opiniojuris.org/posts/1169000173.shtml at page 3.

⁵⁰ *Id.*

⁵¹ *Id.*

hostilities. They do not, however, forfeit civilian status, although their mere participation in hostilities might be a crime under domestic law, or if, for example, they are targeting civilians, which is a war crime.⁵²

Mr. Bellinger seeks to minimize the importance of the distinction between civilians who engage in terrorist acts and “unlawful enemy combatants,” claiming that either way, the state can detain persons who pose a threat for the duration of the conflict. But important distinctions lie in the different processes applicable to different classes of suspects. In international armed conflict, civilians who pose a serious security threat may, indeed be detained with a minimum of process. GV IV makes no mention of *habeas corpus* review, but does require a bi-annual administrative review.⁵³ In non-international armed conflict and non-armed conflict, detention must be in accordance with domestic and international law, which, at the least, grants the detainee a right to challenge detention in court (ICCPR Article 9.4).⁵⁴

III. The U.S. Definition of “Enemy Combatant”

The U.S. administration overreacted after 9/11 and obscured the time-honored distinctions between war and its absence, and within war, between civilian and combatant. The President’s Military Order of November 13, 2001 authorized detention of:

any individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy,

⁵² See, e.g., A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 8 (2d. ed. 2004); David Glazier, *A Self-inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12:1 LEWIS & CLARK L. REV. 131, 152-153 (2008).

⁵³ Article 43, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516.

⁵⁴ See *supra* note 35 (application of human rights law in non-international armed conflict).

or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;...⁵⁵

This precursor to the U.S. definition of "enemy combatant" is tethered neither to any concept of armed conflict, nor to the meaning of "combatant" under the laws of war, nor to any semblance of due process required by the laws of war and applicable international human rights law. Subsequent efforts to pin the administration down on a reasonable and workable definition of "enemy combatant" have resembled a game of whack-a-mole and three-card-Monty combined. Thus, Justice O'Connor noted in the *Hamdi* case that "the Government has never provided any court with the full criteria that it uses in classifying individuals as such."⁵⁶ Not coincident to the Supreme Court's consideration of detention challenges in *Hamdi* and the *Rasul* case in 2004, the administration arranged for Combatant Status Review Tribunals (CSRTs) at Guantanamo to determine whether a detainee is an "enemy combatant," which the CSRT rules defined as:

an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁵⁷

This sounds better than the definition in the President's 2001 Military Order, but let's look at how the administration has applied it.

Would the term cover (and thus, permit detention of) a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al-Qaeda activities, asked U.S. District Judge Joyce Hens Green?⁵⁸ "She could," replied Deputy Associate Attorney General Brian Boyle. "Someone's intention is clearly not a factor that would disable

⁵⁵ <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

⁵⁶ *Hamdi v. Rumsfeld*, 124 S. Ct. at 2639 (plurality opinion).

⁵⁷ DoD, Guantanamo Detainee Processes 2 (June 9, 2006), at <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf>.

⁵⁸ In re: Guantanamo Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

detention."⁵⁹ Judge Green objected to such an expansive definition of enemy combatant which includes "individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies."⁶⁰

Judge Green highlighted another problem with the CSRTs. Detainees are given no meaningful opportunity to contest their designation, which is potentially based on coerced evidence and often based on secret evidence.⁶¹ Such evidence is not only unavailable to the detainee, but may also be unknown to the hearing officers, such as that the detainee "associated with" an alleged, but unnamed member of Al Qaeda.⁶² Administration supporters respond that under the Detainee Treatment Act (DTA) judicial review of the "enemy combatant" designation is available.⁶³ They neglect to mention that the DTA carefully limits review of CSRT decisions to whether or not they conform to the rules for CSRTs and to U.S. laws and the Constitution.⁶⁴ U.S. treaty obligations are not mentioned. This could be significant because CSRTs clearly do not satisfy either the requirement in international armed conflict to convene a "competent tribunal" under GC III to determine entitlement to PoW status in cases of doubt, or the requirement in non-international armed conflict and non-armed conflict situations to provide habeas corpus, per the ICCPR, Art. 9.4.⁶⁵

Mr. Bellinger's assertion of what process a detainee theoretically receives in a CSRT and beyond must be seen in light of the evidence of how CSRTs actually operate. In the *Boumediene* case mentioned by Mr. Bellinger - a challenge to the Military Commissions Act⁶⁶ (MCA)'s denial of *habeas corpus* review to detainees - the

⁵⁹ <http://www.msnbc.msn.com/id/6631668/>.

⁶⁰ *In re: Guantanamo Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

⁶¹ *Id.* at 468, et seq. and 472 et seq.

⁶² *Id.* at 469: "Detainee: Give me his name. Tribunal President: I do not know."

⁶³ See, e.g., Testimony of David B. Rivkin, Jr., Partner, Baker & Hostetler LLP, Senate Committee on Armed Services, Thursday, April 26, 2007; <http://armed-services.senate.gov/statemnt/2007/April/Rivkin%2004-26-07.pdf>.

⁶⁴ The scope of judicial review of CSRT proceedings remains unsettled as of this writing. See, Linda Greenhouse, *A 2nd Case on Detainees Complicates Deliberations*, NY Times, February 6, 2008, http://www.nytimes.com/2008/02/06/us/nationalspecial3/06scotus.html?_r=1&hp=&adxnln=1&oref=slogin&adxnlnx=1202310132-9kB+9xxk8SJupwIew02QAg; and Lyle Denniston, U.S. Plans Swift New Appeal On Detainees, <http://www.scotusblog.com/wp/uncategorized/us-plans-swift-new-appeal-on-detainees/>; discussing *Bismullah v. Gates*, D.Ct. D.C. (Circuit docket 06-1197).

⁶⁵ See *supra* note 35 (application of human rights law in non-international armed conflict).

⁶⁶ Military Commission Act. of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

government argued to the Supreme Court on December 5 of last year that the CSRTs, as applied, do comply with all applicable law and rules. More recently, the government has appealed to the Supreme Court to relieve it of the Decision in *Bismullah*,⁶⁷ that it must supply a reviewing court with more information than that which the government presented to the CSRT.

E. Military Commissions

Mr. Bellinger acknowledges that the U.S. is bound by CA 3's fair trial provision.⁶⁸ His claim that U.S. military commissions at Guantanamo comply with CA 3 is disputable. This dispute requires resolution of the question: What exactly are the judicial guarantees deemed "indispensable by civilized peoples?" At a minimum, this would include judicial guarantees that have achieved the status of customary international law. A good place to look for the list of such guarantees is Article 75 of Additional Protocol I to the Geneva Conventions.⁶⁹

Another good place to look for obligatory judicial guarantees is in the ICCPR.⁷⁰ Regardless of the direct applicability of human rights law to situations of armed conflict, its incorporation by virtue of CA 3's reference to, rather than recitation of, judicial guarantees deemed "indispensable by civilized peoples," is hardly disputable. A second reason why human rights norms apply relates back to the nature of the distinction between international and non-international armed conflict discussed previously. To reiterate: the drafters of CA 3 presumed that in such conflicts, fighters do not achieve combatant status with its attendant privilege of belligerency, but rather, remain mere criminals under domestic law. Thus, they also presumed that domestic law, as tempered by international human rights obligations, would continue to apply. A third reason why human rights norms

⁶⁷ Fn. 64, *supra*.

⁶⁸ CA 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples."

⁶⁹ Although the U.S. is not party to Additional Protocol I, important segments of the Additional Protocol are widely regarded as customary international law. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005); William H. Taft, IV, *Symposium: Current Pressure on Int'l Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321-23 (2003) (arguing that Article 75 of Additional Protocol I is customary international law). Mr. Taft was the Legal Advisor of the U.S. State Department from 2001 to 2005. See also Matheson, *The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POLICY 419, 420, 427 (1987) (with particular reference to the customary nature of Art. 75 of Additional Protocol I).

⁷⁰ See *supra* note 6, ICCPR Arts 9, 14, 15.

must apply relates to the definition of unlawful enemy combatant, since only enemy combatants are subject to military commissions. The vague and overbroad definition used to determine enemy combatant status has naturally resulted in exposure to military commissions for many individuals whose activities and capture have no relationship to battlefields or armed conflict. Even if armed conflict judicial guarantees were less than those of peacetime, it would be illegitimate to place civilians who take no part in hostilities (although they may have committed criminal acts) into a category applicable to armed conflict, by the simple means of attaching to them the label "unlawful enemy combatant."

How then, do the military commissions shape up in the face of CA 3's requirements? In a word, poorly. Supporters of the military commission system, including Mr. Bellinger, note the requirement of proof beyond reasonable doubt, the right to be present at trial, the presumption of innocence, the right to cross examine witnesses, the right to counsel and the ban on evidence obtained through torture.⁷¹ All of these provisions are subject to caveats.

Military counsel is imposed.⁷² Civilian counsel may be used, but under highly restrictive conditions.⁷³ Military judges have broad discretion to close the proceedings to the public.⁷⁴

In addition to normal provisions for excluding the accused who becomes disruptive, the accused may also be excluded from the trial when classified evidence is considered.⁷⁵ Both the accused and his civilian lawyer may be excluded from the process by which the government argues to the judge that classified evidence should be withheld. The rules for classified evidence are so broad that they would prevent the defense from seeing evidence that tends to show innocence or a lack of responsibility. The government has no duty to disclose classified information that could result in a more lenient sentence for the defendant.⁷⁶ The

⁷¹ See *supra* note 15; Bellinger, *supra* note 27 (citing to Sections 948k, 948r(b), 949a(b)(1)(A), 949a(b)(1)(B), and 949l(c)(1) of the Military Commissions Act).

⁷² Sec. 948k. The accused may represent himself (Sec. 949a(b)(1)(D)), but it is unclear that the exercise of this right is to the exclusion of military counsel imposed upon the accused.

⁷³ Sec. 949c recites the duties of trial counsel. The practical difficulties of representing Guantanamo detainees include obstacles to attorney-client communication that exist by simple virtue of Guantanamo's isolation, compounded by obstacles imposed by detaining authorities.

⁷⁴ Sec. 949d(d).

⁷⁵ Sec. 949a(b)(1)(B).

⁷⁶ Sec. 949d(f).

practical ability of an accused to obtain witnesses and evidence on his behalf is questionable.⁷⁷

The right to confront and cross examine witnesses is compromised by the ease with which hearsay can be presented.⁷⁸ Admissibility of hearsay and measures used to protect national security information will also potentially mask the fact that evidence was obtained by illegal means, including coercion which may rise to the level of torture. Evidence obtained through coercion that does not rise to the level of torture is explicitly admissible.⁷⁹

Protections against double jeopardy are illusory, since jeopardy is deemed to attach only once a guilty finding becomes "final after review of the case has been fully completed," thus permitting verdicts of "not guilty" to be returned to the military commission for further proceedings.⁸⁰

Judging from charges brought to date, *ex post facto* prosecution, in violation of the principle of legality, will be the norm. The accused are all charged with crimes for conduct that allegedly occurred prior to enactment of the MCA. This is problematic to the extent the MCA defines new crimes, such as conspiracy, material support to terrorism and murder in violation of the laws of war when the predicate act is the targeting of a combatant (not a violation of the laws of war).⁸¹

The scope of judicial review of military commission decisions is restricted and inadequate. The review by the initial appeals court, the Court of Military Commission Review, is limited only to matters of law (not fact) that "prejudiced a substantial trial right" of the defendant. This provision would prevent the first appellate court, the U.S. Court of Appeals for the District of Columbia, and the U.S. Supreme Court, from considering factual appeals, including possible appeals based on a defendant's factual innocence.⁸²

The most significant and overarching flaw in the military commissions, however, is their lack of independence. Justice, and equally important, the appearance of

⁷⁷ Sec. 949j.

⁷⁸ Sec. 949a(b)(2)(E).

⁷⁹ Sec. 948r.

⁸⁰ Sec. 949h.

⁸¹ See, e.g., Glazier, *supra* note 52.

⁸² Sec. 950g.

justice, depend upon independence of the judicial function from other branches of government, especially the branch responsible for charging and prosecuting cases. The fact that the charging authority, the prosecutor, the judges, the reviewing authority, the first level of appellate authority and even the (military) defense counsel are not only part of one governmental branch, but also, part of one military chain of command is the antithesis of independence.⁸³ This fact alone raises much doubt about the ability of military commissions to operate in accordance with the dictates of CA 3 and especially about their ability to satisfy the more hortatory elements of the MCA – the presumption of innocence and the requirement of proof beyond a reasonable doubt.

The MCA has provisions designed to guard against unlawful command influence over the process.⁸⁴ But in a turn of events that can only be described as remarkable, even in the star-crossed experience of the military commissions, former Chief Prosecutor for the commissions, Col. Morris Davis recently testified for the defense in the Hamdan case that he was subjected to brazen attempts from his chain of command to influence his choice of cases and conduct of trials. He claimed, for example, that “one Pentagon official called for charges to be brought against the detainees ahead of the November 2006 midterm elections” and that “other officials reversed his policy against using evidence obtained through torture and told him that acquittals would be unacceptable.”⁸⁵

Historically, military commissions have been appropriately relegated to times and places where the normal machinery of the judiciary is unavailable or dysfunctional.⁸⁶ In light of the conditions under which military commissions are

⁸³ See Secs. 950b and 950c.

⁸⁴ Sec. 949b.

⁸⁵ Michael Melia, *Ex-Gitmo prosecutor alleges politics*, WASHINGTON POST, April 28, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042801401.html>.

⁸⁶ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1864), where the U.S. Supreme Court held that the Constitution barred the application of laws of war by a military tribunal “to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” Another oft-quoted statement about the proper scope of application of military tribunals is from the author of Articles 15 and 21 of the 1916 Articles of War, subsequently interpreted by the U.S. Supreme Court to constitute congressional authorization for military commissions in *Ex parte Quirin*, 317 U.S. 1, 25-28 (1942) and *In re Yamashita*, 327 U.S. 1, 1 (1946). The language’s author, Army Judge Advocate General Enoch Crowder, testified before a Senate committee: “A military commission is our common law war court . . . [Art. 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts martial, so that the military commander *in the field in time of war* will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure.” (Emphasis added). S. Rep. No. 64-130, at 40-41 (1916) (testimony of General Crowder), quoted in David Glazier, *A Self-inflicted Wound*, fn. 52, *supra* at 139.

proper, some compromises to peacetime due process may be excused. But where the courts of the detaining authority are open and operational – where they have shown themselves to be entirely capable of holding terrorists and their supporters to account – there is no such excuse.

F. Application of International Human Rights Law

Perhaps the widest gulf between the United States and international jurisprudence in relation to “war on terror” legal issues concerns the extraterritorial application of human rights law. Mr. Bellinger reiterates the U.S. position that the ICCPR applies only in the territory of a party.⁸⁷ The essence of the U.S.’s argument is that Article 2 of the Covenant limits its application to individuals “within its territory and subject to its jurisdiction,” and that the word “and” is to be understood as conjunctive, not disjunctive.⁸⁸ The U.S. posited that during the negotiations of the ICCPR, the U.S. delegate, Mrs. Eleanor Roosevelt explicitly balked at the notion of a state’s responsibility for human rights violations that occur on another state’s territory.⁸⁹ What makes this argument somewhat disingenuous is the fact that Mrs. Roosevelt was referring to conduct over which the state in question had no control – acts committed by others, for example, where the U.S. occupies another country but has no role in the acts that are alleged to constitute the violation. She was not referring to acts that are committed by, or are the direct responsibility of, the U.S.⁹⁰ Indeed, the suggestion that Mrs. Roosevelt, perhaps the world’s most renown supporter of the concept of a *Universal Declaration of Human Rights* (emphasis added), would have approved of a loophole permitting conduct abroad that would violate human rights law if committed at home, is speculation beyond the realm of reason.

⁸⁷ See *supra* note 15.

⁸⁸ See, *United States Responses to Selected Recommendations of the Human Rights Committee*, October 10, 2007, <http://www.state.gov/documents/organization/100845.pdf>. The Human Rights Committee rejected this interpretation in response to the appearance of the United States before the Committee: “19. The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject matter jurisdiction of a state party even when outside that state territory.” Human Rights Committee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50 (1995); <http://www1.umn.edu/humanrts/hrcommittee/US-ADD1.htm#two>.

⁸⁹ See *id.*

⁹⁰ See, *Summary Record of the Hundred and Thirty-Eighth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. UN Document, E/CN.4/SR.138 (1950) Sec. 34; *Summary Record of the Hundred and Ninety-Fourth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 194th mtg. UN Document, E/CN.4/SR.194 (1950), Secs. 15, 16, 31, 32.

In short, the complementary roles of humanitarian and human rights law in armed conflict and extraterritorially are well established by the jurisprudence of international tribunals, the major treaty monitoring bodies, and the weight of international scholarship.

G. Conclusion: Why Wise Men Fear to Tread on Time-honored Legal Distinctions

Shoehorning non-fighters, let alone innocents and criminals who have no connection to armed conflict, into the definition of “enemy combatant” wreaks havoc with important, time-honored distinctions in international law. For 150 years, parties to armed conflict have been bound by an international code of conduct in warfare: the Geneva Conventions. The Conventions have been periodically amended and augmented to reflect the changing nature of warfare. It may surprise some in the Bush Administration, but not many professionals in the Pentagon and military academies, that this is not the first time ill-advised departures from humanitarian law sought justification in the claim that the old rules were “quaint” and could not be applied to the new face of war. But the growing numbers of humanitarian law rules have always remained true to the fundamental principles of that body of law: since war itself cannot be prohibited, its horrors might at least be ameliorated through rules that limit the means and methods used, that require distinction between combatants and non-combatants (civilians), and that mandate humane treatment and fair trials of detainees. Equally important has been the consensus that the laws of war apply only in and to war for many reasons having to do with the rights of those detained, but also because treating mere criminals as combatants, whether privileged or unprivileged, cloaks them with a veneer of legitimacy to which they are not entitled.

The US-manufactured definition of “unlawful enemy combatant” obscures the distinction between war and its absence and between combatants and civilians. It also seeks to deprive those to whom the label is attached of their rights under any framework of applicable international law. In the first of a one-two punch, administrative determinations such as the President’s Military Order of November 13, 2001 and legislation such as the MCA, bring within the laws of war persons whose conduct has no nexus to armed conflict, while denying them their rights under that body of law. The second punch is an equally ill-advised U.S. position that human rights law does not apply in armed conflict, and in any case, does not apply to U.S. conduct abroad, meaning to include Guantanamo. The end result, absent correction by Congress or the courts, is to allow the U.S. a barely-limited definition of who it may detain without charge or trial in a virtually rights-free zone.

The Army's new Counterinsurgency Manual,⁹¹ drafted under the authority of General David H. Petraeus, is accompanied by a Rule of Law Handbook, which counsels against conduct "that would be questionable under any mainstream interpretation of international human rights law."⁹² This is wise counsel, consistent with a tradition of construing international human rights and humanitarian law obligations in the light most favorable to the interests of human dignity, and thus, human security.

The effort to combat terrorism and the bedrock principles served by international humanitarian and human rights law would be well served by the U.S.'s return to the mainstream concept of "combatant." Here are three things that the U.S. can do to that end:

- For people detained outside of armed conflict: stop using the term "combatant" and stop asserting application of IHL. Reform legal procedures so that the power to detain, the right to challenge detention and trial procedures comport with the requirements of international human rights law, including the right to *habeas corpus*.
- For people detained in international armed conflict: reform legal procedures so that entitlement to PoW status and civilian status might be determined in appropriate cases and so that trial procedures are consistent with applicable requirements of IHL. Restrict the use of the term "combatant" to persons entitled to PoW status.
- For people detained in non-international armed conflict: reform legal procedures so that the power to detain, the right to challenge detention and trial procedures comport with the requirements of applicable IHL and international human rights law, including the right to *habeas corpus*. Stop using the term "combatant" to describe persons in this category.

⁹¹ See *supra* note 13.

⁹² See *supra* note 14.

